ORAL HISTORY OF
JOHN ALDOCK
Seventh Interview
June 3, 2010

This interview is being conducted on behalf of the Oral History Project of the Historical Society of the District of Columbia Circuit. The interviewee is John Aldock, and the interviewer is Judy Feigin. The interview is taking place in John's office in Washington, DC, on June 3, 2010. This is the seventh interview.

Ms. Feigin: Good afternoon.

Mr. Aldock: Good afternoon.

Ms. Feigin: We've done a lot of extraordinary cases, but I know there is another one that also is very much worthy of including in this history. Could you please tell us about the libel case that involved Bob Bennett?

John Aldock: Yes. It was an interesting case both because we are friends and because it had some odd slants. The basic facts were as follows: There was a lawsuit filed by Judicial Watch, a conservative litigation group that brought a lot of "political" cases, against Bob Bennett, President Clinton, two or three Clinton aides, the *New Yorker* magazine, and maybe a couple of other senior people in the Clinton administration. It was brought on behalf of Ms. Dolly Browning, who alleged that she had had an affair with Clinton and that she had been libeled by Bennett in a press conference that he held during the Paula Jones case. (Paula Jones had sued the president alleging sexual harassment.) Ms. Browning alleged that she had written a book about her affair with Clinton in Arkansas and that there was a conspiracy among all these people and the *New Yorker* magazine not to publish her story. A pretty kooky concept in itself. The idea that somebody had an affair with Clinton and that people successfully conspired to keep it from getting

published was not very credible. Just maybe the book wasn't any good, [laughter] which was in fact what the *New Yorker* lawyer told me.

The Bennett aspect was legally interesting in that Bob Bennett gave a press conference when he filed summary judgment papers in the Paula Jones case. At the press conference, Bennett commented on the opposition's papers and said, "They were nonsense and a pack of lies," and perhaps a couple other similar phrases.

Among the affidavits, I think there were six, filed by the opponents, one was by Ms. Browning. But there were five others, and Bennett did not mention Browning by name. The case involving Bennett's alleged libel and the *New Yorker* conspiracy came before the late William Bryant of the US District Court for DC. Having appeared before Judge Bryant for years and knowing how he approached certain issues, I was pretty confident of a favorable outcome. The Court of Appeals, of course, always was harder to predict. The proceedings before Judge Bryant were brief. The lawyer for Judicial Watch tried several times unsuccessfully to introduce his client to the court. Judge Bryant said several times, "This case is not going to become a media circus." Bryant heard the arguments on summary judgment and wrote an opinion dismissing the case. Browning appealed, the case went to the DC Circuit, and the argument date was set.

When I received the schedule, I immediately saw that the argument date was in the middle of a trip to India that had been two years in the planning. The

trip was with three other couples whom I knew well, but who had never met each other. Judy and I were the only common link. [Laughter] Everybody had their frequent flier way of getting to India and, with these people not knowing each other, the notion of cancelling this trip was distressful. Moreover, this wasn't the usual commercial client case where I could take a partner to my client and say, "My partner will do a better job than I would. You have nothing to worry about." This was a personal matter for a good friend who had asked me, not the law firm, to handle the case.

I gave it some thought and told my partner Matt Hoffman, who was working with me on the brief, that I was going to move for an extension of the argument. Matt, who had clerked in the DC Circuit, said, "You are not going to get an extension. What are you going to tell them? What ground are you going to give?" I said, "I'm going to tell them about my vacation and my friends who don't know each other." [Laughter] Matt said, "You're kidding. What are you really going to do?" I said that was what I intended. Matt urged against filing the motion; he thought it would be an embarrassment or worse. [Laughter] I said, "Matt, I know these judges. I think they would find it human. We filed, and the court granted the extension. [Laughter] But there was one more potentially troublesome aspect: The DC Circuit panel that had the case continued the argument before a new panel sitting on the continued date. No one was a bigger conspiracy believer than my opponents at Judicial Watch. The first panel had two judges appointed by a Republican president and one appointed by a Democrat. The new panel was going to have two judges appointed by a Democratic

president and one appointed by a Republican. While I put no stock in who appointed a judge, I was sure my opponent did.

