

**Securities and Exchange Commission Historical Society**  
**Interview with Meyer Eisenberg**  
**Conducted on September 7, 2003, by Richard Phillips**

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

**ME:** Let's see, I had graduated from Columbia in 1958.

**RP:** Columbia Law School?

**ME:** Columbia Law School. I then was law clerk to the Chief Justice of the Oregon Supreme Court, William M. McAllister. Judge McAllister was a member of the Conference of State Chief Justices and I planned to come to Washington to work for the Anti-Trust Division of the Department of Justice. He had given me an introduction to the-then Deputy Attorney General, Lawrence Walsh. The Anti-Trust Division was paying something like \$4600 a year for starting lawyers and I heard from a friend that the Federal Trade Commission would pay \$5200 a year, I think it was, for a GS-7.

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

**ME:** Because I was interviewed by Daniel Patrick McCauley, who had been the Associate General Counsel at the SEC and was now the General Counsel at Federal Trade Commission. He interviewed me and he said, "You really don't want to work here. There's a really good agency that I know—the SEC. You know anything about the SEC?" Well I had a vague familiarity with the SEC because one of the problems in a seminar course with Professor Gerry Gunther was an SEC problem. But that was my total familiarity with securities. And he said that he'd give me a job at the Federal Trade Commission, but he thought I'd like the SEC better. And he called over to Joe Levin, who was then an Assistant General Counsel and recommended that I go over there. I met a classmate of mine, Peter Morrison, who was then working in the General Counsel's Office. He says, "Oh yeah, I can get a GS-7"—I think it was—and at that time the money was important because the difference between \$4600 and \$5200 was significant. Carolyn was pregnant . . .

**RP:** Carolyn is your wife?

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

And they decided that I should be hired. The whole General Counsel's Office at the time, I think, had twenty-three or twenty-four lawyers and in addition to doing the appellate work, we also tried a number of our own cases.

**RP:** The district court cases?

**ME:** District court cases, like Texas Gulf Sulphur, Fifth Avenue Coach, and Great American Industries. And that's how I got to the SEC. That was October 1959.

**RP:** And what's the first major matter that you can recall working on in the General Counsel's Office at the SEC?

**ME:** Well, the Commission had lost the ISI case. It was SEC versus ISI out in the Ninth Circuit and the certiorari had been denied. The ISI case involved the transfer of ownership of an investment advisor for a profit. The Commission thought that that was a "gross abuse of trust" under Section 36 of the Investment Company Act because they were transferring what was essentially a trust relationship for a profit. The Commission fought the case out in the Ninth Circuit and lost. And the question was, why did we lose? And involved in that was the question of what was a "gross abuse of trust" under Section 36.

**RP:** This was Section 36 of?

**ME:** Of the Investment Company Act, which says, that the Commission has the power to bring an action for "gross abuse of trust" involving investment companies. And I went to go look to see where gross abuses of trust came from. The legislative history was pretty sparse. I looked up Bogart Trusts, agency cases, and a whole bunch of other cases where abuse of trust was involved. And it really didn't pan out very much. So we were sort of stuck in terms of what was the origin of the term "gross abuse of trust." It had been negotiated just before the '40 act was adopted by Congress, by David Schenker, who was the Chief Counsel of the Investment Trust Study. And the words somehow got into the statute. There was some writing about it, but nothing particularly definitive. It just had to be a serious abuse of trust, whatever that meant.

And anyway, that was the first major issue that I got into and that interest in the meaning of the terms of Section 36, Breach of Fiduciary Duty, what does abuse of trust mean is still today a live issue, much less back then. I found out how gross abuse of trust got into the statute. David Schenker got it out of the Yom Kippur prayer for forgiving sins, "God forgive me for the sin I have committed before time in the abuse of trust."

**RP:** Who was the Chairman of the Commission at that time?

**ME:** The Chairman of the Commission at the time and when I started was Ned Gadsby, who had been Chairman for, I think, five years. He had been appointed by President Eisenhower. And, of course, he remained as Chairman until President Kennedy appointed William Cary.

**RP:** Did you notice any significant difference in the Commission with the transition from a Republican Chairman to a Democratic Chairman?

**ME:** If you take yourself back to 1960Ca new younger generation was coming in and that was what Kennedy represented. They had new Commissioners appointed and it was a very strong Commission. On the Commission during the Kennedy and beginning of the Johnson administration were people who had been career SEC staff, division heads. Barney Woodside, who had been the Director of Corporation Finance, was a Commissioner. Manny Cohen, who had also been director of Corp Fin, was also appointed and later became Chairman. That had not really happened before.

But in terms of the politics, it was not a political Commission. People voted on their own philosophy. I don't think people thought, he is a Republican Commissioner, so this is the way he is going to vote because he's a Republican. I served as Ned Gadsby's legal assistant for a period of time when he was holding over after he lost the Chairmanship to Cary. It was pretty collegial. It was a collegial Commission, it was much smaller.

