

## SEC HISTORICAL SOCIETY

### **Fireside Chat – SEC Office of the General Counsel**

March 11, 2008

**THERESA GABALDON:** Good afternoon, and welcome to the first broadcast of the 2008 season of Fireside Chats at the Securities and Exchange Commission Historical Society on [www.sechistorical.org](http://www.sechistorical.org).

I'm Theresa Gabaldon, Lyle T. Alverson Professor of Law at The George Washington University School of Law and moderator of the Fireside Chats.

As our listeners may know, the SEC Historical Society preserves and shares the history of the U.S. Securities and Exchange Commission and of the securities Industry to its virtual museum and archive at [www.sechistorical.org](http://www.sechistorical.org). The museum's collections are free and accessible worldwide at all times. The virtual museum and archive as well as the Society are separate from and independent of the SEC and receive no government funding.

Our program today marks the start of the fifth anniversary broadcast season of the Fireside Chats. The chats were launched by the Society in 2004 with moderator Donald Langevoort of Georgetown University Law School to help mark the seventieth anniversary of the founding of the U.S. Securities and Exchange Commission. Today's Fireside Chat is part of the Society's commemoration of the upcoming seventy-fifth anniversary of the SEC in 2009. From now through next May, we'll focus our discussions on the distinctive history and work of many of the major SEC divisions and offices.

Our Fireside Chat today looks at the SEC Office of the General Counsel. I am delighted to welcome two former General Counsels, Daniel Goelzer, member of the Board of the Public Company Accounting Oversight Board; and Giovanni Prezioso, a partner with Cleary Gottlieb Steen & Hamilton LLP. Their remarks today are solely their own and are not representative of the opinions of the Society. Our speakers cannot give legal or investment advice.

We thank Pfizer Inc. for its continuing generous sponsorship of the entire 2008 Fireside Chat season. Its support, along with gifts and grants from many other institutions and individuals, make possible the growth and the outreach of the virtual museum and archive.

Of particular importance, our chat today is in remembrance of Eric Summergrad, a former Deputy Solicitor of the Office of the General Counsel, who died last September. Eric's service at the SEC since 1984 is a testament to the quality and dedication of the many SEC staff members who have worked and continue to work on behalf of U.S. and international investors since 1934.

I'd like to take a moment before we begin our discussion to highlight a few of the many significant milestones in Eric's career. He was a graduate of Oberlin College, with highest honors in government, and earned a law degree from New York University Law School, where he was research editor of the Law Review. Prior to joining the SEC in 1984, he was with Arnold and Porter LLP. Once joining the Commission, he rose quickly within the Office of the General Counsel, serving successively as Special Counsel in the appellate group, Senior Special Counsel, Assistant Principal General Counsel, Principal Assistant General Counsel, and finally as Deputy Solicitor beginning in 1998. Eric was recognized as the 1989 Younger Federal Lawyer by the Federal Bar Association in Washington. In 1995, Eric was given the SEC's Philip A. Loomis, Jr. Award, presented to, I quote, "The individual who displays the

qualities of outstanding legal scholarship analysis and draftsmanship, the legal counselor's ability to reconcile opposing view points and create workable solutions to difficult legal and policy issues and the highest caliber of personal and professional integrity." Dan, I know that you received this same award a decade prior to Eric's recognition. Philip Loomis was a former General Counselor and Commissioner who had a distinguished career of twenty-eight years at the SEC.

I'd now like to read from a letter sent to Eric in 1997 by Milton V. Freeman, one of the giants of securities law who had served the SEC in its earliest days. Mr. Freeman was congratulating Eric on his successful argument on behalf of the SEC in *U.S. v. O'Hagan*, one of the key insider trading cases. As Mr. Freeman wrote, "You have won the O'Hagan case. I hold you exclusively responsible for this great victory by the Commission. I hope never to find myself in a position where I have to face your formidable talents in opposition again."

Dan and Giovanni, would you like to share any of your memories of working with Eric?

**DANIEL GOELZER:** Thanks, Theresa. As you've noted, Eric joined the office in 1984 and I think we realized pretty rapidly that we had an appellate litigation star on our hands. He really had the main role in many of the significant securities law developments in the appellate courts over the years he was in the General Counsel's Office. When I think back on those times, I think of Eric's role in our amicus program particularly. He was the principal author of the Commission's amicus brief in *Basic v. Levenson*, which is one of the landmark cases on the law of materiality. He was also responsible in those days for a series of briefs we were filing about the relationship between state and federal takeover laws and trying to ensure that state law couldn't interfere unduly with federal tender offer regulation. Another brief that comes to mind was one we filed in the contest between Pennzoil and Texaco over the attempt to take over Getty Oil. The day that that brief was filed, the two stocks moved a combined total of \$1 billion. That was a pretty good accomplishment for a government lawyer writing an amicus brief.

At a personal level, Eric was just a wonderful guy to work with. I know it's kind of a cliché to say that a lawyer has an encyclopedic knowledge of the law, but I would say that about Eric. He was also a great teacher and mentor to the folks that he worked with. Another thing that I recall about him is that he was a devoted uncle to his brother's children and was always happy to pull out photos and show how they were doing and developing.

