



Megan Barbero Oral History Interviewed by Dr. Kenneth Durr, October 1, 2025

KD: This is an interview with Megan Barbero for the SEC Historical Society's Virtual Museum and Archive on the History of Financial Regulation. Today is October 1st, 2025, and I'm Kenneth Durr. Megan, thanks. Good to see you.

MB: It's great to see you. Thank you, Kenneth.

KD: I'd like to go back and touch on the early years a little bit. Talk about your education, how you became interested in law.

MB: Sure, I'd be happy to do that. I became interested in law at an early age. When I was in high school, I—among other activities—was on the mock trial team at my high school and the debate team. And I really just loved the analytical aspect of debate and the trial presentation, and so I thought this would be a good career for me. I come from a family with no lawyers, and I thought it would be helpful to have a lawyer in the family, so that played a role as well.

KD: Any influential professors either at Harvard or at Stanford?

MB: Yes, I had many influential professors and people who took time to get to know me as a student. Certainly at Stanford, among other professors, I had Michelle Friedland for several classes. Michelle's now a judge on the Ninth Circuit, but at the time she was doing her rectorship at Stanford, following her clerkship with Justice O'Connor, and she was just terrific as a professor. I also had Kathleen Sullivan who was the dean of the law school at the time for constitutional law, and Janet Alexander, who supervised my independent study at Stanford. And among other professors with my undergrad at Harvard, I had Professor Posner, who was very energized and energizing. I had him for a small seminar. And I remember he had us over at his house. There were debates, it was really a lively discussion. And I still think about the idea of America not having bowling alleys anymore. They were the central fabric for people in the community to come together and build those relationships and sort of what is our modern bowling alley?

KD: Yes. Let's hope it's not online. Talk about how you got to Judge Rymer for your clerkship.

MB: Sure. When I applied for clerkships, it was at the time when judges had agreed that there would be a very circumscribed process, so you had a limited amount of time to apply, to get an interview, to accept a job. And I was fortunate to have a number of offers from some really remarkable judges, but I just clicked with Judge Rymer on a personal level and I felt like she would be a really excellent mentor to me early in my career. I liked her writing style, I liked her approach to judging, her judicial philosophy. She was fair and open-minded and very diligent in approaching the law and the facts. And it was a terrific year. I was very happy to have clerked.

KD: Did you go to WilmerHale after that?

MB: I did. So my husband had been applying for graduate school programs and he went to MIT to do his PhD, so we ended up in Boston and it was a happy accident of geography and mergers. The Wilmer Cutler Pickering had merged with Hale and Dorr, and so there was now a firm in Boston that had an established supreme court and appellate practice, and it was just a great practice fit and culture fit for me.

KD: Tell me about that practice. It sounds like you knew you wanted to get into appellate work.

MB: I did. And I had a conversation with Judge Rymer at the end of my clerkship, and she gave me some career advice, which I always try to pass on, and that was to figure out what I wanted to do and then to politely ask to do it. And so I took that to heart. And when I got to Wilmer, I started actually working on

some federal circuit appeals right from the get-go, but I also did a significant amount of trial work, which I highly recommend for any appellate attorney. It's a very good experience to have. But I transitioned more and more into the appellate space as I stayed at the firm and I had an opportunity to work with some of the country's best appellate practitioners, including Seth Waxman, Paul Wolfson, Mark Fleming. I just learned so much from them in terms of persuasive writing and appellate presentation, and how to think through issues, and really how to find my own voice in my writing, too. So it was all around a great experience for me at the firm.

KD: Did you prepare some Supreme Court briefs?

MB: I did. I prepared quite a few. Had a chance to sit at counsel's table in the Supreme Court. There's nothing quite like a Supreme Court merits brief in the sense that you are really turning over every stone, exploring every possible argument. You want to know more about the case than anyone else. And so putting together a brief in the Supreme Court on the merits is a significant undertaking. It's also quite a remarkable experience to have... All of these questions that the Supreme Court takes, they're taking because they're undecided, there's a conflict of law in the courts of appeals, they're important questions on which reasonable minds can and have differed. And so you're doing a lot more first principles thinking about the law than what you do in a court of appeals brief or certainly in a district court brief. And that's something I really appreciated, especially as a more junior associate at the firm, to have an opportunity to work on those really challenging cases and issues.

KD: Was there a particular case that stood out, that was sort of formative or just plain exciting?

MB: Yes, there were several. I think, without getting into the details of the cases, there was one case where I remember we gave a draft of the brief to Seth, who reviewed the draft. And his feedback was, "You've done the right thing in terms of addressing the legal arguments in the case, but unless the Supreme Court is persuaded that our client is innocent, then it's not going to matter a whole lot." And so it was moments like that where you just realized the perspective that someone like Seth has, given all the arguments he's done and being able to look at a brief and say, "It's right, but it's not right. And here's the way to fix it." And there were a lot of moments like that, that just really helped inform my judgment as a lawyer and how I think about and approach cases.

KD: Terrific. Why did you decide to go into government? It's a big step to switch to the other side of the aisle.

MB: Yes. So I've been interested in public service for a long time. I ended up staying at the firm longer than I thought I would because I enjoy the work so much. But I got to a point where I had two small kids, I had another one on the way. I was looking for a change, but also wanted to maintain a significant practice. And so I reached out actually to Seth. And this is another piece of advice I like to give more junior attorneys, is you often feel like, and I certainly did, that it was burdensome to reach out to your mentors and ask them for advice, and you're taking up their time and these are really busy people. But every experience I've had where I've actually done that, the reception has been so gracious, and this was no exception. I reached out to Seth him and he said, "Let's go out to lunch." And we sat down and talked about various options, especially appellate options in the government. And I'd been familiar with the civil appellate staff at DOJ but hadn't really focused on that as a potential place to work. And Seth, he's very persuasive, and he told me, "It's going to be a great fit. You'll love the work. The people are wonderful." When he had been solicitor general, he'd worked very closely with the appellate staff. And he was absolutely right. I ended up going over to DOJ, to the civil appellate staff, and it was just an incredible opportunity and really a special place to work in the government.

