Securities and Exchange Commission Historical Society
Interview with Barry Goldsmith
Conducted on February 5, 2010, by Kenneth Durr

KD: Interview with Barry Goldsmith, February 5th, 2010 in Washington, D.C., by Kenneth Durr. We can start by digging back into the past and talking a little bit about your education. I noticed you went to Wharton, and you got a degree in economics, unusual for someone who ends up in securities law. Tell me a little bit about that decision.

BG: Well, I ended up going to Wharton, and I think the degree you get at Wharton is a BSE - Bachelor of Science in economics - so everyone who went to Wharton got that. I can't say I took a lot of rigorous economics courses. I placed out of some and took things like Soviet economics.

KD: But you had an interest in that subject.

BG: Yes. Economics, business, markets interested me. My father, who passed away a few weeks ago, ninety-four, worked for forty-four years at the *New York Times*, and then opened up his own brokerage firm. Up until the end, he was watching CNBC and tracking his former clients' portfolios, so there might be some genetic component here as well.

KD: So you had some sense that this is what you were interested in and wanted to pursue.

BG: Well, I thought more about law. We can jump ahead to law school.

KD: Yes, let's jump ahead to law school.

BG: I really went right to law school from Penn. I went to Georgetown Law School and ended up taking a number of securities courses. Professor Bowman, who was at Georgetown, for years—I got the highest grade ever in his corporations class and then I took him for securities regulation, pass-fail. I was worried that I was going to fail it, so I changed it to audit [laughter], so I had an up-and-down career at Georgetown, but I enjoyed those courses. I ended up clerking for a Federal District Judge in Chicago for a year, which was fascinating, and then went to an antitrust litigation firm here in D.C., so I certainly didn't start out as a securities lawyer.

KD: Okay. What was the antitrust litigation firm?

BG: It was a boutique at that time, sort of a mid-sized firm. I think we got as big as sixty, which was not tiny in those days—Bergson, Borkland, Margolis & Adler—and did, primarily, antitrust and then diversified into environmental and energy. We did a lot of work for ABC. I happened to do a fair amount of work for ABC News, FOIA litigation and that kind of thing. So it was interesting.

KD: Did you start doing a lot of trial work at that point?

BG: I was involved in several trials. It was a litigation firm, so most large cases don't go to trial that much, but I was involved in several trials. Lots of depositions and litigation. It was a very good law firm, and I became a partner there. I remember right around the time that President Reagan became President and antitrust started to dry up. I became a partner and immediately got a cut in pay. The firm eventually dissolved. It was not a bankruptcy or anything, just the business had changed. So having been a partner just a few years, I ended up learning a lot about the tax laws because I recaptured all the depreciation I never got on things. So I was there for about ten years. I was there from about 1976 to 1986.

KD: So what took you to the SEC?

BG: Well, that's an interesting question. The firm had decided to disband. There were people going to other antitrust firms. I liked antitrust law very much. You sort of delve into the ins and outs of a particular business. I did work for Frito-Lay and I learned all about the salty-snack market and other industries. But I thought going to the government would be interesting. I remember somebody telling me that the trial unit in the Enforcement department was looking for lawyers. Somebody, I think, knew Tom Newkirk, who was the head of the trial group at that point. I said this sounded interesting, so I went there and met Tom. I think the trial group numbered all of about eight people at that point in time. I interviewed with Tom, and it just sounded exciting and different, so I decided it's a good time for change, and accepted an offer and started there.

KD: Now this is in the General Counsel's Office?

BG: This is in the Enforcement department.

KD: Who was head of Enforcement at that point?

BG: Gary Lynch.

KD: Did you talk to him too?

BG: I met him briefly, interviewed with Tom and several of the other people in the group. Again, it was a fairly small group at that point in time.

KD: So how did they bring you into things? How did they season you and make you an SEC guy?

BG: Well, a legend which should go down in the annals of the SEC—I could not have this interview without talking about it—is that I was coming from a law firm. It wasn't a fancy law firm, but we had nice offices. At the SEC my office was an interior office. It was actually larger. I think there were two or three paralegals in there. But the walls were all marked up from boxes and everything like that. So when I got the office, somehow I got in touch with the office manager and said, could I get the office painted before I come in, and he sort of laughed and said, "No, but you can go ahead and paint

it." And he mentioned somebody who was there a long time. Al Roush had just painted his office, and he can tell you what color paint or whatever.

So I said fine. So I spoke to Al and got the paint. I never did a lot of painting, but my wife and I came in the Sunday before I was going to start. We brought in a ladder, and we brought in the paint, painted the office and started on Monday. Went down to get fingerprinted, and they show you films, and I came back to the office. On the desk was, at that point—I'm sure they don't have them anymore, but there were these yellow message slips that the government had—a slip that said "call so-and-so." So I remember standing there, picked up the phone, calling this person. I didn't even sit down.

It was somebody in facilities, and they said, "We know you painted your office this weekend. We have the masking tape as evidence," and he said, "Turn around," and I turned around and I had this radio, an old tube radio that I bought at a flea market that I would listen to maybe World Series games or something on, and he said, "We should've confiscated that radio and sent it to GSA to see if it was a fire hazard. We are going to have to repaint your office and bill you for it 200 and some-odd dollars." I thought I was going to be fired and go to jail, and I went in and spoke to Tom, and he sort of laughed and spoke to Gary.