The last thing I would note about Eric was that he had a distinction that no other lawyer at the SEC had. He was the only SEC staff member on the winning side in the *Dirks* case, because he was at Arnold and Porter and was representing Dirks at the time that the Commission lost that litigation. But again, he was really one of the mainstays of the office. He will be very much missed.

**THERESA GABALDON:** Giovanni?

**GIOVANNI PREZIOSO:** He really was a fantastic colleague during my tenure at the Commission. I'll mention two things that come to mind. When I first arrived at the Commission, one of the first experiences I had with Eric was getting a brief late on a Saturday night. He was just an indefatigable worker. I thought this is great, this fellow is a hard worker, he sent me a brief at 11:00 on a Saturday night. In the morning when I woke up, at whatever time I woke up, I saw he had done a whole new draft of the brief and had sent it out a few hours later. I said, this is really a work ethic I'm not sure I can keep up with.

The second thing that comes to mind is that towards the end of the time that I was at the Commission, there was a very interesting case in which the NASD, for the first time in the history of the

Commission's oversight of its sanctions, challenged the Commission's decision overturning its sanctions. It was a case of first impression. It was very important to the programs of the Commission and there were some very tricky legal issues. Eric did his usual masterful job on the brief, developing some theories in the absence of any kind of clear precedent really dealing with these issues. He did such a good job that I prevailed upon him to argue the case at the D.C. Circuit. I think he did that with some trepidation because there's a lot of downside. It was a difficult case and he was facing some health challenges. But, as always, he stepped right up. Not only did he do a great job at the oral argument. I still remember very vividly sort of his face when he came with the news that the opinion had been very favorable -- so favorable that it surprised even him. He was just delighted as you can imagine. I was delighted for the Commission and for him. He was just a great colleague and took on some wonderful challenges and worked very hard for all of the folks at the Commission to get that mission done.

**THERESA GABALDON:** Thank you for sharing your thoughts. It is a privilege to remember Eric Summergrad as we begin this chat about the SEC Office of the General Counsel. We thank his family for making a generous gift to help sponsor this chat and for contributing materials from and about Eric for inclusion in the collections of the virtual museum. I encourage our listeners to access these materials after today's broadcast.

Turning now to a more general discussion of the Office of the General Counsel, I would appreciate it if one of you could give us a little bit of background about the office. Did it come into existence at the same time as the Commission itself or some time later?

**DANIEL GOELZER:** While I was at the Commission somewhat before Giovanni was, I'm afraid even my memory doesn't extend back to 1934. I had to look it up. In Joel Seligman's book, *The Transformation of Wall Street*, he describes the appointment of the first General Counsel, who was John Burns. At least according to Professor Seligman's version, there was some horse trading among the Commissioners about who would be responsible for which staff appointments. Joe Kennedy reserved for himself the appointment of the General Counsel and appointed John Burns, who was a young judge in the state of Massachusetts. At the age of twenty-nine, he had been a professor at Harvard Law School, so he was apparently quite a hotshot in the legal field.

The difficulty was that Commissioner Landis felt that Ben Cohen, one of the drafters of the securities laws, ought to be General Counsel. Kennedy, in order to avoid dissension on the Commission, said, well, we will have two General Counsels. Cohen and Burns can both be General Counsels. Felix Frankfurter, who was apparently pulling the strings on a lot of these things, persuaded Landis that it wouldn't be a good idea to have two General Counsels. So Landis withdrew his insistence on Cohen, and Burns became the first General Counsel. What the office was like in those days, I'm afraid I wasn't able to discover.

**THERESA GABALDON:** Do all Federal agencies have something more or less equivalent to the General Counsel's Office?

**DANIEL GOELZER:** My answer would be yes, as far as I know. It seems to me, given the nature of Washington and federal agencies, that it's almost essential to have some sort of legal staff advising you about the agency's compliance with the law. The thing that distinguishes the SEC General Counsel's Office is the broad range of its responsibilities. This has traditionally been close to the maximum that a federal agency's legal staff can have. The office represents the agency in the appellate courts, free of the Justice Department's control; traditionally argues its own cases in the Supreme Court with only minimal supervision from the Solicitor General's Office; takes positions on legislation free of any

controls from the administration; and carries out the regular host of internal legal advisory tasks that any General Counsel's Office would perform.

**GIOVANNI PREZIOSO:** The closest similarities would be in General Counsel's Offices of the other independent agencies, such as the Federal Trade Commission and the CFTC. The issues that the General Counsel's Office of those independent agencies face often overlap. The General Counsels of the different agencies will speak to each other, even informally meet over lunch to discuss matters such as how to administer the Sunshine Act in a multi-member agency and other issues that pretty much no other legal office on the planet would care about.

**THERESA GABALDON:** It sounds like there's a lot of work to be done. What size of an office are we talking about to provide the person power here?