Division directors, associate directors, and their staff spoke to each other often. The Chairman knew what was going on in most divisions. Our office was an example, there were twenty-three or four lawyers in the office. All of the Assistant General Counsels were people who were career, who had been there for almost all of their careers, Pollack, Ferber, and Levin. The General Counsel was a political appointee.

**RP:** Who succeeded Mr. Meeker?

**ME:** After he left, Walter North succeeded him. Walter North came from Michigan and was a good Republican from Michigan and was appointed when Tom Meeker left and that certainly didn't make very much difference. When Bill Cary became Chairman, I think his first General Counsel was Allen Cowell.

**RP:** And Mr. North left?

**ME:** No, North stayed on as Associate General Counsel. There was no thought of really ousting him or anything like that. We didn't have that kind of a change. There was an executive director whose name was Scheidenheim. He was ousted. He was a political person. But in terms of the direction of the Commission, I think, because the markets were picking up and there was attention being paid to the markets, and the mutual fund

industry particularly because of the Wharton School ReportCwhich came out about that timeCthere were things happening at the Commission.

**RP:** What do you mean by the Wharton School Report?

**ME:** The Wharton School Report was a report that dealt with essentially whether or not the fees that were being charged for investment advice and whether the load structure for mutual funds was appropriate. It was done by a team headed by Irwin Friend, who was a senior professor at the Wharton School.

**RP:** Was this done for the Commission? Under the Gadsby administration?

**ME:** Yes. It started under the Gadsby administration and it was picked up . . . it just went on under Chairman Cary.

**RP:** And generally speaking, what was the tone of the report?

**ME:** The tone of the report was highly critical of the industry. The report in effect said that investors were not benefitting from the economies of scale because the fund industry had grown so much. It sounds funny nowCbecause the whole industry was maybe \$40, \$50 billion, which is the size of one of the Fidelity funds these days. But the whole industry,

the whole mutual fund industry, was \$40, \$50 billion. And in effect, if you had a \$400 or \$500 million fund complex, that was big stuff, and consequently they said that 2 of 1 percent, which was pretty standard across the industry, was high.

**RP:** 2 of 1 percent management fee?

**ME:** The management fee was, in effect, not providing the benefits of scale. Of course, there was a load structure that started in at 82 percent. And they really didn't get into sales tactics that much. That was left later for the Special Study.

**RP:** And so what was the result of this report?

**ME:** The result of the Wharton Report was a sharper look into the fund industry that was later picked up by the Special Study.

**RP:** Explain what the Special Study was.

**ME:** Okay. One of the things that came from the appointment of Chairman Cary and the attention given to the markets, it wasn't just mutual funds, was the fixed commission rate at the New York Stock Exchange and various recommendations for abolition of fixed rates that were being bandied about at that time. The Special Study was then authorized by the

Congress and a staff was assembled when Bill Cary was Chairman. Milton Cohen was made the head of that study. Ralph Saul, who was then the deputy director of the Division of Trading and Markets, was made the deputy head, and people were gathered from all over the Commission and outside the Commission.

There were about sixty people, if I remember correctly, who were on the staff of the Special Study. I was detailed to it for allegedly a couple of months. It ended up being the length of the Study, which is about a year and a half. And part of that, going back to your question, was mutual fund sales practices and chapter 11 of the Study deals with fund sales practices and that's how they got into that. One of the sales practices that was tied to it had to do with the fixed commission rate and the amount of money that was given up or directed by fund managements to brokers to reward them funds for sales. So it was a relationship between the way they were sold and the rewards to brokers for distribution. I ended up publicly cross-examining Don Regan, who was then Executive Vice President of Merrill Lynch, and others who were involved in promoting fund sales.

The other part of the Study that was very important that I dealt with was the anti-trust part of it, which later led to Gene Rotberg, who was then associate director of Trading and Markets, to what was called the commission rate hearings, in which the fixed commission rate of the New York Stock Exchange was called into question. And one of the reasons that the fixed commission rate was abolished was because of what happened

in the Special Study, the disclosure of the operation of give-ups and the commission rate hearings that Rotberg conducted.

**RP:** Were you a member of the General Counsel Office during this period?

**ME:** I was a member of the General Counsel's Office and I think I was Assistant Chief Counsel of the Division of Corporate Regulation, which now is Investment Management.

Essentially then I went back to the General Counsel's Office after the Study.

**RP:** When were you Assistant Chief Counsel of the Division of Corporate Regulation, which regulated mutual funds, I take it?

**ME:** Yes. I think it was probably '61 or something like that.

**RP:** For a short time?

**ME:** About a year.

**RP:** And you left General Counsel's Office?

**ME:** Yes. I got a promotion out of it, I think. And we did the Allegheny Corporation hearings, involving the Murchisons' takeover of Allegheny, which controlled IDS. It was really pretty interesting.