Lo and behold, a few days later somebody did come in and repaint the office. I heard rumblings about it for months, and I eventually found out that the office manager, a guy by the name of Tom Rogers who told me I could do it, they sort of blamed him, and they

ended up settling for $90, and I think Tom had left by then, Tom had to pay that money. But apparently there was some regulation—maybe it was a private building and a union issue or something. So I remember the *Washington Post*—and I think it's in some book—did this story about how somebody, sort of a government-type of story, you pay for the paint and do it, and then they bill you to repaint it. So that was my introduction to the government.

KD: So you learned about doing things according to the book, I guess, after that.

BG: Yes. And to Tom and Gary's credit, I was new, they didn't want me to deal with it, so they sort of shielded me from the controversy, but it was pretty funny.

KD: Yes. And I suppose that was one of the easier things to deal with that they had to worry about at that point.

BG: Yes. I started there, I believe, in April or March of '86. I was very fortunate because when I got there, I had nothing on my plate, and they assigned me to the Dennis Levine insider trading case, which led to the Ivan Boesky and Michael Milken cases. So my first assignment there was, at that time, probably the largest insider trading case ever. I sort of got the benefit of everybody else's work and got involved in that. Coming from doing antitrust with lots of documents and papers, this was like a movie. It was pretty amazing.

KD: How far had that case gone along when you came in?

BG: I think it was something like the fourteenth of April. It was probably within a week or ten days from being filed, so it was essentially done. That was the first case that I worked on. There were a number of staff lawyers who broke the case. I think there was a little resentment on coming in at the end for all the fun, but it was press and stories and front-page news. It was pretty interesting, and we were at the U.S. Attorney's Office.

KD: What kind of work were you doing as part of this team?

BG: Helping to draft the complaint. The case was litigated a little bit, and John Sturc, who's a partner of mine here now, was handling some of the in-court litigation as it went forward. I think my major work was, once Dennis Levine cooperated, interviewing him and other people who ended up cooperating. I was working primarily with Peter Sonnenthal, and we spent many, many days interviewing Dennis Levine and Robert Wilkis and the people in that ring. That case was built and then the Boesky case was filed. I drafted that complaint—and then Milken—was sort of in charge of that set of litigation, most of which settled eventually, and we negotiated. It was a whole litany, it was a $100 million case with Boesky, and I can't remember what Drexel settled for, and then Michael Milken.

Everything settled except for a case against the Posners, which I actually tried in New York before Judge Pollack, and we won that case. It was a remarkable series of cases because of the dollars involved and the people involved. The Milken case involved a lot

of very intense negotiations with his lawyer, Arthur Liman. It spanned a number of chairmen. So it was just an incredible series of cases.

KD: Tell me about this team that you're on. Was it a fairly coherent group that followed these people from one to the other?

BG: Yes. There were people who came in and out at different stages, but there was sort of a core group. John Sturc had been very much involved until he left. On the Milken stuff—I think by that time Bill McLucas had become head of Enforcement—so Bill was involved. But in terms of staff lawyers, Peter Sonnenthal was very much involved, Leo Lang, Terry Pritchard in some things, Tom Newkirk had been involved, but I was sort of the lead litigator. I remember in the Dennis Levine case, we tried to get the money that we collected to go back to investors, and the IRS came in and said, no, we want the money, so we were litigating against the IRS for it, which was sort of odd.

But a couple of anecdotes that I remember. I remember going up to New York—this was days after I started and I think Dennis Levine had said he was going to cooperate—and we were in the U.S. Attorney's Office. The head of the securities group at the U.S. Attorney's Office, Charlie Carberry, is sort of a legend—he's a big guy and they probably still have the desk. The head of the securities group had this humongous old government desk. I remember Levine sort of coming in and "cooperating," and Carberry just saying that's not going to do, and leaning over the table, and I'm sitting there taking notes. We spent that Sunday—this was before the Metroliner, but I remember taking the last train

back. It was something like a night sleeper train and I was in a little compartment. I wrote down my notes and my mental impressions, I remember that.

I also remember that in the Boesky case, he paid 50 million in cash and 50 million in securities. I remember being downtown and they just handed us these securities. I'm walking around with a trench coat, I remember, with Peter, carrying under my coat $50 million—I don't know if they were negotiable securities or not.

I remember the day we filed the Dennis Levine case, we went up to Drexel and met with the firm, and they had their annual report with a picture of Dennis Levine in it. And the next day, we went back and all the reports were gone, and then a couple of weeks later, they reissued the report without Dennis Levine. We got to know Levine, and Boesky too. There was a lot of debriefing, and a lot of these other people, so it was interesting to get to know them as people.

KD: Did you work with Michael Milken?

BG: Yes. Milken ostensibly cooperated, but didn't. Really would not say anything bad about any of his people, essentially. This was after Milken was sentenced and in jail. I went out to someplace east of San Francisco and interviewed him in jail about something. Visiting him in jail was quite something. I remember he had worn a toupee throughout this. He doesn't wear one now, but in jail, I guess, you're not allowed to, so I was speculating, what's he going to look like without the toupee, but he didn't want me to

have any pleasure, so he wore a baseball cap through the whole thing. But I remember seeing him in jail, this notion of these white collar country club prisons, well it was certainly a lot better than a medium-security prison, but that was interesting.