**DANIEL GOELZER:** I don't know exactly what the headcount is today. I would suspect it's in the neighborhood of a hundred and twenty people all in. I can say that when I joined the office on September 1, 1974, it had thirty-five people in it, secretaries and lawyers, all included. I believe when I left in 1990 the total was in the high nineties. So that's the range of the staff. Perhaps unlike some other agencies, not all the lawyers at the SEC are in the General Counsel's Office. The agency is very heavily staffed with lawyers, and all the divisions have their own chief counsel's offices. So we're not talking about the entire legal staff of the SEC

**GIOVANNI PREZIOSO:** The number of folks in the office went up to roughly a hundred and twenty when Congress and the administration increased the budget after 2002. The agency as a whole grew a great deal and there were additional staff added in the General Counsel's Office to help with some of the new responsibilities that were added.

**THERESA GABALDON:** If we were to imagine the organizational chart of the SEC, where would the General Counsel's Office appear on that chart?

**GIOVANNI PREZIOSO:** There are a series of direct reports to the Chairman and Commissioners and those include the heads of the divisions, including the General Counsel. The General Counsel's Office on that organization chart would be located in a line that reports through the General Counsel to the Chairman and the Commissioners, and at the same level as the division directors. Indeed, as you may know, under one of the organic statutes that governs the administration of the Commission, Reorganization Plan 10 of 1950, the Chairman is authorized to direct the staff and appoint the staff without the consent of the Commission, except for the heads of major organizational units within the agency. The division directors and the General Counsel have traditionally been viewed among those that would require the sign off of the other Commissioners. So it's at that level.

**THERESA GABALDON:** You've given us some notion of the breadth of activities in the office. Do you think it's possible to describe its mission in twenty-five or fifty words or less?

**DANIEL GOELZER:** I guess you'd say the General Counsel is the chief legal officer of the Commission, but maybe we ought to go into the laundry list of some of the sorts of things that fall under that heading.

**THERESA GABALDON:** Please do.

**DANIEL GOELZER:** It's a long list.

**GIOVANNI PREZIOSO:** Another way to think about it, to pick up on Dan's comment, is you can think about the General Counsel's Office as the Commission's law firm. I choose those words carefully because it reflects an important element of the office which is, the office works for the Commission. That comes up in multiple ways because many times -- because this is significant organization in terms of size -- not every division of the Commission sees all the different moving parts and all the different things that the agency is doing. Part of what the General Counsel's Office brings as the Commission's law firm is a legal perspective that cuts across division and office lines.

The other element of being a Commission's law firm is that part of the Commission's job is to test what's going on in the divisions, to offer their own perspective and to see opposing perspectives that the rest of the world might see. Part of the General Counsel's Office job, again, as the Commission's law firm, is to help develop that perspective of a counterpoint to some of the other things that various folks on the staff are doing.

It's also the Commission's law firm in the sense that when a legal problem comes in and there's no one who is assigned to take care of it, it goes to the General Counsel's Office. That can be everything from negotiating the lease for the new building to, litigation that's designed to preempt an enforcement action.

**THERESA GABALDON:** One thing I've always been a bit curious about is the exact relationship between the General Counsel and the SEC solicitor. Could you perhaps help me out with that a bit?

**DANIEL GOELZER:** I think that's something that's changed over time. If I remember correctly, when I arrived in 1974, there was no Solicitor, although if you look back at older documents, that title had apparently been used at various times during the '30s, '40s and 50s. I think the current position of Solicitor was created in the mid or late '70s, essentially for Dave Ferber, who had been running the office's appellate litigation for many years. The Commission wanted to recognize his service and, at least to a limited degree, his independence in the area of appellate litigation by creating this new title of Solicitor. But even then, and I'm quite sure continuing to today, the Solicitor was part of the General Counsel's Office, and at least for administrative purposes, reported to the General Counsel. I think it's pretty clear today that the General Counsel is the head of the office and is also the supervisor, if you will, of the Solicitor and the appellate work under the Solicitor's jurisdiction.

**GIOVANNI PREZIOSO:** To pick up on that, going back to Dan's point about the organizational structure of the office, within the General Counsel's Office there are five components, one of which is the appellate group. That is headed by the Solicitor, who is responsible for all appellate matters that the Commission is involved in. There is counseling, which has a broader mandate to provide advice on legal policy to the staff and the Commission. This legal policy group and is also responsible for reviewing any enforcement actions. Then there is adjudication, which was previously the office of opinions and review, that writes the Commission's opinions in adjudicatory appeals. The fourth major unit in terms of the number of people is the general litigation and administrative unit that handles any actions against the Commission and defends the Commission employees when they are witnesses, lease type matters, personnel matters, et cetera as well as attorney misconduct issues. And the final group, which is small in numbers but important in its role, is the office of ethics, with the chief ethics officer also reporting to the General Counsel. So that kind of picks up on the role of the Solicitor and where it fits into the office and its structure.

