Securities and Exchange Commission Historical Society
Interview with Robert Dean Pope
Conducted on March 12, 2014 by William Thomas

WT: This is an interview with Dean Pope for the SEC Historical Society's virtual museum and archive of the history of the financial regulation. I'm William Thomas, the date is March 12th, 2014, and we're in Richmond, Virginia. So, thanks very much for talking with us today. Why don't we start out with a little bit of your personal background, where you're from and your education?

DP: Well, I grew up in Memphis, Tennessee, which, if you go way back in the history of bonds, was an infamous place. But I didn't know that at the time I was growing up that the infamous Memphis Bond Daddies, back in the '60s I believe, led to first state law, and, I think, had something to do with the first federal legislation. I went to college at Princeton, I went to law school at Yale, and I did graduate work at Yale and Cambridge. I joined Hunton & Williams on January the 2nd, 1974, and I've been here ever since.

WT: So when you were at Princeton you studied history, I see, and actually went on to get a PhD in the subject.

DP: Yes.

WT: Could you tell me a little bit about that interest?

DP: I never thought I would be a professional academic. It was a terrible time for history grad students to get jobs then. It was a chance to study with a really great history department, and to do a dissertation under Vann Woodward, who I think was arguably the greatest American historian in the twentieth century, so it was a personal indulgence.

WT: You've maintained an interest in that since, I see, you've done a number of book reviews and that sort of thing.

DP: Yes.

WT: How did you get into law; did you intend to do that from the beginning?

DP: Law school in the 1960s was kind of a default position for students who weren't quite sure what they wanted to do. I had thought up until probably the second year of law school that I was going to be a professional journalist. I had worked part time as a journalist at Princeton. I ended up working six summers for the morning newspaper in Memphis, *The Commercial Appeal*, the first three as a reporter, the last three as an editorial writer, so I thought that that was what I was going to do.

I'm not quite sure I can remember the decision making process in which I decided I would try working for a law firm. I had worked one summer, the summer of 1970, in New York for Hawkins Delafield, and that's where I was first exposed to municipal bonds. When I was hired by Hunton & Williams, I was not hired to be a bond lawyer,

but, having been hired, when they found out that I had had some experience with that in the summer, they needed a bond lawyer and that's how that decision was made and has stuck for four decades.

WT: So you started then at Hunton & Williams in 1974?

DP: Right.

WT: Could you tell me a little bit about what your position was like at that time as a bond lawyer?

DP: I was the first person hired at Hunton & Williams specifically and directly to be a bond lawyer. At the time I joined there were three other bond lawyers, Harry Frazier, who had created the practice, Jack Spain, who is now retired, and John Ashton, who is now retired, and they had all sort of gotten into the bond business.

As you know from looking at the history, bond counsel work was dominated, going back in the previous decades, by law firms mostly in New York, but also in Chicago. There are a few scattered exceptions, like Huger Sinkler in South Carolina. And the question was, then, how could a, quote, "regional firm" become bond counsel, because it was the old Red Book dilemma, you couldn't be a bond counsel unless you'd been a bond counsel.

Harry Frazier, who was my mentor, is the one who really created the Hunton & Williams bond practice, working with regional investment bankers. Richmond was very fortunate then to have very strong regional investment banking firms that were very good in municipal finance, and Harry's work with them helped him establish the fact that we were competent to give bond counsel opinions, and had started doing so by the time I joined the firm.

WT: Could you tell me a little bit about the municipal securities market at that time and the changes that it was undergoing, particularly the regulatory ones?

DP: Well, I think if you would ask a bond lawyer, at least in the South in 1974, about the SEC, his initial reaction is that you would be thinking of the football conference, because they were pretty much unregulated securities. I remember Walter Craigie, a very distinguished investment banker here, who's still around as a consultant, who was the State Treasurer at one time; his father was the head of a good regional firm. Walter explained to me how he once sold bonds on a Saturday afternoon while he was down cleaning the office when he was fifteen years old because, I believe, prior to the Security Act Amendments of 1975, it was essentially an unregulated industry.

I think it's fair to say that we lawyers believed that the anti-fraud provisions always applied. And at that time, going back to the Washington County Case and the Jo Ferguson case, people were beginning to realize that the anti-fraud provisions applied.

But most municipal issuers, I think, really didn't even think about that. Prior to the New York City crisis, municipal disclosure was very skimpy.

The reasons for that are not as bad as they might seem in hindsight, because the great majority of the bonds were general obligation bonds. We were just, when I started practicing, getting into the great shift in which the percentage of bonds that were general obligation bonds was dropping precipitously, the percentage of revenue bonds was going up, and private activity bonds were growing dramatically. And both governmental revenue bonds and private activity bonds brought to bear securities law concerns that pretty much just didn't exist with general obligation bonds.

WT: Were your clients at that time mainly issuers?

DP: Most of our work was as bond counsel to cities, counties, and towns, special agencies, like the Virginia Education Loan Authority or the Virginia College Building Authority. That was a time in which Virginia and other states were creating various special agencies to do kinds of bonds. But, from early on, we also had a good practice as underwriter's counsel in municipal finance.

WT: And were the clients mainly regional ones, then?