**RP:** What was that?

**ME:** That was about the takeover . . . Allegheny was part of the holding company that owned IDS and this was Investment Diversified Services, which at that time was one of the largest, if not the largest, mutual fund group in the country. And it was also sold through a captive force of salesmen, which they controlled. It was not sold through brokers.

**RP:** Not independent salesmen, but a captive sales force.

**ME:** Captive salesmen. They were part of IDS. IDS was the advisor, IDS ran the sales force and it was a very large sales force, headquartered in Minneapolis. There was a change of control in Allegheny, there was a proxy fight that was involved in it and the highlight of that for me was my taking testimony of Mr. Murchison, with Abe Fartae as the defense lawyer. We had an interesting time there. Allen Gordon was the Chief Counsel of the Division of Corporate Regulation.

**RP:** The Division of Corporate Regulation, which regulated the mutual funds.

**ME:** The mutual fund industry and the public utility holding company industry. Anyway, that wasCso just to put this in orderCyou had the Wharton Study. The Wharton Study criticized the industry on loads and on fees and disclosure and I think about the role of directors. There was a significant piece on the role of directors in the Wharton School Report. Jack Bogle was then the assistant to Joe WelchCwho was CEO at WellingtonCand was the Chairman of the Investment Company Institute, then called the National Association of Investment Companies. And Professor Irwin Friend was the head of the Study, and Andy Brimmer, who as I said, later became a member of the Federal Reserve. He was another Wharton professor and it led to some very interesting discussions.

Meanwhile, back at the ranch, after the Wharton Report became public, there were some class action lawsuits brought, mostly by a fellow named Abe Pomerantz, who was a derivative class action lawyer in New York. And he sued a number of the investment complexes on the ground that it was an abuse of trust, a gross abuse of trust, for them not to pass on the benefits of scale to investors, and the other allegations were pretty much based on the Wharton Report. And the Commission, when I was in the General Counsel's Office, the Commission authorized us to take the position that there was a private right of action for people like Pomerantz, who represented the fund share holders, to bring an action under Section 36.

And we filed several amicus briefs. I was involved in the major case, *Brown vs. Bullock*. Bullock was a fund group. And they challenged the existence of a private right of action under 36. We went before Judge Harlands in the Southern District of New York, who had been a member of the staff of the Commission in the thirties. And he ruled, yes there was private right of action. That decision eventually went to the Second Circuit, which affirmed the private right of action under Sections 10 and 15 and 37. So all of that had to do with the establishment of private rights of action under the '40 Act.

**RP:** And there was a period . . . actually a period generally where there was a lot of litigation involving the question of whether private rights of action under the federal securities laws and General Counsel's Office and you were active in that.

**ME:** Right. And the other branch, as you know, since you were in the office at the time also, was . . . and by the way we really had a small office, but some really top-notch people, aside from you. But, George Michaely was there, Jack Dudley, Marion FrankhouserC who later became the regional administrator of New YorkCFaith Colish, Mel Katz, and others.

**RP:** Paul Gonson?

**ME:** Paul Gonson came much later. He was not there at that time. But Gonson was there in the latter part of the '60s. Jake Stillman came later in the early '60s. Irv Pollack was head of the criminal reference group, later went on to become a Commissioner. But in any event the other private right of action set of cases were private rights of action under Section 10(b), which is now taken for granted. But that was a big fight. Texas Gulf Sulphur was the seminal insider trading case. I remember, at Berkeley when I was teaching this, I said, "When we went to the Commission," the students thought Texas Gulf Sulphur was brought in 1934. By the way, the enforcement people were skeptical about our chances, but the Commission agreed with our office so we went ahead.

**RP:** Texas Gulf Sulphur was the seminal case on the private rights of action?

**ME:** No, on insider trading.

**RP:** Insider trading.

**ME:** The question basically became whether or not there was a private right of action under Section 10(b) and Rule 10(b)-5 in the insider trading cases. Because there were a group of cases dealing with private rights of action in which we took the position that there was such a right. And uniformly the courts held that yes there was a private right of action under 10(b) because even though it didn't specifically provide for a private right of action.

I think that by the time that got to the Supreme Court, no circuit had held it that there was no private right of action. And so you had both those streams of cases, some under the Investment Company Act and the other under the '34 Act on private rights of action.

As for the Special StudyCthe things that were coming out of the Special StudyCthe basic argument was on the fixed minimum commission rate and getting rid of the fixed minimum commission rate. That took a lot of effort and took a lot of time and it was ultimately successful.

**RP:** And what was your involvement in that?

**ME:** Well I worked with Gene Rotberg, Peter Archie, Dick Paul, who was the Chief Counsel of the Study, in setting up how give-ups were being used.