**DANIEL GOELZER:** All this has evolved and changed a lot over the years. From the perspective of my arrival in 1974, the office was then doing almost exclusively appellate litigation; the counseling function didn't exist, except in the informal sense that the Commission might seek advice from time to time about particular non-litigation matters from the office. The separate title of Solicitor didn't exist; ethics

wasn't a separately broken out function; opinions and review was a separate office in the Commission; and adjudication wasn't part of the office's work. If you look over the last thirty years or so, there's been an expansion of the office's role and a consolidation of some functions that were separate in the office.

**THERESA GABALDON:** To pick up again on something you said earlier - that we can think of the Office of the General Counsel as the Commission's law firm - that leads me to ask the question, how do you go about conceptualizing your client in that circumstance? Is it the five Commissioners acting as a single body? Is it the entire organization? What is the real client there?

**DANIEL GOELZER:** This is a big subject. It seems to me that technically it's the agency -- whose will or position is determined by a majority vote of the five Commissioners. Commissioners presumably base their votes on what they think is in the public interest, as defined in the securities laws. In practice, General Counsels tend to have a close relationship with the Chairman. Sometimes that produces some tension, but I wouldn't say that the Chairman is the General Counsel's client, as distinguished from the agency itself. You raised the possibility of the American people being the client of the General Counsel, which is a concept I hadn't really thought of before. I suppose "the people" come into the picture through the Commissioners making their determinations about how the securities laws should be administered in the public interest.

**GIOVANNI PREZIOSO:** I agree with that. On the point of the American people, if you walked into court and said I'm here on behalf of the United States of America, I think that the Justice Department would be pretty unhappy about that. There are many areas where there are disagreements between the Commission's lawyers and the Justice Department. We see that in antitrust cases; they get sorted out at the highest levels when it goes to the Supreme Court.

Within the agency, obviously the issue is just the way Dan posed it. The client is the Commission. What is of course true, with that kind of organizational client like any client is that there are mechanisms by which the client administers its affairs, that the General Counsel respects. On matters like rule-making or where you're having an approval of an enforcement action, the Commissioners vote. The General Counsel's Office must actively support the decision that was taken by the Commission or by a majority as appropriate. There are a number of matters that I alluded to earlier that are committed by law to the Chairman to make decisions on without reference to having Commission votes. In those contexts, of course, one works with the Chairman because the Chairman is ultimately, by law, the boss of all the people who work in the agency, in terms of the administration of the Commission and the executions of its function. So, your client is the Commission, but your boss is the Chairman, is one way to think about it. And occasionally, that can present issues, but it depends very much on the human beings involved. You try never to let things get to that point. Indeed, one of the main things you do as General Counsels is to try to avoid ever getting into the position where the views of the Commission and the views of the Chairman are so at odds that it is really a problem figuring out who your client is.

**THERESA GABALDON:** That makes a lot of sense. Suppose as a strictly hypothetical matter, with respect to one of the matters that's dedicated to the Chairman by virtue of law, the General Counsel felt that the Chairman was doing something that was completely wrong headed, perhaps against the law, where would the General Counsel go in that circumstance?

**GIOVANNI PREZIOSO:** I think that's the same problem that any lawyer who works inside an organization faces if they find the leader of their organization want to take an action that's illegal. Obviously the lawyer can't allow that to occur. The range of options is all pretty much a menu of unappealing things that one could do, ranging from resigning, trying to seek inquiries by the Inspector General, enlisting the assistance of other people on the staff to raise issues. They are an unappealing menu. I think, by and large, we've been fortunate in that I don't think that the Chairmen of the

Commission have been people who, when push came to shove, would do something that their General Counsel thought was illegal.

**DANIEL GOELZER:** I suppose that's not an issue that's unique to the Chairman. You could have a situation where the General Counsel felt that the Commission majority wanted to do something that was illegal. I agree you would then be confronted with what Giovanni called a menu of unattractive choices. At a lower level, we had occasional situations where people in the office wouldn't work on a particular matter because they thought that the position the Commission was taking was wrong. Fortunately, those situations weren't very common, but that did occur occasionally. We usually accommodated those people when that happened.

**THERESA GABALDON:** You said it was the same issue that would confront anyone representing an organization. Do you think that it is more or less challenging than representing your garden variety organization?

**GIOVANNI PREZIOSO:** My sense is that being a lawyer inside a government agency does have significant differences in the way it plays out compared to a private company. One of the most visible things is the very visibility of everything one does in the government. There is a working assumption that you have to have as a lawyer in the government that, while there may be attorney-client privilege, it's not very meaningful as to Congress. All of your advice, everything you say, may well end up being produced at some Congressional hearing someday. That can happen to anyone, I understand. But it's a much more public way of practicing law when you're inside the agency, especially in times when the agency's mission is an important topic of broad public interest.

There are also challenges that come from being inside an agency in terms of motivation, because one doesn't have the same tools to influence people, either on the positive side by lots of financial incentives, or on the negative side by having them go away and find other work, at least with the same ease as in the private sector. That can present some challenges when people aren't all on board with the mission as Dan was describing.

