

Paul Berger – Oral History

With Dr. Harwell Wells

Debevoise & Plimpton LLP, Washington, DC

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Harwell Wells: We're here today with Paul Berger in the Washington DC offices of Debevoise and Plimpton on July 16th, 2019 doing an oral history for the SEC Historical Society about Mr. Berger's long career at the Securities and Exchange Commission. Thank you so much for taking the time to talk with us.

Paul Berger: Thank you.

Harwell Wells: We'd like to begin these interviews with a little background. I was wondering if you could start by telling us about where you grew up and where you decided to go to college.

Paul Berger: Sure. I grew up in Fall River, Mass, which is about 50 miles Southeast of Boston. It's about a town of about a 100,000 people. An old textile mill town. In fact, I worked in textile mills in the summer. That's all gone now. Went to Korea and to the South and dissipated over a while. Then for college, I actually was a soccer player, and got a partial scholarship to Boston University, but that was too close to home.

Paul Berger: I decided to go to American University. Went there graduated in, I think it was '72. This is really stretching now for me first time. After that I went to the University of Wisconsin, Madison. I was in a PhD program for Normative Political Theory. Decided after a couple of years that the only thing I could do with that would be to teach, and I wasn't inclined to teach. Left that, decided to write for a while, wrote for a while, wasn't very successful.

Harwell Wells: You say, "wrote." You mean...?

Paul Berger: Writing fiction. Went back to my hometown worked as a production manager on a textile factory. Opened a little store selling fabric stretched over frames. I did a variety of different things. Then finally decided to go to law school, went to law school.

Harwell Wells: I am going to have to ask, because it's interesting that you have a background running your own business, doing a variety of things. Did you find those helpful in your career as a lawyer and especially at the SEC?

Paul Berger: Yes. I think so. I learned a lot being on the business side, learning to be productive on my own. No clients, customers is at best. It was a good learning experience. Interesting thing, just an anecdote -- when I was being interviewed for the associate director position by Chairman Levitt, he asked me the same thing about my background and I told him, and he said, "Well, I like you because you didn't take a traditional path." If you know anything about Arthur Levitt's background, he went to law school for about 10 minutes and then he did a lot of different things before he found his groove, so to speak. I was more of the unorthodox past that he liked.

Harwell Wells: Sorry, I diverted you a little. Cut you off when you were about to go to law school.

Paul Berger: Yes. I went to law school. Going to law school, I didn't know what I wanted to do. All I knew is I needed to find something to do. I'd always been a hard worker, so I went to law school later on. I think I started when I was 30. I worked very, very hard unlike a lot of other people.

Paul Berger: I was graduated in '82, I think. Worked for a while for just a small firm, actually working on the Gulf of Maine case. We represented the Government of Canada, Ministry of Justice against the United States in the Gulf of Maine case dispute over the North Sea and the Georges bank region. My job was the estoppel job, which was to determine that the US was stopped from claiming certain parts of the Georges bank region.

Paul Berger: One of the things I did is I went to Maine and I went to a library in Maine and I discovered some very, very old maps and asked them to copy them and they copied them. Then the librarian came to me and said, "We have a call for you." I said, "Who's that from?" They said, it's the Secretary of State for the State of Maine. They told me that I was persona non grata in Maine and that I had to leave.

Harwell Wells: I'm sorry, you had to leave the library or you had to leave the state.

Paul Berger: I had to leave the state. I left the state, but I left with the maps and the maps were important in the International Court of Justice in the Hague and helping Canada win a part of the Gulf of Maine Case.

Harwell Wells: How did you get from working at that firm to an inter-state...? Did you at that time have any interest in securities law?

Paul Berger: I had none. In fact, I think I took a corporation's course. It was required in law school, but I never took a securities course. What happened was, I got a job at the US Court Of Appeals in the DC Circuit. I worked there for, I think it was three years. At the end of the second year I had applied for the US Attorney's Office in DC. They didn't have an opening at that point.

Paul Berger: The chief judge at that time, Pat Wald, asked me to stay on for another year, so I did. Then, actually, and maybe the third month of working in that year, it turned out they had an opening and they asked me to come on and I said I couldn't because I had already committed.

Paul Berger: That foiled any opportunity to get a job there the next time. I got a job at a Jenner & Block, and worked there for two years. Did not particularly like the work. Did a lot of transportation law, represented Amtrak, railroads in the Northeast corner. Was pretty much disillusioned with what I was doing.

Paul Berger: A friend of mine who had worked at the court, her husband worked at the SEC. I was in contact with her and she said, "You need to speak to my husband." I spoke to him and he was in love with the SEC and he just was enamored with the work there. I said, "Well, if someone loves it that much, maybe this is interesting." I applied and I was accepted and I thought, "Well, I'll stay there a couple of years and see what happens." It turned into 14 years.

Harwell Wells: What was your image of the SEC? You mentioned that your acquaintance really liked working there. What was your impression of the SEC overall when you went there in I think 1992?

Paul Berger: I think it was '92. It was an interesting place. It was a very collegial place, nice place to work. It was a little bit of a backwater. I remember we were on 4th or 5th street. At that time it was not called Penn Quarter. It was just a part of your downtown that very few people went to. I remember my very first day there, I left the office at around 7:30 in the evening and I walked outside and it was desolate. It was tumbleweeds blowing down the street. It was a little scary. There was just no one out there.

Paul Berger: I remember a couple of days later telling someone about that and they said, "What were you doing working until 7:30?" I said, "Well, that's what I did when I worked at a private firm and that's what I think I should do now." I kept to that routine, throughout my career there.

Paul Berger: It was a place without technology. The phone was a black dial phone if people even remember those phones. We did everything by hand and if you got documents produced by defense counsel, you sat with a box in front of you and you picked out each piece of paper and looked at it and wrote notes. It was a very old school process.

Harwell Wells: There wouldn't have been electronic production at this time.

Paul Berger: Oh, there's definitely not electronic production now.

Harwell Wells: Did you join the Division of Enforcement when you entered?

Paul Berger: Yes, I had interviewed there in both the General Counsel's Office and Enforcement. Enforcement was actually pretty interested in having me on board and they offered me a position pretty much right away. It sounded interesting, it sounded exciting.

Harwell Wells: You entered with a decent amount of legal experience as opposed to other people who entered right after law school. What tasks did they give you when you joined? What matters did you start with?

Paul Berger: Well, it's interesting, the enforcement division didn't as a rule hire people right out of law school. Most of the people that came there had about three years practice experience at firms. In fact, when I got there, there was a committee, which, being one of the junior people, I was put on, that selected and interviewed people for right out of law school.

Paul Berger: We had a small program. Usually, I think in the first year we took 10 people out of law school. It was very small. Most people did have some experience at firms or other government agencies who are transferring over. People generally had a limited experience in securities law.

Paul Berger: At that time it was a back burner. You told someone you worked at the SEC, they'd say, "FEC? Where is that?" At least when I was there at the beginning, didn't have that much of a reputation. It wasn't doing a tremendous number of cases a year either. The cases were taking an extraordinary amount of time too. Certainly over the course of the time that I was there, I saw a dramatic change in both the stature and in the productivity of the division.

Harwell Wells: As a starting matter, what was the day to day work of an enforcement attorney if they weren't bringing that many matters, if they took a long time.

Paul Berger: The day to day work was, and this is the best part of enforcement. When you got there, you were given cases or you opened cases and they were yours. You work for them, you ended up being on the other side of the table of people with 30 years securities experience. Some of the titans of the securities industry.