KD: Describe the appellate section at DOJ a little bit. How big was it? How was the work divided up? And where did you fit in?

MB: So the civil appellate staff, and this just to clarify, there's a criminal appellate staff in main justice, there's also a civil appellate staff. I was on the civil side. And a lot of the work in the appellate courts

around the country is handled in the US Attorney's offices, but when there are cases that have nationwide significance or there are novel questions of statutory or constitutional law, those are often pulled up by main justice and handled by the lawyers on the appellate staff at justice. And so you end up with a whole range of really interesting cases where you are representing the United States in some cases, and then really agencies around the whole range of legal issues. Just to give you a handful of examples, I worked on cases relating to questions of extraterritorial application of the copyright law, to the right statutory interpretation for FDA civil money penalties for tobacco sales to minors, appeals involving the discretionary function exception to the Federal Tort Claims Act, the interpretation of the False Claims Act and the United States interest in that. And then there's also a significant amount and probably increasing in more recent years of counseling on Administrative Procedure Act issues and litigation risk and application of Supreme Court decisions. So you're working with the general counsels' offices in many agencies. Most agencies don't have independent litigating authority, so they are looking to justice to defend them, or in cases where they're bringing affirmative litigation, to represent them. And the SEC, as you know, does have independent litigating authority, but they were actually one of my clients for many years when I was at justice, because there's a close-working relationship between the independent agencies and the justice. And especially in cases that raise constitutional challenges that have implications for lots of agencies, those cases or those parts of the cases will be handled by DOJ and not by the lawyers in the particular agency that's affected in that case. So I represented the SEC in challenges to the administrative law judge proceedings in front of the agency, which culminated in the Supreme Court's decisions in *Cochrane* and *Axon*, on the question whether respondents could go to district court to challenge an SEC adjudication while it was ongoing. And then also in *Lucia*, which was the case that decided that the ALJs, the administrative law judges, were inferior officers who needed to be appointed by the agency head. So that was my first really close working relationship with the staff in the Office of General Counsel at the SEC. And I remember going over there for moot courts. And we had Annie Small who was the general counsel at the time. I had worked with Annie at Wilmer. And Annie and some of the staff came over for some of our moot courts at DOJ. So it was a prelude to my later role at the agency.

KD: Were you familiar with securities law enough to jump into these cases or was this a matter of getting up to speed and learning something completely new?

MB: I had handled some securities enforcement defense when I was at Wilmer, both representing clients in agency investigations and also in appellate matters on appeal from securities fraud conviction and then a related SEC case. And so I have familiarity from the defense side. And then, as with all of the cases I mentioned before, one of the jobs of an attorney in the appellate section at DOJ is to be able to get up to speed very quickly on new statutory schemes. And certainly was doing that as I learned the ins and outs of the Exchange Act and the Securities Act as they related to both the claims that the agency was bringing and also how the administrative proceedings functioned within the agency.

KD: Let's talk about *Lucia* a little bit, because it's pretty important. This is maybe not the leading edge, but it seems like it's an early case in sort of challenging the constitutionality of administrative law judges.

MB: Yes. And it's an interesting case too because we had—initially the way the challenges came up is that we had respondents in SEC ALJ proceedings who went to district court to challenge the fact that the ALJ was appointed under the civil service regulations and not by the head of the agency. Arguing that under the appointments clause they were exercising significant authority on behalf of the United States and had to be appointed as inferior officers by the political head of the agency. And we ended up, I think at the time we had swept all the circuits where the challenge had come up. There's a case called *Thunder Basin*, which we don't need to get into, but the question there is whether you have to be... your claims should be channeled through the agency administrative proceeding and then you can raise them on appeal at the end of that proceeding, or whether you can jump out of the statutory scheme that Congress set up, go to district court and bring a challenge. At the time, all the courts of appeals had said that respondents had to go through their administrative proceedings first. So we got those claims channeled. That changed with *Axon* and *Cochran*, and the Supreme Court ultimately decided that no, at least for structural

constitutional claims, you could go to district court immediately. But that was the first set of cases that we argued.

KD: Axon and Cochran, the Supreme Court decided that in 2023, right?

MB: These cases were coming, I want to say it was maybe 2015, when I was first arguing with these channeling cases. And so this has been a long-running saga. And the underlying constitutional challenges in those cases, some respondents raised the removal challenge, but the real issue at the time was this appointments clause question. And it did end up coming up, *Lucia* is the case that everyone knows because that's the one that went to the Supreme Court, but we had a whole set of these cases raising appointments clause challenges. Under the Obama administration, we had defended the ALJs on the theory that they were employees. They were employees as distinct from inferior officers, and the theory was they were not issuing the final decision of the agency. They were taking testimony, developing a record, issuing an initial decision, but really the commission retained all of the power in the administrative proceedings. That was the position we had maintained throughout, including in the D.C. Circuit. And then when it went up at the cert stage, there was another case coming out of the Tenth Circuit at the same time. It was right around the time that the administration was changing. So the Trump administration was coming into power, Obama was leaving office, and essentially there was a long pause in the cases while the new administration sorted out the position they would take and then decided in the Supreme Court to argue that the administrative law judges were inferior officers. So the government actually won in the sense that they convinced the Supreme Court that the ALJs were inferior officers. The ALJs that needed to be appointed consistent with the appointments clause. A new process was put in place to allow for that. And that solved the appointment issue. And the theory here is that it's a political accountability theory. So the idea is the President is appointing the heads of the agencies with senate confirmation. He is then accountable and able to hold those agency heads to account for exercising authority on his behalf under Article 2. And the ALJs should also be appointed consistent with that process. And so the appointment was fixed, but of course that left the big question of if they are inferior officers, which we now know they are, do they then have too much removal protection, because there are multiple layers of removal protection for the administrative law judges? All of these cases have made a sea change in how the agency approached its enforcement authority. Because before *Lucia*, the agency could make a decision under the statute whether to go to district court or go to an administrative proceeding. It had a choice and was exercising its enforcement discretion consistent with a statutory scheme. And then there was really a constitutional cloud kind of hanging over those administrative proceedings, where if you went to an administrative proceeding, you didn't know would the proceeding be on hold for years while these constitutional challenges played out in district court. So it changed the enforcement tools that were available.