Ms. Feigin: How would you know who was on the second panel?

Mr. Aldock: I knew the names of the judges on the order granting the extension. Our brief raised several interesting issues. First, we argued no libel because Bennett had not mentioned Ms. Browning by name, and it was not clear from the context to whom he was referring. Second, at the press conference Bennett had said virtually the same things that he said in his filed papers, only in more colorful words. So we argued it was as protected as the filed papers. Third, we argued it was just hyperbole and thus protected speech and not libelous.

At the argument before the DC Circuit, David Kendall of Williams & Connolly argued for President Clinton and received a lot of pushback from the panel. I got up and fielded a lot of seemingly hostile questions. The *New Yorker* lawyer had no trouble in oral argument. The most active judge was Judge Tatel, who is very smart, always active, and perceptive during arguments. Tatel gave both Kendall and me a hard time.

In the end, the court reversed on President Clinton and sent the case back to Judge Bryant for further findings. As to Bennett, the court affirmed Bryant's dismissal but on very narrow grounds. And I got the vacation. [Laughter] Generally speaking, victories are nice, but the most immediately gratifying results for busy lawyers are successful motions for extensions. Such extensions make practicing law and "having a life" possible.

Ms. Feigin: There may be more of them when people read your history.

Mr. Aldock: [Laughter] It was a fun case in that sense.

Ms. Feigin: Tell us about Shea & Gardner, the development of the firm, and your role in it.

Mr. Aldock: Shea & Gardner, as I think I said early in these interviews, was a firm that, on paper, I was not qualified to join, because the lawyers were mostly Supreme Court clerks. Everyone had been an Editor-In-Chief of their respective law reviews, as Frank Shea often pointed out to me. [Laughter] I didn't make Phi Beta Kappa in my second year, which Frank also noticed. [Laughter] But as the firm grew, it obviously had to hire people who did not meet that profile. In time, I became the hiring partner and was going to see to it that we broadened beyond a purely academic record profile.

Ms. Feigin: Before you continue, tell me why you did not want that to be the profile.

Mr. Aldock: I had met a lot of Supreme Court clerks, including the ones we interviewed and the ones we ultimately hired. Over a number of years I noticed how they worked out. They were all bright, but that does not translate necessarily into being a successful lawyer in private practice. The man who finished first in my law school class was virtually unemployable. He was brilliant, but I think the judge he clerked for fired him. He would write what he thought the law should be, not what it was, which is not a recipe for a successful law clerk. Also, some people can't be advocates. They just tell you their answer. That may work well for a judge or a law professor, but it doesn't work in private practice. We had quite a

few very highly credentialed hires who were not suited to private practice. I came to the conclusion over time that the law firm hiring criteria should not be based solely on academic credentials but should focus also on who wanted these positions and why they wanted them. Indeed, I had a view that people who had jobs and worked their way through law school were the real stars. That showed drive and commitment. Those people were going to succeed as lawyers. Nevertheless, I did not prevail in convincing the firm to hire a night school lawyer.

In private practice, the determining difference between those lawyers who succeed and those who do not is rarely how bright they are. It is an unusual case where the brilliant lawyer alone finds the argument that makes the difference. Rather, the defining difference is hard work, care, taking a client's problems seriously and worrying about them. A lawyer must have a certain level of intelligence, but the difference between the brilliant lawyer and the smart lawyer isn't likely to change the results in many cases. The difference between the diligent, careful lawyer who also is smart and the one who is careless, lazy, and doesn't take his case seriously, that's the distinction between somebody who will make it in private practice and somebody who will not. We ultimately changed the hiring criteria and got a few more people who clerked for lower court judges, maybe even for a district judge like me.

Ms. Feigin: Just to put this in context, back then but not now or much less so now, there were people who went to law school at night.

Mr. Aldock: Yes, there are lawyers in this town with that background who have done very well.

Ms. Feigin: I don't think that's really an option now in law school, at least not that I'm aware of.

Mr. Aldock: Probably not.