Paul Berger: You took all the testimony yourself, maybe your branch chief was there, a high profile case, your assistant director who is there, but you were the one responsible for putting together the testimony, which is like a deposition. Taking all of that testimony and putting together the case, writing up all of the facts, then writing up what they called an Action Memo, which would be a recommendation.

Paul Berger: Putting it together, all the facts for a Wells call, things like that. Your responsibility as a staff attorney was tremendous, and it was not something that you could get, frankly, at a law firm. One of the major attractions I think for people was to come to the SEC and get the experience that a 10 year associate or an eight year associate might just be getting. That was a tremendous benefit.

Harwell Wells: I think you've answered some of this, but how much supervision did you have? How much guidance assistance were you able to get from either the people above you or other people in the office?

Paul Berger: The way it worked at the SEC it pretty much was a strong meritocracy. I expect it still is. I hope it is. You were given assignments. Here's your case. I was given two cases right away. One, which had been under investigation for about a year and that person had left the commission. I took it over. Then another one, which I just opened. In both those matters the branch chief feels you out as to what your capabilities are and how strong you are in being able to handle things by yourself.

Paul Berger: You run things by the branch chief and you draft subpoenas, you give them the subpoena to look at, you draft outlines for a testimony. They look at that and after a time they leave you. Or at least I was left by myself and I just did the work, turned it in and moved forward. Now, I don't know if that was true for everyone, but for me, I found after a couple of months, that I was pretty much on my own, which was fine with me.

Harwell Wells: Okay. Within a couple of years you were promoted to branch chief and then a couple of years after that to assistant director. I don't know if that was a rapid promotion within the SEC, whether that appeared to be unusual?

Paul Berger: I think at the time it was fairly rapid. Keep in mind that in the '92, '94 through '96, it was a pretty poor legal market. People were not moving, and so there was very limited mobility at the commission. The ability to move up to a branch chief or assistant director relied heavily on someone after leaving the commission or being promoted themselves. There weren't that many openings. I was fortunate, there was an opening for branch chief. I got in. Then two years later people suggested I apply for assistant director and I did and I got that. I was very lucky.

Harwell Wells: What did you do in those roles?

Paul Berger: Branch chief at the time, which is totally different from the way it is today, supervised either four or six staff attorneys. In my case it was six. I did what my branch chief did. I looked at the work that the person was doing. I would attend testimony with him almost all the time. The branch chief would attend testimony and very limited times participate.

Paul Berger: I would do that. I would review all of the written work product, edit that work product and then pass it on to the assistant director. As an assistant director I was -- and it's something I learned over time in terms of management -- I was very hands on and very detail-oriented and I would end up rewriting a lot of the action memos as an assistant director.

Paul Berger: I learned after a while an assistant director would supervise either two or three branch chiefs. I supervised three branch chiefs. I learned after a while that I couldn't write the Action Memo for 18, 20 staff attorneys. I had to rely more on the branch chiefs and the staff attorneys.

Paul Berger: I would supervise all of those investigations. As the assistant director, you are also helping supervise cases that would go into litigation, back then the staff attorneys would work on litigation along with the trial unit people.

Harwell Wells: When it came to litigation, then at some point the branch chief for the attorney handling the matter would be paired with the trial unit?

Paul Berger: The staff attorney, not the branch chief. Would be paired with the trial unit person and would assist sometimes second chair, sometimes take a witness or two depending on their abilities at opening or closing. They would get some trial experience. Oftentimes when there'd be an opening in the trial unit, staff attorneys would apply for that position.

Paul Berger: Depending on how much experience they had, they might get that position. It used to be when I got to the commission in '92, a trial unit person had to have 10 years trial experience. That dramatically decreased over time. I'm not sure why that was, but it just did.

Harwell Wells: Was that because trial unit was particularly desirable or did some people just have a particular bent for litigation?

Paul Berger: Oh, I think some people just really liked the idea of litigation and some people were ultimately a little bit dismayed at having transferred to...trials are just incredibly time intensive, very stressful, takes an enormous amount of energy to try a case. It takes a certain type of person to be able to do that. Some people did it very, very well and some people had a difficult time. It's not because they didn't have the talent, they had the talent, but their talent was best placed somewhere else.

Harwell Wells: Yes. Why at the time do you think there were a fairly limited number of investigations taking a long time?

Paul Berger: The volume of investigations in the division was generally high. The number of investigations that were moving through the division to completion was low. You ask 10 people what the reason for that is and you'll get 10 answers. My view was that, there wasn't enough drive within the division and people needed to be pushed, and some people just moved at a different pace, which is fine, but there needs to be deadlines.

Paul Berger: Part of the problem sometimes in government is there are no deadlines, except when you're in litigation and a court setting deadlines. But if no one's telling you, you need to get something done by X, you don't get it done by X. It's part of

human nature I think. I think what needed to happen, and certainly what I did and perhaps people thought I was too aggressive is, I did set deadlines.

Paul Berger: That comes from my business experience, because on the business side I had to get things done at a certain time or business would suffer. When I started something, I set deadlines and I would have regular meetings, okay, here's what we did last week. This is what we're going to do next week. This is what I expect we should get done by X date. Tell me if there's a reason we can't get it done by X date. Things started to move and I turned out to be a very high producer of cases.

Harwell Wells: Would these either move to an action memo being sent up the ladder, or would they be cases. Did the staff attorney or branch chief have the power to close a case by themselves? Or what happened next?

Paul Berger: The assistant director and the associate director would determine about closing a case, whether or not to close the case. Certainly a staff attorney would participate in that decision. Ultimately people didn't like to close cases. It may be true today. I don't know. I'm not sure why it is. First of all, there's a whole series of checklist items that you have to go through to close a case. No one wanted to do that.

Paul Berger: I remember when I was a staff attorney, I would come in on the weekends and I would go through boxes and everything to close cases because it was a dirty job and I had to mark the boxes in a certain way. You had to create indexes, certain items could be shredded, certain items had to be preserved under government rules. You had to go through every single document to do it. No one wanted to close cases, so cases would stay open for a long time. That was a problem. I suspect it's still a problem today.

Harwell Wells: One of the early cases you worked on, and speaking of moving things quickly, was the Livent matter. I gather either you, or the group you were with, took an unusual approach to investigating that case.

Paul Berger: It's true. This was around the time Chairman Levitt was on the commission's board. We had talked about doing a case much, much faster. I had suggested why don't we do a SWAT team style, which is throw a tremendous amount of resources, very, very fast, push defense counsel to the point that we'd say you need to produce documents by X date and there'll be no extensions unless there's some extraordinary circumstance.

Paul Berger: We took my whole branch, plus a couple of other attorneys, plus some of the people from the accounting staff and we threw that all in one case in which was Livent. Livent was a Canadian Company, a Theater Production Company. They did things like Ragtime and Phantom Of The Opera and number of high profile productions. It was an accounting fraud case and we did that case in a little under six months.

Paul Berger: From beginning to end also working with US Attorney for the Southern District, who ended up indicting a number of individuals. Working with the Ontario Securities Commission. We managed to do that in a way that was efficient, productive. We met every single morning with the entire staff, discussed what had happened the day or days before, what was happening today, and what's going to happen tomorrow, how are we going to move things along, what our sub-positions were, what evidence we had, what was admissible evidence, how could we make something admissible. We'd have those discussions usually for an hour every single morning. Then in the evening before people went home, I would usually have a conversation with all the other people or senior supervisors to discuss what we had done and what our expectations were.

