Meyer “Mike” Eisenberg Oral History
Interviewed by Richard Phillips, September 7, 2003

This is Richard Phillips, trustee of the SEC Historical Society interviewing Meyer or Mike Eisenberg, presently Deputy General Counsel of the Commission, but that's his second tour. His first tour started in 1959. The date is Sunday, September 7th, 2003. Mike, tell us when did you first join the SEC and at what point in your career?

Eisenberg:

Let's see. I had graduated from Columbia in 1958, Columbia Law School. I then was the law clerk to the Chief Justice of the Oregon Supreme Court. William McAllister, Judge McAllister was a member of the conference in state chief justices and I had planned to come to Washington to work for the Antitrust Division and he had given me an introduction to then the Deputy Attorney General Lawrence Walsh, the Antitrust Division was paying something like $4,600 a year. And I heard from a friend that the Federal Trade Commission would pay $5,200 a year. I think it was like a GS-7.

Phillips:

So how come you didn't go to work for the Federal Trade Commission?

Eisenberg:

I was interviewed by Daniel McCauley, who apparently was the associate, had been the Associate General Counsel at the SEC and was then the General Counsel of Federal Trade Commission. He interviewed me and he says, you really don't want to work here. There's a really good agency that I know. The SEC, do you know anything about the SEC? Well, I had a vague familiarity with the SEC because one of the problems in a seminar course with Gerry Gunther had an SEC problem in it. But that was my total familiarity with the securities and he said that he would call, he'd give me a job at the Federal Trade Commission, but he thought I'd like the SEC better and he called over to Joe Levin, who was then an Assistant General Counsel and recommended that I go over there. I met a classmate of mine, Peter Morrison, who was then working in the General Counsel's office. He says, oh yeah, you can get a GS-7, I think it was. And at that time the money was important because the difference between forty six hundred and fifty two hundred. In any event, Carol was pregnant.

Phillips:

Carol is your wife?

Eisenberg:

Yes. So I went over and was interviewed by Joe Levin. Tom Meeker was not, the General Counsel is not around at the time. He sent me to be interviewed by David Ferber, who was then another Assistant General Counsel. And David interviewed me on the porch of his house while drinking a martini in his bathrobe.

And between the two of 'em, I was also interviewed by Irv Pollack who was then an Assistant General Counsel and they decided that I should be hired. The whole General Counsel's office at the time, I think, had 23 or 24 lawyers. And in addition to doing the appellate work, we also tried our own cases. By court, you mean District Court cases?

Phillips:

From the August 3rd …

Eisenberg:

And that's how I got to the SEC. That was October 1959.

Phillips:

What's the first major matter that you can recall working on in general? Counsel's office of the SEC.

Eisenberg:

The Commission had lost the ISI case it was SEC versus ISI out in the Ninth Circuit. And cert had been denied, and the ISI case involved the transfer of ownership of an investment adviser for a profit. The Commission thought that was a gross abuse of trust under Section 36 because they were transferring what was essentially a trust relationship for a profit. And they fought the case out in the Ninth Circuit and lost. And the question was why did we lose and involved in that was the question of what was a gross abuse of trust. Under section 36 there had

Phillips: Section 36?

Eisenberg:

The Investment Company Act, which says, thou shall, the Commission has the power to bring an action for gross abuse of trust involving investment companies. And I went to go look to see what gross abuse of trust was. The legislative history was pretty sparse, looked up (inaudible) on trusts and agency and a whole bunch of other issues where abuse of trust was involved. And I really didn't pan out very much. So we were sort of stuck in terms of what was the origin of the term gross abuse of trust. It had been negotiated during when, just before the '40 Act was adopted by the Commission by David Schenker, who was the Chief Counsel of the study. And the words just got into the statute. There was some writing about it, but nothing particularly definitive. It just had to be a serious abuse of trust or whatever that meant. Anyway, that was the first thing that I got into. And that interest in terms of section 36 breach of fiduciary duty, what does abuse of trust mean? And as is today a live issue much less. Back then I found out how gross abuse of trust got into the statute.

Phillips:

Who was the Chairman of the Commission at that time,

Eisenberg:

Chairman of the Commission at the time. And when I started was Ned Gadsby, who had been Chairman for, I think, five years, had been appointed by President Eisenhower. And of course, during that period, 1959, he remained as Chairman until President Kennedy appointed William Cary.

Phillips:

Did you notice any significant difference in the Commission with the transition from a Republican Chairman and a Democratic Chairman?

Eisenberg:

Okay, I'll go back to the other thing in a minute, but not particularly. I mean I think that if you take yourself back to that time 1960, that the new younger generation was coming in and that what Kennedy represented a new vigor for the government and they had new Commissioners were appointed and it was a very strong commission on the Commission during the Kennedy and the beginning of the Johnson administration were people who had been career SEC and division heads, Barney Woodside was who had been the Director of Corp Fin was a Commissioner, Manny Cohen, who had also been Director of Corp Fin, was also appointed later became Chairman. And there that had not really happened before, but in terms of the politics, it was not a political commission. People voted on their philosophy, but nobody ever really thought, I don't think of people as well, this is a Republican Commissioner and this is the way he's going to vote because he's a Commissioner.