DP: Well, our bond clients, at that point almost all of them were Virginians. We from early on had done some little work in West Virginia. I was involved, I think, in our first issue

in North Carolina, probably in the late '70s. Our work as underwriter's counsel was mostly for regional investment banking firms, but not exclusively. If a Wall Street firm came down and needed underwriter's counsel for a major Virginia issue, they would frequently hire us as underwriter's counsel.

WT: And was the question of the tax exemption of bonds a major issue at that time? Were there legal gray areas in that?

DP: Bond lawyers had started to worry about tax exemption by the time I started practicing law. There was a time, thirty or forty years earlier, where it was often so uncontroversial that it was not even addressed in an opinion, but by the time I started practicing we had had the Tax Act of 1968, which had put the first limitations on private activity bonds and created the first tax matters. So in hindsight, the tax analysis looks pretty simple going back to 1974, but it was not fundamentally different from what it is now. We just had a lot less rules, simpler rules. It was almost impossible to screw up a tax exemption of a true general obligation bond, whereas now it's quite easy to mess it up.

But the private activity bond tests were already in place. It was 25 percent bad use, as opposed to the current 10 percent limit and 5 percent limit. So the development of the tax law analysis was well underway, a specialization of that. We went through the process of trying to figure out how much of the tax work we would do ourselves, how much of the tax work we would look to pre-existing tax specialists in our firm to do. I think we reached a good compromise on that with our doing most of the work.

There would still be firms in those days where if you went to a documents meeting and you asked a tax question, the bond counsel would say, "Well, I'll have to get with my tax colleagues and get back to you." I've hidden behind that remark myself many times, but I think we took the view, that I think most of the major bond firms took, that we would have, even if we had tax specialists within the bond group, bond lawyers who would be prepared to be part of the financing team that worked on the deal.

WT: And throughout the late-1970s and early-1980s, that was a period of, really, an increase in things like industrial development bonds.

DP: Right, the growth of those were tremendous. Part of it of course was the states realizing and succumbing to political pressure, that even if the legislature had some doubts about the propriety of these, it was a perfect beggar-thy-neighbor kind of situation. If there were going to be tax-exempt industrial development bonds in Mississippi and Louisiana, then Virginia should have them too. Part of that was competitive advantage.

In one state where we practice, and continue to practice a lot, North Carolina, the Supreme Court initially held industrial development bonds were unconstitutional, and that was eventually overturned by a constitutional amendment. So, certainly by the time we got up to the major reforms in the 1986 Tax Act, pretty much every state had opened its doors on the understandable theory that it didn't cost them anything to do that.

WT: So tell me a little bit, then, if the creation of the MSRB and that whole shift in regulation had a major impact.

DP: Well, that of course grew out of the New York crisis, and the New York crisis and the resulting report, I think, confirmed for some of us what we'd always believed, that, one, the anti-fraud provisions of securities laws, applied to the issuance of traditional municipal bonds, and that, two, disclosure needed to be looked at more carefully, particularly in light of the fact that more and more bonds were looking more and more like corporate debt rather than the general obligation debt, even traditional revenue bonds, in terms of being enterprises that involved economic risk.

That process was slow. It was helped by the GFOA guidelines and the GFOA recognizing the process. I think that the organization I was most involved with in those days, the National Association of Bond Lawyers, played a very important part in that. And I still remember, I think it was right after the most recent edition of the GFOA guidelines came out in the early '90s, going to a GFOA meeting and hearing a chief financial officer of a major issuer saying, "I don't think the federal securities laws apply to me. That's the underwriter's problem." That view steadily has eroded as a result of SEC actions, Orange County and others, but it didn't disappear instantly.

WT: So in the 1980s, then, as you mentioned, there was the 1986 Act and then, later on, 15c2-12. Could you talk a little bit about the changes in that period in general? I know that there's more of a move towards the retail part of it.

DP: Well, let's separate them, because the '86 Act has really fundamentally altered the tax practice by making it more complicated, by creating rebate, by, as I said, making it possible to foul up the tax exemption of an old-fashioned GO bond issued to finance a courthouse, and so the bond counsel practice became much more complicated.

To a certain extent, it meant that bond lawyers at least should have recognized they needed to be better than some of them were. And there was some filtering out, as law firms recognized that doing just a little bond work is very hard business in terms of being able to stay on top of the expertise that's required.

And there were predictions that turned out to be mostly untrue about a huge decline in volume. I was on the board of NABL at that time and we had contingency plans for, I think, a 60 percent drop in our membership, which did not happen, because creative lawyers, and especially creative bankers, still found ways after the 1986 Tax Act to do a lot of bond issues.

The 501(c)(3) exempt organization bonds continued, pollution control and airport private activity bonds – I mean, there was still a lot of that kind of stuff out there, as there still is today. And I gather once again Congress and the administration are considering whether there's still too much of that stuff. But, I mean, what they got rid of were those things that I think were most provocative politically, the burger bonds and the skybox bonds and things like that.

WT: What were those, the burger and the sky box bonds?

DP: Well, going back to the history of industrial development bonds – which goes back to Mississippi in the 1930s in the BAWI, Balance Agriculture with Industry Act – the original state law of public purpose was industrial growth, on the theory that Mississippi needed to get textile mills to move from New Jersey and Massachusetts down to Mississippi. And, so, in many states, job creation was the public purpose that met the state law requirements, which are frequently overlooked, that all government action must have a "public purpose."