Paul Berger: Defense Counsel were shocked and surprised and pushed back very, very hard. But we managed to hold the line and we got the case done. I presented the case to the commission with a 102 fever, had the flu, and the commission was very grateful that we had moved that case as fast as we did. The upside, obviously, as you move a case really fast that was a high profile case, it got a lot of publicity.

Paul Berger: I think you did a lot of good for the commission and the staff. I remember getting on my own, and I got hats that said SEC SWAT for all the staff. But the downside is, it's a tremendous amount of resources, time and effort devoted to one case. You had to balance the amount of time and the resources with the fact that you're taking away from other potential cases too.

Harwell Wells: This raises a follow up question, which is often in discussing the SEC, people who've been involved in enforcement, talk about the need to choose a certain number of high profile cases to project, to let people know that the SEC in the enforcement division is on the beat. Was that ever in your mind with Livent? Or a similar case? That the case is there in part to send a larger message as well as to pursue a particular bit of wrong doing?

Paul Berger: Yes. I'm not sure how much it's on the mind of the staff attorney, but as soon as you get into management and supervision, it was always on your mind. There are a limited number of staff attorneys throughout the country at the SEC. They can't do every case that comes across their desk. As a result, you have to pick and choose carefully. Sometimes you pick cases that don't turn out to be cases.

Paul Berger: But you've got to be as thoughtful as possible. It should come down from the top. The chairman usually has a particular band or theme that they want to address during the course of their administration, and they are in close contact with their director. The director in turn talks with the associate directors, and they come up with ideas about where they want to go and how they want to pursue particular areas.

Paul Berger: It's all about sending messages because one case important enough, significant enough, cutting edge enough, can send a ripple effect throughout the industry. That can bring about changes. I think for example, that it did that in the accounting fraud area during a certain period of time.

Paul Berger: The Commission brought an extraordinary number of accounting fraud cases. I think it's had a dramatic effect, which has lasted till today. I think you see much less in terms of accounting fraud than you did back in the late 90s, early 2000s.

Harwell Wells: Does that relate as well to the notion that the enforcement division only had certain programs. At least the term is tossed around a lot, that there would be a program followed, be it accounting fraud, be it internet fraud, be it any stocks in the early 90s where resources would be deployed in a particular industry in a particular area perceived as problematic?

Paul Berger: It's true, and it's always been true that the division, well before I got there, they had different units back in the time of savings and loan and bank fraud, they had a unit for that. They had a unit for insurance fraud. When I was there, we had internet micro cap. I was a co-chair of the Financial Fraud Task Force.

Harwell Wells: Which, we'll talk about in a few minutes.

Paul Berger: There were a lot of units to address a lot of problems. I think that's a good thing. I think that it creates some high level of visibility for the commission. When you bring an important case from one of these divisions, it sends a message that we are targeting these areas. It gets people to think twice about what they might do.

Paul Berger: Particularly if they see penalties in the area that threatens ultimately their financial position or economic positions. When some of these cases are brought parallel with US attorney's offices, it threatens their freedoms. I think things change as a result of focusing that attention.

Harwell Wells: Okay. That actually leads to a question you mentioned with Livent, that you are cooperating with the US Attorney's office, which I wasn't aware of with International Cooperation, for instance, with Ontario. While you were in enforcement, did you have managed cooperation with either other governmental units, most obviously the Department of Justice or, even in the Livent case, in other nations?

Paul Berger: There are two areas. One is a cooperation within the US Government. The other is internationally. Internationally, it was always hard. We had an office of International Affairs. I don't know if you've spoken with anyone there. But they worked very, very hard in order to address a level of cooperation that certainly when I started wasn't there. I think it improved.

Paul Berger: It probably still needs more improvement, but I think it's getting better. One of the problems was enforcement in the US was considered something that was expected and required in order to make the markets a fair and competitive marketplace. That wasn't necessarily true, particularly in other areas of the world. When you started dealing with European or Asian regulators, it was a difficult process. You had to be a Diplomat, you had to push and pull.

Paul Berger: It was not easy. These were in the days, the early days, of creating a lot of the memorandum of understanding among different countries. Even when you had an MOU it was difficult sometimes to get the other country to, for example, get testimony from an individual the commission didn't have jurisdiction over, or to get documents where we didn't have jurisdiction.

Paul Berger: It was a difficult process. It's a cultural issue I think. I always thought it was because they weren't used to enforcement. They weren't used to regulators going into companies and companies saying, "Oh, sure, we'll do whatever it is you require." I know when I had a few cases, just as an anecdote, I had a defense counsel in the US call me and tell me, "I can't tell this person in this country to produce these documents."

Paul Berger: I said, "Why not?" He said, "Because I talked to them." They just said, "Well, tell them to go away." That was their approach. It was funny and it was true from a very cultural sense that they didn't understand that there could be some sort of regulatory agency that could require, say, production of documents or talking to a regulator.

Paul Berger: Their view was "go away, we've got to do our business." That's what we were up against. It changed over a while, and I think it dramatically changed in terms of the FCPA area, a lot of cooperation and a lot of foreign regulators bringing cases and seeking significant penalties. But that took a lot of time.

Harwell Wells: Actually, I want to move forward. I want to talk about the accounting matters, and the FCPA stuff because it came up in the late 90s. But let's start with the FCPA matters because I know that you worked on those matters and actually I know you worked on those matters in private practice, which maybe we can talk about towards the end of the interview. It seems as though FCPA became a greater issue in the later 1990s. I don't know if that's just because more resources were directed or really, I don't know why that is.

Paul Berger: It's interesting. I took over a case from someone who moved to an office, I think it was Salt Lake City or maybe Denver office. It was called Triton, and it was about bribes being paid in Indonesia. This was in, I think I took it over in '96 and in '97, we brought the case against Triton and a number of individuals, quite a few individuals for bribery.

Paul Berger: That was the first FCPA case brought by the commission in 11 years. The last one being in '86 against Ashland Oil. I remember bringing that to the commission and, without naming names, one of the senior people in the commission said, "Can we bring cases for bribery?" It was a fair question. No one had done it in 11 years. No one knew about it.

Paul Berger: The answer of course was, yes. There's a statute that was passed in 1977, that gave jurisdiction to the SEC and the Department of Justice to bring cases for foreign bribery. I remember talking with senior people at the commission at the

time and said, "This is something that we should focus on. There must be hundreds of cases like this out there and we should start doing it." I did start focusing on that. I did start looking for those cases and investigating and bringing those cases.

Harwell Wells: I find that interesting because the SEC in the late 70s was so involved went through the voluntary program with the origins of the FCPA and with disguised international bribes. It's interesting for it appears to have gotten into a bands for what, 20 years.

Paul Berger: Another actually interesting anecdote is that in '77 when the Congress was contemplating writing this law, they obviously were working with the commission and Department of Justice. They asked the commission whether or not this so-called books and records charge should be a part of the FCPA. The answer was no, it doesn't need to be. Congress went ahead and wrote it into the law anyway. It turns out that the books and records charges and the accounting charges are the most used charges by the commission throughout the last 30, 40 years now.

Harwell Wells: You mean the overall books and requirement to keep accurate books and records, not just with connection with foreign credits?

Paul Berger: They commission started using those outside of FCPA, even though they were written under the FCPA. That is, as I said, the most used provision in the arsenal that the SEC has.

Harwell Wells: Let's continue with our theme. The FCPA cases are interesting because they have an international aspect. I don't know the degree to which you can investigate bribes that are actually being paid overseas. Do you look at the records of the US company? Are you actually able to do investigations of overseas activities, or activities of consultants or subsidiaries or what have you?