**RP:** Explain what a give-up is.

**ME:** A give-up is part of a fixed commission rate, that means that everybodyCevery member of the New York Stock ExchangeCcharged the same commission and they would give away a portion to another broker, but first you had to be a member of the New York Stock Exchange. If Fidelity executed a trade through Merrill Lynch, Merrill Lynch would give away between 70 and 80 percent of that commission to any member firm Fidelity Management would designate. And they would designate brokers who gave them

research or who gave them distribution, who sold their funds' shares. And there were other services as well, but those were the two main services. So 70 to 80 percent of the commission was going to whoever the customer, in effect, designated.

Well that didn't last too long because you had to be a member of the New York Stock Exchange "club" to do that. So the regional exchanges started doing the same thing. So you could get the same result through a regional exchange. And then that spread to anybody who was a member of the NASD. Well all brokers are pretty much members of the NASD. So you had the proliferation of these fixed-commission rates and the give-away of that money, which indicated that there was a lot of fat in the commission rate. And consequently the spread of the commission rate practices led to the phase in of negotiated rates, where the exchanges could not legally fix the commission rate. And indeed it would be a violation of the anti-trust laws for them to do that. Negotiated rates were phased in starting in 1970, which is when I left the Commission, and were completed in 1975, May day 1975, no more fixed-commission rates.

**RP:** You mentioned anti-trust and that you had worked on anti-trust issues affecting the securities industry while in General Counsel's Office. Tell us what was happening in that area during your tenure at the Commission.

**ME:** Okay. Well there were a couple of cases. One was *Silver vs. New York Stock Exchange*.

Silver was a broker in Texas. You're really testing my memory. It wasn't Dave Silver who had his telephonic connections pulled by the stock exchange because he was alleged to have had some relationship to people that were in the Communist Party or who were sympathetic to the Communist Party. McCarthy was long gone but there was a residue of that. And they didn't give him a hearing, they just pulled the lines, which would kill his business. And so he brought an action under the anti-trust laws against the stock exchange who he alleged participated in this conspiracy and he won.

And we took the position as amicus that only that which is necessary to make the Exchange Act work would be immune from the anti-trust law, and therefore, if you have something like an underwriting syndicate and they're setting the price, that's contemplated by the Act. However, if you do some things which are not contemplated—supposing they got together and decided that they would enforce certain discriminatory measures or like this—that they would deny a fellow due process, that wasn't authorized by the Exchange Act and our position prevailed in the Supreme Court.

The other case was . . . there were a couple of cases. Another one was *Kaplan*. But the question really was, "How much immunity the exchange and brokers had under the anti-trust laws?" Because but for the existence of the '34 Act, they would not be able to engage in some of the joint actions that they were doing. That came up again fairly

recently and there still is some significant dispute over the extent and reach of the anti-trust laws. There are some people who think that there was blanket immunity for brokers even if they are violating the securities lawCa position with which I have great difficulty.

**RP:** Now the *Silver* case came up around mid '70s.

**ME:** Oh no. Mid '60s.

**RP:** Mid '60s, I'm sorry. What other developments were significant during that time?

**ME:** Well there were other . . . after the Special Study, as you know, there was a Mutual Fund Study. And the Mutual Fund Study consisted of also a special team that was put togetherC which was an interesting way of dealing with these problems which we don't have nowC which is one of the differences. People are much more . . . divisions are much more turf conscious now than they were then. It was normal to put together a cross-divisional team with people from our office, or Corp Reg, or Trading and Markets to do these things.

**RP:** You mentioned the Mutual Funds Study.

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

**RP:** It was after Bill Cary left.

**ME:** This was during Manny Cohen's term. Bill Cary left shortly after President Kennedy was assassinated and President Johnson succeeded him. I think Cary lasted some months into the Johnson administration, but not that long. And Johnson appointed Manny Cohen, who was then a Commissioner to the chairmanship. And it was under Manny that the Study was completed. The report that came out of that study was Public Policy Implications of Investment Company Growth. And the Public Policy Implications report made specific recommendations about reform of the mutual fund industry. The Special Study did it for the brokerage industry and the fund study did it for the mutual fund industry. And that had to do with front end sales loads, market tactics, and give-ups. There was a section that dealt with some of the things that we brought up in the Special Study in terms of distribution and also there was a significant section on

management fees. At that time I think the whole mutual fund industry was about \$60 or \$80 billion.

