Simon Lorne Oral History
Interviewed by Dr. Kenneth Durr, April 2, 2025

KD: This is an interview with Simon Lorne for the SEC Historical Society's virtual museum and archive on the history of financial regulation. Today is April 2nd, 2025, and I'm Kenneth Durr. Simon, great to talk to you today.

SL: Great to be here.

KD: We've got a lot to cover, but I want to jump in and get a little bit of your background before we start into the SEC stuff. And I was interested in the fact that early on you were looking at both business and law. Tell me about how that came about and how you reconciled the two.

SL: Well, it came about, in a way, backwards. When I was in college, I couldn't figure out what I wanted to do, like a lot of college students. In my senior year, I was an economics major, and I applied to law schools, business schools, and schools of economics. I got various acceptances, and I just couldn't decide what I wanted to do. I thought law had more optionality in it, and if I went to law school, I could always do business. But if I went to business school, I couldn't do law, sort of thing. So I chose law school. Nobody in my family had been a lawyer and I didn't really have much idea. Turned out when I was in law school, I fell in love with the law. And the last 20 years I've been inside an organization, but I still read cases even though I don't very much use the cases actually. In the last year or two that turned out to be useful. I read cases because I enjoy the law, and I enjoy reading them. But I gravitated toward the business side of law and have spent my career as a lawyer for businesses or within businesses or regulating businesses and combining both interests.

KD: It looks like you were so interested in the law itself that you became a professor. Is that right?

SL: Yes, and part of that I did fairly well in law school, and it intrigued me and it turned out I enjoyed the process of thinking about law. And you do that a lot more in a law school environment, pretty much all of my career. I was teaching as an adjunct at one point in 1978, I think it was. I took a year off and spent the year teaching at the University of Pennsylvania Law School. Now I'm an adjunct at the University of Texas Law School. Turns out teaching is one of those things that will absorb as much time as you have to give it. My wife tells me I work as hard now as I did when I was full-time in the employment of an organization, I just don't get paid as much.

KD: You went to Munger, Tolles?

SL: Yes.

KD: I know that a lot of what you did you can't talk about but tell me about the firm and tell me about the types of cases that you handled.

SL: A friend of mine in Dallas distinguishes between stand-up lawyers and sit-down lawyers. And in that context, I was a sit-down lawyer. I had little or no involvement in litigated matters and was entirely... At that time at least, and maybe still, a lot of firms had rotation programs. I'd spend six months in a labor department and six months in litigation. Munger, Tolles didn't have such a program. That was one of the things that appealed to me about it because I knew where I wanted to be. And at the time, Munger, Tolles was much smaller, it's still a fairly small firm, but I think I was the 15th or 16th lawyer in the door. And because it was smaller, it had much more opportunity for various kinds of work to be sent down to the youngest lawyer. There weren't that many lawyers around. The few lawyers at the top of the firm who had established, pardon me, reputations. There was a fair amount of work coming in and when I started practicing, within a month or two, I was effectively the only lawyer doing work for two or three public

companies, for example. Relatively small public companies, but those were opportunities. It was in a little bit more than two years that I was a partner in the firm, and we kept going. It was a wonderful experience to be part of a good group of lawyers and a growing firm. But as I said, it's still a relatively small firm with only a couple of hundred lawyers, but it was great.

KD: Were you doing securities practice basically, or were you doing M&A, things like that?

SL: Both. I was always much more of a generalist. After I did the teaching stint, which was when I was seven years into practice, I wrote a treatise on mergers and acquisitions that has grown in volumes. I haven't had much to do with it, but my name is still on it.

KD: Nice.

SL: But the publishers keep growing it with other people. I did mergers and acquisitions. I did public offerings. Again, it was a smaller firm, you could do that, and I enjoyed doing that. The impression I have is it's much harder to do that in 2025 than it was in 1971.

KD: Yes. Talk about some of your initial interactions with the SEC. You would've been on the other side of the table. Tell me about your experiences there.

SL: They were, I think, fairly typical kinds of experiences. Again, not enforcement matters, not litigation matters, but a lot of interaction with the Division of Corporation Finance. I represented both companies and underwriters in a number of public offerings. One experience at that time, there was some dispute as to whether a spin-off of a portfolio company required registration. And there was an argument that there was no sale involved because a sale involves a transfer for value under the definition. And if you're just distributing the stock to your shareholders, you're not receiving any value. The SEC took the position in a few enforcement cases and was successful in taking the position at first that that required registration. I had a client who was spinning off a subsidiary. In fact, I'm still the vice chairman of the board of that subsidiary all these years later. It was spinning off a subsidiary to its shareholders, and I got into discussions with the SEC. I think it started with a no action letter request. That was, of course, at the time turned down. I both filed the registration statement and registered the offering and published a law review article that I think was in the Texas Law Review about why registration shouldn't legally be required under those circumstances. And I may have said something in the prospectus about denying that registration was required. Let me rephrase that. Although I think that doesn't really do any good if you end up in litigation, we never ended up in litigation regarding a transaction. But there were a lot of interactions, and I was representing also a couple of broker-dealers. A regional firm in Los Angeles and a regional firm in San Diego that had a number of interactions with market regulation and those kinds of questions. There was a fairly heavy securities element to my practice from the beginning.

KD: Okay. I didn't write down the date, but at some point you testified, I think, before Congress about small businesses and securities law. You must have had a reputation that was growing up. Can you tell me about... Do you remember that incident when you were...?

SL: Yes, barely. I remember that it occurred, and I don't remember very much about it. Congress is a funny animal as we know. There was a congresswoman from, I think, Long Beach, California. She knew a couple of people in the firm, and I think it evolved from that. I was invited to come back and testify. And, of course, as a young lawyer, that was an exciting thing to do.