But, as I mentioned, that eroded as states decided, well, if they're going to issue burger bonds in Virginia, why, we should certainly issue them in Georgia too, so we'll be as competitive. I mean, it's a genuine question as to whether financing retail activities is a public purpose. At least it's a different question from whether you're creating jobs, particularly if you're poaching jobs from another state, because the total amount of hamburgers eaten in a state is probably not going to go up as a result of a bond issue that provides assistance to a particular burger monger.

And so those questions, many of those questions, state law questions sort of got deferred because of the restrictions of the 1986 Tax Act, although I think that they're still out there under many state laws: What is the public purpose? And there's still the dangerous tendency of public officials I think, from a public policy point of view, of borrowing

money for economic development. It is fraught with risk and uncertainty, and it is in one sense spending tomorrow's money today.

Those issues are still out there, I think. Most states have gotten much more sophisticated about dealing with them than they used to, but they're still out there. But the '86 Act was really the reaction – the principal reaction was to the fact that the '86 Act is what changed and complicated the tax laws. The securities law concerns were much later in coming, generally. I mean, we had had New York, we had the Washington County case, and the other cases I mentioned, but there wasn't very much of enforcement and it wasn't a matter of great concern.

WT: The defaults, for example, like WPPSS, didn't have a major impact?

DP: Well, you're taking me right I wanted to go. I mean, I think that it was WPPSS and the WPPSS report that triggered a chain of events that's still going on in terms of gradual, not instant, change in the securities law regime for bonds. In some senses, WPPSS is interesting. Well, first of all, the fact that the acronym for the world's largest municipal default is pronounced "whoops" does show that God has a sense of humor. But it also is a classic bond law case. The default arose because of state law, a state constitutional law issue, which is what we bond lawyers are originally supposed to know about.

But that did generate the first version of Rule 15c2-12, and the slow recognition by issuer groups, by the PSA (as it then was), and other groups that this was a responsibility for

which you could be held liable, both in SEC actions and in private actions. But it was a very slow process. I think it's natural that an industry that has never really been regulated does not embrace regulation, even if it's rational and limited.

And the first round of 15c2-12 and related SEC pronouncements established what I think most of us thought would be made clear, that basic responsibilities under the anti-fraud provisions for both issuers and underwriters are not materially different in municipal securities than they are in corporate securities: the same basic concept of full disclosure, the same basic two-pronged test, no material misstatements, no material omissions. In theory, it's pretty simple without the complications of a registration system.

The next stage of development was the concern about the complete lack in many cases, and a serious lack generally, of secondary market disclosure. So that led to round two of 15c2-12, which is the continuing disclosure requirements, and once again this whole development reflects the peculiarities of state and local government finance in the federal system. I think this affects the sensitivity of both Congress and the SEC and the courts. And it was also directly affected by the Tower Amendment, which came with the creation of the MSRB and all that, which required the regulatory system to dance a bit and do indirectly what the Commission probably would prefer to do directly.

Hence, 15c2-12 is an underwriter conduct rule. It is not a rule that directly applies to municipal issuers. And I think the SEC is still sort of wrestling as to how much jurisdiction it properly has, and can convince the courts it has, for violations of 15c2-12,

because, again, it's an underwriter conduct rule. If an issuer breaches its 15c2-12 agreement, that's a contractual problem under state law, not directly a federal securities law problem.

The continuing disclosure development prompted by that caused a major change. It also caused a lot of misunderstanding. I participated in a number of programs right after round two of 15c2-12 was implemented that indicated that a lot of institutional investors thought that 15c2-12 required municipal issuers to disclose any material event that happened at any time. It does not require that.

So the gradualism. If someone were looking at this from the outside, it would seem strange that it developed in the fashion that it did. And that, again, I think is a reflection of the history of the federal system and the attempt of the federal government, and the Congress, and the IRS to a certain extent, and the SEC to a certain extent, to recognize that state and local governments were entitled to a certain amount of autonomy as they carried out their public purposes.

WT: Do you have an opinion as to whether or not the restrictions of the Tower Amendment make things like 15c2-12 unduly awkward from a legal standpoint?

DP: I'm not aware of any case where the Commission has been unable to take action against what I considered serious fraud. They clearly would like to have a more unfettered

power to go directly after municipal issuers, but I'm really not convinced that it is necessary for them to carry out their job.

WT: So, let's talk a little bit more about some of the general changes in the bond market at this time. I know that there's a sort of long running move towards a more retail-oriented market. Did that change the practice?

DP: I don't think it changed the practice of the average bond lawyer. Bond lawyers, even functioning as underwriter's counsel, don't get into those issues as much. One of the very interesting things for me in being on the MSRB was that was really my first exposure to issues related to distribution, secondary market, trading prices and all that. The average bond lawyer just doesn't get involved in those. And so that was a very enlightening experience for me, in terms of seeing the things that happen in those worlds, and indeed some of bad things that happen in that world.

When I was first on the MSRB, they handed us some redacted information. This was in the early days of trading reporting, which is something I previously had absolutely nothing to do with. And they handed it to those of us who were the five members of the new class, various trading data showing multiple trades between a group of traders, and it was completely incomprehensible to me. And one of my colleagues, the late Damon Smith, a wonderful guy who was an investment banker, immediately said, "These boys are doing bad things," in terms of daisy chains and stuff like that. But the average bond lawyer doesn't get involved in that.