KD: Yes. You spent a lot of time under this constitutional cloud, and we'll get back to that. Let's move on to the House. I want to make sure to touch on that before we get back to securities law.

MB: Sure. So I left DOJ in early 2019 to go work at the House of Representatives, where I was the Deputy General Counsel. Doug Letter was the general counsel of the House at the time. He had been the previous director of the civil appellate staff at DOJ. And Doug had been at DOJ on the civil appellate staff for the most part, for something on the order of 40 years before he left. And Speaker Pelosi appointed him to be the general counsel of the House. So that is how I ended up going over to the House at that time.

KD: Okay. How was the work different?

MB: It's a very different environment to go, I think anywhere in Congress, but especially the House of Representatives, where each member has his or her constituents, you have the committees, each of which has its own jurisdiction. The committee chairs are a lot of different organizational layers within the House, a lot of different interests at the House. And in the general counsel's office, you are advising the members, you're advising the committees, you're advising leadership, and you're also doing some of that on a bipartisan basis. So you may have Republicans who were in the minority at the time asking for advice. You have the Democrats who are running the committees asking for advice. And so it was a

challenging environment in that respect. But part of why I went over is that the speaker was anticipating that there could well be litigation against the administration because the House had significant oversight authority under the constitution. But there was also an understanding that there would be resistance from the executive branch in turning over documents, witnesses for testimony through information. And historically, the branches had almost always been able to resolve those types of disputes using their political tools, but it was not clear that that was going to work at that moment in time. So we were anticipating there would be some significant investigations and potentially litigation to test the House's authority. And that's what helped.

KD: Okay. So it wasn't just by chance that you got involved in all of this, you were coming in to deal with these questions that were coming up?

MB: Yes. Maybe as I'm speaking now, I'm realizing I may have a pattern and practice of following hard legal issues. So I anticipated that there would be some really interesting legal questions. And it's different from the DOJ role in the sense that there's a lot more advice and counseling in the House role, because you're really trying to avoid litigation. The ideal would be the committees have an investigation, they need information, they are able to put together a subpoena that we expect would be complied with, and they get the information and they're able to issue the report, draft legislation, et cetera. It's only when that doesn't happen that you're looking at litigation as a potential option.

KD: Were you primarily working for the committees in this?

MB: So we did represent a number of the committees in the litigation and we did a lot of counseling with the committees. There is also a leadership structure in the House. And so Doug in particular, who was the general counsel at the time, would meet with House leadership. There's the overarching priorities that the House has and the leadership in the House has, and then each of the committees, of course, has their part to play in that overall strategy.

KD: Okay. So it looks like, for you at least, a lot of this came to a head with the McGahn tax returns case. Is that right?

MB: Yes. So there are a few different kind of marquee cases I would say that we litigated on these questions. The fundamental question was could the House take advantage of Article 3 courts to enforce its constitutional powers vis-a-vis the executive branch? And the McGahn case was one of those. The Judiciary Committee had subpoenaed Don McGahn, seeking documents and testimony. And he claimed absolute immunity from testifying before Congress. And we then sued on behalf of the Judiciary Committee for McGahn's testimony. An initial panel in the D.C. Circuit found that he did not have... or we did not have a cause of action to sue, but then the en banc court reversed that decision and affirmed to the subpoena power and, at least on that question, the authority to sue. That case ended up resulting in a negotiated resolution after the Biden administration came in. But similar constitutional questions and questions about access to the courts were at play in the tax returns case and also the cases where we had sought financial documents, such as the Deutsche Bank and Mazars cases. We also handled significant other litigation and amicus participation in cases involving the appropriations clause, the spending on the southern border wall, whether that could be done without the assent of Congress. And so there were lots of interesting issues. And then, of course, there were issues around once the investigations transitioned from legislative oversight investigations to impeachment investigations, there were additional questions around the impeachment power and what that meant. So there were no end of interesting legal issues at the time for the House.

KD: You dealt with a lot of interesting legal issues. What else did you learn during this process? I would think that it would be pretty formative as far as shaping your perspective on the law and what's important.

MB: Yes. I will say it's very helpful to have had a broad range of experiences, because it does inform my judgment anytime I'm getting a question. This was the case certainly before, but definitely when, I was working at the House and talking with committee staff. You're trying to figure out these are your clients.

Even when you're in the government, you have clients, although sometimes they can't fire you, so it's a little bit of a different relationship. But what are they trying to accomplish and how can I as their lawyer help them accomplish that? And you start to appreciate that there are lots of tools that you have at your disposal to help reach a resolution that is advantageous for the client. And sometimes that's a negotiated solution. Sometimes it's a litigation. It also, actually having worked in all three branches of the government, you do start to appreciate how politics influences the development of the law. I talked a little bit before about the solicitor general's office changing position in the *Lucia* case. We've seen many examples of that over the years, but also how political pressures, when there's not an available political resolution, can look to the legal system and the court system for resolution, because you've got two sides with very different views of what the law requires and what the right outcome is. And how do you present that to an Article 3 judge in a persuasive way, again, to achieve an advantageous resolution for your client. So there's a lot of that. And I would say it is all, the House of Representatives is really the representative branch of our government. I mean, you have the members from all over the country coming, many of them for the first time, to Congress, to Washington, D.C., and trying to help them navigate the process of governing too, especially when you're on a two-year clock, which the House always is. It's a real challenge. I mean, every daytime is of the essence. And there's also the issue that the litigation clock doesn't marry very well with that kind of political clock, because just litigating cases takes a long time.

KD: Right. Some of these big efforts that you worked on, generally upholding the constitutionality of congressional oversight, are well-known. Talk about some of the other things that you did. For example, without names, what were sort of the typical things that members might come to you to talk about?