KD: Okay. That was pretty early on then, I guess?

SL: Yes.

KD: Okay. Any other highlights from your time in practice before you got into the Commission?

SL: Well, a number of things. By the time I came into the Commission, I had two fairly active clients. One was Berkshire Hathaway, Warren Buffett's firm, and Charlie Munger was Warren's vice chairman

until Charlie died a little bit over a year ago. I fell into a group by purely fortuitous circumstances. There were a small group of people in the industry, seven or eight of us, who met for breakfast every morning in the old Stock Exchange club in Los Angeles. Whoever was in town would meet for breakfast between 7:00 and 7:30, read the paper and talk about what was there. Charlie Munger was part of that group. Charlie was enormously influential person in business history in the United States, but in the firm as well. And for a period of close to 20 years, I had breakfast with Charlie most mornings, and at the end of breakfast we rolled the dice to see who would pay for the breakfast on the theory that if you're there every day for 20 years, you're going to pay for as many breakfasts as you eat. It was influential and importantly formative for me. The other client was the old Price company started by Sol Price, which is today's Costco. And, in fact, Costco started... An officer from the Price company, Jim Sinegal, wanted to start a company in the Northwest, and, as I said, Sol Price was the chairman and CEO of the Price company. And Jim said to Sol, "I'd like to start a company in the Northwest of my own, kind of like this." And he went with Sol's blessing. Indeed, Jim was one of the speakers at Sol's Memorial Service several years later. And in 1992, I think it was, roughly 1992, the Price company and Costco were just about the same size, just about the same facilities. You couldn't tell the difference between them if you went into what they call warehouses. They had as close to a merger of equals as you can possibly have. And that was the last transaction I was engaged in, the merger of Costco and the Price company. Both fairly substantial public companies before I showed up on the Commission's doorstep.

KD: You said those breakfasts with Charlie Munger were formative. How so?

SL: Just listening and... We would read typically the Wall Street Journal during breakfast. There was a Wall Street Journal at every place, and we'd all be reading the paper, and somebody would remark on this company doing such and such a thing. Sometimes it was Charlie. Sometimes it was me. Sometimes it was somebody else at the table. Charlie was not at all reticent to share his views of anything. And Charlie would talk about why they were doing it. Berkshire Hathaway at the time was a smaller company. It had a stock, which at the time was relatively highly priced. As I recall, it was about $300. Now it's around 3/4 of a million dollars a share for the A shares. It was the same company you read about today. It was just a lot smaller. And Charlie had views about everything going on and shared those views, and I learned a lot from Charlie.

KD: Okay. At one point, I guess, was it ‘93, you were approached by Chairman Levitt? Is that how that worked out, becoming general counsel?

SL: Well, that was a typical Washington phone call. I got a phone call from an intermediary that said if—and this was the first year of the Clinton administration and Arthur Levitt had been named as chairman, as you said, and confirmed—and I got a call that said, "If Chairman Levitt wanted to talk to you about being general counsel of the Commission, would you be willing to talk about it?" It was like being in college and asking a friend to call a girl and ask her if she would go on a date with me if I asked her. I hadn't known Arthur at all, but I said... I was a securities lawyer. If the chairman of the SEC wants to talk to me, I'm going to talk to the chairman of the SEC. So I flew back to New York. At the time, it was shortly after the Salomon Brothers scandal when Salomon had some misdeeds in the treasury auction market. Warren Buffett at that time came in as chairman of Salomon and installed Bob Denham, my partner, who unfortunately passed away a couple of weeks ago, who was a wonderful lawyer. Warren installed Bob as general counsel. Then when the immediate emergency was over, Warren left and Bob Denham moved up to chairman and I came in as acting general counsel of Salomon, so I was in New York quite a bit. And I told, I don't remember who called me, that I would be delighted to talk to the chairman of the SEC. I had a meeting with Arthur. Then probably about a month or two later... Actually, there's a funny story about this too. A month or two later, Arthur asked me if I'd take the position as general counsel, and I was thrilled to do so. As it turned out, it was about that time the Los Angeles County Bar Association, the business and corporations law section, had an annual program with the Securities and Exchange Commission. Typical securities law conference in Los Angeles. It is still going on, being led by my friend John Hartigan. I had gotten to know Stan Sporkin, and Stan, of course, was the longtime head of the Division of Enforcement before he was general counsel of the CIA, and then a federal judge. The annual

program, we had an ethics session. Ethics sessions were always put at the end of the program, so people will stick around to get ethics credit. I was on that panel along with Stan Sporkin, and that program turned out to be on the day I was announced as general counsel. Stan saw me and said, "Well, we're on the panel together and you're going to be general counsel." That was an amusing coincidence.

KD: And people were extra interested in what you had to say given that.

SL: Right.

KD: In your discussions with Arthur Levitt early on, did you get a sense of his program generally or what his expectations were of the general counsel's office?

SL: Yes, I did, but I'm not sure where they came from. Arthur was not a lawyer. Arthur had been involved in the securities industry starting with the small brokerage firm, CBWL, Cogan, Berlind, Weill & Levitt. Then he'd been chairman of the American Stock Exchange, but he didn't really know the insides of the SEC. He told me he thought of the general counsel's office as effectively the chief operating officer of the commission. Some refer to the general counsel as first among equals. Mostly that's general counsels, not former directors of the other divisions. He asked me if I would come back and do it, and I was delighted to show up.

KD: That's interesting. I'd never heard the COO analogy. Did that work out in your experience? Was that a good characterization?