Paul Berger: It's very interesting. At first, those investigations were very, very difficult, in part, because it was difficult to get the cooperation of the foreign regulator. But over time, as they saw these cases being high profile, they recognized that there were certain benefits for the foreign regulators as well. We got more cooperation from a jurisdictional point of view.

Paul Berger: The commission took the position that any transaction that occurred in dollars transpired through a correspondent US Bank, and therefore we had jurisdiction. I'm not sure about that as a legal theory, but it was a theory certainly adhered to by both the commission and the Department of Justice.

Paul Berger: You always had jurisdiction over the US company or the company operating on the laws of the US. In that respect, you could go to court and try to enforce subpoenas. Defense counsel knew that. Many times they didn't push you to subpoena enforcement.

Paul Berger: They would agree to production and so you'd get certain production from their foreign subsidiaries and that would be extraordinarily helpful. Then you'd go to the foreign regulator to see if you could get any information from the company or people who are situated in the foreign country.

Paul Berger: That was less successful, mostly because the people who are getting paid are usually working in the government and they're not going to cooperate with you. They're extraordinarily difficult cases to make. Yet, we still were successful in a number of instances.

Harwell Wells: I know it also involves cooperation with domestic, other US governmental agencies. It comes to mind because of the ABB case. I wanted to ask in part because that was a high profile case, I know it was the SEC and the Department of Justice working together.

Paul Berger: I think the interesting thing about the ABB case, to one, we did work with the Department of Justice and we started developing a relationship. Keep in mind that prior to Triton, the SEC hadn't been bringing FCPA cases. There was no structure in place to work with the Department of Justice. Then, post Triton, and then with ABB, all of a sudden we started working with Justice, and Justice had their fraud division and started devoting resources also to FCPA cases.

Paul Berger: We developed a strong line of communication and decided to work together to the extent that you could. They were parallel investigations and we did that. Then there were certain issues that were presented along the way. For example, when you decide to bring cases, how do you deal with penalties?

Paul Berger: It would be unfair for both sides to penalize. In ABB, if I recall correctly, it was the first case that the commission brought in the FCPA area seeking disgorgement. Again, just as an anecdote, a high profile person at the commission said, "Can we get to disgorgement in an FCPA case?" We made the argument that, in fact, you can and should. That became the basis for a lot of these parallel investigations to the Department of Justice.

Paul Berger: Justice would get the penalty, and the SEC would get the disgorgement. That's how they would break it up, because otherwise you'd have these turf battles over penalties. There's a certain amount of publicity that is accorded these cases and both sides want some publicity and want some recognition for bringing the case. Maybe that's the downside of these things, but that's human nature. There had to be a Solomonic way, I guess, to divvy these things up.

Harwell Wells: But how is disgorgement calculated in FCPA cases? Something like insider trading seems fairly straight forward, but how can you figure out the benefit that should be returned?

Paul Berger: That's an excellent question. The answer is that there is no science to this. It is very, very difficult. To some extent it was rough justice. For example, in ABB the

staff, we requested a tremendous amount of information on the profits made as a result of the payments, the contracts that were let. The numbers were extraordinarily high. The question that we all thought about was, they actually did the work of the contract and they reaped, obviously, the reward from that.

Paul Berger: How do you correlate the payment to get the contract? You can take the position, and some people in the commission did, but for the payment you wouldn't have gotten the contract. You pay, you've got a hundred million dollar contract, you pay \$100 million. I didn't have that view at the time. I felt like that was excessive, that people expended a certain amount of energy in doing the work.

Paul Berger: They presented all the things that they would have to do in terms of fulfilling their obligations under a contract. That's post payment. I felt like it would be unfair, or at least for me it was unfair to see all of that work reap zero reward. We came up with, as I said, a very rough justice idea of what disgorgement should be.

Paul Berger: I think that theory has undergone changes over time. I've seen some cases come out more recently where the numbers reflect more the theory "but for the payment, you wouldn't have gotten the contract." The entire amount should be given up. I don't agree with that, but I think that's more where the government is now.

Harwell Wells: Okay. Moving onto another big issue of late 90s, which is accounting fraud. I know you started the Financial Fraud Task Force. You were co-creator of that. I actually want to start with Arthur Levitt and talk about why, because his speech, the numbers game clearly made a splash in '98. But talk about how accounting fraud became a particular important issue within the commission. Was it thrust on the commission? Was it something Chairman Levitt identified as a priority? How did that come to be a major issue for the SEC.

Paul Berger: Chairman Levitt definitely was the guiding light on that. He was definitely concerned about corporations and their effort to manage earnings, which was the big issue, the numbers game. I think that he pushed very hard, and they wanted enforcement to push very hard, to focus in that area, to find cases, to pursue those cases, and to investigate them vigorously.

Paul Berger: We did that and we started thinking -- I know in Chairman Levitt's time I became associate director -- we tried to think proactively about this. This was before a lot of the technology was available to develop algorithms to look at potential patterns. I would take home academic articles at night and I'd read them, sometimes falling asleep, reading them, sometimes very difficult to get through.

Paul Berger: But the issue for us was to try and find things in the literature that suggested that there were problems in the marketplace, and try and find ways to address that in a proactive way. We had to be careful because you don't want to open

an investigation based on just a very flimsy theory because you're also putting a public company, particularly if gets publicly known, in a difficult position.

Paul Berger: It's difficult for them to defend themselves. It's also costly. It impacts the shareholder. You had to walk a very fine line between developing theories and addressing these issues in a way that was appropriate.

Harwell Wells: That leads us to Financial Fraud Task Force. I understand it was started about 2000?

Paul Berger: That's right.

Harwell Wells: Can you talk a little about your role in creating the Task Force? We have an idea of what its broad goals were. How is a Financial Fraud Task Force supposed to accomplish those?

Paul Berger: We decided this was really an extension of Arthur Levitt's numbers game and managing earnings. It was a way to focus, again, resources. It was an extension of the SWAT team. It was a way to throw a tremendous amount of resources in a way that was efficient. I became the chair of that. Then Charley Neimeier came on and we were co-chairs of that.

Harwell Wells: He was chief...?

Paul Berger: Charlie Niemeyer was the chief of the Division of Enforcement's Accounting Division. The two of us ran that and what we did, is we did a couple things. One is we brought together a staff of Financial Fraud Task Force individuals collected from the division. It was staff from different branches. Most of the people had experience investigating accounting fraud.

Paul Berger: Then we used of Charley's staff and accounting. I can't remember, probably 10 accountants. We did two things. We did the investigations that were already opened. We'd focus resources on those investigations. We'd go through them to determine the efficacy of those particular investigations, those that looked promising, we'd pursue quickly. Those that weren't, we'd close.

Paul Berger: The other thing we would do is we started going through filings, as, once, quarterlies. We tried to see if we could find patterns or disclosures that looked odd in light of past disclosures. We opened investigations based on that. We tried to generate a fair amount of publicity surrounding the Task Force, which generated calls to the commission.

Harwell Wells: Whistleblower calls?

Paul Berger: Whistleblower calls. You always got a certain amount of short seller calls and you always had to be careful with short seller calls because obviously it was a self-fulfilling prophecy for them to make claims about certain companies. We

would vet those calls very carefully. That presented its own problem in and of itself. But that's what we did in the task force. I think the first case we did was the Xerox case.

Harwell Wells: Quick question before we get there, because I know whistleblowers became an issue by the time you've got Dodd Frank, you've got the office, the whistleblower. Were whistleblowers important during your earlier career at the commission?