You really couldn't tell. And Gadsby and I served as his legal assistant for a period of time when he was holding over after he lost the chairmanship to Cary. It was pretty collegial. It was a collegial commission. It was much smaller. The division directors and associate directors spoke to each other.
Often the Chairman knew what was going on in most divisions. Our office was an example. There were 23 or four lawyers in the office. All of the Assistant General Counsels were people who were career who had been there for almost all of their careers. Pollack, Ferber and Levin. The General Counsel was a political appointee, but that didn't really,

Phillips:

Who succeeded? Mr. Meeker . . .

Eisenberg:

After he left Walter North succeeded him. Walter North came from Michigan, was a good Republican from Michigan and was appointed when Tom left. And that certainly didn't make much difference. And after that, when Bill Cary became Chairman, I think the first General Counsel was Allan Conwill and

Phillips:

Mr. North left or?

Eisenberg:

No, North stayed on as Associate General Counsel. There was no thought of really ousting him or anything like that. You didn't have that kind of a change. There was an Executive Director whose name was Hel and he was ousted and he was a political person. But in terms of the direction of the Commission, I think because the markets were picking up and there was attention being paid to the markets and the mutual fund industry, particularly because of the Wharton School report, which came out about that time, there were things happening at the Commission. What do you mean by the Wharton School report? Wharton School report was a report that dealt with essentially whether or not the fees that were being charged for investment advice and whether the load structure for mutual funds was appropriate. And it was done by a team headed by Irwin Friend who was a professor at the Wharton School. Andy Brimmer who later

Phillips:

Was this done for the Commission?

Eisenberg:

Yes. Who? Andy Brimmer who under

Phillips:
The

Eisenberg:
Gadsby administration. It started under the Gadsby administration and it was picked up. It just went on.

Phillips:
And generally speaking, what was the tenor of the report?

Eisenberg:
The tenor report was highly critical of the industry. The reports in effect said that they were not the economies of scale because the fund industry sounds funny now because the whole industry was maybe 40, $50 billion, which is the size of one of the smaller fidelity funds these days. But the whole industry, the whole mutual fund industry was 40, $50 billion. And in effect, you had a four or $500 million complex. That was big stuff. And consequently, they said that the half of 1%, which was pretty standard across the

Phillips:
Half of 1% management fee,

Eisenberg:
Management fee was in effect, didn't provide the benefits of scale. And of course there was a load structure that started at eight and a half percent and they really didn't get into sales tactics that much. That was left later for the special study.

Phillips:
And so what was the result of this report?

Eisenberg:
The result of the Wharton report was a look a sharper look into the industry that was picked up by the special study. One of the things that came,

Phillips:
Explain what the special study is.

Eisenberg:
Okay. One of the things that came from the appointment of Cary and the attention given to the markets, it wasn't just mutual funds, it was the fixed commission rate at the New York Stock Exchange and various recommendations that were being bandied about at that time. Part of the special study then was authorized by the Congress and a staff was assembled when Bill Cary was Chairman, Milton Cohen was made the head of that study, Ralph Saul, who was then the Deputy Director of Division of Trading and Markets was made the deputy head of that. And people were gathered from all over the Commission and outside the Commission there were about 60 people if I remember correctly, who were on the staff. The

special study. I was detailed to it for allegedly a couple of months. It ended up being the length of the study, which about a year and a half.

And part of that, going back to your question was mutual fund sales practices in Chapter 11 of the fund study deals with sales practices. And that's how they got into that. One of the sales practices that were tied to it had to do with the fixed commission rate and the amount of money that was given up were directed by fund managements to brokers to reward fund sales. So there was a relationship between the way they were sold and the rewards for distribution. And there was a significant part. I ended up cross-examining publicly Don Regan, who was then executive vice president of Merrill Lynch and others who were involved in sales. The other part of the study that was very important that I dealt with was the antitrust part of it, which later led to Gene Rotberg, who was then Associate Director of Trading and Markets to what was called the commission rate hearings in which the fixed commission rate of the New York Stock Exchange was called into question. And one of the reasons that the fixed commission rate was abolished was because of what happened in the special study, the disclosure of the give up and the commission rate hearings that Rotberg conducted.

Phillips:

And were you a member of General Counsel's office during this period?

Eisenberg:

I was a member of the General Counsel's office and essentially then I went back to the General Counsel's office after the study.

Phillips:

When were you as Assistant Chief Counsel of the Division of Market Regulation? Not regulated mutual funds, I take it?

Eisenberg:

Yes. I think it was probably 61 or something like that

Phillips:

For a short time.

Eisenberg:

About a year.

Phillips:

And you left General Counsel's office?