SL: I don't know. It's a much more collegial relationship with the division directors, and we'll probably get into it later. I certainly had moments of disagreement with Bill McLucas who was director of the Division of Enforcement and Linda Quinn who was director of corporation finance. I was quite close to Barry Barbash in investment management and Brandon Becker, I guess, in market regulation then trading and markets, before and after. It was a much more collegial relationship, and we'd have weekly meetings and discuss things and come to conclusions. If there was general agreement among the group, Arthur would usually go along with that. And if there was a decision that had to be made, if there was disagreement, as sometimes occurred, Arthur made the decision. I don't think it was really comparable to a chief operating officer. I think it was a much more collegial group.

KD: Okay. You mentioned ethics a little bit ago. I was interested to see that in 93 when you came in, along with your other responsibilities, you were the agency ethics official?

SL: Yes, we had a person who was focused entirely on that. I was designated as the agency ethics official, but all of the questions went through her office and when she had an issue, she came to me and we talked about it and came to a rational conclusion. But I've always had a strong interest in ethics. I had a wonderful experience teaching an ethics course to the joint New York University Law School and the Stern School of Business at NYU. Sorry for the digression, but one of the interesting things about that was that in the class, which was about half business school students and half law school students, and, of course, the lawyers have the Model Rules of Professional Conduct and the whole history of ethical concern going back to the early 1900s. Business students don't have any such code. But when you talk to the students, you generally couldn't tell who a business school student was and who was a law school student, which was, I thought, quite encouraging. Every so often a law school student would talk about a case or something and you knew they were a law school student. But other than that, you couldn't really tell. Anyway, I was chief ethics officer and at one point our ethics officer left to be running the program at the White House and we had to appoint a new officer, which fell to me, at least in the interviewing and initial decision stage. I remember well that I used to say to everybody I interviewed, "There are two critically important things in this office. One, is to be able to say no to the chairman of the SEC, who is almost by definition a powerful individual with a lot of experience and quite selfconfident." And certainly, Arthur Levitt fit that bill. The most important thing is to be able to tell Arthur Levitt he can't do something he suggested. And the second most important thing is to be able to say yes. And with those two, it's important to know when the right answer is no and when the right answer is yes, obviously. But

you've got to be willing to do that. I think over the last several years, too often, no has been the right answer because it's the easier answer. You're never going to get in trouble in the newspapers or the chat rooms saying no. You might get in trouble with the chairman if you say no when you shouldn't, but you're not going to get in trouble in the public perception.

KD: Well, great. Let's dive into some of the meat of the things I wanted to talk about. We've got some categories here. This was a period when internationalization was big. There was a lot of concern about making investors overseas more comfortable in American markets, more able to do business here. And you were involved in a few of these, I believe. Talk about the SEC's interest in international matters at this point, and your involvement with some of the MOUs, things like that.

SL: Yes, it was interesting. It was less a focus of the Chairman's at the time. He was well aware of it and paying attention to it, but less focused. I came to it with a little bit more of an instinctive appreciation. I was born in England. I grew up in an English family and moved to America when I was young, but I'd always been sensitive to the international concerns. It was apparent then, it's become more apparent ever since, that the international realm was one the SEC should pay attention to and had a natural leadership position simply because there weren't generally any equivalent organizations for a long time to the SEC in the United States. We had, for example, an annual program where we brought regulators in from 50 or 60 countries to talk about how we viewed securities regulation and to give them insights. One of the questions I always had and used to talk about with them was the United States experience, which didn't start in 1933, it started a lot earlier than that. We went through the period with the so-called robber barons and with a lot of hard practices, shall we say. There was a question in my mind whether it was necessary to go through that or whether a relatively new country, for example, could go directly into meaningful securities regulation. And I still don't know the answer to that. IOSCO, the International Organization of Securities Commissioners, was fairly young then and has become much more meaningful in recent years. It was growing and it was a field I was interested in. Michael Mann was the head of that program internally at the SEC. Michael's a first-rate lawyer and spent a lot of time developing it, and I gave him a lot of credit for the way in which it has evolved. You don't want the United States to be in the position of the font of all securities law wisdom, telling all other countries what they should do. And even more, they don't want to be in the position of being told what they should do. And I think the SEC has done a pretty good job of maintaining that balance and not being or appearing too arrogant in the discussions. They think IOSCO has done a lot of good. It's difficult, because the SEC is a part of the United States government. There isn't a world government, and IOSCO can only make recommendations to the different countries. But it's been a very good sounding board for different countries. Sometimes, in my view, one country will go off a little bit off track. Sometimes, in my view, the SEC goes a little bit off track too. Reasonable minds can differ about a lot of these things.

KD: It's one thing to prescribe for international securities regulators. It's another thing to prescribe for what the SEC is going to do. There were efforts to simplify registration, for example. Conceivably, I think, you would've had to scrutinize these, look at them and counsel. Did that happen?

SL: That's been a pretty constant pressure in the United States here. You see some of it in... I guess, Paul Atkins is now the chairman-designate. I'm not sure if that's the right appellation. He's been nominated and had his Senate hearing, but he hasn't been confirmed yet. But in some of the questioning from the Senate, you see continued concern with simplifying the registration process and you see industry responses to it. The whole experience with special purpose acquisition corporations, SPACs, was a drive to let people become public more easily. I think that movement had a lot of problems, and it's declined significantly in the last couple of years, but it's been a pretty constant pressure. When I was general counsel, I think the pressure was a little bit more toward plain English in prospectuses, and that's a tough not to crack because sometimes plain English is imprecise English for documents that are going to potentially end up in litigation. We're all trained as lawyers to be as precise as we can, and so we get... I was looking at something yesterday that had one sentence that went on for 18 lines. It's hard to diagram a sentence like that and figure out exactly what it's saying, and even harder for investors to understand. But Arthur cared

about trying to drive toward plain English as a means of simplifying things. You still see efforts in that regard, although I'm not sure they've been very successful.