MB: Setting aside the strategic litigation, members rely on the House Office of General Counsel for essentially a full range of legal services. So you have everything from members who have questions about how the First Amendment applies in a town hall meeting with protesters, and what the constitution requires, what their security detail can do to help control a town hall meeting. You get questions like that. You get some questions that come through constituents who are looking for help with various agency requests or information they need from agencies that are channeled through. You have members who have an interest in filing an amicus brief, so you get questions about that as well. You may get questions, or have cases, where constituents will sometimes sue their members. Some of these cases are pro se, some of them are frivolous, but you still have members who have to defend those kinds of cases. And then you have members who have questions and would like the Office of General Counsel to weigh in on an issue that has come up before the committee where there may be a legal question, a procedural question, and they would like an opinion on that. The office signs off on all of the subpoenas that go out, so you're reviewing those and negotiating—negotiating may be the wrong word—but going back and forth with committee staff on the scope there. So it really is a whole range of issues. And then another challenge is you don't know what is going to come in the door, because a lot of the members will go on morning talk shows and something will come up, and it's totally unexpected. And then there's a question and you're sort of having to think on your feet a little bit when those types of issues arise.

KD: Okay. Well, we've gotten you through two branches of the federal government. Let's get you into the next one. You came to the commission in the summer of 2021. What brought you there?

MB: I think it's back to this theme of following the interesting legal issues. A friend of mine who had worked on the transition team on the financial regulatory agencies had met Gary Gensler during the transition. She knew that the agency was interested in finding a senior lawyer who had a background in Administrative Procedure Act issues and agency action and authority, and also a litigation background. And so she introduced me to Gary and said, "I think it would be advantageous if you all connected." Which we did. And once I started to have a sense of what both the regulatory and enforcement agendas were likely to look like for the agency, I pretty quickly realized that I could add some value in terms of counseling on legal risk and APA issues, and helping to navigate what I anticipated the agency would face in terms of the public comment potential lawsuits. And so it seemed like it would be a good fit for me professionally. And then of course, having worked with many of the lawyers in the Office of General

Counsel while I was at DOJ, I knew it was just filled with the world's experts in securities laws who were also just lovely people and colleagues. And so that gave me a lot of comfort going into the job that I would both have support and also I would really enjoy working with the folks in the office.

KD: Well, let's talk a little more about your colleagues. Describe the Office of the General Counsel when you came in. How was it structured? What surprised you about the office or what did you find particularly interesting?

MB: When I first came in John Coates was the general counsel. He was in that role for I think a few months, and then he went back to Harvard and Dan Berkovitz stepped in as the general counsel. And when I started, the agency was very much in a transitional period. So Chair Gensler had started and was starting to roll out his policy priorities. John was new to that job. And in terms of things that surprised me, although I've been involved in some rulemaking issues and defense, I didn't fully appreciate how critical a role the Office of General Counsel played in the entire development process of a rule, really from the very first concept phase all the way through the finalization of the rule. And it wasn't necessarily a surprise; it was just not something that I had fully appreciated in terms of the resources that were dedicated to that piece of the agency's work. And I also, I didn't realize I'd worked with some of the lawyers in the office, but I didn't realize how big the office was. It's about 160 people. It's down a little bit now in terms of numbers. And it really covers the full gamut of the agency's work. So you have attorneys in the office who specialize in the rulemakings from each of the major divisions, Corp Fin, IM, TM, and also do a host of work with the smaller offices in the agency. You've got a whole group of attorneys who work on all of the enforcement matters, so advising on every enforcement memo that's going up to the commission for consideration, in terms of the legal theories, the damages that are being sought, litigation risks. And they're doing that really important work, which is a heavy docket, too. And then you have the folks who are the adjudicatory attorneys who are drafting opinions for the commission and adjudications. And as we discussed before, because fewer cases are going to the ALJs, what that really means is more cases are coming up to the commission, and so that's a heavy caseload as well. And then you've got the appellate staff, which was about 30 lawyers who are defending all of the commission rulemakings and handling all of the appeals from the enforcement actions. And you've got a general law group within the office that handles the range of work that you think of a general counsel's office doing, labor and employment. They deal with a lot of advising on—well they're very busy now, I'm sure as we're talking at this moment. We're in the first day of a government shutdown, which is exactly the type of work that that office handles in terms of Antideficiency Act questions and exempting employees, and those types of issues. We had IP attorneys who worked on issues, you wouldn't even necessarily think that the agency handles, that they do. And then while I was there, we stood up a group that handled oversight and investigations, and we hired some really key attorneys both to help respond to congressional oversight requests, because we didn't have anybody dedicated to that function before, and then also to help with some high-profile internal investigations that the agency was conducting, including there's a case where it's public that OGC stepped in to help when a district court issued an order to show cause as to whether the commission should be sanctioned, and we stepped in that case. So there are just a whole host of functions within the office.

KD: You've given me a good overview and I want to run through all those. Now I am particularly interested in this oversight and investigations function. Was this a group? Was it informal? Was it a formal office? How did that work?

MB: We created it as a formal group. They had an associate general counsel who reported up to a deputy general counsel. It was a relatively small group as far as group size goes within the office. But it was formalized as a function within the office, and they largely stayed very busy.

KD: Was this when you were deputy or was it after that?

MB: I believe that I was a deputy at the time, yes.

KD: Let's talk about the responsibilities of the, I think, principal deputy was your official title.

MB: Right. And that's really, that description is really borrowed from a DOJ model, where the principal deputy is... And it's not a role that the SEC Office of General Counsel has had before, but it signifies a deputy who's a non-career political appointee rather than a career deputy. And so that's a person who generally works very closely with the head of the office. You can think like principal deputy solicitor general and the solicitor general's office at DOJ. The various offices there will have principal deputies. And so I came in the principal deputy role... Or actually, I may have come in as a deputy and then we added principal later. I don't remember the exact sequence. But the idea was to come in and help on the rulemaking side. I sat over the associate for the Corp Fin rulemakings, Bryant Morris, who has been in the office for a very long time, is very well regarded by everybody in OGC and across the commission. And so I sat there, but also worked very closely with Meredith Mitchell, who was the deputy supervising the IM and TM rulemakings. The idea generally was to be able to provide advice throughout the rulemaking process, with an eye toward the key issues that could come up in a litigation, statutory authority, APA issues. The economic analysis was always a question, making sure that was up to snuff. And so that was really my role when I started in the office.