WT: And I know you mentioned at the beginning that there is more of a shift towards negotiated bonds, revenue bonds and that sort of thing already, when you were starting out. I know that increases with time, as well.

DP: Yes.

WT: Can you discuss that a little bit?

DP: Well, again, I think it quite properly said that the old levels of disclosure were inappropriate. It is true that if you have a true general obligation bond – and thanks to Detroit and Jefferson County we're finding out that there are all kinds of general obligation bonds – the disclosure is pretty simple in terms of the locality and its tax base. But it did mean that we were suddenly working on financings that were much more like traditional businesses in that they were enterprises, and that was hospitals – whether it be governmental hospital, or nonprofit hospitals – private businesses, airports.

I mean, there are all sorts of governmental enterprises, sea ports, airports, parking systems that required the disclosure to, again, look more and more like traditional corporate disclosure. That process evolved, and it's continuing to evolve, but I think it's pretty far along. Thirty, thirty-five years ago, it was not clear what the disclosure should be, it was not clear who should get comfort on it.

Frequently there was no underwriter's counsel. The role of special disclosure counsel did not exist then. The county attorney, let's say if it's a county bond, might give a no-litigation opinion and maybe even an authorization opinion, but probably didn't give the kind of securities law opinion that a company counsel would give in a corporate offering.

But over time the evolution, at least with respect to revenue bonds, became very clear and financings became much more like traditional corporate offerings in that you had bond counsel, underwriters, underwriter's counsel and counsel for an issuer. Sometimes it was the county attorney or city attorney, sometimes it was a law firm, that at least started to be involved in the disclosure process, so it began to become much more like a traditional corporate finance practice.

WT: I know that the number of issuers has always been very large and that they've come in a very large variety. Have you noticed any change over time from, say, the '70s to the early '90s?

DP: Well, there are still a remarkably large number of very small issuers who very efficiently borrow money. A particular interest of mine has sort of been why America developed this very efficient system and most of the rest of the world hasn't. There have been developments in Europe, Western Europe and Eastern Europe and in other places, even China, about local government finance, but the national governments have never had the courage to create the kind of independence that state and local governments have in this

country. And I think the fact that a small school district in Rhode Island can borrow money efficiently is a great strength of the American economic system, in terms of people making decisions about schools and roads and whatever.

But it is still true that, while there are lots of large issuers, there are lots of small issuers. I think the SEC recognizes that those of us in private practice don't always think they go quite as far as they should in recognizing the cliché that's always used in this discussion: one size does not fit all. But it is still a regulatory dilemma in writing rules that apply to the Metropolitan Washington Airports Authority and a small town of 500 people that just cannot pay for the staff and the consultants and outsiders that the Port Authority of New York and New Jersey can pay for, or even the city of Richmond can pay for. It is a regulatory dilemma that will never go away.

WT: Could I ask a little bit about your own career? Of course you move up within the law firm, become a partner, but you're also involved with the National Association of Bond Lawyers, as you said, you become involved with the governance or president of it from – I have to flip through to find the dates.

DP: '87, '88, I think, anyway, many, many, many years ago.

WT: Could you tell me a little bit about how you became so involved?

DP: Well, NABL grew out of the establishment of the Bond Attorney's Workshop, which predated it by a couple of years. I was not present at the creation, but I didn't miss it by very many years. A small group of bond lawyers, Bernie Friel from Minnesota, Fred Kiel from Ohio, and others, were dissatisfied with the continuing legal education materials available to bond lawyers. They recognized correctly that it was already pretty specialized and was becoming more so, and it's fair to say that they didn't think the traditional bar groups, the ABA section on taxation or securities law, really had the time or inclination to address bond lawyer-peculiar issues. In particular, the combination of really three areas of the law – state public finance law, both statutory and constitutional; federal tax law, certainly since the 1968 legislation; and, slower getting around to this, federal securities law – analyses. The early days of NABL and the Bond Attorney's Workshop dealt more with state law, public finance issues, and federal tax issues than they did with federal securities law issues.

That evolution has been slow and steady for that to become a major part of NABL's concern. I mean with NABL – the Bond Attorney's Workshop is now officially part of NABL -- it was not always that way, and it's the leading annual continuing legal education thing and it's very good. In NABL itself, I first got involved as the chairman of the committee on health care financing, and then went on the board and became an officer. NABL was growing because the bond world was growing. It also was making a very conscientious effort to bring high quality continuing legal education to these bond lawyer-peculiar areas.

When I was on the board the question came up, well, what is NABL going to do beyond continuing legal education? Is it going to influence, or attempt to influence legislation, tax legislation, securities law regulation? And we decided that we should, that we were the people who understood it best, we were the people who were able to do it.

I was on the board in the period when NABL considered what kind of an organization it was going to be. I was part of a small group sent to Washington, and we talked to the home builders and we talked to the GFOA and the National League of Cities. We correctly concluded that we could never be a lobbying power. We didn't have the money; we didn't have the direct political influence. We made a decision that has stood the test of time, in my opinion, that we were going to take as one of our major missions to analyze legislative and regulatory pronouncements and enforcement and comment on them.

And if you look at comments and the things that NABL has done over the last thirty years, the volume is substantial. NABL has done a very good job of being very careful in what it says, being very professional, avoiding hyperbole, of earning the respect of the regulators. It's easier to deal with the IRS and the Commission, because we deal with them directly. Having influence on Congress is a much greater challenge. And that's one of NABL's great successes.