KD: Yes, it was notable that he wasn't a lawyer, he could look at it that way. Did you find yourself pushing back on that and saying, "Well, we would like to do that, but it's not going to work in this case?"

SL: Not very much. Frankly, I participated in drafting releases that said we should use more plain English. I was always a little skeptical as to how successful they were going to be.

KD: Yes.

SL: At one point we hired, we the SEC, an English professor to try to provide more simplified examples, but that never really got very far either.

KD: Well, let's turn to something that I know you were greatly involved in, which is the issue of gatekeepers, lawyers and accountants, and how regulation went with them. Talk a little bit about how things had been prior to the early 1990s as far as the SEC's ability and the court's approval of the SEC's efforts to rein in.

SL: Always a sensitive question. SEC is largely a lawyer-driven organization. I'll call it the regulation of lawyers has been a little bit more sensitive than the regulation of accountants, I think. Maybe that's changed more recently with the Public Company Accounting Oversight Board. I don't really think so though. But the right role for the SEC to take has always been both important and difficult. I think the SEC has always realized the importance of so-called gatekeepers, professionals, lawyers, accountants. Sometimes petroleum engineers. Prospectus experts perhaps is a term, although lawyers try to think they're not experts. But the system really depends on the intermediaries. Businessmen are in my experience generally... And when I say generally here, I mean 90 percent trying to do the right thing, but they're trying to run a business and to raise money, et cetera. And like the ethics officer at the SEC, the lawyer sometimes needs to rein in the animal instincts of the CEO and be what the term implies, a gatekeeper. Somebody who watches the gate and says, "No, you can't go through that. You can't do what you want to do that way. And maybe there's another way you can get close to it." It's the lawyer who brings that expertise. Then the question becomes when should and when should not the SEC discipline lawyers who failed in that effort? And it's been a constant question. Ed Greene, one of my predecessors as general counsel, had written a fairly lengthy article on SEC actions against lawyers. I followed that up with a couple of speeches and articles on the same question. Wrote one article in The Business Lawyer with Hardy Callcott that got some attention. Actually, the fact that it was Ed Greene followed by Sy Lorne on it, had some people calling it the Bonanza argument, because Bonanza was a popular TV show, the star of which was Lorne Greene.

KD: I was wondering...

SL: Some people called it the Bonanza movement. But it's something that's always concerned me and maybe we'll get into it a little bit more later on, but it's always concerned me and you don't want the SEC interfering with the lawyer's proper zealous representation of a client. But you do rely on the lawyer to keep the client honest. Those two are in conflict to some degree, and it requires judgment. I've long thought the SEC shouldn't criticize or discipline a lawyer for honest mistakes of judgment but should discipline the lawyer for gross negligence in the representation of a client, for willful participation with a client. And we're not talking about the cases where the lawyer's guilty of insider trading like we had in the O'Hagan case or something. Clearly, if the lawyer's just breaking the law, the lawyer ought to go to jail. But for errors of judgment for thinking a close question, it comes down this way rather than that way. I think you should allow the lawyer a fair amount of leeway. But it's hard to figure out exactly where that line is. And it is important to the process that lawyers take the gatekeeper role seriously and recognize that there are times you have to tell the client they can't do that.

KD: Let's talk about some cases in which those concepts were worked out. I think in your article you wrote a bit about the Central Bank case.

SL: Yes, I did. Central Bank was key. It comes back to Stan Sporkin. Central Bank was the decision the Supreme Court came down with... It was not an SEC case; it was private securities litigation. The claim had been that the defendants were aiding and abetting the fraud of the principal participant, and the Supreme Court decided there was no, at least, private right of action for aiding and abetting. Stan Sporkin, all his life, a part of him was the Director of Enforcement. But when I was general counsel, he was a federal district judge. I will not forget, the afternoon the case came down, I got a phone call from Stan and the first thing he said was, "Sy, what are we going to do about this case?" And I said, "Your Honor, it's the Supreme Court. We're going to follow it." Then began a series that... In fact, I argued a couple of cases about whether the SEC had a private right of... I'm sorry. Central Bank was limited to a private right of action, and whether the SEC could prosecute aiders and abetters. A lot of people drew a parallel between the Hochfelder case in which the Supreme Court had held that Sienta was necessary for 10b-5 cases. And the subsequent Aaron case, which held the SEC also had to find scienter to find a 10b-5 violation. I thought there were significant bases to distinguish central bank from the Hochfelder/Aaron situation, that the SEC could continue to prosecute aiders and abettors. I decided to write a Business Lawyer article in the form of a Supreme Court opinion on that question, simply because I decided if you could write an apparently credible Supreme Court opinion coming down that way, then the case hadn't been decided. So I published that article in the Business Lawyer, and we had a couple of cases. One of which I argued myself.

KD: Which case was that?

SL: It's in the Ninth Circuit and I'm not remembering the name of it offhand. I do remember when I started to argue, one of the judges on the panel looked at me and said, "Well, if the general counsel is here to argue the case, the SEC must think it's quite important." I viewed that as a little bit of a victory all by itself. The case was remanded for reconsideration. But in the meantime, we'd gotten into the Private Securities Litigation Reform Act, that I'm sure we're going to talk about, and we tucked a provision into the PSLRA confirming the SEC's ability to bring aiding and abetting cases under 10b-5, so that the litigation question went away.