KD: Okay. Rulemaking in particular.

MB: Yes.

KD: One of the big ones, I think during that period, was the clawback rule, 10D-1.

MB: Yes.

KD: Was that one controversial? Did you realize you had to build an ironclad rule? How did that work?

MB: I think that with every rule, you had different opinions about how controversial they would be within the building and different views within the building about how likely it would be that we would be sued on the rule. I think one of the questions that came up in the clawbacks rulemaking process were the so-called “little r” restatements, and that was where—I think this was new, actually new terminology for the commission. The “big R” Restatements were when you were correcting a material error from a previously issued statement, and then the “little r” restatements were now looking back to past years for material misstatement. That's just one example, but it's a question of, okay, we're talking about something new, we're changing things around. How is the public going to respond to this? If we get sued, what would the courts think? This is one of the benefits of doing notice and comment rulemaking: you have all of these discussions internally at the commission, but then you have the benefit of putting out a proposal for notice and comment, getting feedback, which really gives the agency a much better sense of who is affected, what are the main concerns, what are the potential challenges, what are the burdens involved in this rulemaking? And so being able to internalize those and come back with a final that addresses those questions is really important. When I started it was mostly proposals that we were putting out. But I mean, we had proxy voting advice rules, form PF amendments, the proposed ESG disclosures for investment advisors and investment companies, the private fund advisors. Well, it's a substantial list of rulemaking, so we're kind of in the nascent stages at that time when I came in. So there was certainly plenty to do. And we may talk about it later in more detail, but we also had, when Allison Lee had been the acting chair, she had put out for public comment and questions around the climate risk disclosure rule. And so we were receiving feedback from that and contemplating a climate risk disclosure rule and what that would look like. That was a long rulemaking step.

KD: Yes. And so these started when you're a deputy and they came back to you when you were general counsel.

MB: That is true. Or they never left.

KD: Yes. Let's talk about that transition. Dan Berkovitz undoubtedly had his way of running things. When you came in, what did you see that you wanted to change or what did you see that you thought was good and you wanted him to do more of?

MB: Yes. So I'd had the benefit of seeing both John Coates in the role of general counsel and then Dan in the role, and also Michael Conley, who I think was acting in between. And one of the concerns for the office at the time is that there had been so much transition and it was such a busy time for the office. One of the things I wanted to do when I came into the role was to make the transition as seamless as possible for the staff, because they were in the middle. We just talked about all of the rulemakings, there were also lots of enforcement actions, appellate cases. I wanted staff to be able to continue to do the important work that they were doing, and so that was really important to me stepping into the role. And I think having been there while Dan was the GC allowed me to step into the role without making any big changes right out of the gate, keep everything running smoothly. I think Dan and I have different management styles or maybe different... We certainly have different backgrounds; we have different things we focus on. So all of that people already knew from having worked with both of us. But once I stepped into the role, I realized pretty quickly that one of the things we really needed in the office was a managing executive. Many of the other offices and divisions that are the same size as OGC had had a managing executives office for a long time. We had a business office within the office, but it wasn't the same function as having a managing executive. So we did post for that job, managed to hire Charlene Arietta Gould, who came in and was terrific. And that was a real help, especially as we were transitioning from being fully remote to being back in the office and then dealing with some of the different changes in the footprint of the building and different work arrangements. So that was an important administrative management change in the office. But I think also I just have a tendency to ask lots of questions and want to get to the bottom of legal issues. And so in a lot of the deputies' meetings that we would have on a weekly basis, I would try to zero in on, I'm going to be asked to give advice on this, let me make sure I understand it. And kind of going back and forth with the deputies who know the substance inside and out to make sure I understood it and could advise the chair and commissioners on the issues.

KD: Okay. And this could be any number of things.

MB: Yes. So I would meet almost every day with the chair on a range of issues but would also meet bi-weekly with each of the commissioners and I would meet with my counterparts who were running the various divisions on a regular basis. And so I tried to be up to speed on the major issues and the legal implications for everybody around the building.

KD: Yes. You've mentioned meeting with the chairman. I've done a lot of research on the OGC over the years. People have said how the OGC functions depends on whether the general counsel is good friends with the chairman, or whether he or she is not. Was there sort of tension between your working with the chairman and you're working with the committee members?

MB: You mean the commissioners versus the chairman?

KD: Yes, I'm sorry, the commissioners.

MB: Yes. No, it took me a while to transition from committees to commission, when I switched from the House to the SEC. I tried very hard to have a really strong working relationship with all of the commissioners. I wanted them to get my best legal judgment on whatever the issues were that they were bringing to me, and to be able to trust that I was providing them with my best legal judgment. And they understood the chair under Reorg Plan 10 directs the agenda for the commission. He decides what policies are moving forward and on what timeframe. They're very sophisticated folks, and so they understand all of that. But when it comes down to questions about what is the litigation risk? What is the authority? Why are we making this argument? What is this adjudicatory opinion based on? Those issues which are legal issues, all of the commissioners deserve good counsel from the general counsel on those issues. And I strived to do that while I was in the office and would like to think I largely accomplished that goal. And to your question about the relationship between the chair and the general counsel, and how that affects the office. I certainly think that's true. The general counsel is in many of the meetings where decisions are made about how the commission will proceed in any number of difficult cases. And you have to be in a position where the general counsel is able to advise the chair. The chair is not always going to agree with your advice, but you need to make sure that the advice is understood and that the

decisions that are being made are well counseled, in the sense that there may be a policy preference to go in a particular direction that raises significant legal risk. But everybody in the room needs to understand what that legal risk is so that they can make an informed decision about whether the policy is important enough to pursue notwithstanding the risk. And similarly, if there are ways to reduce the legal risk while effectuating the policy, you need to be the person in the room putting your hand up to say, why don't we try this other... Can we do it this other way? And here's why. So I do think that that's important. Like any client, the client's not always going to listen to your legal advice, but you want to have the kind of relationship where they keep coming back and asking you for advice.