NABL made lots of comments at a meeting with Commission staff on the new municipal advisory rule. NABL has submitted comments on almost every major tax or SEC

regulatory pronouncement of various sorts over the last twenty-some years. That's been very good for our clients and very good for the regulators.

WT: What is the relationship between NABL and, say, what was the TBMA?

DP: Well, let's see, it's gone through two names. Which was first? It was the PSA, and then it was The Bond Market Association, and now it's SIFMA. And there was also another predecessor organization that was for dealer banks back when that concept was meaningful, and it went through a couple of name changes. The relationship has been good. I know a number of us bond lawyers have been asked to participate in SIFMA events, and I participated in a lot in the '80s and '90s. And we usually have staff members from SIFMA, as well as from the IRS and the SEC at the Bond Attorney's Workshop and other educational seminars.

NABL now puts on a tax and securities law seminar each spring. It will be later this month, in Boston, and there will be representatives from the IRS and the SEC there. NABL's also had very good relationships with the GFOA, which has been a major player in that area and the GFOA also can claim credit quite fairly for encouraging its members to embrace good disclosure.

WT: So I guess we have a choice, moving into the 1990s, as to whether or not we would want to address electronic disclosure, which has a very long history indeed, or perhaps pay-to-play, or perhaps another subject you think is pertinent.

DP: Well, again, pay-to-play was a subject that most bond lawyers themselves wouldn't have any direct involvement with. I saw it in my three years on the MSRB. It clearly was intended to address a serious problem. I'm not sure it cured that problem, or if there is ever a cure for the problem of allegedly improper influence over public bodies in the selection of investment bankers, any more than you can ever cure the problem of proper selection by public bodies of road contractors or any other major supplier of goods and services where governments buy things.

I don't assert that that was not important. I don't assert that it wasn't appropriate to respond to it, but I don't think it had profound effects on the municipal industry, and I don't think particularly it had profound effects on the quality of the disclosure. The example I use is if a large issuer was considering five high-quality investment banking firms as its underwriter and one of those five paid a bunch of bribes to get hired, I'm not sure that that directly affects bondholders. I don't think the quality of the disclosure – the investment bankers would still understand their risks, so I'm not sure that – that certainly wasn't an area that practicing bond lawyers spent a lot of time worrying about in that period.

WT: As far as being concerned with the ability of the regulators to enforce those rules, is that something that bond lawyers would deal with, or would that be another branch of the firm, even?

DP: That would be another branch of the firm, with a few exceptions. I've gotten involved in some of that work, primarily because of my experience with NABL and with dealing with those matters when I was on the MSRB. Where lawyers are getting involved in the securities law is in connection with the actual production of disclosure and in responding to the guidance that we give, and that guidance has taken the form of various SEC pronouncements, interpretive releases. A couple of them have been very thorough. It also takes the form of guidance in their enforcement proceedings. That doesn't distinguish it completely from the corporate world.

In terms of lawyers and their day-to-day practice affecting securities laws and compliance with securities laws, it is mostly in the trenches of preparing disclosure and convincing underwriters and issuers that they need to take it seriously. That's a lot easier today than it was thirty years ago, because both investment bankers, municipal investment bankers and municipal issuers now have several decades of seeing what can happen to you if you do not take it seriously.

WT: Now, in terms of setting standards for disclosure, I've read some quotes from you in *The Bond Buyer*, for example, but I'm not sure about your overarching view of their ability to set coherent standards that can be easily followed and how that affects your own law practice.

DP: Well, I am suspicious, and I think most bond lawyers are suspicious, of the SEC's ability to get very, very specific about what is appropriate disclosure. The last SEC major report

on this was a little confusing, I think, to those of us out in the field, in that it seemed to say, "We want more power to do that," but then at the same time it also said, "But we really do understand that one size does not fit all, and we really don't want line item disclosure." That's term they used, focusing on issues, rather than requiring specific disclosure. The details are where that would all be.

And, again, my view, some might say my prejudice, is that those kinds of specifics are not really necessary for the enforcement of the securities laws. Repeating a point I made earlier, I'm not aware of any case where I think there was really bad disclosure and where the Commission did not and does not have the tools to go after that and to punish those who did badly, and to send a message to the market as to what is not permitted and the consequences of not making good disclosures. All regulators would like to have more unfettered power to enforce in what they think is the right way and with the right rules. But I'm really not yet convinced that the Commission is crippled in any material way, if I can use a securities law term, in their ability to combat municipal fraud.

WT: So let's talk maybe about a specific case, such as Orange County, and the challenges of things like investment pools, is that any different from more run-of-the-mill cases?

DP: I think the significance of the Orange County case for the bond world, generally, as opposed to Orange County or California, was to make it indisputably clear that the Commission had jurisdiction to go after municipal disclosure. It also was the first of a

number of developments to remind us that modern financial complications can affect municipal disclosure.

The investment pool, the idea that there would be that kind of investment pool that a county would set up to, in effect, be an investment bank for other local governments, would have been inconceivable twenty years earlier. And, you know, it seemed shocking at the time. Now we see, of course, derivatives and interest rate swaps, and all part of that is the fact that the regulatory regime needs to respond to the complexities of municipal finance.