KD: Okay. Backing up just a bit, your office had done amicus in the Central Bank case before it was decided?

SL: Yes, I think that's right. We had an active, and the general counsel's OGC still does have an active amicus program. In fact, I would wish the SEC would do more to make available amicus briefs. You can find them on the SEC website, but it's not easy. It should be easy because they do reflect public statements of the SEC's position on things. Back to your question, the SEC has always thought that private litigation was an important adjunct to the SEC's litigation, simply because there are so many thousands of participants in the securities markets who can be guilty of fraud, and the SEC can't go after all of them, and private litigation has always been thought, and I continue to think, a valuable way of sending a message out to all of the other would-be bad guys to say, "No, you can't do those things." So in Central Bank we filed a brief in support of the petitioners saying that... I think it was the petitioners. Saying that private litigation was important, and aiders and abettors are by and large gatekeepers, and it's important to make sure they're doing their job in the operation of the system.

KD: Okay. Now, you mentioned... This is particularly interesting. After the Supreme Court ruling, you still found or maintained that the SEC could go after lawyers and accountants in certain cases, aiders and abettors.

SL: Yes.

KD: Does the SEC versus Zimmerman case come into this?

SL: I don't think it came in that much. Maybe it did. I just don't remember very well, I'm afraid.

KD: Okay. Anything else we should talk about on the gatekeepers subject?

SL: It's a continuing question, and I'm not sure it'll ever be resolved simply because the line between giving reasonable advice and participating in improper activities is so hard to define. And sometimes it's in the eye of the beholder and the SEC enforcement staff is more likely to behold bad activity perhaps than the defense bar.

KD: Something that's very relevant these days is the issue of administrative proceedings. You were in there in a very critical period for this, I guess. Is that right?

SL: Yes, and it's changed a lot in the last six or seven years. Some of which I've been somewhat responsible for on the other side. But yes, it's always been a troublesome question. When I came to the SEC, I had a daughter who was then in middle school, and I will not forget, I told her I was going back to be general counsel of the SEC, and I told her a little bit about what the SEC does, and she was taking a civics class and she said, "Well, Daddy, is that executive legislative or judicial?" And I said, "Yes." The line between what's legislative and executive and what's judicial and the proprieties of, for example, the SEC deciding to bring a case, prosecuting the case, and then having an in-house administrative law judge decide the case with appeal to the SEC, always seems troublesome. And yet it's a fairly efficient way of administering the securities laws or any other laws, take a different agency. I think an awful lot started with the Roosevelt administration and actually there've been some useful analyses. Adam Pritchard at the University of Michigan has looked closely into the evolution of the Supreme Court's view of administrative law and has a quite good book out on that topic. In the 1930s, the general movement toward administrative law was embraced as an efficient way of bringing expertise to bear. That system was in place and growing until perhaps, 2015, but I may be off by five years. But over a long period of time, the system was there and growing and the environment grew around it. And securities professionals, to deal with the SEC as an agency, understood that and worked with it, and the courts accepted it. Then in 2015 or whatever it was, we started to rethink that. Philip Hamburger at Columbia wrote a book called Is Administrative Law Unlawful? That's had some significant effect, and a number of cases have challenged different parts of the process.

KD: Let's talk about your career a bit. You ran a task force on administrative proceedingsSL: Yes.

KD: Do you remember that? What precipitated the creation of that task force?

SL: Probably my daughter's question. I was trying to, I would say, legitimize the process. We were trying to do more to insulate the administrative law judges from the criticism that they were a house organ. I think Judge Brenda Murray did a lot to establish the independence of administrative law judges, and I give her enormous credit for that. But I was trying to do everything we could within the structure, as it was then accepted, to avoid criticism that we were prosecutor, judge, and jury. We established a separate division within the Office of General Counsel that worked with the administrative law judges and didn't talk to the enforcement division and had as much independence as we could within the confines of the Securities and Exchange Commission itself. We couldn't change the statutory procedure in which administrative law judge opinions are appealable to the SEC itself and then into the courts. But I could do a fair amount to establish the independence of the administrative law judges, and they were all in favor of working with that and to have a, call it a Chinese wall, between the people in the Office of General Counsel who worked with the administrative law judges and the people in the Office of General Counsel who communicated with the enforcement division and to try to separate that and keep us intellectually honest, a degree of separation as we could, to establish the legitimacy of the process.

KD: Any other measures come out of that besides the Chinese wall?

SL: I think they were mostly aimed in that direction. I don't remember much more in the way of specific provisions.

KD: But that's a pretty important one. It has come up in the last few years.

SL: It's come up and the courts have been leaning toward saying, "We didn't do enough." Or the statutory setup was deficient. The Supreme Court in Jarkesy has moved in that direction and we'll see where it all ends. It's in some flux right now.

KD: Who were the members of this task force? Was it all SEC or did you bring in people from the outside?

SL: It was all internal.

KD: Okay. Anything else regarding the SEC adjudication program that the general counsel's office targeted or looked at in your period?

SL: Don't think so. We were also the judge's clerks, if you wanted. We performed for the ALJ services that a judicial clerk would perform for district court judge. Again, those people were insulated from the enforcement division. But if you look at it from 40,000 feet, it was the SEC on both sides of it all.

KD: Were there any ideas that came up that you would've liked to have done that you weren't able to do?

SL: Limited to the ALJ environment or...?

KD: Yes, and we can definitely talk about others too after that.