KD: Right. I want to talk generally and specifically about one of the most interesting things about the OGC, is which what was once called counseling, it's been called oversight, it's been called legal review, which is essentially looking over the shoulder of the divisions or working with the divisions. For TM, IM, and Corp Fin, is that mostly rulemaking in which that happens?

MB: It happens more on the rulemaking side, but it also happens on the enforcement side, because if the Division of Enforcement is considering bringing an enforcement action to enforce a '40 Act violation or to enforce one of the commission's rulemakings, it's a Corp Fin rulemaking, you want to have the input from the experts in the division who worked on the rule to make sure that how enforcement is interpreting and enforcing the rule is consistent with how the division understands the rule to work. So it does come up and there are sometimes friendly discussions among colleagues about the right interpretation. So it comes up there as well. But I think it raises, maybe implicit in your question, as an important issue about the relationship between the general counsel's office and the divisions. And you would often hear people, not just specific to the SEC, but more generally say things like, "Oh, the Office of General Counsel is the place where good ideas go to die," or it's "The place where people say no to everything you want to do." And we were very aware of the potential for that kind of reputation and wanted to make sure we maintain the collaborative working relationship with the divisions. And that's through the people. I mean, that's through staff and obviously my relationship with my counterparts, who were the division heads, is important. And there is setting that cooperative tone from the top. But also on the day-to-day interactions, I wanted to make sure that my staff was not saying this is a bad idea, that they were saying, "Help me understand what it is you want to accomplish. There's probably a way to get there. I'm not sure it's what we have here, but let's think collaboratively about how we can do it." And maybe have you considered this other piece of authority or have you considered getting at it this way? And everyone's not always going to see eye to eye. I don't think there's any way to get to 100 percent agreement on a path forward, but what you want is for people to feel like you as the lawyers are partners in the endeavor of how do we get to the place that you're trying to go?

KD: Great. Let's talk about some of those instances in which you had to think collaboratively. Tough ones, and some of those rules that kept percolating through—ESG, cyber stuff. But let's talk about the climate risk rule in particular.

MB: Yes. The climate risk disclosure rule really was an important rulemaking for the agency for a lot of reasons. But one of the reasons was, it was really putting a lot on the table in terms of how far does the disclosure authority extend? What can the agency require companies to disclose? How does it need to justify that? How do we understand the statutory authority? What is the best legal support for this undertaking? And what does the record show in terms of what we can support from the economic side? And how burdensome are these disclosures going to be? How developed is this space? How do we make sure the record is clear about investor demand for this type of information and need for this type of information? And a lot of time and energy went into answering those questions. And you can see that in the difference between the proposed rule and the final rule, where among other things, we did not require Scope 3 greenhouse gas emissions disclosures. That was scaled back. There were additional qualifiers that were put in, other pieces of the rule that were modified from the proposing stage, all in response to the public feedback and internal consideration of that feedback. But we knew from the beginning that we would be sued on that rule. That sort of went without saying, just given the broader political climate and the public interest in the rule. I didn't know that we would be sued within two hours, which I continue to

think was bad form because I know that they didn't read the rule in those two hours. It was also the commission's first experience in the multi-district litigation lottery, because we were sued in multiple circuits. Within the 10-day window we ended up going to the lottery. That is how we ended up in the Eighth Circuit, which was one of the circuits where we had been sued and the cases were consolidated. And then we put together a very nice brief defending the rule in the Eighth Circuit. And the case had been fully briefed right around or maybe before the time of the election. And then of course, the election happened, the case hadn't been argued, and then there was a question for the new administration about would they continue to defend the prior commission's rulemaking? Would they revisit the rulemaking? How would they proceed? And we had Michael Conlely, who had retired while I was the general counsel, but fortunately, at the very end of my tenure. Tracy Harden been a longtime assistant in the office, and as a terrific appellate attorney had stepped into that role. I think they had a series of difficult decisions about how to proceed in the Eighth Circuit, and ultimately the commission decided that it would not defend the rule, but I think they tried to chart a middle ground unsuccessfully, because the court said in its recent order, it was going to hold the case in abeyance. But basically it was the commission's job to determine how it wanted to proceed with its own rulemaking. Essentially, I read that as the Eighth Circuit declining the invitation to invalidate the rule without the participation of the commission in the case. Obviously, it would be the easier course for the current commission that doesn't support the rule, because then they wouldn't have to figure out what to do with the rule. As it stands, the rule is still on the books. It's held in abeyance by the commission until the end of the litigation. Now the litigation is in abeyance, so essentially, it's in abeyance unless and until the commission does something with it, which is an awkward posture, but that's where we are.

KD: Yes. I want to talk about when the general counsel gets involved. For example, that rule, would that have been a Corp Fin rule?

MB: Corp Fin, yes. So it was Renee first and then Eric.

KD: Okay. So as proposed, would it mostly have been a Corp Fin rule or would your office have been really involved in revising before the proposal came out?

MB: We were really involved. And it is, again, sort of circling back to when you asked me what surprised me about the office, the attorneys in the Office of General Counsel are reviewing from the very early stages the initial documents that are outlining potential rulemakings before they go to the chair's office, participating in meetings about the concept of a rulemaking, reviewing drafts of a proposed rulemaking, commenting extensively on the drafts, providing edits to language, making suggestions about changes. The office is involved from the very beginning with the rulemaking in a way that it really embeds them, I think, in a lot of the decision-making on the rulemaking side. And again, that's going to ebb and flow, I think, with different leadership of the office and the chair's office. But by and large, it's been the case that the office has been involved from the beginning.