I also remember a funny story. I was with Peter—and this was when Dennis Levine was in jail and he was in Lewisburg—and it was the end of his jail time, and he had gotten a lot of harassment in jail for being a stool pigeon: like dead rats in his bed and that kind of thing. Every time he spoke to the government, something would happen to him, so he was very, very nervous, didn't like to do it because something would happen in jail. So they developed this thing where he would go to the infirmary, and they would take him out the door through there, and we went to a Red Lion Inn, a motel in Lewisburg. The marshals were there with him and we would interview him, so they would go through this whole elaborate thing. We walk into the lobby. In those days, they didn't have electronic message boards. They had these felt boards with the letters, and it said, "Dennis Levine, Ambassador Room," or something like that [laughter]. So everybody knew he was there. That was pretty interesting.

KD: This was over a period of a few years, I guess, that this thing unfolded.

BG: Yes. Levine was '86, Boesky was a couple years later, and then Milken and then the Posner trial that I did was a few years later. Interspersed with this was this global settlement growing out of Drexel's bankruptcy where all of the class actions, all the cases against Milken, all the cases against Drexel, Judge Pollack in New York engineered this

massive, I don't remember what the number was, but billions, I can't even remember. I was involved in that. That was quite interesting. I got to know Judge Pollack very, very well. We were pretty close for many years after that, also because they tried to kick him off the case.

KD: Which case was that?

BG: This was Drexel, the Milken case.

KD: I remember something about it. It appeared that he was the judge that the SEC would—

BG: Yes. These stories are great, but it was a sort of long investigation, and negotiation, and then the case didn't settle, so the case was filed in federal court, and we filed it as a related case to another case that Judge Pollack had. We thought Judge Pollack would be a good judge. And they must have been tapping the phones or watching with cameras: they knew we were filing. So we went to the clerk's office to file the case and, lo and behold, the defense lawyers were there. And there was a paralegal—a woman, I can't remember her name, in New York who sort of did all the filings—and they knew how to do it. So we're in the clerk's office with her, and Tom Newkirk was there, and a lawyer representing Lowell Milken, Michael Armstrong, is there.

We go to file it, and there is this sort of shoving match at the clerk's window. We're trying to file it as a related case, and they didn't want it, and they're pushing us away, and

this pushing back and forth. Marty Flumenbaum, one of the lawyers for Milken, starts yelling at me that, "I'm going to file Rule 11 sanctions against you if you file it to Judge Pollack." So there's all this hubbub in the clerk's office. And the judge knew we were filing it, and sends his clerk down, and motions us over and takes us up the judge's elevator to give him the papers.

And then, lo and behold, we file that on a Thursday or Friday, I can't remember. Couple days later we hear, "Oh, we just learned that Judge Pollack's wife—her family—owned a number of stores, Palais Royale, in Texas, and we just learned that Drexel is doing an LBO, and we're sorry, the judge is going to have to recuse himself." The judge went nuts over this. It turned out, in a very divided court of appeals eventually, that he kept the case. The reason, I think, was there was always this sort of smell that this was a setup. The fighting in the clerk's office, I think, colored some of the judges in the court of appeals' perceptions that they were playing games here. I think they had a pretty strong case for getting him off. So he stayed on, and since I was the one defending the judge, and the judge took this very personally, we became sort of close.

KD: You were defending the judge, although you were a lawyer for the SEC.

BG: Right. Well, they filed a motion to recuse him in the District Court, and we said there's no basis, he should stay on the case, which he agreed, obviously.

KD: In these legendary cases there were obviously the little idiosyncrasies and things, but what did you learn over this period of time? What were the things that you realized when you'd gone through all this that things had really changed and you were doing things differently somehow?

BG: The SEC always brought big cases, but for people who have this in their blood, it's just very invigorating to deal with significant, substantial cases involving what we believed was clear wrongdoing. In terms of motivating people, and people like to read about their cases in the newspapers and that kind of thing, but there's really an enormous amount of satisfaction in doing that. These cases were not made in the courtroom, particularly not the Levine case. For the people who worked on that case, there were foreign bank issues, and they stuck with it and broke the case.

That is the real work and the good work that the SEC has done: people who can amass facts and develop facts and develop evidence. Sometimes you have a cooperator who walks in the door. It's pretty easy. Not that easy, but it's easier. But these cases, it started with an anonymous letter, leading to how they developed that. And there have been books written about that, so that's pretty amazing stuff.

KD: So you moved through those cases. You mentioned a little bit about the Posner case. There were also some stock-parking cases that came up.

BG: Yes. Interesting case. There was a case against the Belzberg Company. They were a very wealthy Canadian family. The label that people put on them was greenmailers. They would acquire a stake in a company and then demand that they be bought out and make a lot of money. It was a case involving Mark Belzberg and the company. And it was the first litigated 13d case. It was an interesting case. Ace Greenburg was involved. He was not named, although he was very close to being named. We tried that here in D.C. The lawyer on the other side was Arthur Liman, who had just been finishing up Iran Contra, so it was going up against a legend. It was pretty intense, pretty interesting. I remember the closing arguments.

Arthur was analogizing our case to *Alice in Wonderland*. There was an *Esquire* article with a profile of Arthur Liman. It came out before the judge had ruled, but basically said I was just limp against the wall, amazed by this guy's oratory. And then we, of course, won the case and won the appeal. So that was a good case, really a significant case as well.

KD: Was this stock parking new as far as something that was recognized?

BG: There were other 13d cases, but not too many parking cases. I think it was, clearly, the first litigated case. I think it wasn't groundbreaking law. The question really turned on being able to prove the facts. It was circumstantial, and we did pretty well. Harry Weiss had worked on that case as a staff lawyer, and was involved in the trial, and Leo Orenstein, a fabulous writer, significantly contributed to that case as well.