Paul Berger: No, I didn't see a lot of whistleblowers. I think part of it, there are probably a few reasons. One is that the commission's visibility in the marketplace, general marketplace was not very high. People didn't know. If there were whistleblowers, I think they were more inclined to go to the US Attorney's offices than they were to go to the commission.

Paul Berger: I think there was a fair amount of people who would come forward in the middle of an investigation. That's where I remember most people coming forward. I remember we had disgruntled spouses that would come forward a number of times. There were a couple of cases I can think of where we made the case because the spouse came forward.

Paul Berger: In the middle of an investigation, as you push along and things are starting to come out, senior executives are starting to see the handwriting on the wall and deciding to come forward. That happened a fair amount too.

Harwell Wells: I want to get to Xerox in a second, but you mentioned the attempt to give the Financial Fraud Task Force a high profile so a lot of people know what's going on. I did notice in 2000, you gave a speech to the AICPA, which it seemed designed to scare them among other things. Since one of the memorable points you made in that speech was, "over the last couple of years 18 CFOs had gone to jail," I was curious about the response you got to that particular speech.

Paul Berger: The speech was prompted again by the very senior people in the division. We're all concerned about getting the message out. One of the messages was, a lot of the fraud that's occurring, not all of it, but a lot of it, was occurring right under the noses of accounting firms.

Paul Berger: The concern was that the accounting firms weren't living up to their appropriate responsibilities and expectations. There needed to be some signals sent that it wasn't just going to be the corporations that were going to suffer. It was going to be the accountants who are going to suffer as well. With that in mind, my marching orders were to go out and give a speech and bang the table and bang it loud enough so that the industry would hear it.

Paul Berger: Turned out the AICPA conference was the perfect opportunity to do that. I remember when writing it, people had suggested you need to tell them that other people can go to jail too, because that really gets people to sit up and take

notice. In particular, in the accounting industry, which hadn't been subject to under the criminal form. They might sit up and take notice.

Paul Berger: I did that. The response was deafening. People came forward who were very upset that we were taking such a dramatic approach that was unnecessary. That these are people who are doing their jobs and that they weren't responsible for the accounting frauds. Our response was, "How did these things happen? Some of these people were managing earnings through quarter, after quarter, after quarter, and no one's asking any questions?" We wanted to understand how that could happen with accounting firms going in and auditing and doing the work that they're supposed to be doing.

Harwell Wells: Is that a recurrent problem? Because I know dating back to the '70s, under the access theory, or gatekeeper theory, there've been times when leadership at the division or leadership of the SEC has really tried to target, or threatened to target, lawyers and accountants for their roles in accounting fraud.

Paul Berger: Yes. Over the years, the commission has had its successes and losses in respect to that, particularly with attorneys -- to bring in cases against attorneys. It has always been a difficult process for the commission. I think the commission is generally pretty careful about making decisions on bringing cases against professionals.

Paul Berger: Not that they're not careful on other aspects, but they want to make sure that they're approaching the standards correctly to be able to bring cases against them. It was always easy to bring cases against either a lawyer or an accountant who is actually involved in the fraud. That wasn't the issue.

Paul Berger: The issue was someone who is, as you said, the gatekeeper who is sitting on the outside looking in, but has certain responsibilities as a professional. How do you treat them? Those cases required a terrific amount of additional investigation and they were not easy cases to make.

Paul Berger: I think the commission over the span of the last 30 plus years has made a pretty good effort to be careful about who they decide to bring enforcement actions against. But I think the success of the commission has been in bringing cases against accountants and accounting firms. Sending a message that has really changed the approach that national offices of accounting firms have taken over the last maybe more than 10 years, maybe the last 20 years.

Harwell Wells: Is that a consequence of the late '90s prosecutions or investigations. But SARBOX, also Sarbanes-Oxley, also put new requirements on the accounting profession. What would be the cause of that improvement?

Paul Berger: I think it's combination of factors, and the start was the cases that were being brought. Xerox was a wake-up call for both the corporate world and the accounting world. I think the accounting firms were shocked that there was a

case brought against accountants in the Xerox case and SARBOX was actually, I wouldn't say, "put things over the top," because I think there's still issues out there in the industry.

Paul Berger: But I think it helped provide more structure to the industry by creating the PCAOB, by creating an oversight to audits by creating more audit standards. By bringing its own enforcement actions, I think, has had a dramatic impact, but I think it all started with the accounting fraud cases.

Harwell Wells: Okay, going back to Xerox. The firm is accused of accounting fraud at the time. At the time it seemed to be an unusual case to bring, or at least a very high-profile case to bring, but it was clearly dwarfed by later cases. Can you talk about bringing the case against Xerox?

Paul Berger: Xerox was the, as I mentioned before, the first Financial Fraud Task Force case. We had a tremendous amount of resources devoted to that because it involved a number of different countries. We had country teams -- Mexico team, Brazil team, I think there was, but can't remember, Hong Kong team or an Asian team.

Paul Berger: There were a number of teams devoted to that. It was a very large staff. A little bit cumbersome to supervise because we used that same process of morning meetings, deciding what's been done, what are we doing today, what are we doing tomorrow, what are our expectations? There was a larger number of people involved in that. Trying to juggle all those balls and keep things moving was very difficult.

Paul Berger: But we were successful at it. I think the industry, and Xerox and outside of the industry, that was watching what was going on was shocked by it. They thought that it was, certainly at the time, I think they thought it was inappropriate and we were being overly aggressive.

Harwell Wells: Why?

Paul Berger: Because we were trying to penalize, in their view, a good corporate actor. There are a lot of good people at these companies, and how can you go after these companies who are, Hallmark names in the industry? That's not appropriate when there are really bad actors out there.

Paul Berger: Our answer was, yes, there really are bad actors out there. But what we're seeing here is entirely inappropriate, and that has to be addressed. In order for us to send the right message, and pick the right cases, we need to send that rock into the pond that creates the ripple effect. This looks like the case that we're going to do it with.

Harwell Wells: That leads up to the question of penalty, which the \$10,000,000 penalty, I'll be blunt, in 2019, it seems remarkably small. Clearly, it was seen as extraordinarily

high at the time. I guess my first question is, why was it seen as extraordinarily high? Just because of its unprecedented nature?

Paul Berger: I think so. The commission simply hadn't done that in the past, and the commission had, even with the smaller penalties that it had assessed, the commission had always had, and probably today still has, a debate in its building about penalties against corporations.

Paul Berger: There's one side, which says penalties against corporation hurts shareholders, and it should be against the individuals, but not against the corporation. The other side is, if you expect some measure of deterrence, then you need to penalize the corporation, and if the shareholders are upset, maybe they'll do something about it.

Paul Berger: That might be a little bit naive, but it certainly was part of the theory. At least the time that I was there, the general theory of "penalize the corporation" won out over the other theory. But I think it's swung back and forth over time. The amount of money at the time, \$10,000,000 was a lot of money.

Paul Berger: When that number was thrown out, there was shock on the other side that, "How could you do that? That is so far afield from where other penalties were for other companies, for much more egregious behavior," etc. That was the debate that we had with defense counsel, but we decided that we needed to send a message. It had to be a significant number. As you say in today's dollars, that doesn't sound like a lot. But back then that was a shocking amount.

Harwell Wells: Was there a debate within the commission over the appropriateness of that penalty?