KD: And on the flip side, once you're looking at making revisions, would Corp Fin still be heavily involved or would this mostly be approached from a legal point of view by the OGC?

MB: Corp Fin would always have the pen on their rulemaking, so it would, or at least that was the structure at the time, so the revisions would be suggestions to Corp Fin as to how the rule should be revised and here's why, and here's what we think could be done differently. I think climate in some ways, just because of how high-profile the rulemaking was, got a lot of attention within the building, understandably. It was something that folks were involved in at the highest levels, and that's not the case for every rule at that sort of level of involvement, but certainly for climate, yes, it makes sense that it was structured that way.

KD: Okay. We've got about 15 minutes left, so I think we should head into the appellate function. Give that plenty of space.

MB: Great.

KD: You mentioned Michael Conley. I get the impression that the solicitor's group within OGC is sort of like, I don't know, first among equals or something like that. Tell me about working with Michael Conley and his office.

MB: Well, I really enjoyed working with Michael Connolly. I had worked with Michael and Tracy and Donnie and the other two associates or assistants, Dan Starosowski and Jeff Berger for many years in my prior role when I was at DOJ, and they're all terrific. I was very glad that Michael stayed, as I said before. Through my tenure he was very well respected around the building, has excellent judgment, knows the securities laws inside and out. People really look to Michael for his guidance on the best way to proceed on a whole range of issues. I think it was maybe a little bit of a different experience for them to have somebody who has an appellate litigation background come into the general counsel role, because my background is not the typical background of an SEC general counsel, as I'm sure you know, Kenneth, from all of your interviews and work on the office. And so I did probably pay more attention to and scrutinize more the work that the group was doing than perhaps they had been accustomed to with prior general counsels. To their credit, they were very welcoming of the engagement. And so it was never like, "Why are you asking us all these questions?" It was always like, "We welcome the discussion. Let's see if we can make this better together." So it was great. And it's an absolutely terrific resource to have an appellate shop of that size and that caliber within the office, because in addition to handling a very busy appellate docket, they are also available. We were talking earlier about how the rulemaking teams are involved with the rule writing, but they are also talking with their colleagues on the appellate team to figure out what are we likely to face in court? How do we improve our chances? What can we do at this juncture as we're thinking about finalizing the rule to give us the best possible case of prevailing? And so you have that collaboration too and that sort of litigation eye on the rulemakings from the beginning.

KD: All of these relationships between the solicitor and the divisions, and you for that matter, how much of this is formal? How much of this is sort of accepted practice? And how much is informal? How much depended on just walking around and knocking on doors?

MB: Yes, it's a great question. I would say it was probably more formalized under Gary than it had been previously. Because the way the rulemaking teams were structured, there would be an appellate person who was sort of a point person for the rulemaking team. And it was not uncommon for the chair to want to hear directly from litigators. And so they were involved in a, not a strictly formal way, but in probably a more formal way than who's in the office today? Whose ear can I get in terms of figuring out this tricky legal issue?

KD: Okay. Let's talk about some of the big challenges that came along for the appellate group. I've got Rio Tinto, 2022. Was that significant?

MB: You'll have to remind me.

KD: Scheme liability was the issue in that one.

MB: Oh, yeah. So I mean, Rio Tinto was significant. Thank you for the reminder. I mean, it's one of those cases where the folks who are advising enforcement from the office would talk with the appellate team about the matter and then figure it out. A lot of times when you have a change in the law, you have memos that are already fully baked, that are kind of on their way up. And then it's a question of, do we need to revisit? How do we look at this? What is a factual record? Does it satisfy the new standard? Are there cases that can move forward? Are there cases that we need to take a second look at? And so that is, again, some of that collaboration as changes in the law are happening. And I think Rio Tinto was before I was in the general counsel role, and so probably I was less directly involved since I, at the time, was more focused on the rulemaking side and a little bit less on the enforcement appellate side. But obviously Jarkesy is another huge example of that in terms of advice from the general counsel's office to enforcement about how to incorporate, respond to, respect, a Supreme Court decision in that case about how enforcement matters should be handled. So that was a little bit of a sea change as well.

KD: Oh, yes. Let's talk about that one in some detail. Jarkesy had been out there for a long time. Did you feel like you were already well-prepared when this thing made its way to the Supreme Court?

MB: It's a great question. The Jarkesy Fifth Circuit opinion had decided that the administrative law judge proceedings were unconstitutional on three grounds. So there was a Seventh Amendment ground. There was a non-delegation ground, which was this idea that the enforcement staff was exercising legislative authority when it decided which forum to proceed in. And then there was the removal issue we talked about earlier for the administrative law judges. And I think by and large folks were thinking the Supreme Court was likely to decide the removal question, including because it had been sort of lingering since *Lucia*. Here was an opportunity to decide it. But of course, as we know, that's not how the case came out. And it was clear from the oral argument, I was in the court that day, that they were very interested in the Seventh Amendment issue. So in some respects, yes. Did the commission anticipate there would be a change? Yes, but not necessarily that it would be the Seventh Amendment argument that carried the day of the Supreme Court.

KD: So in your preparations, were you looking to these other arguments that you expected to come down?

MB: Yes, I think there was more an expectation that the removal issue would be kind of the front and center of the case. And then the challenge on the civil money penalty piece and seeking civil money penalties when you have a common law analog for the claim that the agency is bringing in its administrative proceedings is not just an issue for the SEC, it's an issue for agencies across the government. So there really was government wide response to Jarkesy to figure out how best to utilize administrative proceedings consistent with the decision moving forward.

KD: What was your involvement in that government-wide response? Were you talking to a lot of people at other agencies at that point?

MB: Yes. I don't want to go into any of the details about the conversations, but I think it's safe to say we were talking with other agencies who were also affected. We had been monitoring the case, working with other agencies we thought would be affected. I think more agencies were affected even than we had anticipated going into the oral argument. And then DOJ has also been at the center of providing advice to agencies as part of their role on how to implement the Supreme Court's decision. So it was a very collaborative effort across the agencies, but we were front and center because of course the SEC was the party in the case. It was our proceeding that was at issue. There was no question that securities fraud claims were covered, because those were the facts of the case. So it really was an important decision for the agency in terms of figuring out pretty quickly how to respond.