**DANIEL GOELZER:** There are always challenges coming from the fact that the organization may be your client, but you're dealing with individuals. The organization can only communicate with you through people that you have a personal relationship with. Maybe more in the corporate setting than in the governmental setting, there's a strong human tendency to want to please the people that you're working for and have them feel that you're doing a good job and promoting their interests. In the corporate setting, occasionally you may have to sit up and think about whether the management that you are dealing with is diverging from the interest of the shareholders, from their fiduciary duties to the corporation, or from compliance with the law. That is, I think, something Giovanni could speak about at length because he worked on the rules coming out of the Sarbanes-Oxley Act that deal with that.

In a sense, it's easier working for a government agency like the Commission because there's a defined process to make a decision. If a majority of the Commissioners say this is our position, nobody else can really come in and say, well you are breaching your duty to the American public or to the shareholders. You may win or lose in court, if it is a position you are going to be taking in court, but there is no real collateral way of challenging the propriety of that decision.

**THERESA GABALDON:** What are the basic challenges, the basic dynamics of representing an agency? Is the SEC in a unique situation?

**GIOVANNI PREZIOSO:** There's a difference that I perceived at the SEC from some other agencies, and it is something Dan alluded to a little bit earlier. I think that the SEC has preserved its tradition of

independence from whoever the administration may be and from whoever may be controlling Congress to a greater extent than some of the other agencies. Everyone in government has to be responsive to someone; that's appropriate and that is the system we have and we want. But there are times when there are external forces that would like to influence the decisions of a regulatory agency. The agency has been better at saying to Congress, to the administration, we do this here and we are an independent agency. We are of course happy to listen to any thoughtful views on any issue in public as it always worked at the SEC. It's not perfect; we know that. But in my perception, we had a higher degree of independence than many other agencies.

**DANIEL GOELZER:** I think that's really an important point. In fact, it's one of the defining characteristics of the Office of the General Counsel at the SEC and perhaps of the SEC itself - the independence that the office and the agency have been able to maintain from the administration and from other kinds of inter-governmental pressures.

**GIOVANNI PREZIOSO:** Right.

**DANIEL GOELZER:** Apart from that, I would say that I don't think the challenges are conceptually different than they would be at any other multi-headed agency.

**THERESA GABALDON:** Presumably with the independence comes responsibility. I am interested in how the General Counsel's Office goes about recruiting to satisfy its obligations. What do you look for in the perfect recruit?

**GIOVANNI PREZIOSO:** I think that people look for the same things they look for in any lawyer that they are trying to recruit: intelligence, commitment, judgment and interest in the work of the agency. I think that the agency has been fortunate over the years to have a strong tradition that has fed on itself of attracting very bright people, both out of law school and later in their careers after they have dabbled in private practice or in other jobs, and has tried to maintain some pretty high intellectual standards and academic standards on top of maintaining a work environment that is, I think, very collegial and that is very mission oriented. The agency still is a place where I think by and large people believe in its mission -- and I am not sure that is true in every government agency or organization. So you try to find folks who have the sort of characteristics that will leave the agency in as good or better place for the next generation as it was left to them.

**DANIEL GOELZER:** The day I went to interview at the SEC, the first thing they did in the General Counsel's Office was make me take a written test. I don't know whether they still administer that written test or not, but it was quite a tradition in the office, although I must say, I hadn't heard about it until the day I had to take it. The idea was to give people a problem comparable to an issue that you would address in an appellate brief. You were given the law; it didn't call for any substantive knowledge of the law but you were supposed to write a little essay or a section of an appellate brief. As you interviewed with people, you had to take your paper around with you and they would all read it and then quiz you on the subject. I guess that was a reflection that the kind of people that the office was trying to recruit were people with writing abilities, and the kinds of skills that would lead to making good appellate lawyers. That was the main thing that was being sought.

It was fairly uncommon in those days to recruit anyone straight out of law school. Most people had a couple of years of private practice experience and had gotten some training and a little knowledge of the securities laws in that context. Candidates were looking either for a change in perspective, a change in lifestyle or for whatever the resume burnishing effects might be of some period of service on the SEC staff.

**THERESA GABALDON:** I was going to ask what sort of training might be provided to your younger hires. Obviously, people who come in with more experience will require less training. But is there a formal period of training or formal program?

**GIOVANNI PREZIOSO:** Picking up on Dan's point, while some lawyers do come in right out of law school, it's still a minority in the General Counsel's Office. There are usually people who have had a few years of experience at a law firm, so they have picked up some of the basic elements of practicing law. The training tends to be highly focused on on-the-job type of training and the traditional way that lawyers who have been trained. There are programs that people go to; there is more technology to support training than there was even probably ten years ago, and so there is a commitment to doing that. In addition the agency has been successful in recruiting some good folks out of law school who do want to go right in to public service and has tried to think about how to make that more effective.

One of the good things about the General Counsel's Office is that the ratio of supervisors to younger lawyers is actually much more favorable than it is in the rest of the Commission. You will have a supervisor who typically will have only three or four people working for them, whereas in the rest of the agency, it's probably going to be twice that ratio. When you combine that with the absolute wealth of expertise in terms of human beings that exist in the agency, the reliance on human resources makes a lot of sense, because at the agency, there are always at least one or two people who are among the leading experts on any section of securities laws, who you can go and speak with and will have a wealth of history and knowledge. There are also people who have just a long tradition in terms of the way they do the work, such as writing appellate briefs or arguing appellate cases. So you are really learning from people who are at the highest level of experience and expertise throughout your time there. I think it's a good training environment.