Eisenberg:

Yes. I got a promotion out of it, I think. And we did things like Allegheny was the Allegheny Corporation hearings, the Murchisons, the takeover of Allegheny. It was pretty

Phillips:

Interesting. What was that

Eisenberg:

About? That was about the takeover. Allegheny was part of the holding company that owned IDS Investors Diversified Services, which at that time was one of the largest, if not the largest mutual fund group in the country. And it was also sold by through independent salesman, which they controlled, it was not sold through brokers and

Phillips:

Not independent salesman, but

Eisenberg:

Captive, captive sales force. They were part of I-D-S was the adviser, I-D-S-R-N, the sales force. And it was a very large sales force. It was headquartered in Minneapolis, and there was a change of control in Allegheny. There was a proxy fight that was involved in it. And the highlight of that was my taking testimony of Mr. Murchison with Abe Fortas as the defense lawyer. We had an interesting time there. Alan Gordon was the Chief Counsel of the division and was Chief Counsel of Corp Reg. But basically

Phillips:

I You had said market reg before. Did you mean corporate? Corporate regulation? Corporate

Eisenberg:

Regulation,

Phillips:

Which regulated the mutual

Eisenberg:

Fund. The mutual fund industry and the

Phillips:
Public utility,

Eisenberg:
Utility Holding Company industry. Anyway, you had the Wharton study. The Wharton study criticized the industry on loads and on fees and disclosures. And I think there was some things about role of directors. There was a significant piece on the role of directors of the Wharton School report. Jack Bogle was the assistant to Joe Welch who was at Wellington, who was the chairman of the Investment Company Institute, then called the National Association of Investment Companies. And there was an interest in Irwin Friend, who was the head of the study, and Andy Brimmer, who later became a member of the Federal Reserve. And there was a professor and it led to some very interesting discussion. Meanwhile, back at the ranch, after the Wharton report became public, there was some class action lawsuits brought mostly by a fellow named Abe Pomerantz, who was a derivative class action lawyer in New York.

And he sued a number of the investment complexes on the ground that it was

a gross abuse of trust for them not to give value the benefits of scale and the other things. But pretty much based on the Wharton report and the Commission. And when I was in General Counsel's office, the Commission authorized us to take the position that there was a private right of action for people like Pomerantz who represented shareholders to bring actions under 36. And we filed several briefs. I argued part of that. The major case was something called Brown versus Bullock. Bullock was a fund group. And they challenged Sullivan and Cromwell

on behalf of Bullock Challenge, whether there was a private right of action who went before Judge Herlands in the Southern District of New York, who apparently was a member of the staff of the Commission in the thirties. And he ruled, yes, there was a private right of action. It eventually went to the Second Circuit, which affirmed a private right of action under sections 10 and 15 and 37. So all of that had to do with, and that was Rights of Action.

Phillips:

Was that period generally where there was an awful lot of litigation involving the question of whether implied rights of action in the federal securities laws and counsel's office. And you were active in that.

Eisenberg:

We were active in that. And the other branch, as you know since you were in the office at the time also was, and by the way, we really had some, it was a small office, but there's some really top-notch people in there aside from you. But George McKayley was there, Jack Dudley, Mahlon Frankhauser, later became the Regional Administrator in New York. Faith Kish, Mel Katz, Paul Gonson came much later. He was not there at that time, but Gonson was there in the latter part of it, the sixties. Jake Stillman came later in the sixties. But that group and the people who, and Irv Pollack, who was the head of that later went on to be a Commissioner. But in any event, the other private right of action set of cases were private rights of action under 10(b), which is now taken for granted. But that was a big fight. A lot of that whether or not with Texas Gulf Sulphur was the seminal case. I remember in Berkeley when I was teaching this, I said, when we went to the Commission,

Phillips:

Texas Gulf was seminal case on the implied rights of action,

Eisenberg:

No, on insider trading

Phillips:

Insider trading.

Eisenberg:

The question basically became whether or not there was a private right of action under Section 10(b) and Rule 10b-5 on the insider trading cases because that's, and there were a group of cases dealing with private rights of action, which we took the position that it was. And uniformly the courts held that yes, there was a private right of action under 10(b), even though it didn't provide for a private right of action. And I think by the time that got to the Supreme Court, no circuit had held that there was no private right of action. And so you had both those streams of cases under the Investment Company Act and under the '34 Act on private rights of action as the special study, the things that were coming out of the special study, the basic argument was the fixed minimum commission rate and getting rid of the fixed minimum commission rate. And that took a lot of effort and took a lot of time and it was successful.

Phillips:

And what was your involvement in that?

Eisenberg:

Well, I worked with Gene Berg, Peter Archie, Dick Paul, who was the Chief Counsel of the study and in setting up how give ups were

Phillips:

Given up and explain what a give up

Eisenberg:

Is. The give up is that a fixed commission rate? That means that everybody who members of the New York Stock Exchange charged the same commission, they would give away to another broker. First you had to be a member of the New York Stock Exchange, but if Fidelity executed a trade through Merrill Lynch, Merrill Lynch would give away between 75 and 80% of that commission to whoever Fidelity Management would designate and they would designate people who gave them research or who gave them distribution, who sold shares, and there were other services as well, but those were the two main services. So 80% of the Commission was going to whoever the customer in effect designated. Well, that didn't last too long because you had to be a member of the New York Stock Exchange Club to do that. So the regional exchanges started doing the same thing, so you could get the same result through a regional exchange and then that spread to anybody who's a member of the NASD.