Paul Berger: At first, yes. When we came up with the number, I think that there were some people who said -- almost taking the defense position -- that "that's far afield from where we've assessed penalties in the past, and shouldn't we be providing some measure of notice to the public that that's where we're going?"

Paul Berger: Our response, and my response was, we have provided that notice. We have made a number of speeches. We have talked about this. We have created this task force. We have publicized it. We have said to people, this is where we're going to go. Don't be shocked if we get there.

Harwell Wells: It also brings up sort of a continuing issue or debate around the SEC, which is the question of regulation versus enforcement and the idea of regulation by enforcement, where in some cases, critics have argued that, not even critics, people who have acknowledged that in some cases, enforcement action serves a regulatory function. Did that ever come up as an issue for you?

Paul Berger: Sure. It did come up a lot. There were certainly commissioners who took the view that we were taking the place of regulation and we needed to tamp down

our efforts, be less aggressive. I think that was a little bit politically driven, but it was a theory, and it was something that we had to deal with.

Paul Berger: My view was that there are regulations that the industry needs to work with the regulators on the Corp Fin side, on the chief accountant's office side. Those are areas where there needs to be a good working relationship. But on the enforcement side, it's very different.

Paul Berger: Our mission was very different, and our mission was to protect the marketplace. Where we saw problems, we thought we should address them. The question that we always had to ask is, do we address it aggressively or just run of the mill? I know my decision was, and others that I worked with was, we do this aggressively because that's the only way that we can create as level of playing field as we can.

Paul Berger: We always kept in mind the fact that if people didn't perceive the playing field as a level one, that eroded the trust and the confidence in the marketplace. Ultimately, while corporations might not have agreed with it at the time, our enforcement helped create a better working environment for the corporate structure.

Paul Berger: I've talked with a lot of corporate people, particularly when I went to work at Debevoise, and I found that people, although they didn't want to be the subject of an enforcement action, no one does, but they also felt that enforcement being where it was, and being as aggressive as it was, made it a little bit easier for them to operate in the marketplace.

Paul Berger: I always felt -- and I don't know if they were telling me that because that's what I wanted to hear -- but I always felt proud that we made the right decision by being aggressive and helping stabilize and make sure that people have that trust and confidence in the marketplace.

Harwell Wells: Okay. So, in the Xerox matter, you also brought charges against KPMG?

Paul Berger: That's right.

Harwell Wells: And that also got a certain amount of attention.

Paul Berger: A terrific amount of attention. I mean, I think that the heads of all of the accounting firms at the time were in to speak to people at the SEC, and they were concerned about where things were going. And another question that arose then, again, in the same context as it arose with respect to corporations was, "should we be bringing cases against the firm as opposed to individuals?" Now in Xerox ,we brought case against KPMG and individuals.

Harwell Wells: Individual partners or KPMG?

Paul Berger: Individual partners. And the partners were the people who were responsible for the audit itself. And that created a difficult decision-making process, too. I mean, these are just like corporations -- there are thousands of people. How can you hold the corporation responsible for the acts of a few people in a corporation? How can you hold the accounting firm responsible for a few people?

Paul Berger: And one of the things we looked at was the national office participation, or lack of participation, in the audits. And there are procedures, well-documented procedures, for accounting firms to review audits, including the participation of the national firm. And we looked carefully at what the participation was and whether or not it was fair to attribute the failings of the individuals to the entity itself. Ultimately, in Xerox, we did both with the corporation and with the accounting firm. But that's an issue that you have to address, I think, in each and every case.

Harwell Wells: At what point do you hold... I guess two questions. At what point do you decide accounting differences become the issues that should be dealt with by enforcement? For instance, when do you choose to bring a partner, to bring charges against an accounting partner for a client's accounting statements?

Paul Berger: So the answer is, I wish it was scientific, but it's not. It was, we would sit down and talk with the chief accountant in the division of enforcement, and we'd talk with the chief accountant of the commission, and we would have regular conversations, and try and find out where they sat with respect to the conduct we were seeing and what they felt was appropriate.

Paul Berger: And, again, part of the issue was, "what kind of message are we sending if we're just going to bring a case against that audit partner," for example, "and no one else?" I mean, so the audit partner is a subject of an enforcement investigation and perhaps can't practice or appear before the commission for a number of years, or permanently. Is there any consequence for the firm, other than the potential liability or publicity surrounding an enforcement action with the name of the firm out there? And we talked about that quite a bit, and I don't think there was ever any kind of resolution to that other than, in an individual case, here's the message that we have to send, and the firm itself has to take some responsibility.

Paul Berger: But we did look at other things. As I said, we looked at the national office participation, we looked at the extent of the fraud, the timing of the fraud. How many years did this happen? Did it happen with more than one audit partner, or is it something that was just pervasive? Are no people in national reviewing these things? So there are a lot of elements to a decision as to whether or not to bring a case against the firms, but there was an overriding thesis in the commission in the late '90s and early '2000s that, in order to stem the tide of accounting fraud, you had to bring cases against the firms, the corporations and the accounting firms in order to send the right message and to get a change of behavior.

Harwell Wells: Okay. So moving forward a little, I wanted to ask about one more accounting matter you were involved in, which is the case against Fannie Mae for accounting fraud, and that eventually settled for \$400 million in 2006.

Paul Berger: It's a little bit different than the 10 million, yes.

Harwell Wells: A little bit different. Was that because of the nature of Fannie Mae or just because there was a big difference between 2000 and 2006?

Paul Berger: Both really. I mean, certainly the change in time. There had been a number of cases since Xerox, a high number of cases, including in the mutual fund area and a market research area. Other cases got a certain high visibility because of the numbers. But Fannie Mae was the last case I brought.

Paul Berger: In fact, I was writing the complaint at about 11:00 the night before it came out, and I left two days later. So that was the last thing that I did. That was also a function of the tremendous impact that that case had in the marketplace and the message that it had to send. And we worked closely with OFHEO, which was the Office of Federal Housing Enterprise Oversight. It's remarkable that I can remember that, because my memory is not that good. And we worked closely with them and their general counsel in bringing that case.

Paul Berger: We also worked closely with the Department of Justice on that, and in fact, we had several high-profile meetings with the Department of justice because of the impact of suing an agency like Fannie Mae. But that was a case where it was important to bring a case in the marketplace to help give some sense of stability to the marketplace and confidence back to the marketplace over the actions of Fannie Mae.

Harwell Wells: So, I don't know if the Fannie Mae case in particular this occurred, but Fannie Mae was headed by individuals who are very politically prominent and there was a lot of press coverage before and after the case about it. And I'm curious in your position, I guess by this time you would have been Deputy Director.

Paul Berger: No, I was Associate Director.

Harwell Wells: Associate, I'm sorry. But did you perceive those political pressures? Did they ever worry you? Were they communicated downwards from the commission?

Paul Berger: I don't remember any political pressure. I mean there were some cases over the years where I felt a little political pressure, but my view was keep my head down, just do the job and I wasn't going to be pushed by the politics. I just felt that it was inappropriate. But in that particular case, I know that all of us at very senior levels had to get involved in order to resolve that case, but I don't remember anyone pushing us politically one way or the other.

Harwell Wells: Okay. Were there other matters you worked on or led while you were in the Enforcement Division that, that you thought either particularly important or just particularly memorable?