**DANIEL GOELZER:** My reaction is that the work is the training. It is probably the best post graduate course you can get in the federal securities laws. And, certainly thinking of my own time there, it was commonly said that you couldn't get better training in appellate advocacy and writing an appellate brief than working with Dave Ferber on writing a brief, if you survived the experience. Dave was not an easy person to work with, but you always learned a lot and perfected your writing skills. If you didn't, he would let you know in the most forceful way. I think, other than perhaps going to the Solicitor General's Office of the Justice Department, the General Counsel's Office at the SEC is the best way to learn to become an appellate lawyer.

**THERESA GABALDON:** Speaking of sharpening skills, I would like to go to the issue of basic skills, the ones that recent graduates bring to the table. This is an aside, but it is one that I am particularly interested in. Do you think that law schools are turning out the right lawyers for jobs like service in the Office of General Counsel? Here I am asking both about basic skill set of research, analytic and writing ability and about ethical sensitivity?

**GIOVANNI PREZIOSO:** I will jump in on this, Dan. I think the answer is yes and no, in the sense that I think yes, law schools are producing people that have a right basic skill set in terms of the core things that law schools can teach people -- which are about writing, analyzing problems cases, statutes, thinking about how to read in the law, trying to have some sensitivity to the broader public policy issues. But I think the answer is no on the other side, in the sense that there are a lot of things that one does as a lawyer, including at the SEC, that are not readily taught in law schools, and those include a variety of human elements and people dynamics. One of the joys of the law is that it ranges from sublime to the mundane. You not only have to write a beautiful brief; you have to make sure it's got the right color cover on it and that it arrives at the right courthouse at the right time on the right day. It's that kind of work and so there is a real mixture there. In addition, in a place like the SEC, there is a lot of specialized

knowledge that we were just talking about. Law schools may not turn out folks who have that high degree of specialized securities knowledge, but that's okay because you can learn that at the SEC.

**DANIEL GOELZER:** My reaction is pretty much the same. Both at the SEC and during my time in private practice, we weren't really expecting much more of the new law school graduates' training than that they had some of the basic knowledge of how to do legal research and a basic grounding in what the law consisted of. Most of the learning would be on the job. The work of lawyers at the SEC is so vast and varied, you can't really expect a law school to be training people for all those particular kinds of things. In the General Counsel's Office, we had fairly high standards of who would be hired, so we weren't perhaps seeing the average run of law school graduates. We were seeing more of the cream of the crop.

**THERESA GABALDON:** When you speak of vast and varied, I take it that you mean not just the collected tasks of the entire office, but also the discreet things that an individual lawyer might be called on to do. If there is anything like an ordinary day in the life of a lawyer in the General Counsel's Office, could you describe it? For instance, how many things might he or she be working on at one time?

**GIOVANNI PREZIOSO:** You can't really give a single answer to that because it is going to depend on what part of the office the person is working in. For example, if you are working on an appellate brief, you might well devote all day for a week or two weeks in researching and writing that brief. The folks in the counseling group are dealing on with what's on the Commission's calendar, they may well have to look at six, ten, whatever the number might be, issues in the course of the day. So it's going to vary widely, I would say.

**THERESA GABALDON:** I think that you have already indicated that the job of the office has changed over time and that various functions have been added particularly. I would expect too, that if the job of the Commission changes, the job of its lawyer's office is also going to change. In your view, has the job of the Commission itself changed over time?

**DANIEL GOELZER:** I suppose it depends what you mean by "job." The basic job of investor protection through a largely disclosure-based regime hasn't changed. I think that's really one of the things that's been the strength of the Commission -- that it's had that fairly clear mission. On the other hand, I think one of the fun things about being there is that, if you begin to list the issues that are important at a particular time, and then to list them over time, it's almost endless. When I was there, insider trading was a major issue, regulation of hostile takeovers was a major issue, the relationship between the SEC and the CFTC was an issue. Many of those general issues still exist in some form today, but the specifics have changed. The particular things that people have to deal with in the office and at the Commission generally have changed as the underlying markets change.

**GIOVANNI PREZIOSO:** Picking up on that thought, if you think about how dynamic the financial markets are in the United States and now globally, the mission has evolved as those markets evolve. One of the things I think that for me is always interesting is, because change seems to be coming faster and faster, market time is increasingly getting shorter. The Commission has adapted many of its mechanisms -- think about how shelf registration has helped move things along -- at various times. At some point, though, the agency has to work on due process time when it does rule makings, adjudications and litigations. There is a real tension that has to be resolved as to how you reconcile those two different timeframes. I think that's especially true as we look at what's happening in the cross border context today, the different style of regulation in other countries. I think the current Commission is very aware of that and embracing that as an issue to try to think through. But again, as Dan says, this is not the first time the Commission's faced challenges.