KD: So in '93, you became chief litigation counsel. Tell me a little bit about the setup at that point. How many people have you got working for you? Is there some kind of organization that you have?

BG: I'm just guessing. Maybe we had sixteen, seventeen people. The unit, when I joined, was seven or eight, so it was large. The challenge, and it's probably still the challenge even though the unit's much larger, is the way it was structured. Once a case got into litigation it was handled by the trial group, but theoretically you had the staff who developed the case working with you from the branches. There was always this tension because the supervisors and the branches wanted to develop new cases and use their people to investigate. And, of course, when you get involved in litigation, it's sort of day and night, and you can't do too much more, so you would always have some of the associate directors were better than others in giving up their people.

And often times, you had these fabulous staff attorneys who were critical to your case that you're litigating. On the other side, they're trying to develop new cases, so you would negotiate, and it was a little tense. It wasn't as if the trial group had senior lawyers and junior lawyers who did that. Plus, you needed the expertise, the people on the case.

KD: So you're negotiating resources.

BG: Right. And other challenges: we had a terrific General Counsel's Office—Paul Gonson, Jake Stillman and others—but it always seemed that you win a case, and then the General Counsel's Office gets it and they're saying, "Well, what about this? And what about that? I don't see this, this is a problem." You sort of educate them, and pretty soon, they're gung ho on the case, so that was always fun. We had some interesting appeals. The Belzberg case was appealed. I think Eric Summergrad did that. Might've been Paul Gonson. The Pollack recusal case was appealed, and I remember Paul Gonson did that. That was a lot of fun.

KD: So if it gets appealed, it goes to the General Counsel's Office.

BG: Right, so they handled it. But of course, you work with it. And then the Posner case was also appealed, and I think Paul handled that. On the other side was a very conservative lawyer; Ken Starr was defending the Posners. Those appeals were fun. I didn't handle them, but rooting them on.

KD: There must have been a sense of carrying a lot on your shoulders when you were handling the cases.

BG: Yes, the significant cases. I think there are a lot of other cases. Having cooperating witnesses helps. The cases that are really hard are the ones, the circumstantial insider trading cases where you don't have somebody up there saying they did it. Those cases, trial group had a lot of them. Those were difficult cases. There were a lot of cases that

were in the group that I didn't handle directly, the Crazy Eddie case. There were a lot of interesting cases that people did.

KD: Because of the struggle for resources or the negotiations, did you ever hit a point where you said, "Well, we just can't pursue that one because it's not clear that we're going to get anywhere with it?"

BG: I'm sure that cases were dropped or settled. I don't think it was ever really a resource issue. Some of the cases turned out to go on for a very long time. The First Jersey case, which I remember, we won, went for a long time. We always managed to get things done. Some of the litigation now in some of the cases, I think, are probably more complex and more resource intensive today.

Of course, the trial group is bigger, the SEC is bigger, but I think a big challenge for the Commission as they bring more cases, and more cases are not settling, is to be able to have the resources. The joke would be a defendant who has insurance, or the companies backing them have an unlimited budget, and they've exceeded it. So being on this side now, I can see that, although unlimited budgets don't exist anymore.

KD: Well, let's take you to NASD, the decision to make the jump over there. I want to get a sense of how the skills overlapped. Was there a learning curve?

BG: Yes. Mary Schapiro went over there when the NASD had the 21A report, and Elisse Walter. I was at the SEC, didn't really want to go into private practice that much. I remember reading something in the journal that they were looking for the head of enforcement or something. The NASD, based on my job, I think I had two contacts with them in all my career. So I sort of knew what they did, but I really didn't. Then I said, "Mary's really good, and this is a way to do something else, and there's a lot of changes."

So I went over there and spoke to Mary. I didn't understand very much about the NASD rules and disciplinary process, and everything was in flux. But I went over there, and they were very interested, so I did it. But I sort of walked into—its federal court, and at that point, the disciplinary process was being revamped, these sort of obscure rules that I didn't deal with, what do they mean? So it was very different, the job was different because it was, basically, building an enforcement program from the ground up, not litigating cases.

KD: Did you sit down and try to learn about the NASD and figure out how it was structured?

BG: Yes, a little bit, but it was more sort of learning on the job. There were a lot of issues coming in because there was a small enforcement department in Washington called the enforcement department, and the rest of the lawyers were part of the regional offices and reported into the directors of those offices. What we did was we took those lawyers and had them reporting into me. Many of those people were the more experienced senior people, very close to the director. So it was several years before people were on the same

team. There was a lot of resistance to people running district offices, losing authority over sometimes their closest advisors and lawyers.

KD: It had been a decentralized sort of organization.

BG: Right. There was a small group in Washington that did cases. There was a group in market surveillance, market regulation that did cases. But the bulk of the cases were done in the district offices, so there was not one enforcement department. Getting the district directors on board, and even getting the lawyers on board—who's this guy coming in, he's not here, he's not in Chicago or New York. So it really took four or five years before people were reading from the same page, and that was challenging.

KD: How much of what you did was prescribed by the 21A report or by the Rudman Commission Report?

BG: The disciplinary code and the governance that was set up, there was a special monitor in place for a number of years. Had certain reports, and don't talk to him. So I think the structure was, but not so much the day-to-day work. We were, obviously, very sensitive to bringing cases and doing things in the areas where there were the lapses that were identified.

KD: Such as?