**RP:** And that was 1966.

**ME:** '66 . . .

**RP:** When that was published.

**ME:** When that was published.

**RP:** And that was during Chairman Cohen's term.

**ME:** That was during Cohen's term.

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

**ME:** Well they're just totally different personalities. Cary was an academic, he was a tough guy, but he was very gentlemanly. He was very knowledgeable, he was pretty friendly, approachable, but I wouldn't say that Bill Cary was an outgoing personality. The

Commission was very collegial at the time. But Manny, who was much more of an outgoing personality and was really recognized as one of the true mavens of securities law. I mean, he probably knew as much as anybody in the country about securities law, including Louis Loss. And Manny knew where all the bodies were buried, had been at the Commission for twenty-five, or something like that, years. He came to the Commission after World War II. And, nevertheless, it was still a very collegial Commission although there were differences.

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

**ME:** I got mixed up between . . .

**RP:** During this period Jack Whitney.

**ME:** Well he brought Jack Whitney on. Jack Whitney was a Bell Boyd partner from Chicago. He also broughtCwho else was put onCFrank Wheat. Frank Wheat was a senior partner at Gibson Dunn, and was also a very well known and very highly respected securities lawyer. Whitney was also a securities lawyer. Let's see . . .

**RP:** Senator Frear?

**ME:** President Johnson appointed Senator Frear of Delaware as a Commissioner and there was pretty much always a place for somebody who had Hill connections, either a Senator, sometimes a representative. Those people were generally fairly useful. Senator Frear got us our new building on 500 North Capitol. When Lyndon Johnson came to swear him in, he came to the old tar paper shack on Second Street . . .

**RP:** That was a World War I temporary space.

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

**RP:** Shelter. When did the Commission move? During your tenure?

**ME:** Yes. When Johnson came to swear Frear in he looked around, he saw the shabby tar paper building, and he said, "We're going to have to get you a new building." And they did and the result was the move to 500 North Capitol. And I became executive assistant to Manny Cohen.

**RP:** How long were you in General Counsel's Office?

**ME:** Except for the period where I was executive assistant to Manny, I was in General Counsel.

**RP:** When did you become executive assistant to Manny?

**ME:** Let's see, after Dave Ratner left, I guess it was . . .

**RP:** Dave Ratner was who?

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

**RP:** And you became his assistant when?

**ME:** '68. I was his assistant from '68 until Nixon became president and replaced him in February of '69 and Hamer Budge became Chairman. Budge had served on the

Commission for three to four years, appointed by Johnson originally. And he was a former representative from Idaho. He was Chairman for a while but . . .

**RP:** Have we covered the significant events during the Cary administration?

**ME:** I think so. I think during the Cary administration, the major accomplishments of Cary were the starting of the Special Study and the manning of the Special Study and setting out what they wanted to do and the reforms they were going to take on. And also the insider trading cases.

**RP:** Were there any significant cases or events that you participated in during this period other than what we've described? What about *Fifth Avenue Coach*?

**ME:** Fifth Avenue Coach came in '67, which was after the mutual fund study. I was Assistant General Counsel. I think we both made Assistant General Counsel at the same time. And I was assigned to the *Fifth Avenue Coach* case. The *Fifth Avenue Coach* case involved a condemnation award of about \$30 million, which was a lot of money in those days. When New York City condemned the Fifth Avenue Coach Company, the people who took over Fifth Avenue Coach and proceeded to loot the company of the \$30 million condemnation. Roy Cohn headed that group.

**RP:** Who was Roy Cohn?

**ME:** Roy Cohn was the chief counsel for Senator McCarthy of Wisconsin, of his investigating committee and was basically responsible, with McCarthy, for some of the things that happened in the early 1950s, the black list accusing people of being Communists. There were Communists in the State Department and the Army, there were Communists under the rug, there were Communists everywhere, according to McCarthy.

**RP:** And Fifth Avenue Coach was then an administrative proceeding, a court proceeding?

**ME:** No, it was a court proceeding and it was assigned to our office and we put a team together which included counsel from the Investment Company division. Every division had its own enforcement group, which is not true today. And Sid Mendelson was the chief enforcement counsel and Dave Butowsky, along with Phil Smith, were assigned to the case. Ted Sonde from our office was also assigned to it.

**RP:** Butowsky and Mendelson were from what division?

**ME:** They were from investment management within Corp Reg. Sonde was in General Counsel's Office.

**RP:** So this was a joint general counsel division of investment management team.

**ME:** Butowsky was from Corp Reg. Dick Tow was from Corp Fin. He was a financial analyst type. Phil Smith was from Butowsky's office. And we were going to try this case and what it involved was that Roy Cohn and his group were going to take that \$30 million. It involved bags of money going to England with the Panamanian ambassador to England, other CD's and Panamanian and Swiss banks. It was really quite a story and we investigated it. But the first thing we did was to bring an action against these people in the Southern District of New York. We went up and argued for an injunction against them.

And the interesting thing about it was that it was an investment company. We argued that this was an unregistered investment company. They had taken the pool of money and they were investing it in a lot of junk, but they were investing it and taking the money out. And it was unregistered and they were saying no it was not an investment company. And then, of course, there was a fraud charge. And it was . . .