Paul Berger: Well, there were some cases that were memorable, mostly because they were odd, or from an investigative point of view, you have to remember that it takes a certain personality to be an enforcement lawyer, and you have to be aggressive, and you have to be someone who is willing to put themselves out there. So, there are certain cases that were just plain fun to do. And I don't want to give that a pejorative connotation, but it was enjoyable to investigate and bring a case against people that we thought were bad guys. And I think there was one case that we did, which was called Fast Trades. That was the case against some Georgetown law students who were involved in a pretty outlandish pump and dump scheme. So, we brought a case against several individuals who were law students, and brought a case against the chair, at the time, of Keefe Bruyette for insider trading. He was tipping his mistress who turned out to be a porn star.

Paul Berger: And that was an interesting case that was also prosecuted by the US Attorney's Office for the Southern District. So, there are cases like that that were interesting. We did another case against an individual, turned out to be two individuals, called Normandy America. Normandy America was a company that had filed a registration statement for, I can't remember, a \$700 million offering, and it opened and we managed to figure that one out almost instantly and stop trading a day after it traded, and rewound all the trades.

Paul Berger: And then we did the rest of the investigation and prosecuted the individual and the person who was the accountant from a large accounting firm -- it might've been Deloitte who was the audit partner-- and it turned out to be a total fraud. The individual said that he was getting all of his trading information from this individual who had been advising him since he was 13, 14 years old. And it turned out to be a made-up person.

Paul Berger: So, it was interesting. It was a little bit entertaining. Sad, because of people who were impacted. I mean this person had pulled in several very high profile, prominent people for the board. But, ultimately, I think we did the right thing.

Harwell Wells: So, shifting gears a little, I know you're also very involved in technology issues during your time and we earlier mentioned how when you approached, or when you joined, in 1992, it was all paper.

Paul Berger: Yes.

Harwell Wells: And I wonder if you can talk a little about technological changes in the Division of Enforcement and, frankly, your perception about technological changes across the practice of law. At least the areas you've seen.

Paul Berger: Sure. So, it was the time around the cooling of the earth for enforcement. When I started, it was, as I said, the little black dial phones and no computers. Over time things got better, the phones improved. When I started out, I shared an office with another staff attorney and it was enough room for two desks and probably about 40 boxes of documents piled up to the ceiling. And we just worked through boxes. Over time, as I rose up in management and I became the head of the Enforcement Division Technology Committee where we would seek funds from Congress for development of different things and from data mining, which was something we pursued vigorously, to improving our technology, getting, back in those days, Blackberries for people. At first, it was just the most senior people who had a Blackberry, and then it was more supervisors and then finally staff attorneys. By the time I left, the last thing I did on the technology committee was get every desk two computer screens and either a laptop or a desktop.

Paul Berger: And, I think at the time, we had case notes or case management and you could use both screens and you could transfer one thing over to the other screen. And we also developed requirements for anyone producing documents that had to be produced electronically. So, everything was done electronically. You could review everything electronically and you could cut and paste from a document and you could ID a document. We had, again, by the time I left, every document was data input so that it was tagged and you could search any document and as a result, I think investigations became much more efficient and I think much better. I think it became very difficult for defense counsel for example, to bury a document in a million-document production, because you could find it. I mean, you came up with the right word searches, you'd find the document.

Harwell Wells: Is that what you meant by data mining, then? The ease in plowing through these once ridiculous productions.

Paul Berger: Data mining, I meant something different, which was developing algorithms to search through filings, things like that to develop an ability to find patterns and instances of potential corruption.

Harwell Wells: Was that something an enforcement attorney did him or herself? Did you have specialists?

Paul Berger: No, we had specialists. We had a section that, actually, when I was an associate, I was responsible for three assistant director groups, but I was also responsible for an assistant director group at that was the head of technology, and we had several people in that section who were responsible for looking at different types of technology. By the time I left, we had built a room that was certified for forensics analysis.

Paul Berger: So, we could do forensics analysis there, looking at hard drives, recreating documents that had been destroyed on a computer or deleted, things like that, which over time, I'm sure they're even better now than they were when I left. And that became a real strong part of the progress of the division. And I think

that has had a tremendous impact. I've seen that on the defense side, I've seen the improvements that they have made in the way that they handle their cases, even in the way they do their testimony now, they're much more efficient.

Harwell Wells: So, as you rose up the ranks, would you have had more interaction with the commission itself and with the commissioners as your career progressed in division of enforcement?

Paul Berger: Yes. Even as a staff attorney you will go to the table. Going to the table is when you present your recommendation for enforcement, and staff attorneys sit there at the table facing the semicircle of the commissioners, and the commissioners ask questions and sometimes the staff attorney will answer a question.

Paul Berger: But as you rise up and become, say, an assistant director, and especially an associate director, you have a much more frequent communication with the commissioners and you'll go see commissioners and their commissioner's councils about cases, talk to them about it, something that's going to be on the calendar, answer questions that they might have prior to the commission meeting. Commissioners would call me and say, "What are you doing about this particular area? Aren't you addressing this?" And you'd have to tell them what you were doing and how you might go about addressing a particular area of interest to them. So you had much more interaction with commissioners issues the more senior you were.

Harwell Wells: Okay. I guess we've already talked about Chair Levitt and how his priorities were communicated pretty effectively to the division enforcement. What about the other chairs you served under? You served under Harvey Pitt, William Donaldson and I guess Chair Cox as well.

Paul Berger: Laura Unger.

Harwell Wells: Oh, I'm sorry. Yes, Laura Unger as well. How did...

Paul Berger: And Breeden.

Harwell Wells: I'm thinking of the Chair that...

Paul Berger: Yeah. Laura Unger was a chair for...

Harwell Wells: Oh, okay, I'm sorry.

Paul Berger: And Breeden too.

Harwell Wells: So how did... Oh, Breeden was still a Chair when you joined.

Paul Berger: I served under six Chairs.

Harwell Wells: Okay. How did a Chair identify and communicate what the priority should be and how much did that actually change your work? I think you've already given us a very nice example with Chair Levitt.

Paul Berger: I think that when a Chair comes in, hopefully they've thought through what their priorities are and how they want to pursue them. And they usually bring in their own Director of Division Enforcement or promote someone whose thinking is attuned to what they want to do. So they communicate usually with the director as to where they want to go and how they want to do it, or at least where they want to go, and leave the "how" to the director of the division. And I think that was generally the case with most Chairs. I think that to a greater or lesser extent the Chairs would have ideas about enforcement, sometimes not so much. And sometimes I think that was driven more by the Director of Enforcement with the ideas as to what they wanted to do and made sure that that coalesced with what the Chair wanted to do. So sometimes it was top driven, sometimes a little bit less so. Sometimes driven more by the director.

Harwell Wells: Okay. You served under four... Well, yeah, let's see. You served under four directors.

Paul Berger: Right.

Harwell Wells: Bill McLucas, Dick Walker...

Paul Berger: Steve Cutler.

Harwell Wells: Steve Cutler and then Linda Thomsen. And I'm curious if you have any insights about how those individuals led the division and how that changed over time.

Paul Berger: So, that's interesting. I mean Bill had been there in enforcement for years and the natural evolution was, he took over enforcement and I don't know... I got there and he was already Director. Excuse me. So, I don't know how things changed or didn't change when I was there under him. I know that I participated in a lot of meetings. All the directors would have meetings prior to the enforcement meetings with the commission. You'd go into a room and everyone would talk about the cases that they were going to present and the director would be there to ask any questions or make sure they were comfortable. Bill had those; I think they were very informal. They work their way through. Then Dick Walker took over. I think Dick had more marching orders from the Chair Levitt at that time.