Shea & Gardner grew to about 60 lawyers. We had a different standard than most law firms today in that people made partner solely on the basis of whether they were first-class lawyers. There was only one question and that was whether an associate had demonstrated consistent excellence in the practice of law. The idea that he/she had brought in business or even had the potential to bring in business just never came up. It wasn't part of the criteria. The belief was that the firm would develop the business and, in time, it would come to good lawyers. Clients would call; they always did. That was the way the firm was built. It was quite laudable during those days but, as we'll get to later, I don't think you can do that any more.

Over time I developed an interest in how law firms were run. I was the youngest lawyer on the Shea & Gardner Executive Committee when Frank Shea chaired it. I always was questioning the decisions, but the prevailing view was that I was "the junior justice, so sit down and shut up." [Laughter]

Eventually, in the mid-1990s, my contemporaries in the firm thought that the firm needed to be run in a more business-like way. The phone wouldn't ring

forever, so we should think about marketing. Also, everybody should not be paid in seniority lock-step, because there were differences in the contributions of our partners. These were pretty modest moves. I became the chairman of the firm around 1997. The firm's vice-chair whose job was to watch me and make sure that I did not do anything radical [laughter] was Steve Hadley, who subsequently became George W. Bush's National Security Advisor. Steve and I were a great pair. I would make some blunders, and Steve would say, "I'll take the fall for that." I had the feeling that Steve did much of the same thing throughout the Bush presidency.

Ms. Feigin: [Laughter]

Mr. Aldock: Steve is a selfless, wonderful guy.

The firm evolved and we started to do some marketing. Law practice was changing in the city. In the old days, being a Washington law firm was itself a specialty. Shea & Gardner got a lot of its work from Covington & Burling with whom we shared a building. We received many of Covington's conflicts. For years New York, California, and Chicago firms would hire Washington firms to do Washington work. Eventually, they all decided to open offices here. Now there are hundreds of law firms in the city when there used to be a dozen significant local firms.

Also, clients were becoming more risk-adverse, and general counsels often felt compelled to hire big firms even when they thought a smaller firm might do a better job.

Ms. Feigin: Why do you say that?

Mr. Aldock: We used to hear these things from some of our good clients. Shea & Gardner with a dozen lawyers represented GE in the electrical equipment antitrust cases, the biggest cases against one of the country's largest companies. That wouldn't happen today. Even a strong general counsel would come to the view, "If I lose this case and I lose it being represented by Cravath, nobody's going to second-guess me. If I lose it because I picked some boutique firm that I think is great but nobody's ever heard of, I'm going to be in trouble." Many companies now think that way. I remember going to meetings with general counsel, and they would say something like that, and I would respond, "But don't you want to win?" And the general counsel would say "Yes, I'd kind of like to do both." [Laughter] I have a chance of doing both with Cravath but, if I lose, my directors will not know your firm."

Over time, many of the best DC boutique litigation firms started disappearing. The one that made the difference in my mind was when Miller, Cassidy, Larroca & Lewin went under. Jack Miller had been the Assistant Attorney General for the Criminal Division under Robert Kennedy. Miller, Cassidy attracted great lawyers, Bill Jeffress among many others, and yet they weren't making it commercially. They were not doing well enough to stay in business as a separate entity, so the firm ultimately merged into Baker & Botts. Leva, Hawes and Wald, Harkrader were good firms that merged out of existence. There must have been a half dozen others. I had no doubt that Shea & Gardner would have continued to be successful through the rest of my career. We were

doing very well commercially from 2000-2004. We were profitable, had great clients, and had maintained our promotion practices. Shea & Gardner still promoted lawyers solely on the basis of performance, not business. We were half partners and half associates, which is a ratio that is frowned upon commercially today. Leverage is part of what makes money for law firms, but we never bothered about leverage. We all were hands-on practicing attorneys. While Shea & Gardner was doing fine, I thought that our model would have trouble in the long run.