BG: There was collusion, that kind of thing. I remember there were some follow-up cases that we investigated. When I came in, the big cases that were going on and continued to go on were the boiler room penny stock cases, and there was a policy in place that I thought was nuts. If you filed a complaint, the complaint was not public and you couldn't publicize it until you got a final adjudication on it. So you would file a case against Stratton Oakmont or some of these boiler rooms, and they continued to do business. Investors didn't even know that you had allegations out there.

So that was changed, and we ended up focusing a lot of the efforts on a lot of the big penny stock cases and doing some pretty good work getting those out. And those were sort of in place. But I think the additional resources—I remember part of 21A was that the NASD had to spend X million dollars on enforcement. So I was a beneficiary of that. I think they were 30 people when I got there. When I left, there were over 200 in enforcement, so we built up staff and resources. But it was a very different process, very different rules, and it took a little while to realize, in a sense, sometimes you could do more with those rules because some of those rules, like Rule 2110, Just and Equitable Principles of Trade, involved a high ethical standard, so that's a lot easier to prove than a violation of 10B5. So some of the NASD rules were a lot more flexible and, in a sense, fit some of the bad conduct.

KD: One of the early principles of the self-regulatory organizations is the idea of upholding moral, ethical standards.

BG: I think over time we saw—even in the cases involving research analysts, spinning, laddering, some of these practices—there's a lot of wisdom to that because it may not be 10B5, it may not be fraud, but it's unethical, it's wrong, it's bad. And some of the NASD rules, the gift and gratuities rules, which is a pretty simple rule, it's a little nuts sometimes.

KD: Why is it nuts?

BG: Well, it says a firm can't give someone a gift of more than $100 a year if the gift was made in relation to the business. So you look at the cases, I don't know if you remember the dwarf case. There were a bunch of Fidelity traders—there was a guy at Jeffries who, in order to get trading business through Jeffries, was taking people on vacations. There were allegations of drugs and prostitutes. Also, there was a bachelor party where they hired a dwarf to entertain. But does that violate 10b-5? I'm not sure, but it would violate the gift rule.

So some of the research cases where there were some fraud cases, but a lot of those cases were brought under the NASD's advertising rules, which covers research that wasn't fair and balanced. You might not be able to prove that it was intentionally false, so there's a lot more flexibility to cover a wider range of market conduct that federal securities laws may not cover. So we, I think, were pretty effective in doing that.

KD: So you've got a lot more room to bring action against people. As far as penalties, what was the range there?

BG: Well, again, you can get fines, you can get suspensions, and you can bar people from the industry. So in some sense, if you want to work in the securities industry, compared to the remedies that the SEC can do, FINRA and the NASD are just as good or better. One remedy we didn't have we put in place—we used it very sparingly—was a sort of emergency, temporary cease and desist order, like a TRO. There was no ability, other than financial, if the firm was in financial trouble, to stop ongoing conduct. Unfortunately, it was a cumbersome process, it was better suited for federal court, so people were reluctant to use it. We used it a few times, but that was something that the industry just went crazy about. We got it approved. It wasn't used that much.

The SEC had a much easier job because you could go to court and get an asset freeze or a TRO, a pretty easy, well-worn process. It was difficult at the NASD. The NASD did have the ability, still does, that if you don't cooperate, they can bar you from the industry. So if somebody comes in and takes the Fifth, you, theoretically, and they do this a lot, can bar someone. That was challenged a lot. People have chipped away at it. Whereas at the SEC, somebody could come in and say, look, I'm subject to a criminal investigation, and I take the Fifth. You can get an adverse inference in court, but it'll throw them out.

KD: So, again, you've got this greater area that you can work within in the SRO.

BG: Right.

KD: Something else that caused a lot of uproar was this Criminal Prosecution Assistance Group. Tell me about where the idea came from for that.

BG: It was called CPAG. I think it's a lot to do about nothing. One thing the NASD, I think, has, and I think Mary is clearly moving the SEC towards it, is that in the NASD, historically, even the enforcement process was not lawyer-oriented. You have a lot of analysts, you have people from the industry who are not lawyers who are very good at analyzing trading records and what have you. So the idea for CPAG was from Bruce Bettigole who worked with me at my law firm. I worked with him at the SEC and brought him into the NASD, and Bruce always liked the criminal end of it.

But there are a lot of prosecutors around the country who get a securities case and never tried one. They don't have people who can put together exhibits, or explain trading, or explain phenomena. So we put together this group in enforcement not to investigate criminal cases, but to provide assistance to prosecutors, either as expert witnesses or helping to put together charts or looking at evidence, that kind of thing, and it was a very small group.

There were a couple of cases where the idea of the NASD being a state actor was an issue, another arm of the government. So there was a case where, actually, somebody

challenged that, and we won the case. But there was always this sort of, "Why are you doing criminal work? You're an industry organization." So there was a lot of hubbub about that. It was in enforcement, so I think that, eventually, transferred to the general counsel's office.

KD: That was Cromwell Investments?

BG: Yes, that was before Judge Kaplan. And we won the case, but there was an evidentiary hearing, so people got very nervous about it. My law firm now, I think, was involved in that, assisting the NASD.

KD: What were you nervous about?

BG: People were always nervous about being called a state actor. If you're a state actor, that brings into play a whole bunch of limitations, particularly, I think, if somebody takes the Fifth and you can't throw them out of the industry. So people have challenged that over the years. The case law has been, I think, pretty good. But I think CPAG got people a little nervous because they were working with the government. I don't think that makes them a state actor. But if you talk to the prosecutors, this group provided really important assistance. It would be like the government going out and hiring an expert in trading to explain things to them. I think there were a number of cases with very bad conduct that this group helped enormously.