I think most bond lawyers and most leaders in things like the GFOA would say it is probably harder for the public finance world and for public officials to deal with these matters than it is for a large corporation that has very specialized staff. A lot of people in the public finance world were sold stuff they shouldn't buy over the last fifteen years, in a way that would not have happened in the corporate world just because public officials are frequently so dependent on outside advice and expertise.

That's one of the reasons we have the Municipal Advisor Rule, which arguably doesn't really add anything to the world in the sense of who I really think is responsible for what. But it clearly was a response of Congress based on a perception that investment bankers, consultants, financial advisors and others failed miserably in serving public bodies.

WT: So, there have been a series of other enforcement actions from the Orange County, up until say Harrisburg quite recently, in Miami and San Diego, for example – to what extent did those clarify, or have they had a more ambiguous effect on advising issuers?

DP: I think they have been a steady course. One can argue that it really isn't the job of the SEC to solve America's public pension problem, but they clearly have brought it to the forefront in a way that is important far beyond the securities law implications of it.

In some ways disclosure lawyers are like French generals. We're fighting the last war, not the next one, in terms of what we're looking at. And so, reflecting the events of the last twenty years, we started worrying about interest rate swaps, we now worry about pension disclosure, and how much of that is necessary. It's clearly material if you have a grievously underfunded pension plan, but how much detail is really material to investors?

That is also an area where the one-size-fits-all problem is particularly acute. What do you tell a small municipal issuer is the meaning of the San Diego case? San Diego spent millions of dollars hiring outside lawyers to come in and completely revamp their internal education system to do things that most even traditional governments couldn't begin to afford. So there's still that problem of how you apply the apparent lessons of a big case – like San Diego or New Jersey or Illinois pension cases – how you apply that with a very small state and local government issuer. There are certain general principles you learn and check boxes that we've addressed pension disclosure, but that's going to be a challenge forever.

WT: So let's talk a little bit about electronic disclosure and its slow evolution. Has that been more problematic that it's gone so slowly, or has it been generally to the benefit of –

DP: I think everyone in the bond world agrees that EMMA is a great success and is much, much better than the previous NRMSIR system, if we can keep the old term. The timing is interesting. I think if the continuing disclosure version, round two of Rule 15c2-12, had been promulgated five years later, there would probably have been an EMMA system created directly. I think it was really more a question of timing in electronic developments that the convoluted NRMSIR system was there for a while. Everyone regards EMMA as a great success. I think most issuers now view it as a great success. Investors do, just because it creates a very easy way to promote a level playing field as one of the two or three major goals of the federal securities laws.

WT: Were there particular difficulties in the NRMSIR period that one should be aware of?

DP: There were the difficulties that I don't fully understand because I never had occasion to look into them, as to whether or not all filings got properly recorded in the NRMSIR system. And I must disclaim as I simply never had much occasion to actually do any research through the NRMSIRs, so I'm relying on mostly hearsay to say it was not completely reliable.

Both investors, particularly institutional investors and regulators, would say that, well, there was also the basic problem unrelated to that, is that issuers simply didn't take continuing disclosure very seriously and they frequently just didn't make it. And, again, the frustration, understandable frustration for the SEC, was that it was not clear exactly what they could do about that, because at worst the issuer had violated a contract with limited remedies for its failure to do so.

That's when the Commission focused on the tool of, one, going after the investment bankers and therefore indirectly putting pressure on the issuers, and, two, the utilization of the provision of Rule 15c2-12 that requires disclosure of all material failures to comply with continuing disclosure. And that's where the enforcement action has been recently and has clearly put pressure on investment bankers to put pressure on issuers to do a better job.

WT: You've mentioned in the context of disclosure some of the novelties that have entered the market, like interest rate swaps and derivatives. There's also things like bond insurance, mutual bond funds, I'm wondering if you'd like to discuss some of those explicitly or directly.

DP: I think the legislative reaction in Dodd-Frank is appropriate, in that I think there were many municipal issuers that did not fully understand the risks they were taking with interest rate swaps. What we saw was a huge movement to so-called low floaters, which

goes back more than twenty years, but the particular form they took in the ‘90s and the early oughties, is that the right term?

WT: Sounds good to me.

DP: In terms of, instead of doing a twenty year bond issue, you did a variable rate bond issue with an interest rate swap, and then how long did you go with the swap, and what were the risks of renewing it? By and large, the public finance world did not understand those risks very well. I think maybe there were parts of the investment banking world that didn’t understand them very well, and there were parts of the world I think that intentionally didn’t explain those risks very clearly. Issuers paid the price.

The disclosure that developed relating to that is still a controversial matter, in that if you had a variable rate bond issue with a letter of credit, how much disclosure did you have to put about the underlying credit? There have been a number of good articles written by bond lawyers. I still think many bond lawyers are not convinced that the SEC’s position on that is correct, but it’s largely a moot point these days, because that kind of financing has declined so precipitously.

The other issue that rose and now has declined with the decline of bond insurance was, if you had bond insurance, how much disclosure did you need to put it on the underlying credit? The Commission made it very clear going back to, I think, the first WPPSS

release, in 1988 or ’89, its view that the presence of credit enhancement does not obviate the need for underlying disclosure.

The bond world pretty completely accepted that, with respect to fixed-rate long-term bonds, and so they developed pretty strong industry standards and practices that, if you did a twenty-year bond issue with bond insurance, you also had to make full disclosure on the underlying credit. The real dispute was whether, if you had a letter of credit and liquidity arrangement and a seven-day low floater, the underlying credit was really material in that.