**RP:** What was the result?

**ME:** The result was that, after I think it was an eight-week trial, before a wonderful judge, whose name was Edward McLean. He was a wonderful judge, not just because we won,

but because he was really a fine judge. He put us through what we would have had to go through in a criminal trial to do this. And the Commission got an injunction, a special trustee was appointed to take charge of the money. The Commission basically won its case, unfortunately, the recommendation that Mr. Cohn be disbarred as a member of the New York Bar never went anyplace. And he wasn't disbarred till many years later.

**RP:** This was the first time, was it not, that Mr. Cohn lost a case.

**ME:** It was the only case, as far as I know, that Roy lost to the government. And Bob Morgenthau, who was the United States Attorney at the time, had tried Cohn twice in cases not related to Fifth Avenue, but other cases that he had, that were criminal. Cohn managed to get a hung jury on one because one of the jurors' father died and that was the end of that. And then they lost, I think, in another case. So it was . . . this was the only case that Cohn ever lost to the government. Roy was about as despicable a character as I ever met.

**RP:** And you considered it a very significant victory.

**ME:** There's no question that it was significant. We even got a promotion out of it. The other really important case, of course, was Texas Gulf Sulphur and I was involved but not in the trial. I was involved in Great American Industries and a couple of other cases. But

the big cases were Fifth Avenue and IOS. IOS was Fund of Funds and Bernie Cornfeld, and at that time was a pretty big case. What they were doing was that they had these off-shore funds that were being sold overseas but were investing in the American stock market. They were selling to service men and people overseas and so on.

And it was a really big fraud because they would use give-ups, there was the receptacle for the give-ups was a Cuban skin diver named Martika Clapp, who was in the Bahamas and the money would go to Switzerland and end up in a Bahamian bank account controlled by Clapp. And they were very successful. If they had done their business honestly, it was a good business. But they got very greedy, and we pursued the case. The case was originally brought . . . what's our jurisdiction? Why does the Commission have jurisdiction over this stuff which is happening overseas.

So we started searching for places where IOS was doing business in the United States and two things happened. One was we got a notice from the United States Attorney in Guam which said that they were selling in Guam, Guam was American territory so we detailed Allen Gordon to go to Guam. The telegram to the United States Attorney apparently went to the IOS agent on Guam who contacted his people in Switzerland and David Silver was detailed.

**RP:** David Silver was counsel for IOS.

**ME:** He was counsel, that's right. To go to Guam. The reason that Allen Gordon was detailed was that he was supposed to go to Hawaii to some conference, they didn't know that. And he stayed in Hawaii for about a week and poor Silver was out in Guam with gnats and snakes and so on, waiting for Gordon to show up.

**RP:** This is David Silver that went on to become president of the ICI.

**ME:** Right. He would check every Pan Am flight that came on and eventually Gordon landed and of course they knew each other and Silver was delighted to see the inquisitor coming. Anyway, so we had Guam. I went down to Puerto Rico where they decided they would fight the Commission's subpoena. So the first part was a Commission enforcement action which I argued before Judge Cancio. It was the U.S. District Court in San Juan. I had been before Cancio before on the Puerto Rico Capital case, which was the first investment company case in the history of Puerto Rico. The question was whether the U.S. securities laws applied in Puerto Rico. They did.

[End Tape 1, Side A]

[Begin Tape 1, Side B]

**RP:** This is the Society's interview of Meyer "Mike" Eisenberg, continued on the second side of the tape.

**ME:** In any event, I mean there were various stories that go along with the IOS case. The sum and substance of the case, aside from the colorful characters and how the thing was defended and some of how we beat them in Puerto Rico where it was just poor me against all these guys from Willkie Farr, like Allen Conwell.

**RP:** This was the Conwell who was General Counsel of the Commission at one time?

**ME:** Yes. He was also Director of Investment Management, and then left and was IOS's counsel. But, of course, I had argued before Cancio before and it was really funny. The attorney general of Puerto Rico, Herendez Colon, later became governor. He introduced me to the court. It was really a riot because Judge Cancio had previously been the attorney general of Puerto Rico. There was this whole scene with all these New York lawyers in dark suits sitting at one table and me sitting alone at the other table. And the door was flung open and Herendez Colon comes in and Cancio gets up and says, "For what purpose does the attorney general of the Commonwealth appear in my court?" "To introduce our good friend and distinguished SEC lawyer from Washington, Meyer Eisenberg," he said. It was clear IOS was going to lose this one. It was really great stuff. So I was admitted pro hoc vice for the case and the judge ruled against IOS.

And the important thing of the IOS case was it had to do with the extent of U.S. jurisdiction over things that were happening overseas but affected the American markets. And to that extent aside from the cast of characters and all of that it was quite important.