KD: Well, there are those who argue that NASD was a state actor. But on the other hand, how much of an industry representative was NASD? The members, would the members really relate themselves to enforcement? Or would they say, "Oh, here come you guys again"?

BG: No, they certainly didn't. I think one thing in this enforcing, there's a pendulum. And I think that in 21A one of the criticisms was this was an old-boy network. The organization did not have enough independence from the industry. It was dominated by the industry, so there were all these governance changes about having non-industry board members on the NAC having balance. The disciplinary process was a very insular process where people in enforcement would go to the district committee and present their case, get authorized. And then the district committee would hear the case. There was a feeling that certain kinds of cases would get authorized, and that there were competitor issues having the industry so enmeshed in the disciplinary process. So part of 21A was to try to give more independence to the NASD. There was enormous push-back for years, and probably still is, that we're no longer a membership organization, you don't care what we say, you're just like the SEC. I think, by design, there was this independence. So the question is, well, did the industry still have a meaningful role?

Mary's challenge—I think she did an excellent job of getting input from the industry on rule changes, processes, and making sure that rules work, because they don't always affect big firms and small firms the same way. Having people who are dealing with these on a day-to-day basis come in and say, "You know, you really need to change this because it's not going to work, it's not going to get to where you want, or it's just going to

cause the industry a waste of money because it could be done this way." So I think, over time, the industry realized, okay, this is not the old NASD.

I think things have sort of shifted back a little bit. The enforcement has been dialed back a little bit on some of the cases. But it's certainly, by virtue of the 21A, it's not a trade association. I think the view, at least of the SEC, was that it wasn't doing its job. So striking that balance between getting industry input is extremely valuable. The hearings are still one hearing officer and two people from the industry. There are industry people, obviously, on the board, industry people on the NAC, the appellate body, so there is still a lot of industry input, but it's certainly not dominated, particularly in the disciplinary process.

So to answer your question, we were never welcome. I think they'd probably rather see us than the SEC or the justice department, but enforcement, there's a lot of criticism and push back there. There still is.

KD: And you talked about bringing the members in on the front end. As far as enforcement being on the back end of the process, was there ever any consideration about doing things differently in order to hold the membership together?

BG: No. Our investigations, there were times when people would pick up the phone and call Mary or Bob Glauber and sometimes there'd be a meeting or something and we would attend, but to their credit I can't think of one instance where somebody would say, " I got

a call from"—I'll use Bear Stearns as an example because they're no longer around—but from the chairman of Bear Stearns saying, "You guys are all over this, and I want you to stop this." Those calls did come in, and I remember some to Bob Glauber, and he said, "Talk to Mary." Mary would listen and maybe relay something, but there was never pressure to go a certain way. I mean, there were, "Look, the industry's very upset about this. Did you consider X, Y and Z?" sort of generally, and that was fine. But never, "Shut down this investigation," or anything like that.

KD: Well, moving from those conceptual-type things back into some of the specifics. You talked about the penny stock issue, which seemed to be pretty big in the late 90s, around 2000 or so. And then day trading came in as well.

BG: Yes. There was penny stocks, there was day trading, which seized everybody's imagination. We brought some cases.

KD: That would be one where you'd have a lot of people on your side, I would suppose.

BG: Yes, other than the day traders, the firms. It was, I think, more of a phenomena. To me, looking back on it, given the realm of bad things that could happen, it was more of an advertising kind of thing. You're enticing people to exaggerate claims of success and that kind of thing. School teachers giving up their jobs and becoming day traders and losing all their money. That, I think, was fairly short lived. There was penny stocks, there was

the mob on Wall Street, which had a few cycles of bad people infiltrating small firms. That was a phenomena as well.

KD: How much of your office's time did things like that involve, those special issues that came up?

BG: Well, I think you see it today, that enforcement people do respond to press. I remember there was all this to-do with the E*TRADE ads of the tow-truck driver who says, "I used to drive this tow truck, and now I'm trading online, and I don't see that island over there; I own it." People saying, "Whoa, something should be done about that." And, of course, everybody would look at it. But I think you do respond to what might be in the news or current. You've seen that today, obviously, in stuff. So the research analyst issues were huge, and everybody credits Elliot Spitzer with exposing that, and the NASD had ongoing investigations at the time of Spitzer, but that was all the tech bubble bursting, and Frank Quattrone spinning and hot IPOs. That was sort of a big issue for the NASD.

KD: Yes, IPO allocation practices.

BG: Right.

KD: And that's what Quattrone was doing.

BG: Well, Quattrone said he wasn't. A book just came out by Randy Smith on Quattrone, *The Prince of Silicon Valley*, which sort of looks at it in perspective. But it started off with the IPO allocation practices. There was an anonymous letter that went to a bunch of regulators. We jumped on it. Basically, hot IPOs being allocated to people who would then do very large-volume trades in liquid securities where the commissions would normally be five or six cents a share, and they'd pay fifty cents or a dollar a share, paying back for the IPOs. So there was that, and there was research analyst problems, and then spinning the Friends of Frank where IPOs would be allocated to people who would be in a position to direct banking business. So those were all very big issues.

KD: Did you assemble teams? Did you have a task force?