There’s some feeling that at the height of bond insurance, when insured transactions were almost 50 percent of the market in terms of number of offerings or dollar amount of offerings, I’m not sure which, that, while investment bankers and bond lawyers and disclosure people accepted the general principle that you had to make full disclosure on the underlying credit, the presence of bond insurance, and therefore the rating being based on that rather than the underlying credit, in some cases probably encouraged some fudging on tough disclosure issues on the theory that, well, it’s not going to make any difference because it’s credit enhanced. So this bond issue is never going to fail, and therefore this question of whether we talked enough about the pension risks or whatever, it’s never going to come back to haunt me.

That view was dispelled by the SEC case a number of years ago against the City of Miami, where we were reminded that, while an investor has to show damages in a

securities lawsuit, the Commission has no requirement to show that anybody was hurt. And so that, I think, was clearly part of the message the Commission was sending in that case and others. And that's a lesson good bond lawyers and disclosure lawyers were always reminding their issuer clients and their banker clients -- that even if this bond issue is paid, even if there is never a default, even if there is never a downgrading of the bonds, the Commission still has the right under the law to come in and say the disclosure is bad and we're bringing an enforcement action against you.

WT: Do you have a particular perspective or opinion on the bond rating system and its ultimate recalibration?

DP: My opinions on the rating agencies are thinly based, in the sense that I have no expertise on the process. I do believe that it has been a healthy development in the last few years that the market appears to be relying on them less and less. They're still essential for small local governments, just because they don't command a huge market presence. If you're the state of Virginia, or you're the Dallas-Fort Worth Airport, your volume of bond issues is enough that investors large and small can monitor you in a meaningful way. If you're a small city or county or town, the rating is critical to your access to low-cost capital. But I think the rating agencies' reputation has taken a major hit. I'm not competent to say whether that is fair or not, but I'm happy generally that the market does not seem to be as focused on them as it was ten years ago.

WT: Do you reckon that that's linked to the availability of information through resources, especially EMMA?

DP: Well, it makes it easier to do that. It's also true that if half the bonds are insured by what were then AAA-rated bond insurance companies, bond ratings generally were just a lot less significant than they otherwise would have been. I mean, it's still very, very important for a Virginia small city to maintain an attractive rating and do all it can, and that still is an important part of having access to capital. But I welcome the development that the market is not as dependent on ratings as it used to be.

WT: Now, prior to Dodd-Frank I know that the question of municipal advisors had been an issue for I think at least a decade, was it your perception that there were a number of conflicts of interest running through the market in terms of those advisors?

DP: Well, there clearly were isolated problems, particularly when investment bankers were selling multiple services. In the good old simple days, an investment banker made money by its bond discount. As more and more services were provided, interest rate swaps and other things, it created a real temptation to say, "I don't make my money off my bond discount, I make it off the other things." So there were some clear conflicts of interest. I'm not sure the rules didn't cover that, and MSRB rules, going back to when I was on the board, addressed that issue. So regulated broker-dealers had pretty clear responsibilities to disclose those conflicts of interest and to make sure that the issuer understood them.

An awful lot of the alleged bad guys in recent events were neither traditional financial advisors nor registered broker-dealers serving either as an underwriter or a financial advisor. They were specialists who allegedly did bad things in the decision making on the purchase of derivatives and in the bidding of the purchase of them. And some of those things that were done wrong were, in my view, violations of applicable state law. But the potential for conflict was there. This will clarify that. I'm not sure that the provisions of the rule are all essential for that protection, but we'll see.

WT: You mentioned your time on the MSRB just now, and I'm wondering if you could tell me a little bit more about that experience.

DP: Well, I found the experience of serving three years on the MSRB to be very reassuring. First of all, I learned an awful lot, particularly about things like pricing of bonds and all that stuff I had no experience with. I was also reassured by the way the board behaved. In those days, it was a simpler world in that there were three classes of members: broker-dealers, dealer banks – the old distinction that's pretty unimportant today – and five public members. I was a public member because I'm not a broker-dealer or a dealer bank employee. And that made it a classic SRO, self-regulatory organization, because two-thirds of the members came from the industry that regulated itself.

There are obviously cynical views that that's not right, and there was much criticism of that that led to the changes in the structure of the MSRB. I was much comforted by the

fact that all of my fellow board members acted in what I thought was the right way. It wasn't public members versus broker-dealer members versus dealer bank members. I can say with pretty close to complete confidence that everybody did what they thought was right. It was also true that it was simpler in the sense that the task was making rules that governed investment firms in order to protect investors.

I am concerned now that the MSRB has not only gotten too large, and therefore arguably unwieldy – fifteen was a very good number, in terms of size of an efficient board – but I think that it now has responsibilities to both issuers and investors that can create some conflicts of interest, because protecting issuers may be inconsistent with protecting investors in certain situations. The MSRB and its staff and Lynnette Kelly are aware of those issues, but it's going to be a real challenge to see if the MSRB can navigate through those waters, because the waters are much trickier now than they were when I was on the board.

WT: You were on the board from '96 to '99, according to this bio you sent me.

DP: That sounds right, yes.

WT: Were there any particular issues that were high on the agenda at that moment that you recall?