**DANIEL GOELZER:** Before we leave this subject of change completely, from my perspective, a radical change in the office occurred in around 1978, 1979, somewhere in that time frame, when the counseling group in the office was created. Prior to that, the center of gravity of the office was litigation and largely appellate litigation. For reasons that Giovanni touched on earlier, there was a desire, particularly by Chairman Williams and Chairman Shad, to hear both sides of many issues, not just the perspective of the division that was making the particular recommendation to the Commission. The counseling group was created, and is now a substantial unit in the office, to take an active role in reviewing everything on the Commission's calendar, and to some extent to be sort of a legal policy arm for the Chairman and for the Commission. I think today counseling is certainly very key in what the office does, without diminishing the appellate and district court litigation and the other things the office is also involved in.

**THERESA GABALDON:** I am going to pose a few questions for both of you to answer in turn here. Dan, what would you say was your biggest frustration as General Counsel?

**DANIEL GOELZER:** I'm not sure frustration is quite the right word. We had some difficult times occasionally with Congressional oversight. During a lot of the time that I was General Counsel, the Presidency was in the hands of one party and the House was in the hands of the other; the Senate swung back and forth. As a result, we had some exciting times at Congressional hearings. I remember one incident particularly. The SEC had come up with the idea of EDGAR, which is now the electronic filing system that's quite familiar to people. John Shad, consistent with his philosophy, wanted it to be self funded by users, which would have meant it was outside the appropriations process. This didn't sit too well on the Hill. We attended one hearing where a congressman held up a sign which said EDGAR on it. He said, "This is supposed to be the Electronic Data Gathering Analysis and Retrieval System, but it can't retrieve data," and tore off the R; "it can't analyze data," and tore off the A; "it can't gather data," and tore off the G. Then he folded out the word Mister in front of what was left so the sign now said, Mr. ED, and he said, "The SEC has as much chance of ever developing this system as it does of finding a talking horse." To me, that kind of incident epitomized some of our relationships with Congress in those days.

**THERESA GABALDON:** Truly memorable. Giovanni, same question?

**GIOVANNI PREZIOSO:** I don't have anything that's so memorable. If one phrases it as a frustration, I think it partly is the flip side of the mission that we are talking about, in-so-far as the mission of General Counsel's Office to provide this broader perspective. More than occasionally, it can be frustrating trying to get the different parts of the agency to all see a shared mission. And when I say that I include the Commissioners, who themselves sometimes have particular views that reflect legitimate interest, but they don't always see that they are role models for all of the staff. Getting everyone on the same page when, after all, everyone really in theory is working for the same people here, especially having come from outside, that was frustrating. But I think it is part of the job of the GC. So it's a probably natural and good frustration to have.

**THERESA GABALDON:** Looking at perhaps the opposite side of things, Dan, what was your fondest achievement as General Counsel?

**DANIEL GOELZER:** Well, again that's a hard question to answer. I think we accomplished some important things in tender offer regulation, and in earlier days, before I was General Counsel, in the area of corrupt payments in the Foreign Corrupt Practices Act. I could go on with a long list. But the thing I really remember the most fondly is those calendar review meetings we had every Monday morning where we got the entire office together, talked about every item that was going to be on the

Commission's calendar in the coming week and decided what perhaps we could say about it to get a little different perspective on what the relevant division wanted to do. I enjoyed those things immensely. I still today have people who were staff attorneys in those days, come up to me and say what a meaningful professional development experience it was for them to be involved in those dialogues and then the opportunity to present a different view to the Commission.

**THERESA GABALDON:** I can see why.

**GIOVANNI PREZIOSO:** There are a lot of fantastic things and calendar meetings are really up there. Another similar thing is when you are looking at an amicus brief and you have the parties come in from both sides and talk to you and then they leave the room and you say to the Commission folks, "Okay, what is the right thing to do?" As a lawyer, you so rarely get to have those experiences where, in an informed way, your job is to figure out the right thing.

In terms of achievements, because I was there during Sarbanes-Oxley, it's hard not to focus on the effort that went into that. The statute was enacted in July at the end of the month and Congress wrote a series of very tight deadlines into that statute for rule making to be done by the agency, most of which had to be done within six months. My tasks included making sure we got all of those rules done on time. I was confident they would be under budget because we didn't have any more money than we had. And the great thing, sort of the other side of what we were just talking about in terms of tensions, I think people really pulled together knowing how difficult the challenge was, knowing how important it was for the agency to take this on even though there were some very significant policy divisions. And amazingly, and people don't always focus on this, the Commission adopted every one of those Sarbanes-Oxley rules on time; it met all of the deadlines for both proposing and adopting or both, and every vote by the Commission was unanimous. There were some other things that happened in that time period that were divisive but I think that ability of the agency to come together was impressive. I enjoyed the opportunity to be part of that exercise -- with our time and responsibility chart and everybody's home phone number on the back and our weekly Tuesday meetings -- it was pretty clearly an interesting and fond moment for me.