Well, all brokers are pretty much members of the NASD, so you had the proliferation of these fixed commission rates and the giveaway of that money, which sort of indicated that there was a lot of fat in the commission rate. And consequently, the abolition of the commission rate led to the phase in of negotiated rates where they could not fix the commission rate and indeed it would be in a violation of the antitrust laws for them to do that. After 1975, it was phased in starting in 1970, which is when I left the Commission. And it was completed in 1975 May Day 1975, no more fixed commission rates.

Phillips:

You mentioned antitrust and that you had worked on antitrust issues affecting the securities industry while in General Counsel's office, tell us what was happening in that area during your tenure at the Commission.

Eisenberg:

Okay, well, there were a couple of cases. One was Silver versus the Stock Exchange, and Silver was a broker in Texas really testing my memory. Silver was a broker in Texas. It wasn't Dave Silver who had his telephonic connections pulled by the Stock Exchange because he was alleged to have had some relationship to people who were in the Communist Party or was sympathetic to the Communist Party. And this was just after McCarthy was long gone, but there was a residue of that and they didn't give him a hearing, they just pulled the lines, which would kill his business. So he brought an action under the antitrust laws that the Stock Exchange participated in this conspiracy and he won. And we took the position that which is necessary to make the Exchange Act work would be immune from the antitrust laws. Therefore if you have something like an underwriting syndicate and they're setting the price that's contemplated by the act.

However, if you do some things which are not contemplated, supposing they got together and decided that they would enforce certain discriminatory measures or like this, that they would deny the fellow due process that wasn't authorized by the Exchange Act. And we won that case in the Supreme Court. The other case was, there were a couple of cases, another one was Kaplan, but the question really was how much immunity the exchange and brokers had under the antitrust laws because, but for the existence of the '34 Act, they would not be able to do some of the things that they would do. And that came up again fairly recently and there still is some significant dispute over the extent and reach of the antitrust laws.

There are some people who think that there was blanket immunity for brokers in the antitrust laws, a position which I have great difficulty

Phillips:

Now, the Silver case came up around in the mid seventies,

Eisenberg:

No, no, mid-sixties.

Phillips:

Mid-sixties. Mid-sixties. I'm sorry. What other developments were significant during that time?

Eisenberg:

Well, there were other, well then after the special study, as you know, there was the mutual fund study. And the mutual fund study consisted of also a special team that was put together, which was an interesting way of dealing with these problems, which we don't have now, which is one of the differences. Divisions are much more turf conscious now than they were then. It was normal to put together a cross divisional team with people from our office or Corp Reg or Trading and Markets to do this, these things. In any event, we, let's see, I lost my train of thought.

Phillips:

You mentioned the mutual fund study.

Eisenberg:

The mutual fund study was put together and we got a group of people together. I remember Dennis Lehr was on that Larry Newman. There were a couple of others that were there. And that basically we went out to the industry and did pretty thorough interviews of five or six major fund complexes to test whether or not some of the Wharton School conclusions were really still valid. And at one point, I think after the first cut of the study, you came in as Director of the study to finish it up. But the result of that was, it

Phillips:

Was after Bill Cary left,

Eisenberg:

This is during Manny Cohen's

Phillips:

Term.

Eisenberg:

Bill Cary left shortly, left shortly after President Kennedy was assassinated and President Johnson, I think he lasted for some time into the Johnson administration not that long. And he appointed Manny Cohen, who was then a Commissioner to the chairmanship and he completed that. And it was, the report that came out of that study was public policy implications and the public policy implications made specific recommendations about reform of the mutual fund industry. The special study did it for the brokerage industry and this did it for the mutual fund industry. And that had to do with the front end sales

loads and market tactics and give up. There was a section there that dealt with some of the things that we brought up in the special study in terms of distribution. And also there was a significant section on management fees at that time. I think the mutual fund industry was a whole 80 billion.

Phillips:

And that was 1966.

Eisenberg:

66 was when that was published. When that was

Phillips:

Published. And that was during Chairman Cohen's,

Eisenberg:

That was during Cohen's.

Phillips:

Tell me the difference if you can, between Chairman Cary's administration and Chairman Cohen.

Eisenberg:

Well, there was just totally different personalities. Cary was an academic, he was a tough guy, but in terms of he was very gentlemanly, he was very knowledgeable. He was pretty friendly, approachable. But I wouldn't say that Bill Cary was an outgoing personality. He commissioned was very collegial at the time, but Manny, who was much more of an outgoing personality and was really recognized as one of the true mavens of securities law, he probably knew as much as anybody in the country about securities law, including blue sky laws. And Manny knew where all the bodies were buried, had been at the Commission for 25 or something like that, years. He came to the Commission in the J after World War II. And nevertheless, it was still a very collegial commission, although there were differences. And I became

Phillips:

During Cary's administration, who were the other members of the Commission? Can you recall?