DP: Well, pay-to-play was an issue. We released a report that I still think is very good on the proper role of municipal issuers in suggesting to underwriters whom they select to pass underwriter's counsel, in terms of legitimate interests of issuers, but also making sure that the underwriter doesn't hire the mayor's brother as the underwriter's counsel just because he is told to do it, and what the risks and perils of that are.

We were at the beginning of the issue of the conflicts of interest over swaps and providing other financial products and we were trying to engage that. We also – in a way that doesn't relate to any particular MSRB rules – we were also in the forefront of just promoting good disclosure practices, recognizing the need for good disclosure practices, reminding both issuers and broker dealers of the issues that can come up in that. Again, a lot of the things that we did properly anticipated the terrible problems that happened ten years later.

WT: And could you tell me a little bit more in general about your relations with the MSRB? I know that Kit Taylor, of course, was executive director for a very long time.

DP: Yes, and he was still executive director. I found the staff knowledgeable and supportive. It did give me the view that I still have, that you should be able to serve a second term because there is the natural tendency with governmental bodies – and I do a lot of work for nonprofits and it's the same thing – you get on a board the first year, you think, "Well, I'll keep my mouth shut and I'll listen," and then, by the time you get more confidence and say, "I think we should address this," you're in your third year. And then,

given that the MSRB generally only meets four times a year, you're off and you just now feel like you're ready to really start engaging tough decisions. So the shortness of the terms is a problem and made it harder for the board itself to make its own decisions, but I don't think that was a huge problem.

WT: One other thing that I did want to ask about is your own personal involvement in legal writing. You did the *15c2-12 Handbook*, and *Making Good Disclosure* as well. I'm wondering if you could tell me a little bit about how you came to undertake those projects.

DP: Well, one of the good things about NABL in particular, and other related undertakings, is that it has produced some very good written products. I've worked on a number of those. *The Disclosure Roles of Counsel in State and Local Government Offerings* and the recent revision of that that came out, what, two years ago – a big undertaking. I spent a lot of time on that. But there's a long tradition in the public finance legal practice of lawyers exchanging thoughts on, frankly, difficult issues. That's probably more true in the corporate securities bar than it is in other parts of the American bar. We do think everybody's helped if the standards are higher.

So, I worked on a lot of NABL projects. The two editions, one in the '90s and one two years ago on *The Disclosure Roles of Counsel in State and Local Government Offerings*, was a challenge. Bond lawyers are not completely free of ego, and getting a group of nine or ten of them to produce a written product is always a challenge. But there's a

great tradition in the bond bar of doing those kinds of projects. And it's also, if you're a bond lawyer, a great way to really make sure you're knowledgeable in the law.

The GFOA book came out of my serving as an advisor to the Debt Committee of the GFOA and of dealing with the people connected with the GFOA in the '90s, who were really at the forefront of encouraging governmental entities to voluntarily produce better disclosure. And the commission there was not to write a treatise on the law, but to write a common sense book that a local county attorney or a director of finance, or even a city council member could understand. So that book is very, very different from, for example, *The Disclosure Roles of Counsel*, which is a very technical and a dense description of responsibilities and the regulatory analysis.

Making Good Disclosure is intentionally a lot simpler and less technical, but is an attempt to draw the line in terms of giving practical advice to people who want to produce good disclosure, because, unlike the federal tax law, federal securities law analysis, in one sense, is common sense. What is good disclosure? It's telling investors what they want to know in terms of analyzing the credit. So, even though there are exceptions to that, and there are some difficult disclosure issues, the general principles of making good disclosures are pretty straightforward.

WT: We talked about what the firm was like when you first arrived here, and of course you've seen a long period of evolution. I'm wondering if you can talk a little bit about if there were any key changes that have occurred. Is it still regional?

DP: We proudly call ourselves international now because we have fifteen or sixteen offices. If you look, they're all over. We do a lot of project finance work in other parts of the world. The bond practice is a combination of regional and national. The heart of our practice is still in our traditional southeastern area, but it expands out into Texas and others. I've done work in California and other places. I would say it has a strong regional basis, but we do work all over the country.

WT: You've never been tempted to move anywhere else?

DP: Not really. Richmond is a very civilized place to live.

WT: Yes, all right. Would you like to discuss any of the contemporary issues, if we haven't covered them already, in municipal bond markets?

DP: Well, again, the Commission has the tools to go after people who perform badly, and I think it has plenty of smart people who know how to deal with that. Thirty years ago we used to worry that the SEC didn't understand our world. Now some people fear they understand it all too well in terms of the expertise that they've created.

WT: Did you notice a change when the Office of Municipal Securities was created, or with its various evolutions through time?

DP: I think it is more an evolutional process. Obviously Arthur Levitt gave it an important stimulus. Whether that would have happened with another Chairman, I don't know. It was a natural development. The Commission said this is a large area. They were getting complaints about bad disclosure, they were seeing examples of bad disclosure, so I think evolution is clearly the right word there. There clearly were major events – the New York crisis, the WPPSS report, Orange County – these are all events that focused the attention of both private lawyers and issuers and bankers on it. But, again, I think the proper way to describe the last forty years has been evolution, not huge changes.

WT: All right. If there's nothing else you'd like to discuss, I think I've covered most of the questions that I have for you.

DP: Okay, that's fine.

WT: All right, terrific.

DP: Thank you.

[End]