BG: I can't remember what we called it, but at some point, we developed these rapid response teams where, basically, you were to pool a lot of resources to deal with an issue. So we did that. We also started a preliminary review group, which I thought was very effective. The way it used to work was something would come in, and you'd assign it to an investigative group, and somebody would spend two months on it and realize there was nothing there. So this was sort of a triage group we did, and that was useful. But there would be larger groups of people put together to look at a specific issue. There would be sweeps.

KD: Like boiler-room type stuff?

BG: Yes. Day trading, we would identify a bunch of day trading firms, and then go out and get certain information, and then from that, say, "Okay, here is a bunch of firms that could be engaging in the practices we're concerned about," and then start to investigate. But that's something the SEC does, a lot of regulators do.

KD: The research analyst issue, at heart, is the idea that the brokers are sort of booming their own stocks. When you're talking about going after that and what happened, it's a pretty draconian sort of solution, saying you're either going to sell stocks or you're going to be an analyst. If you were starting to move into that, I would suppose that that would've been a pretty big deal, given how fundamental the change is likely to be.

BG: Well, the issue was whether research was independent and unbiased. The problem, really, was the structure that research was really part of banking at a lot of firms, and compensation was based on how successful the bankers were, and the research analyst would be, essentially, salesmen or salespersons. When you go in to pitch, you say, "We have so-and-so as an analyst," and you bring the analyst and sort of a promise of favorable research. And then, of course, the emails where an analyst says something is a piece of shit, and the firm has a strong buy on it. But the NASD had advertising rules that covered research.

At the time, there were a lot of tools to address specific problems. What happened was, Elliott Spitzer came out with the Blodget case and Merrill Lynch started saying the SEC was asleep at the switch, and the NASD was, and the regulators felt threatened, and

Spitzer was out there, everything was public. He did his investigations in the press. And there was this whole move to do something about this. The tech bubble burst, so you ended up having fifty states, the SEC, the NASD, maybe some criminal people all looking at the same thing, culminating in what was called the global settlement against eight or ten firms. And out of that, research and banking, the relationship was restructured as part of an enforcement case. And I always felt the way to do that was through rule changes. I think we were a moderating force in that.

But you had a lot of people who didn't really understand what was going on in the industry coming up with, "Well, you need a chaperone here, and you can do it there," sort of an odd way of changing the entire relationship. I think it turned out okay. I think there were some people like Steve Cutler involved who really understood it, and I think Mary was a force for trying to get it right.

KD: So in this case, it sounds like NASD and enforcement or NASD reg would've been representing the interest of the members, and trying to moderate the process.

BG: Well, I think there was a frenzy out there of enforcement, and we brought cases, and there were cases to bring. I guess our concern was—it's part of the global settlement—there was a document that, basically, said, "Well, if you're part of the settlement twelve firms, this is what you can do and can't do." The question was, well, there's 6,000, 5,000 firms out there or whatever, what about the rest of them? That was going to become the template. I think we wanted something that would work. I don't think we were

advocates for the industry, but we didn't want some settlement that would then become the standard somehow for everybody, and it wouldn't work.

So I think that was a challenge. Enforcement, again, the pendulum is swinging, the tech bubble burst, and people are left with portfolios. After that, you could see the pendulum swinging back when people were saying, "Oh, we're driving capital abroad, we need to follow the FSA principle-based regulation, too much regulation by enforcement," swung back. And then you had subprime, and now it's sort of swung off the clock.

KD: We talked about some of the big landmark things, but during this period where you're moving from 30 to 200 people in your group, in addition to handling these big issues, what sorts of systematic things were being changed or beefed up? In the day-to-day, how were things developing over those years?

BG: We started a trial group following the SEC model of a group of lawyers brought in to handle the bigger litigation. Again, the NASD, when I started, was bringing 8 or 900 cases a year. We ended up going up to 1,400. Some years, fines went from a few million dollars, some years hundreds of millions of dollars. But you would get cases that were large cases that had to be litigated, so we started that. I brought in Rory Flynn, who was at the SEC, to head that up. It was a small group. So we did that. This preliminary review group, that would be sort of a triage. We had a big issue.

Historically, in the small enforcement group in Washington we had a lot of analysts, and accountants, and non-lawyers, and then you had the lawyers. There were two chains of command. The non-lawyers reported up one way, lawyers reported up another way. They were supposed to work together. For the most part, they did, but who's in charge? At the end of the day, it was pretty much a legal process. Eventually, those two chains did report up to lawyers. So at some point, we reorganized, had one chain. And we actually had, in some cases, lawyers reporting to non-lawyers, who we felt were really good.

KD: This is just in enforcement.

BG: Right, in D.C. And in the regional offices we had the other problem of the regional directors—people maybe were listening more to them than to us and that kind of thing. As you have turnover and old people who aren't used to the new way leave, things worked pretty well. So that was a big change. And then I think just energizing people. The number of cases went up, the significance of the case. Fines are at least one way of measuring that. So we, I think, became a much more relevant organization. The temporary cease and desist order, our ability to publicize complaints when they're filed was a big issue.

KD: How long did it take for you to get that, after it happened in '96?

BG: That came pretty quickly. I was just astonished. Those cases could go on for years, and you still had boiler rooms operating, and they were content, well, nobody knows about the case. It was crazy.

KD: This morale issue, some of it sounds like what you must've experienced at the SEC during the 80s. When you succeed, you build on the success.