Eisenberg:

I got mixed up between

Phillips:

During this period, Jack Whitney,

Eisenberg:

Well he brought Jack Whitney on. Jack Whitney was a Bell Boyd partner from Chicago. He also brought, who else was put on? Frank Wheat? Frank Wheat. Frank Wheat was a senior partner at Gibson Dunn and was also a very well-known and very highly respected securities lawyer. Whitney was also a securities lawyer. Let's see, Senator Frear, President Johnson appointed Senator Frear of Delaware as a Commissioner. And there was pretty much always a place for somebody who had Hill connections, either senator, sometimes a representative that would, and those people were generally fairly useful. Senator

Frear got us a new building on 500 North Capitol and Lyndon Johnson came to swear him in. He came to the old Tar Paper Shack on Second

Phillips:

Street. That was the World War I temporary.

Eisenberg:

It was a temporary, it was building and it showed it. And that was the Commission headquarters. It is now a poor people's center, the shelter.

Phillips:

When did the Commission move during your tenure?

Eisenberg:

Yeah, and Johnson came tore in. He looked around, he saw the shabby tar paper and he said, we are going to have to get you a new building. And they did. And the result was the move to 500 North Capitol and I became executive assistant to Manny Cohen. That was after we tried the, there were two major cases that were involved.

Phillips:

How long were you in General Counsel's office?

Eisenberg:

Until I, except for the period that I was executive assistant Manny, I was in general

Phillips:

Counsel. When did you become executive assistant to man?

Eisenberg:

Well, let's see. After Dave Ratner left, I guess it was six

Phillips:

Days. Dave Ratner was who?

Eisenberg:

Dave Ratner was a Manny's executive assistant. He was a professor from Cornell and the guy before him was Leonard Lyman, who was a partner in, I forget what firm. But anyway, they were first grade people. Cary's executive assistant was Arthur Fleischer, who became a very well-known M&A lawyer and the senior partner of Fried Frank. So you really had some interesting shoes to fill, especially with Manny who was so knowledgeable about everything.

Phillips:

And you became his assistant when

Eisenberg:

68? I was his assistant from 68 until he, until Nixon became president, then replaced him in February of 69 and Hamer Budge became, was on the Commission. Budge had served on the Commission for three or four years, appointed by Johnson originally. And he was a former representative from Idaho and he was Chairman for a while. But being,

Phillips:

Have we covered the significant events during the Cary? The Cary

Eisenberg:

Casey had some pretty interesting events, but I wasn't there.

Phillips:

The Cary administration?

Eisenberg:

I think so. I think during the Cary administration, the major accomplishments of Cary was the starting of the special study and manning of the special study and the setting out the, what they wanted to do and the reforms that they were going to take on and also the insider trading stuff.

Phillips:

Were there any significant cases or events that you participated in during this period other than what we've described

Eisenberg:

Well later,

Phillips:

What about Fifth Avenue Coach?

Eisenberg:

Fifth Avenue Coach came in 67, which was after the mutual fund study. And I went back to, I was an Assistant General Counsel. I think we both made assistant at the same time and I was assigned to Fifth Avenue Coach case. Fifth Avenue Coach case was involved a condemnation award of about $30 million, which was a lot of money in those days. When New York City condemned Fifth Avenue Coach, the people that ran Fifth Avenue Coach and proceeded to the award, 30 million included Roy Cohn, Krock,

Phillips:

Who was Roy Cohn

Eisenberg:

Roy Cohn was chief counsel to Senator McCarthy of Wisconsin, not Minnesota, of his investigating committee and was basically responsible with McCarthy for some of the things that happened in the early 1950s. Blacklists, accusing people of being communists. There were communists in the State Department. There were communists under the rug, there were communists . . .

Phillips:

And Fifth Avenue Coach was then an administrative proceeding, A court proceeding?

Eisenberg:

No, it was court proceeding and it was assigned to our office and we put a team together, which included the chief counsel of every division had its own enforcement group, which is not true today. And Dave Gutowski was, and Sid Mendelson was a counsel there. Dave Gutowski was assigned to Ted Sande from our office was assigned to a

Phillips:

Gutowski. And Mendelson were from what division?

Eisenberg:

They were from Investment Management or then Corp Reg. Sande was in General Counsel's office.

Phillips:

This was a joint General Counsel's office and Division of Investment Management

Eisenberg:

Team. Yeah, we had an accountant that was, I think was from Tower, was from Corp Fin.

So he was a financial analyst type. Phil Smith was from Butkis office and we were going to try this case. And what it involved was that these people got together and they were going to take that $30 million and it involved bags of money going to England with the Panamanian Ambassador to England and other CDs and Panamanian banks and Swiss banks. It was really quite a story. And we investigated it. The first thing we did was to bring an action in the Southern District of New York. Went up and argued for an injunction against them. And the interesting thing about it was that it was an investment company in that case, because we argued that this was an unregistered investment company. They'd taken the pool of money and they were investing it and a lot of junk, but they were investing it and taking the money out and it was unregistered and they were saying, no, it was not an investment company. And then of course it was a fraud charge and it was

Phillips:

What was the result?