**RP:** And the end result was that IOS was closed down.

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

**RP:** Mainly keeping them out of the United States.

**ME:** Keeping them out of the United States. And of course, pretty much discrediting them.

**RP:** And thereafter the Swiss government took some action.

**ME:** The Swiss government took action and pretty much IOS was discredited.

**RP:** Any other significant event during your first tenure at the Commission, which, as I recall, ended in 1969.

**ME:** It ended in '70. After Manny left, I became Associate General Counsel and my job was to help shepherd the Investment Company Act Amendments of 1970, prepare testimony. Phil Loomis was the General Counsel this should not go by without talking about Phil. Phil Loomis was truly a genius. He was a great General Counsel, knew as much as anybody, was a very reticent fellow and was a real gem to work for. He would sit and he would rearrange a brief and visualize it and do it in a half an hour. The stuff that you would struggle over for three hours, Phil Loomis could solve. And he was a truly amazing person and I think he is somebody that too many people have forgotten. Phil was, I think, among the best people I ever worked for.

Anyway, I went back and there was testimony to be given. Williams, Senator Williams, was . . . first was Sparkman, then Williams was the chair. This had gone on for several years after the mutual fund study and started in '67 and by '68, they were really ready to have the bill and there were hearings and the bill finally passed, much to some people's surprise. There were some compromises made but essentially, at least from my point of view, the Commission got what it wanted. Manny was very involved in this. When

Manny was forced out in February of '69, the Budge Commission took over but the momentum kept up. The momentum kept up. And we saw it through and Judge BudgeChe was a judge in Idaho before he went to Congress after World War II. He testified, the others testified. The Commission was fairly strong at the time and that went forward and that was a very important piece of business which resonates till today in terms of the beginning of mutual fund reforms that were legislated.

**RP:** This legislation did what?

**ME:** The legislation strengthened the role of independent directors, it basically recognized the responsibility of the funds in terms of reasonable fees. Section 36 was divided into two pieces, which I won't go into now, which basically set higher fiduciary standards than existed before and there were also loads. Front-end loads were severely affected.

**RP:** Subject to NASD . . .

**ME:** Subject to NASD limitations. It was an important piece of legislation.

**RP:** You left the Commission in 1970. And what did you do?

**ME:** Well I left the Commission. Manny asked me to go with him to Wilmer, Cutler and they didn't want to give me a partnership and so I went to another firm that was called Lawler,

Sterling and Kent and they opened a Washington office, that was later absorbed by Roseman and Colin and I became a partner. And then I went through mid-life crisis in 1985, '86 and I went to Berkeley to teach. I was the director of the National Center on Financial Services and I taught a course on federal regulation and financial institutions. It was a wonderful experience. I'm still in touch with some of the students I had.

It was the only center like that in the country. We had an advisory board that had the Chairman of the SEC, vice Chairman of the Fed, and a lot of people from industry and academics. A lot of the stuff had to do with bank entry into the securities business, firewalls of capital markets, but also the S&L scandal, which was brewing on the horizon. Then I went to Ballard Spahr

**RP:** After you left Berkeley?

**ME:** After I left Berkeley.

**RP:** You were at Berkeley for how long?

**ME:** I was at Berkeley for almost two years. And I came back . . . Roseman had closed its office, I was a Ballard Spahr partner, and then after a while I went to Kramer Levin for three or four years. And I was innocently attending an ABA meeting in Toronto when

Harvey Goldschmid, who is the . . . Harvey Goldschmid was then the SEC's General Counsel who I had known for a long time because I was on the CORPRO group at the ABA, Corporate Governance Group, and he was a reporter of the ALI Corporate Governance project along with Mel Eisenberg, Marshall Small, and Jack Coffee. He recruited me basically. He said that he wanted a deputy and we negotiated a little bit. My kids were through with school and they were married and so it sounded like a good thing to do. And I was sort of tired of billing time and running after clients and so it worked out well. Arthur Levitt was the Chairman.

**RP:** When was this?

**ME:** This was '99, this was the tail end of 1998, so it will be five years, almost five years that I came back.

**RP:** And Harvey Goldschmid was General Counsel and you were Deputy General Counsel.

**ME:** That's right.

**RP:** And you're still at the Commission.

**ME:** I'm still at the Commission.

**RP:** And you've been through how many chairmen?

**ME:** I've now been through, I've survived Harvey Pitt's chairmanship, barely. That was really not a good time for the Commission. Not a good time for the staff. And Bill Donaldson, obviously took his place. And Donaldson pretty much runs a fairly collegial Commission. There is no kind of partisan political division like there was under Pitt. Goldschmid, and Donaldson and Campos get along and they get along with the other Commissioners. The votes don't split down strict party lines, there's generally consensus; when they do split, it's really more ideological than political.