Paul Berger: He knew what he wanted to do in terms of accounting fraud and addressing those issues. There was, at least from my perspective at that point in time, much more of a drive toward doing a particular type of case and getting those cases done. We also did, I think at that point in time, some microchip cases, micro-cap cases, and we were also doing Internet cases, which was starting to be a big thing. There was definitely a drive from the top from Dick Walker as to

what he wanted to do. Then Steve Cutler took over and that was a natural evolution from Dick Walker in terms of continuing to do those types of cases. We also found the mutual fund market research and market timing cases, and so that was a big area for Steve to pursue, and we tried to devote a lot of resources to that along with the Financial Fraud Task Force.

Paul Berger: So the drive for Steve at that point was making sure that we were devoting those resources. I think Steve brought a lot of structure too, and I was an associate director at that point, so I was seeing a lot of the structure in terms of making sure cases got done, and they got done on time, and they were efficient and productive. We would have a lot more meetings with Steve about the status of our cases. And I remember every month or so we would have a meeting with Steve to go over our cases and I'd bring in a three-ring binder that was eight or nine inches thick, of cases. I'd have maybe 80, 90 cases and go through those cases to tell him the status, what are our expectations, things like that, and the timing for those cases, if we thought they were going to be cases.

Paul Berger: There was a lot more structure. I wasn't there that long after Linda took over. I expect she continued that process, but I really wasn't there that long focusing that much on what she was doing.

Harwell Wells: Okay. You've mentioned a couple of points, the mutual fund and analyst cases. Did you work on either of those matters a great deal?

Paul Berger: No. I helped out on one matter and I can't remember what that was, but I did help out on one thing I think. But my focus at that point in time was the Financial Fraud Task Force. And we were bringing a lot of, not only accounting fraud cases, but accounting independence cases.

Harwell Wells: Okay. I didn't realize you worked in accounting independence cases. So, let me ask just for a minute-

Paul Berger: I probably brought six or seven of them.

Harwell Wells: Why did that become an issue?

Paul Berger: It became an issue because we were talking with both the chief accountant in enforcement and the chief accountant and it was a real concern that there was an issue that people were not paying attention to, which was independence. And the thinking was, we really need to make a statement here. Of course, in enforcement, the way you make a statement is bring a case. So the thinking was, let's look at these cases. Whenever we're looking at a case, make sure we're looking at independence, which I don't think we really were in the past. And if we have something, let's bring it and let's be aggressive and bring the case so we'd make a statement.

Harwell Wells: So as part of an... if an accounting fraud case came up, that would be an appropriate spot in which to hit independence as one of the issues?

Paul Berger: Right. But in any case, we decided that one of the standards for reviewing it throughout an investigation is, let's look at independence, see if there is an issue there.

Harwell Wells: Okay. In these histories, we tend to focus on the people who run the organization, the Chair, the heads of the division. Were there other people you worked with that you found especially memorable or that you think played an important role? I feel bad about asking you to identify a few particular people, but...

Paul Berger: Yeah. I can say generally there were a terrific number of really smart, talented people who worked in the division, contrary to the view of government employees who are just sitting there biding their time. I found at the Commission people who are really dedicated to do the job. The Division and the Commission is like any other place in the marketplace. You have some good people and some not so strong people, but for the most part it was a combination of collegial, talented people who really wanted to do the job and bring good cases. I can't think of an individual that I'd identify, but there are people that I worked with that I thought were very strong, very smart. One person, I guess comes to mind, Richard Grime, who's in private practice now, he was a terrific, is a terrific lawyer.

Paul Berger: Very strong, very talented, and very dedicated. When I mentioned that I was there until 11:00 at night doing the Fannie Mae case, he was sitting right next to me doing the Fannie Mae case. He's someone who I have a tremendous amount of respect for, and the work that he did.

Harwell Wells: Was he in enforcement?

Paul Berger: Yes.

Harwell Wells: Okay, so between 1992 and 2006, what was the biggest change in enforcement? We might've already gone over some of this, but...

Paul Berger: I think between '92 and 2006 the SEC became a high profile agency that brought significant cases that had a tremendous impact on the marketplace. It also had a tremendous change inside the building in terms of how defense counsel approached the SEC. When I got to the SEC and I started, the first two cases that I worked on, dealing with defense counsel was an extraordinarily difficult process.

Paul Berger: A defense counsel didn't want to pay attention to you. They were difficult in producing documents. They just didn't feel, I think, that you had any teeth, so they weren't going to do anything. Over time, that changed dramatically. I think

that defense counsel realized that through the aggressiveness of the Division of Enforcement and through the cases that were being brought, that it was a better thing to cooperate. Not cave, not rollover, they didn't do that, but to cooperate in the course of an investigation and certainly the Seaboard helped in identifying the areas of cooperation that would be beneficial to corporations and corporations began to realize, probably through talking with their counsel, that it's better to cooperate at the end of the day than face these kinds of significant penalties and the bad publicity. So a dramatic change occurred I think in the division, which is still true today, and that is a much more productive and highly successful independent regulatory agency than it ever was before. Certainly, than when I started.

Harwell Wells: Okay. In 2006 you decided to go into private practice? Why?

Paul Berger: Oh, there are a lot of reasons. One is I was there 14 years. When I went to the Commission, I thought I'd stay for two years and then move on. And I enjoyed it so much I decided to stay, obviously. And then after a time in the last couple of years, I realized I was doing the same thing over and over. I mean, I was supervising at least a hundred cases and maybe 30 cases in litigation, but I wasn't feeling like I was practicing law the way I wanted to. I realized, actually after I left, how stale I had become. And it took me a while on the defense side to, one, learn the defense practice, which is not something that I think, at least for me, did not come naturally, and to get comfortable with that job.

Paul Berger: And you got a call from a client, and they ask you a question, and you're operating without a safety net, you have to answer the question, or you're reluctant to always say, "I'll get back to you," so you answered the question. And that became challenging and fun. And I enjoyed that and I realized that after a time you can become stale in one job. And also, that's not who I am. I mean, telling you about my background, I did a lot of different things in my life and I was never one to just say, "This is what I'm going to do for the rest of my life." I was never the kid who at 16 says this is what I want to do for the rest of my life. I didn't know what I wanted to do then.

Paul Berger: I mean, I went to graduate school for political theory. I mean, who does that? I shouldn't say that, a lot of people do that and I think that's great. But I always was curious about doing different things and I did different things and so 14 years was sufficient for me.

Harwell Wells: I believe you're now retired partner at Debevoise?

Paul Berger: I am retired. Yes.

Harwell Wells: Did your 13 years on the defense side change your view of the SEC, give you a different perspective than you had?

Paul Berger: When you're a defense counsel, you're always concerned that people are being too aggressive, and then you think to yourself, "Well, wait a minute. I was pretty aggressive." And you find there are some really good people there that you're up against, and they are very thoughtful and they're careful. I had some very strong successes representing clients for the SEC. And there were other cases where, at best, I knew I was treading water and the Commission, I think, did the right thing.

Paul Berger: So, I don't know that my view has changed. I mean you're dealing with people, and people are different and they change, and some people that you deal with at the commission are very good, very strong, very talented, and you enjoy working with them. And there are other people, maybe not so much.

Harwell Wells: I won't ask you to name names.

Paul Berger: No.

Harwell Wells: Is there anything else you'd like to discuss? Is there anything else we should know about your time at the SEC that I didn't ask about?

Paul Berger: No, I think we've probably covered it all. I can't think of anything else that I'd want to volunteer at this point.

Harwell Wells: Okay. Well, thank you so much for your time. Very much appreciate it.

Paul Berger: Well, thank you. Thank you for doing this.