Over a period of several years I embarked on an educational effort with the law firm, sensitized my partners to the issues, and probed the young people about how confident they were about developing practices beyond the ones they were going to inherit from retiring partners. In time, I convinced my partners that we had to give serious consideration to the issue of merger with another law firm. However, I couldn't get my partners to consider the merger issue in the abstract. It always would depend on whom and on what terms. So I decided to tee up the 'whether' to merge in the same conversation with an almost fully-negotiated merger offer. In the end, my partners were even pickier than that. They wanted more than one choice of potential merger partners, so I had to come up with two choices. [Laughter]

As I looked at the merger voting procedures in our partnership agreement, it became clear to me that the partners who already were over 60, if they voted their self-interest, weren't going to vote for any change. Their life was good, and the future viability of the firm was unlikely to be a personal issue for them.

Ms. Feigin: Was the voting weighted or was everybody equal?

Mr. Aldock: Every partner got a vote, and we had several partners over 60. Also, our older lawyers wanted to work forever. They didn't want to join a firm with a retirement policy, so we first established a retirement program for the firm. From age 68 to 74 income went down progressively; income didn't go down to zero until age 75. This was in the early 1990s, and, at that point, retirement generally within the profession was at 65. In my view, even a generous policy was better than having partners draw money until they died.

Ms. Feigin: Like Shea and Gardner themselves did?

Mr. Aldock: Yes, they worked into their nineties and were paid well until the end. In addition, I worked to convince the older partners that, while they had a right to vote under the partnership agreement, they should abstain on any merger vote. Once we had the retirement policy, the older partners, to their credit, agreed that the decision whether to merge was for the younger partners, because it was their future.

Ms. Feigin: And were you also in that older group?

Mr. Aldock: I cannot remember, which probably means I was.

Ms. Feigin: How did you go about identifying potential merger partners?

Mr. Aldock There was a merger mania in the 1990s in law firms. Law firms were merging all the time. Every week I received calls from headhunters. "Do you want to merge with X?" The extreme was a lawyer I sat next to at a wedding. He was the

chairman of a major law firm, currently one of the biggest firms in the world. I never had met him before. At the end of dinner, the partner said, "Our firms should merge." [Laughter] I said, "Do I have to make the decision before we have dessert?" [Laughter] He said, "No, but I have the power to do this. You're only 60 lawyers. I've got 1,000. Consider it an offer." I thought the whole thing was ridiculous.

At that point, I determined that we should look at the merger issue the way we would work a problem for a client. I hired a consultant, and we did a study. At the outset, we needed to make some decisions to narrow the potential universe of merger candidates. First, we wanted only firms that did first-rate work and whose culture would not clash with ours. Second, we said that we would not consider a merger with a firm that had more lawyers in Washington, DC, than we had, because otherwise we wouldn't be meaningful to the new firm. Finally, we limited the search to firms whose main office was in certain cities: New York, Boston, Chicago, Los Angeles, or San Francisco.

Ms. Feigin: And not another DC firm?

Mr. Aldock: Not another DC firm because most would have more lawyers in DC than we did or would have been less profitable. There were few remaining profitable firms that were our size in those days. Our criteria was a bit arbitrary, but we had the view that an Atlanta law firm or a Texas law firm were less likely to be a good fit. We also excluded the firms that would have eliminated us. There was no sense in talking about merging with Wachtel Lipton, Cravath, or Davis Polk. They had no

need or interest in us. We essentially took off the top layer of New York firms that made many times what we made and generally didn't have a Washington office, nor wanted one.

It was an interesting exercise. The culture fit was hard to define, but we wanted compatible partners. We eliminated the partnerships that did not fully share access by partners to financial information, and where partners did not know how other partners were compensated. There is something to be said for such systems because they minimize jealousy. But once partners are used to an open system there is no going back. We also had a tradition of pro bono at the firm and wanted a firm that shared that value. Pro bono is culturally ingrained in Washington firms, but it's not so inherent elsewhere.

Ms. Feigin: Did you have a minimum number of hours that you expected of people?

Mr. Aldock: By that time we did. It was 1800.

Ms. Feigin: Including pro bono?

Mr. Aldock: Yes, including pro bono. We also had a practice that in some ways was stricter than our present firm. If you worked fewer than 1800 hours as a partner and you had no excuse, i.e. illness, maternity, management, etc., you took a proportionate deduction automatically. Because it was objective and automatic, and not a personal rebuke, it was much more accepted than if a committee took away shares. This practice only applied to partners.