Eisenberg:

The result was that after, I think it was an eight week trial before wonderful judge, his name was Edward McLean. He's a wonderful judge. Not just because we won, but because he was really a fine judge. He put us through what we would have had to go through in a criminal trial to do this. And the Commission got an injunction. A special trustee was appointed to take charge of the money. The Commission basically won its case. And the recommendation that Mr. Cohn be disbarred as a member of the New York Bar never went any place. And he wasn't disbarred until many years later.

Phillips:

This was the first time. Was it not that Mr. Cohn lost the case?

Eisenberg:

It was the only case as far as I know that Roy lost to the government. And Bob Morgenthau, who was the United States Attorney at the time, had tried Cohn on not related to Fifth Avenue, but other cases

that he had that were criminal cases. Cohn managed to get a hung jury on one because one of the juror's father's died. And that was the end of that. And then they lost I think another case. So this was the only case that Cohn ever lost

Phillips:

And considered a very significant victory.

Eisenberg:

There's no question that it was a significant, we got a promotion. The other really important case, I mean of course there was Texas Gulf Sulphur in that, but I was involved, but that was not a thing. I was in Great American Industries and a couple of other cases that we tried, but the real case was fifth Avenue and IOS. IOS was Fund of Funds, Bernie Cornfeld. And at that time it was a pretty big case. What they were doing was that they had these offshore funds that were being sold overseas, but were investing in the American stock market. And they were selling to servicemen and people overseas and so on. And it was a fairly big fraud because they would use give ups. There was the receptacle for the give up was a Cuban skin diver named Tika Clap who lived in The Bahamas and money would go to Switzerland and end up in The Bahamas and all of that.

And they were very successful if they had done what they had done, honestly, it was a good business. But they got very greedy and we pursued the case and the case was originally brought what was the jurisdiction, why does the Commission have jurisdiction over this stuff, which is happening overseas? So we started searching for places where IOS was doing business in the United States, and two things happened. One was we got a message from the United States Attorney in Guam, which said that they were selling in Guam. Guam is American territory. So we detailed Alan Gordon to go to Guam. The telegram to the United States Attorney apparently went to the IOS agent on Guam, who contacted his people in Switzerland. And David Silver was detailed who was then acting for IOS, and

Phillips:

He was counsel for

Eisenberg:

Was counsel to go to Guam. The reason that Alan Gordon was dj, he was supposed to go to Hawaii to some conference. They didn't know that. And he stayed in Hawaii for about a week. And poor Silver was out in Guam with the gnats and huge with snakes and so

Phillips:

On. That's the David Silver went on to become president of the ICI

Eisenberg:

Investment

Phillips:

Company. Correct.

Eisenberg:

Eventually he would check every Pan Am flight that came in. Eventually Gordon landed; course they knew each other and Silver was delighted to see who this inquisitor was. Anyway, so we had Guam. I went down to Puerto Rico, where they decided they would fight the Commission subpoena. So the first

part of it was a Commission enforcement action, which I argued before Judge Cancio, which is relevant. Basically it was a Puerto Rican court. And I had been before Cancio before on a Puerto Rico capital case, which was the first investment company case in the history of Puerto Rico. And there's whole question about whether

Phillips:

Historical Society interview Meyer Mike Eisenberg continued on the second side of the tape.

Eisenberg:

In any event, I mean there are various stories that go along with the IOS case, the sum and substance of the case, aside from the colorful characters and how the thing was defended and some of the, how we beat them in Puerto Rico where it was just poor me against all these guys from Allan Conwill and the Willkie Farr people. And one of the interesting,

Phillips:

This was the Conwill who was General Counsel, the Commission of one time,

Eisenberg:

He was Director of Investment Management also, and then left and was Willkie, IOS's counsel. But of course I had argued before, Cancio before, and it was really funny. I won just the Attorney General of Puerto Rico. And then this Hernández Colón who later became governor introduced me to the court, which was really a riot because he came in and Cancio had previously been the Attorney General. And it was this whole scene about all these guys in suits sitting at one table and he's sitting at the other table and the door was flung open and Hernández Colón comes in and Cancio gets up and says, for what purpose does the Attorney General appear in my court? And it was really great stuff. So I was admitted pro hac vice for the case. And the important thing of the IOS case, it had to do with the extent of US jurisdiction over things that were happening overseas but affected the American markets. And to that extent, aside from the cast of characters and all of that, it was quite important.

Phillips:

And the end result was that IOS was closed down.

Eisenberg:

Yes. That was interesting too. The best that some of our colleagues in what became the Division of Enforcement could do was get a five-year bar. David Ferber and I and who else was involved? I think it was Sol Freedman, the director, said, these guys should be out of business. And they said to us, okay, you go negotiate this. So we went and we did negotiate it and we came back with a permanent bar, which is as much as they could do,

Phillips:

Mainly keeping him out of the United States,

Eisenberg:

Taking him out of the United States, and of course pretty much discrediting

Phillips:

Them. And thereafter the Swiss government took some

Eisenberg:

Action. Swiss government took action and pretty much IOS was discredited.