BG: Yes. I mean, people do this business because they enjoy doing the big cases, and the significant cases. So when you become more relevant and do these, there were a lot of cases involving some really bad firms that were put out of business. Stratton Oakmont was one of the worst. I remember, shortly after I got there, they came in. They were going to put people on their board that, I don't know where they got them, how they convinced them to lend their names, but they wanted to say, "Let us still operate, and we've turned a corner," and we said, "No," which was good. But a lot of really bad firms got put out of business by the NASD.

A lot of criticism: took too long. The NASD, because of the 21A, there was a lot of negativity—the notion of the fox guarding the chicken. How in the world could you police an industry when you're funded by the industry and you're an industry organization? So that concept a lot of people believed.

KD: It's the other side of, you're a government entity, you're just the SEC argument.

BG: Yes. People say, well, why let the SEC do everything?

KD: Yes. One other angle is overlap, such as with New York Stock Exchange, things like that. How much was that systematized? How much would you share notes or work together?

BG: It was a problem. Everybody complained about regulatory duplication. I think the global settlement, the research analyst was just sort of a one-off, because you had everybody looking at everything. But the NASD is supervised by the SEC, there's oversight, so at the end of the day, if the SEC says we want it, they generally got it. But I think it got better over time. I think when people are busy, you're more willing to defer. I think it's less of a problem than people thought. There were times when people felt our cases are being stolen from us.

KD: By the SEC?

BG: Yes. But I think, by and large, it was pretty good. Things would get divided. Sometimes the SEC felt that they had to be there in a case, even though the NASD maybe was one that investigated it. So there would be a joint kind of action. I don't think it was ever the case where the case was a $100 million fine and the SEC wanted to be a part, so it was 50/50. It wasn't increased.

KD: How about the New York Stock Exchange?

BG: There were issues on occasion, but I think the issues, if they were elevated up to the more senior people, got resolved. The problem would be, and this is part of the defense problem, if you know you're being investigated by both, raise your hand early on before the Agency puts in two years of work. They're less likely to disappear. So there were instances, but I think it's a problem that arose from time to time.

KD: Okay, but it wasn't an ongoing kind of a thing.

BG: No.

KD: All right. Well, that runs through everything I've got as far as the landmarks of your time with NASD. Is there anything else that we should cover?

BG: No. I would say that at the NASD, between the time when I joined it in '96 and then when I left, enforcement grew, and we brought a lot more cases and everything else. But where that organization was when I joined and where it ended up technology wise, governance wise…

I remember what's now called "broker check" where you can go online and, in thirty seconds, get a broker's disciplinary history. When I started there, I think you had to mail a letter. The tools that the organization had just transformed. So I think a lot of that credit goes to Mary and Elisse and Linda Fienberg, the arbitration process.

I do think self-regulatory—we sort of changed. Called ourselves a private sector regulator rather than a self-regulatory organization. There's just this disbelief that you could do anything that you're not in the pocket of the industry.

KD: So that was a term that you used?

BG: Well, I think NASD thought it more accurately described things. We did. Quite frankly, there was still an effort to do regulation for other markets. The Chicago Climate Exchange, we did something there, foreign exchanges, so contracting out some of the technology and knowhow. And then there was a huge ongoing small firm, the NASD's in the pockets of the big firms, and these initiatives to unseat the board and sue the NASD, and "You're too tough on the small firms, and double standards." So, just by definition, with such a diverse membership group, the large firms would say, "Look, you're charging us all this money, and we don't have enough input, so you're really a target."

KD: That must've sorted itself out a good bit by the time you—

BG: It would come and go, but there would be lawsuits or threats to have dissidents control the board, and stuff like that. When you have 5 or 6,000 members, it's very difficult. So it's a hard job to run that place because of all the criticism. The merger with the Stock Exchange, it made a lot of sense and it's worked well.

KD: Was that in the air when you were still there? Was there any sense that was coming?

BG: There was some talk. There was always some talk about it. I never thought it would happen, I really didn't.

KD: What made it happen that you didn't anticipate?

BG: I had left when it was happening. I really don't know. I think when you talk about duplication, I was talking more about enforcement, I think. From the rule standpoint, it's probably a bigger issue because people had slightly different rules, so I probably underestimated that, as I told you, more from enforcement. But I think you probably have to talk to people who were there at the time. Maybe the pendulum was sort of, we need more streamlined efficient regulation, and it happened at that time. I'm not sure if we were in the middle of subprime crisis.

KD: Right. Did that factor at all into your decision to go into private practice?

BG: No. I just sort of figured I had one more job left. I was getting old. Cases were good, but it was sort of the same job, so I left.

KD: NASD regulation had been reinvented, and you were seeing the same things then.

BG: Yes. I guess at the time I left in March of '06, the pendulum had swung away from regulation, which may have been a factor—just saying this is sort of a slow time. That could've affected it. Now, of course, it's back.

KD: Right. Anything else we should cover?

BG: No. I have the highest regard for the Commission and the NASD as well. I think the job Mary did and Elisse did in really transforming what was a membership organization at a very hard time to something that really made a difference, while keeping the place together. It was pretty remarkable. The Commission—even on the private side, dealing sometimes with the state regulators is tough because there are so many of them and different, but I think people in both groups try to be fair. I still have a lot of respect for what they do. It's a hard job. You get blamed. The SEC, there's valid criticism in areas, but something goes wrong, "Where were you?" I don't think that will ever change. That comes with the territory.

KD: All right. Terrific. Thanks a lot.

BG: Okay. This was fun.

[End of Interview]