SL: Well, they're similar, but different. Two quandaries that I had when I was there that I would've liked to have been able to do something about and I'd have liked to have done something about it for the last many years since I left, both ethical concerns. One was that the process, at least then, and I think still, on enforcement action, was it would work its way through investigation with the Division of Enforcement and the Division of Enforcement would decide if it wanted to bring a case and the general counsel's office would review it. Phil Parker, one of my deputies, had been a former chief counsel in enforcement and absolutely wonderful lawyer. We would look at it and we would either agree with the recommendation or disagree. And if we disagreed, then we would have a closed hearing before the Commission in which the enforcement division would present their view and I, typically I, sometimes I delegate it, would present our office view. I remember a case in which I was subsequently talking with one of the commissioners who said to me, "You know, had that argument on such and such a case, and I thought you were probably right and we shouldn't bring the case. But the last two times you've had a disagreement with enforcement, we've come down on your side. And for the morale of the Commission, I thought I really had to let enforcement win this one." I understand that. It is important for morale. You can't have enforcement always being shut down when they want to bring a case, but there's somebody who's a defendant or respondent in that case, and you're making her life miserable for the next X years. And how you resolve that tension is not a legal ethics question, but it's an ethical question as to how justice should be administered. I couldn't see a way when I was there, and I haven't really seen anything since then. I do remember when Stan Sporkin was the Director of the Division of Enforcement, he used to pound the table, and he had a reputation as being very difficult. But he used to pound the table with the responsibilities of the office not to bring cases unless they were right. That the power of the government could overwhelm any respondent or almost any respondent, and you need to just discipline yourself. That's one way to get to the right answer. But not all division directors felt as strongly about civil liberties as Stan Sporkin did. Tough question. The other ethical question, and it gets into the ALJ process, a lot of SEC law so-called is made by settlements. In fact, there was an SEC proceeding not too long ago, I was not involved in it, in which there's a footnote in which the SEC criticizes the respondent in that case saying, "We've had a series of cases, and the respondent should have known it was wrong." And all of the cases they listed were settlements. They weren't cases the SEC had won. They were settlements. You have to recognize it is a practical matter, settlements make law. You have a series of settlements over five years, and all of a sudden they've crept into the notion of law and the Division of Enforcement certainly regards them as very close to being law, even though it's all settlements. What's the right answer? If

you've got a principle that the SEC wants to establish that's on the fringe, and you've got two possible respondents. One of whom is rich and perfectly able to defend herself and willing to go to the mat with the SEC. And one of whom is poor and will accept any settlement. The practical answer might well be you drop the case against the rich person because you might lose it in court and you bring the case against the poor person. But none of us likes that answer. But should you bring a case that is going to be fought that you might lose? And don't forget, by hypothesis you believe you've got the right answer here. What's the right way for the general counsel to advise the commission on that kind of case? What's the right thing for the Commission to do? There are some principles of ethical constraints affecting prosecutors in the criminal context, but I've not been able to persuade, and I didn't have the time myself to think that through and figure out what a comfortable answer is.

KD: But you did find yourself in that position when you were general counsel?

SL: Yes, I did.

KD: You mentioned the PSLRA. You talk about the building move towards deregulation, somewhat the sense that litigation was going too far for frivolous lawsuits, all of that.

SL: Yes, that was a concern. I can pinpoint one critical point. It would've been in January 1994, Chairman Levitt was delivering a speech at the San Diego Securities Regulation Conference, which is a widely attended conference of, I think back then it was around 1,000, people showing up in San Diego to hear three days of discussion about the securities law. I'm pretty sure Chairman Levitt and I had talked about the frivolous litigation problem and trying to rebalance the equation a little bit so that we didn't eliminate meritorious actions. But we did eliminate the drag on business and commerce, the frivolous litigation, because if you've got a class action that has potential damages in the billions of dollars, it's going to cost an awful lot to fight it. And it may be nothing other than what they call a stock drop case. Something out of the ordinary happened. In the current context, Elon Musk became a part of DOGE and Tesla's stock drops. Should Tesla have done more to disclose that, that kind of issue. And a lot of those cases weren't legitimate cases and weren't really addressing securities law concerns. So he gave a speech at that San Diego conference, teeing up the issue. And there had been a couple of law review articles. I remember one particularly by Elliott Weiss, in the Yale Law Journal, and he is now on the faculty, I think still, at the University of Arizona Law School. I'm pretty sure it was Elliott's article that initiated the idea of a representative plaintiff, so that it's not just the lawyers, but it's an actual plaintiff who was damaged making the decisions. That was one of the ideas in the PSLRA in what became the PSLRA. And that probably consumed a fair amount of energy as you'd expect. Opinions were divided within the Commission staff and Arthur Levitt could go one way and then the other. Listen to one set of arguments and say, "Yes, we should stop that." And then listen to the other and say, "Well, maybe we shouldn't stop that." It's a difficult thing to find the right balance, preserving the right of plaintiffs to bring a case, but making it harder to bring the frivolous case. We had congressional testimony. I had late night drafting sessions with the Senate Banking Committee. Their chief counsel at the time was Bob Giuffra, who is now managing partner at Sullivan and Cromwell. It was controversial and difficult. The chairman came down on the side of doing something, supporting the legislation. President Clinton vetoed it, and his veto was overwritten. One of the few veto overrides. It came into law, and I think it's had some success over the years and making it possible to dismiss the frivolous cases at an earlier stage without interfering with the meritorious cases.

KD: The decision to submit an amicus in Frank versus Cooper, was that part of this effort?

SL: Yes, it was all part and parcel of our drive. I was on the side of doing something such as the PSLRA, and although amicus briefs go through the full Commission, the brief, what I recall of it, was supportive in that regard.

KD: Remind me how that worked out. Did the court side with the PSLRA?