KD: Talk about that response. Did Jarkesy foreclose approaches you might've taken previously?

MB: I would just want to be mindful of how I answer the question, in part because there's still a number of unanswered questions around Jarkesy, including how far does it extend and how will courts apply it. But I do think it's safe to say that the use of the ALJs has changed. It started changing with *Lucia* and the cases that around that time, where the commission understood if it brought a contested proceeding in front of an ALJ, it might be tied up in litigation for a long time. And the commission had... It's public record the commission had pivoted away from using the ALJs for contested enforcement proceeding. And then you now have a Supreme Court opinion that says the commission cannot get civil money penalties in front of an ALJ. This is a right that can be waived, right? People waive their jury trial right all the time and opt for a bench trial. So if you're talking about a settlement with a potential respondent, a waiver is an option to achieve a settlement. But if you're talking about a contested proceeding, it then raises real issues for the agency about whether proceeding in an administrative proceeding is still an available option, and that's a change.

KD: Okay. A little easier question. You mentioned working with the solicitor general a little bit ago. Talk about relations between the OGC and the Office of the Solicitor General in general.

MB: Yes. So the solicitor general under statute represents the agencies in the Supreme Court and presents the views of the United States in the Supreme Court. So both in merits cases and also when the agency has an interest in participating as an amicus in the Supreme Court, the solicitor general is filing those briefs on our behalf, arguing those cases on our behalf. They take very seriously the agency's input. So we would get requests, for example, if a case is on the court's docket and the SG's office thinks that the SEC might have an interest, they would ask us, do we have an interest in participating? What is the agency's position? And if there's a case that we affirmatively think we should be participating in, such as a private securities litigation, but we think the agency also has an interest because the same standards will apply to our enforcement actions, we could go to the solicitor general's office and say, "The agency has a strong interest in the outcome of this case. We recommend amicus participation." And that would also be taken seriously. And Malcolm Stewart, who's the deputy in the SG's office, who handles SEC-related cases, has worked with the agency for many decades. There's a very good working relationship there. And it's a very collaborative relationship, too. I mean, they take seriously our input and we welcomed their representation in the court, which was always excellent.

KD: Great. You got right to one of the last questions I want to ask, which is about amicus. At various times, the SEC OGCs have talked about a program, a formal program. Was it like that for you? You talked about some of this originating with the SG's office. How much of the amicus originated with the SEC and why?

MB: Yes. I think there's a form online that anybody could fill out to submit to the agency a request for amicus participation. I mean, with all of these things, they're resource questions. It's a question for the staff and the GC, how important is this case? Is it a good use of appellate resources for us to file an amicus brief here? Which would potentially take resources away from other things that the office is doing. There's a formal program in that respect. I think it is also the case that we would get requests or questions from justice, both in the court of appeals level and also in the Supreme Court about our interest in a particular case. And every once in a while, you have a court ask for a brief from the agency. So that happens as well. In terms of formal versus informal, I think there are elements of both. You've got a lot of attorneys who are paying attention to developments in the securities laws. And when they know that there's a case that the agency has an interest in, it's going to get traction and discussion. And then we would write up the interest of the agency in participating, and so it gets formalized. But they often start in a more informal manner.

KD: Okay. A couple of big questions or overarching subjects to finish up. Beyond the fact that the structure and the function is very different, talk about how the OGC itself is different from the commissions from other offices within the SEC.

MB: So the office, the core function of the office is providing legal advice on the business of the commission. That's different from an office that is strictly effectuating a policy agenda, because you are thinking about the courts and the statutes and the regulations and providing legal advice to help achieve a policy goal, but really the function is the legal advice. And I do think that that differentiates the office from the other offices and divisions within the commission. And it's a really important function. I mean, that can't be overstated, it's really a critical function to have a more neutral legal review of the work that the commission is doing.

KD: Okay. And finally, you've been through it yourself, you've watched other people do it, what makes a good general counsel? What are some of the qualities that help?

MB: Yes, it's a great question. I think what makes a good general counsel is probably very similar to what makes a good lawyer. You are a decision-maker in terms of the positions that the office will take. It's important to have good decision-making skills. One of the most important decision-making skills is the ability to listen to others, to internalize what they are telling you in terms of their recommendations, to take all of that and to make a decision, and then to be able to communicate effectively to others why you made the decision that you made so that they know that they have been heard, that their advice was taken into account, and that you have ownership over that decision so that you can then advise others about the

decision. I really think that there's so much expertise in the office, you're never going to lack for detailed in-depth experience in whatever area of the securities laws you're dealing with. The question is how do you take all of that in, apply the broader judgment, reach a decision, and communicate that effectively? I think that's a huge part of the second piece, which it is really a management job. You're managing a large office, you're managing a number of deputies, and you're also managing up to the chair and the commissioners. And a big piece of that is communication. So figuring out how you communicate effectively with the staff. Have some transparency in the decision-making. You want people to trust you because even if you can't communicate with every individual in the office, which is really hard to do, you need them to know that you take seriously the function and they can trust your decision-making process, even if they disagree. And then communicating up, figuring out what information needs to be conveyed. And every chair, every commissioner is different, so the conversations that you're going to have depend on how they do their own decision-making process. And you need to be able to give them the tools to reach good decisions as the head of the agency.

KD: Terrific. Well, you've communicated very well today. I appreciate it.

MB: Check that box.

KD: Is there anything else we should touch on before we wrap it up?

MB: I don't know. We have covered a lot of ground, Kenneth, so I don't have anything else on my end. But I do really appreciate the opportunity to talk with you about the office. I mean, it's a terrific, very special and important place, and I'm just privileged to have been a part of it.

KD: All right. Thank you very much. It's been fun talking.

MB: Take care. Bye.