**RP:** Let me ask you this . . .

**ME:** The difference is that it's a much bigger Commission with a lot . . .

**RP:** The difference between your first tenure and your present tenure.

**ME:** Right. And it's a larger bureaucracy. I think it's harder to run. The problems are, I think, more difficult than they were before, at least they're more complicated. The markets are more complicated. We didn't really have derivatives like we have now. The mutual fund industry is six and a half trillion dollars instead of \$40 billion. The capital markets are international, accounting standards . . . you still have the similar venality in terms of that

there are people out there like the Enron situation, but the frauds are now more complex and affect more people than some of the things we dealt with, which were much more raw in terms of the kinds of frauds that we're talking about. So things are now more complicated and more difficult to pursue.

**RP:** But you're saying except for the Pitt administration, you don't see an increase in partisanship.

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

**RP:** Do you see any . . .

**ME:** Other than that the politicization part of it was unfortunate, but not anything like Watergate.

**RP:** Does the Commission itself retain the same kind of collegiality as existed during your first tenure?

**ME:** I think it pretty much has.

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

**ME:** As far as I'm concerned the Sunshine Act, as it's called, is an impediment to effective governance of the Commission. And I realize why it's in place and it is supposed to serve a good purpose and to some extent there are things that ought to be public and should be public but one of the things during, for instance, the Cary and Cohen administrations was that the Commissioners could get together and argue things out and talk things through and reach a consensus and respect each other whether they . . . and usually you could find a middle ground. When you now have an open Commission meeting, you have set speeches pretty much. The fight that took place at the open meeting where the PCAOB appointment of Judge Webster was clearly extraordinary. I mean, that's the only time I've ever seen a Commission meeting like that.. But usually it's set speeches.

The enforcement meetings which are closed, legitimately closed, you get much more of a back and forth and evaluation, a discussion, the staff doesn't have set speeches at the

enforcement and other private meetings, whereas in the public meetings, as you know, they sit and they talk through largely prepared speeches.

**RP:** But they still have to confine their discussions to formal Commission meetings.

**ME:** Yes.

**RP:** Which is unlike the situation in the 1960s.

**ME:** Yes they could get together. I mean Wheat and Smith and Cohen and Owens would get together and they'd talk something through and if . . .

**RP:** Get together informally?

**ME:** Informally. They'd get together and walk into Barney's office and they'd sit down and they'd talk it through.

**RP:** And that can't be done now. Let me ask you this. What about collegiality and working together between the different divisions. Do you still have the examples of inter-division teams?

**ME:** No. And that's unfortunate and maybe it's a product of turf. But it's also a product of the fact that there's so many more people in a division and that there, I think, is much more turf jealousy now than I've seen in the '60's, but you're talking about a Commission with many times the size it was thirty years ago. So that leads to where we really don't have very many situations where you have joint teams. We now have issues on the table, where Market Reg and IMC Investment Management really ought to be getting together. Yes, they talk, but attacking something jointly is not really done very much. And also there are other players which didn't exist before, like the Office of Compliance and Inspections, which has a significant role in some of these issues, OIA, the economists.

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

**ME:** I think that it has always had interesting and exciting and important things to do. Now it wasn't war and peace or settling the world's problems, but we always felt that there was a pride in being a part of the Commission and that the Commission was doing a good job. The fact that the collegiality may not have been there for a while or the fact that there are turf problems, still you have really very good people who really want to do a good job and then generally it works. There's a real pride in doing that. When we go to the Solicitor's General's Office on some of the cases that we've won, they say, "Well this

officeCthe General Counsel's OfficeCis one of the best that we've ever had, that we've ever had to deal with."

**RP:** And that was true in the '60s and its true today?

**ME:** And that was true in the '60s and it is true today. And the work that's put out of the Office is really first-class work and we win most of our cases. And the SG's office, who we work the Supreme Court cases through, is a terrific help, whether it's Democrat or Republican, whether it's Ted Olson or Waxman, it doesn't matter that much.

**RP:** Is there anything you want to add to this interview?

**ME:** Well, I've always thought that there ought to be a book written about some of the interesting, funny stuff that went on, that really doesn't get told. And this is not the time or place to tell it, but there are so many interesting characters around that people don't really know about. It will die with people and the memories go. It's really too bad. There are IOS stories and Fifth Avenue stories and there are a whole bunch of things now with the big Wall Street settlement and the rest of it. And I think that's too bad that that will be lost.

The other thing is that the institutional memory is fading. It used to be that the people you dealt with had been there for years and years. You could not be an assistant director

in the Division of Corporation Finance unless you'd come up through the ranks. It was not political. The director of the division was not usually political. The General Counsel often was, but the others were not. And consequently, you now have people who are younger and less experienced in positions to make decisions and that shows.

**RP:** Thank you very much, Mr. Eisenberg.

**ME:** You're welcome very much, Mr. Phillips.

**RP:** This is the end of our interview.

[End of Interview]

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