**THERESA GABALDON:** That was quite an achievement. I remember talking to other outsiders, rolling their eyes and saying, they can't possibly get it done that fast, but you did. Now, what I think is a different question, although maybe it will turn out to be exactly the same one, what was the most interesting thing you remember working on?

**DANIEL GOELZER:** I would say being part of the evolution of the laws of insider trading was probably the most interesting. Shortly after I became General Counsel, we lost the Dirks case in the Supreme Court. That put to rest the idea that insider trading depended on unequal access to information. The period I was General Counsel was rife with hostile takeovers which are fertile ground for insider trading, so insider trading was a very active program in the Enforcement division. We worked with the division and then in the appellate courts, in developing the misappropriation theory, fleshing out concepts of personal benefit in tipping cases, and other things that really hadn't been part of the law until the Dirks case. Just after I was gone from the office, with the O'Hagan decision, the Supreme Court endorsed misappropriation. Insider trading law has now become relatively settled, compared to what it was in the early '80s.

**GIOVANNI PREZIOSO:** I think that the amicus program and the appellate program probably as a whole offered the most interesting intellectual pieces of the job for me. We made an effort to try to expand the amicus program a bit, to reinvigorate, draw people's attention to it. In addition, we had several Supreme Court cases on really interesting and important topics, as well as cases throughout the appellate courts. I think for lawyers who enjoy legal work, that kind of work is just always

fascinating. We did have the chance to make a contribution on some important issues ranging from the definition of security to loss causation. But I wouldn't forget that in some ways many of the most interesting things had happened are not big picture things, but small things. One day, we had an unexpected issue come up in the enforcement context and the division decided they wanted to have the Commission meet immediately to authorize a case. It was so unexpected that the Closed Commission meeting room was being used for a kind of international kind of conclave, so we couldn't really throw out all these foreign securities regulators. We took the biggest conference room we could find which was the Enforcement Division's conference room, and set it up with the microphones. I don't think we even had all the Commissioners, but we had a quorum and we started talking about this case. The head of the Enforcement Division started to lay it out, and at a certain point the Chairman, smart person, said, "well, what's the legal theory on that?" The head of the Division of Enforcement, also a smart person, said, "well, Giovanni, what is the legal theory on that?" But it was a great discussion, and I think we ended up in the right place. It is those kinds of moments where you are really at the table, working together with all these folks, developing theories that fit the facts and then try other ways; that kind of thing is just fascinating.

**THERESA GABALDON:** We are getting close to our limit on time, but we've talked already about the achievements and contributions of Eric Summergrad. Are there any other folks that each of you may have worked with and particularly like to reminisce about for a moment?

**DANIEL GOELZER:** I hate this kind of question because, once you start naming people, there are so many people that should be named. I would say that both Harvey Pitt and Ralph Ferrara were kind of role models to me because they followed the same course through the Commission, starting as staff attorneys and eventually becoming General Counsel. I think however that the person that to me has most defined the General Counsel's Office over the last 30 plus years would be Paul Gonson, who was Deputy General Counsel. I always knew that when I needed advice I could go to Paul and get it. On more than one occasion, he restrained me from some of my wilder and more ill-advised ideas. He's just a first rate lawyer, a terrific gentleman and I couldn't imagine a better colleague.

**GIOVANNI PREZIOSO:** Like Dan I feel that if I started naming people it would go on forever but I will add in the Paul Gonson tradition, Jake Stillman, who has now been at the agency for 45 years in the appellate group, who I think has built on the tradition that Paul had and is just a true public servant of the highest level in every sense.

**DANIEL GOELZER:** I would like to add my concurrence on Jake.

**THERESA GABALDON:** Dan and Giovanni, thank you for your insightful comments and perspectives on the SEC office of the General Counsel's work over the past nearly 75 years. Again, I would like to thank the family of Eric Summergrad for making this program possible as a memorial to his work for and legacy within the SEC. Eric was quite modest about his many contributions to the work of the Office of the General Counsel. I'll quote from a letter he wrote in response to Milton Freeman's missive from which I read at the beginning of this broadcast, "While we were working on O'Hagan, I told the folks here that they should defer it to me since I was the only one among them who had actually won an insider trading case in the Supreme Court. Fortunately, I was not taken seriously and the end product of course was the result of a collaborative effort among the highly talented lawyers at the Commission."

Today's Fireside Chat is now archived in audio format in the virtual museum so you can listen again to this discussion at any time. A transcript of the discussion as well as the audio in MP3 format will be accessioned in the Online Programs section in the coming months. The memorial information on Eric Summergrad, currently under News and Events, will be linked with this Fireside Chat in Online Programs beginning in April.

Please join us again next month on April 22nd at 3:00 PM Eastern Daylight Savings Time for our next Fireside Chat, this time discussing the work of the SEC Office of International Affairs, one of the newer, major offices at the SEC. My guest will be Michael Mann, who helped found the office, and Dr. Felice Batlan, who is curating the museum's gallery on the SEC and international securities regulation which will open later this year. Thank you again for being with us today.