SL: It's funny, as you were asking, I was trying to remember, and I was drawing a blank. It's been a long time.

KD: Oh, you created a litigation analysis unit. How did that happen?

SL: I'd say not all that well. We tried to look at litigation and weigh in. We filed a few briefs at the district court level, which was unusual, in private actions. But I don't think the effort continues, and it didn't really do very much. It was taking more time than it was worth, frankly.

KD: Okay. Now, one of Chairman Levitt's signature efforts was pay to play, and you ended up getting involved in MSRB Rule G-37.

SL: Yes. Well, in fact when I came to the Commission, I'd never argued a case anywhere. As I said, I was a sit-down lawyer, not a stand-up lawyer. But when pay-to-play came up, MSRB Rule G-37, which essentially said, "If you're contributing to an election of somebody who can control the allocation of securities business, you can't contribute and do the securities business." We want to get away from the soft bribery, if you will, that was involved in that process. And when I looked around the Office of the General Counsel, the solicitor at the time was Paul Gonson. Paul Gonson was a superb lawyer who had a remarkable knack for explaining complicated securities law issues to a court in a way that didn't talk down to the court but simplified the process. I don't know how Paul did it, but he was wonderful. And under Paul at the time, Jacob Stillman. Jake, when he got a case, he dug down and knew everything about that area of the law. But if he had a case about 10b-5, he knew everything about 10b-5. If you asked him about 10b-6, he'd say, "What's that?" Because he hadn't had a case on that. He probably knew 10b-6, in fact, but you understand the point. But I looked around the office and we were challenged on the Municipal Securities Rulemaking Board rule on pay-toplay, challenged on constitutional grounds. And I was arrogant enough to think I was as able to argue a constitutional case as anybody else around. So I decided I would argue that case myself in front of the D.C. Court of Appeals. And I took a different case... When you argue a case in the D.C. Court of Appeals, the entire Office of the General Counsel comes down to watch. And as I said, I never argued a case before, although I was interested in doing it, new experience. So I argued an earlier case in the Fifth Circuit just so I could have a rehearsal out of the office where I wouldn't have everybody coming down to watch. But the case that was challenged was Blount against SEC. Harvey Pitt, subsequently a chairman, argued the case for the Municipal Securities Rulemaking Board, and I argued it for the SEC. I distinctly remember one argument that I didn't make, which was that the court should use what was then known as Chevron deference, since eliminated by the Loper Bright case. The court should defer to us because the SEC was in the business of regulating speech. But I thought that might not appeal to the court. I went into the argument saying that I was going to use the word bribery as often as I could. And I got one question from the court, I don't remember which panel member it was. One question from the court saying, "How's this different from deciding to go out and play golf with somebody from the group that awards business?" For a minute, I thought about saying, "Well, now you're talking about something serious." But I decided that wouldn't appeal either. So I said that was potentially trivial and not worth the effort, but actual cash contributions amounted to bribery. "That's bribery, your Honor." And, of course, we won the case on constitutional grounds, and that gets cited quite regularly.

KD: Is that a Supreme Court case you're referring to?

SL: That was D.C. Circuit.

KD: D.C. Circuit, yes. The Blount case.

SL: I never argued a case in the Supreme Court. It used to be true that general counsels were given that opportunity, and I had the opportunity in Gustafson, which was a Supreme Court case. But I thought we were probably on the wrong side of it so I shouldn't argue it. We lost in the Supreme Court. It wasn't a very good opinion, I think, by Justice Kennedy. It wasn't a very good opinion in terms of coming to grips with the issues in front of the court, but the SEC lost in any event.

KD: You mentioned Paul Gonson, Jake Stillman, and I think you mentioned Phil Parker back there. Talk about some of the other people that you relied on and maybe some of the folks that gave continuity to the Office of the General Counsel.

SL: Those three were the key people. Eric Summergrad, of course, was there and an important person. Rich Levine was important in the office. It was a good group. It still is. The Office of General Counsel, I think has drawn the best and the brightest people. I don't mean to insult the other divisions, but I thought the Office of General Counsel was the cream of the crop. I thought we really had a good solid group. Bright people, hardworking people. It wasn't unusual to see people staying there until 10:00 or 11:00 at night working on a brief. Dedicated people. I thought the country was lucky to have people like that working for them.

KD: Did the office grow considerably under your leadership?

SL: Not very much. It stayed about the same size, probably about 150, something like that, during my time.

KD: Okay. You'd mentioned an attempted reorganization. Tell me what drove that? What were the circumstances? How did that work out?

SL: My naivete, and it worked out terribly. I thought one of the things that sometimes comes up, and it came up at the SEC, was a multiplicity of titles. So that you had Deputy General Counsels, Associate General Counsels, Assistant General Counsels, deputy assistant... deputy associate... deputy assistant associate. You can make up a title to go as far as you want. I think if you sketched out what we had, we had something like 8 or 10 layers of hierarchy. And coming from a law firm that had a very flat organizational pattern, I thought we should simplify, eliminate, and be more like Department of Justice, which doesn't have very many layers of hierarchy. Hierarchy begets bureaucracy and begets more reporting forms, et cetera. I thought that was a more efficient way to work and that we should try to get into that position. So I put out a memo that said, "We're going to eliminate all these titles." Unfortunately, it created quite an uproar. It turned out that in the government where circumstances are such that people are being paid a lot less than they could get in private practice, they attached a fair amount of emotional importance to titles. And I had a storm of protest, and after weathering the storm for about two or three weeks, I said, "Okay, I give up. We're not doing that after all." It was a tough thing to do and I couldn't get there.

KD: Yes. Would the union have been involved in this too?

SL: That was before we had a union at the SEC.