Phillips:

Any other significant event during your first tenure at the Commission, which I recall ended in 1969. In

Eisenberg:

70, in 70. After Manny left, I became Associate General Counsel and my job was to help shepherd the Investment Company Act Amendments of 1970. Prepare testimony. Phil Loomis was the General Counsel. This should not go by without talk about Phil. Phil Loomis was truly a genius, was a great General Counsel, knew as much as anybody, was a very reticent fellow and was a real gem to work for. He would sit and he would rearrange a brief and visualize it and do it in a half an hour. The stuff that you would struggle over for three hours, Phil quickly could solve. And he was truly amazing. The person, and I think somebody who too many people have forgotten, Phil was I think among the best people I ever worked for. Anyway, went back and there was testimony to be given. Senator Williams was first was Sparkman and Williams was chair.

This had gone on for several years after the mutual fund study and started in 67. By 68 they were really ready to have a bill and there were hearings and the bill passed. Much to some people surprised there was some compromises made. But essentially, at least from my point of view, the Commission got what it wanted. Manny was very involved in this. When Manny was forced out in February of 69, the budge commission took over, but the momentum kept up. Momentum kept up, and we saw it through. And Judge Budge, he was a judge in Idaho at one point. He was called Judge Budge. He testified, the others testified commission. It was fairly strong at the time. And that went forward. And that was a very important piece of business, which resonates till today in terms of the beginning of mutual fund reforms that were legislated. And

Phillips:

That legislation did what?

Eisenberg:

That legislation strengthened the role of independent directors. It basically recognized the responsibility of the funds in terms of reasonableness of fees. It 36 was divided into two pieces, which I won't go into now, which basically set higher fiduciary standards than existed before. And they also, there were with the load and front end loads were severely affected

Phillips:

Subject to NASD.

Eisenberg:

Right. Subject to NASD limitations. It was an important piece of legislation.

Phillips:

You left the Commission in 1970?

Eisenberg:

Yes.

Phillips:

And what did you do?

Eisenberg:

Well, I left the Commission. I went to, I became a partner. I almost became a partner. Manny asked me to go with him to Wilmer Cutler and they didn't want to give me a partnership. And so I went to another firm, it was called Sterling and Kent, and they opened a Washington office and we had, that was later absorbed by Rosenman Colin and I became a Rosenman partner. Let's see. I went through midlife crisis in 19 85, 86. I went to Berkeley to teach. I was director of a center, National Center for Financial Services, and I taught a course on federal regulation of financial institutions. I was a wonderful experience. I was still in touch with some of the students I had. It was the only center like that in the country. We had a board that had the Chairman of the SEC, Vice Chairman of the Fed, and a lot of people from industry. A lot of the stuff had to do with, again, firewalls, the capital markets, but also the S&L scandal, which was brewing on the horizon. I was innocently applying my, I went to Ballard Spahr

Phillips:

After you left Berkeley?

Eisenberg:

After I left Berkeley.

Phillips:

You went Berkeley for how long?

Eisenberg:

I was at Berkeley for almost two years, and I came back. Rosenman had closed its office. I was a Ballard Spahr partner. And then after a while I went to Kramer Levin for three or four years. And I was innocently attending an ABA meeting at Toronto. When Harvey Goldschmid, who was the General Counsel who I had known for a long time because I was on the Corp Pro group of the ABA, a corporate governance group. And he was a reporter on the ALI corporate governance along with Mel Eisenberg and Marshall Small and Jack Coffee. He recruited me. Basically he said that he wanted to have the deputy and we negotiated a little bit and the kids were through school and they were married. And so it sounded like a good thing to do when I was sort of tired of billing time and running after clients. And so it worked out well. Arthur Levitt was the Chairman.

Phillips:

When was this?

Eisenberg:

This was 99. This was the tail end of 1999. So it will be five years, almost five years that

Phillips:

I've been there. And Harvey Goldschmid was General Counsel. You were Deputy General Counsel. General, that's right. And you stated that you're still at the Commission? I'm still at the Commission. And you've been through how many Chairman

Eisenberg:

I've now been through. I survived Harvey Pitt's chairmanship barely. That was really not a good time for the Commission. Not a good time for the staff. Bill Donaldson obviously took his place and Donaldson pretty much runs a collegial commission. There is no political division like there was under Pitt that Goldschmid and Donaldson and Campos get along and they get along together. The votes don't split down party lines. There's generally consensus when they do split. It's really sort of ideological.

Phillips:

Let me ask you this

Eisenberg:

Now, one more thing. The difference is that some much bigger commission with a

Phillips:

Lot the difference between your first tenure at the Commission and your present tenure.

Eisenberg:

Right. And it's a larger bureaucracy. I think it's harder to run. The problems are, I think more difficult than they were before. At least they're more complicated. The markets are more complicated. We didn't really have derivatives like we have now. The mutual fund industry is six and a half trillion dollars instead of 40 billion. The markets are international accounting standards. You still have the similarity in terms of that. There are people out there like the Enron situation, which was more complex than some of the things that we dealt with, which were much more raw in terms of the kinds of frauds that we're talking about. So things were more complicated, more difficult to,

Phillips:

But you're saying except for the Pitt administration, you don't see an increase in partisanship?