KD: Okay.

SL: I'm sure the union would've been if it had existed then. Yes.

KD: You were there, what, two, three years?

SL: Yes, I came in October 1992 and left in 1995.

KD: Any other highlights? Things that you did, decisions you made that were important in that time that we haven't discussed.

SL: I'm sure there were.1 None come specifically to mind at the moment. I spent some time thinking about ahead before we started this. I think you've covered pretty much all the important groundwork.

In June 1995 the Fourth Circuit decided, US v. ReBrook and US v. Bryan, essentially deciding there was no 10b-5 criminal case for insider trading (at least under the circumstances of that case). It was a peculiar case involving a state employee trading on information about the award of a state lottery contract. I argued (internally and with the Department of Justice against seeking certiorari. One of the privileges the

government has is that it is a constant litigant and, therefore, can decide what cases to appeal. It is said that hard cases make bad law, and the government can take advantage of that, only appealing cases in which the facts are such that its position is likely to be attractive to the judges. I thought ReBrook was not such a case. I lost the argument, but—fortunately—the Supreme Court denied certiorari anyway. The next year, the 4th Circuit decided US v. O'Hagan in a manner consistent with ReBrook, a case involving a lawyer who traded on inside information involving one of his law firm's clients. No way the Supreme Court was going to allow that to happen. Certiorari granted, Fourth Circuit reversed, Insider trading lives on! A, enforcement lawyer subsequently contacted me just to let me know he saw I was right and appreciated the arguments I had made. In May 1995 (or so) the SEC was down to 3 Commissioners—Arthur Levitt, Rick Roberts and Steve Wallman. I began to worry what a "quorum" of the Commission was, and whether it could operate with only 2 Commissioners. We did some research, and thought the better answer was that a "rule of necessity" would permit the Commission to operate, but it wasn't 100 percent, so we adopted a rule saying that if there were only 3 Commissioners, 3 was a quorum, if there were only 2, 2 was a quorum and if there were only 1, then 1 was a quorum.

KD: What about the decision to move on?

SL: It was time. I'd been there for two and a half years, three years. Turns out that that's longer than the average general counsel, with a couple of exceptions—Dan Goelzer. Dan was there for 10 years or something. But it was time. I once heard the general counsel of another agency, both, he and the agency will stay unnamed, they had a retirement luncheon forum, as people do. And at his luncheon, which was mostly people in his agency, he said, "You can tell when it's time to retire from these positions because your bank account will tell you." I thought that was kind of insulting to the other people in the agency who were long-term and going on and getting paid a lot less than they could have in the private sector and resolve never to say anything like that. But there comes a time when you think you've done what you can. And I talked to the Chairman about it and we decided it was time.

KD: What was the next step?

SL: The next step was going back to Salomon Brothers. I mentioned earlier I had been the acting general counsel of Salomon Brothers and the general counsel I had brought in, actually, an old friend of mine, Bob Mundheim, former dean of the University of Pennsylvania Law School. Bob was general counsel then of Salomon Brothers, and he suggested that I come in to run the internal audit department because he said," Running internal audit, you're going to see the entirety of Salomon Brothers." Which was then a major investment bank on a par with Goldman Sachs. "And without making any promises, you'd be in a position to come into my position." He said, "as general counsel." I didn't know much about internal audit. But I learned a lot and had a wonderful experience, so that subsequently when I was Chief Legal Officer at Millennium Management, I instituted an internal audit function then because internal audit is an extraordinarily useful and underappreciated role. And I never would've thought of that, particularly if I hadn't been running internal audit at Salomon Brothers. I had that experience. Meanwhile, Salomon merged first into Travelers with Sandy Weill. I'll go back to CBWL, Cogan, Berlind, Weill & Levitt. Citigroup was the Weill and Arthur Levitt was the Levitt. We moved into Travelers and then Travelers merged into Citibank to form today's Citigroup and Travelers insurance subsequently spun out of that. But that wasn't my kind of organization, and I went back to the law firm for what turned out to be five years to the day before I went to Millennium Management as chief legal officer.

KD: Millennium is a hedge fund, is that correct?

SL: It is. It's a hedge fund based in New York, today $75 billion under management. One of the largest hedge funds.

KD: What were some of the new challenges that came your way at Millennium? Then Rick Roberts resigned, and for the next several months we had only 2 Commissioners. The SEC proceeded under the new rule and, sure enough, it was challenged in an enforcement case, the defendant asserting that there had not been a quorum, so the charges were invalid. The District of Columbia Circuit Court upheld the

rule. I understand other agencies, not having such a rule, have been stymied when the Commissioners (or equivalent) in place were less than a majority of the authorized number.

SL: Organizing a department, organizing compliance. When I came there, our total legal and compliance group... We were smaller then, but the total legal compliance group was, I think, seven or eight people. And when I left, the legal compliance group was about 150, and it was compliance, internal audit, and legal. Compliance was a critical part of that. And now I'm teaching a course in compliance because most of the people doing compliance are lawyers, but not very many law schools tell you anything about how to handle a compliance function, and I'm enjoying it immensely.

KD: Terrific. Anything else about Millennium or your career that we should touch on?

SL: Boy, I think we've covered a lot in the time allotted and I appreciate your questioning. I wasn't sure what to expect, but I think you've really done a good job. Thank you.

KD: Oh, thanks. Well, you had lots to say. I really appreciate you filling me in on the Office of the General Counsel, both from a participant's perspective, but also from a legal scholar's perspective. It was a lot of fun.

SL: Office of the General Counsel is a lot of fun. Probably the best job I've ever had.

KD: Terrific. Thank you.

SL: Thank you very much.