Eisenberg:

That's right. What about the only other time where this happened was Watergate when Bill Casey was Chairman, and the difference was that Bill Casey had Irv Pollack and Stan Sporkin there directing enforcement, and they, I think successfully resisted any attempt to politicize the Commission. Of course, we did have a Chairman who was indicted, Brad Cook, and he was Chairman for three months or something like that. So that was a really awful period for the Commission. But the Commission's integrity I think was saved by people like Irv Pollack and Stan Sporkin.

Phillips:

Do you see any

Eisenberg:

Other than that, the politicization during the Pitt administration part of it was unfortunate, but not anything like order.

Phillips:

Has the Commission itself retained the same kind of collegiality as existed during your first tenure?

Eisenberg:

Now? I think it pretty much has.

Phillips:

Notwithstanding things like the legislation that prevents the Commission from getting together.

Eisenberg:

As far as I'm concerned, the Sunshine Act, as it's called, is a impediment to effective governance of the Commission. And I realize why it's in place and that it to serve a good purpose. And to some extent there are things that ought to be public and should be public. But one of the things during, for instance, the Cary and Cohen administrations was that the Commissioners could get together and argue things out and talk things through and reach a consensus and respect each other, whether they, and usually you could find a middle ground when you now have an open Commission, you have set speeches pretty much. I mean, the fight at the open meeting where the PCAOB appointment of Webster was clearly an outlier. I mean, that's the only time that I've ever seen a Commission meeting like that. But usually it's set speeches, the enforcement meetings which are closed and legitimately closed, you get much more of a back and forth and evaluation. A discussion. The staff, the staff doesn't have set speeches at the enforcement than the other private meetings. Whereas in the public meetings, as you know, I mean they sit and they talk through,

Phillips:

But they still have to confine their discussions to formal commission meetings, which is unlike the situation

Eisenberg:

They could get together in

Phillips:

The 1960s.

Eisenberg:

Right. I mean, Wheat and Smith and Cohen and Owens get together and they talk something through and if

Phillips:

Get together informally,

Eisenberg:

Informal, informally, they'd walk through to Barney's office and they'd sit down and talk it through.

Phillips:

Well, let me ask you this. What about collegiality or working together between the different divisions? Do you still have the examples of inter division teams?

Eisenberg:

No. That's unfortunate. And maybe it's a product of the turf, but it's also a product of the fact that there are so many more people in the division. And that there I think is much more turf jealousy than I've seen. But you're talking about a commission with many times the size that it was during the 30 years ago. So that

leads to, we really don't have very many situations where you have joint teams. We joint teams, we now have issues on the table where Market Reg and IM, Investment Management really ought to be getting together. And yeah, they talk, but attacking something jointly is not really done very much. And also there are other players which didn't exist before the Office of Compliance Inspections and Examinations, which has a role in some of this stuff.

Phillips:

Let me ask you one final question and then give you a chance to add anything. In what respects has the Commission not changed today from your prior tenure?

Eisenberg:

I think that it has always had interesting and exciting and important things to do. Now, it wasn't war and peace or settling the world's problems, but we always felt that there was a pride in being a part of the Commission and that the Commission was doing its job. The fact that the collegiality may not have been there for a while, or the fact that there's turf problems still. You have really very good people who really want to do a good job. And then generally it works and this, and there's a real pride in doing that when we go to the Solicitor General's office and on some of the cases that we've wanted to say, well, this office, the General Counsel's office is one of the best we ever that we have to deal with. And

Phillips:

That was true in the sixties, and

Eisenberg:

It's true today. And that was true the sixties, and it was true today. And the work that's put out of the office is really first class work. And we win most of our cases. And the SG's office, who we work the Supreme Court cases through is a terrific help. Whether it's Democrat or Republican, whether it's Ted Olson or Waxman, it doesn't matter. It really doesn't.

Phillips:

Is there anything you want to add to this interview?

Eisenberg:

Well, I've always thought that there ought to be a book written about some of the interesting, funny stuff that went on that really doesn't get told. And this is not the time or place to tell it, but there are so many interesting characters around that people don't really know about or will die with people when the memories go that it really is too bad. And there's IOS stories and Fifth Avenue stories, and there are a whole bunch of things now with the big settlement and the rest of it. And I think that's too bad that that will be lost. But the other thing is that the institutional memory is fading. It used to be that the people you dealt with had been there for years and years. You could not be an Assistant Director in the Division of Corporation Finance unless you'd come up through the ranks. It was not political. The director of the division was not political. The General Counsel was, but the others were not. And consequently, you now have people who are younger and less experienced in positions to make decisions and that shows.

Phillips:

Thank you very much, Mr. Eisenberg.

Eisenberg:

Thank you. You're welcome very much. Mr. Phillips.

Phillips:
This is the end of our interview.