When we applied all of our criteria screens, it was surprising how few firms remained. In the end, only about three or four firms were left and, because all of those firms needed a Washington, DC, presence, it was clear to me that they were going to find a merger partner either with us or someone else. This allowed me to address the lawyers' favorite excuse, "Let's just wait," but we couldn't without a price. If we delayed five years, presumably all the firms that met our criteria no longer would be interested in us, because they would have otherwise met their needs.

Ultimately, we negotiated with Goodwin Procter, which had about eight people in Washington and needed a more significant presence. Goodwin had lost some people in Washington, and there was some pressure to at least replicate what they had lost. On paper, Goodwin had all of the qualities that we wanted. However, I was not familiar with Goodwin and did not know anyone there. At an early point, I was approached by Regina Pisa, Goodwin Procter's managing partner, and was very impressed. My initial view was that, if the firm was smart enough to pick Regina as their managing partner, it must be well-run. She was and is a strong and confident leader and as persuasive as anybody I've ever met. Regina Pisa, then and now, has more skill in managing a law firm than any other managing partner I have met. She certainly is better than I, and I always thought that I was quite good at management.

I had to have a second firm in the mix to please my partners. But the other firm for me was always the second choice and, in the end, I doubt that I would have merged with the second firm if Goodwin had dropped out of the picture.

Regina and I had negotiations, but they were unusual because we never really negotiated anything. It was conversational; we would discuss issues and then arrive at what always seemed to me to be a reasonable resolution. We requested two seats on the Executive Committee in order to be part of the firm in a way that was meaningful. Regina said, "That would be fine. We only have one for our New York office, and they are bigger than you, so they should get a second one, too." Shea & Gardner recently had signed a lease and contracts for furniture, etc., to move into new offices at 901 New York Avenue. It was agreed that we would take the offices, and Goodwin's eight or so DC lawyers would join us there. We agreed to take another floor for which we had an option and to build another internal stairway because only when a building is new is it practicable to build internal stairways; otherwise it gets too expensive. It was agreed that every person at Shea & Gardner would be offered a position in the new firm, including secretaries, etc., and no one would make less at the combined firm. It was a wholly congenial "negotiation." Two like-minded people, both wanting to do the deal because it was right for both firms.

I worked with a small group on the union: my partners, Bill Hanlon and Chris Palmer, and the office administrator, Mike Felty, who is now the office administrator for Latham & Watkins. Our partners voted unanimously for the merger, and all but one of our younger partners, who went elsewhere, moved with us.

Ms. Feigin: And when was this? What year?

Mr. Aldock: This was 2004. We moved into the building at 901 New York Avenue during Thanksgiving weekend. We negotiated the combination over the summer and, with some transition agreements, officially merged on October 1, 2004, which was the beginning of Goodwin's 2005 fiscal year.

The combination has been a success. It was helpful that two of Shea & Gardner's major clients, GE and Prudential, also were clients of Goodwin. Indeed, John Liftin, the then general counsel of Prudential, commented favorably on the merger of two of his law firms in the press release. It was a nice touch.

Ms. Feigin: Was either Shea or Gardner still alive?

Mr. Aldock: No, and that also helped. I think the senior partners, people in their seventies, all would say, "It was too bad. We would have liked to keep the name. It's a shame that there won't be a place forever for a firm like Shea & Gardner." But, with hindsight, having seen how the legal world has changed, our younger lawyers understand they got well placed, and even our older lawyers would say that the union was the right decision. I went on the Executive Committee and the Compensation Committee of Goodwin Procter. It's been an interesting six years' experiencing how a 600+ lawyer firm is managed. It is much different than managing a 60-person firm. Since the combination, we have grown the DC office from 60 to 100 by adding practices that we never could have attracted. We took a private equity group from Hogan & Hartson, an FDA group from WilmerHale, and an IP group from Hunton & Williams. Last year, we lured an investment

management group away from Morrison & Foerster. We still are looking to grow the office in various areas, and I spend not insignificant time recruiting laterals.

Ms. Feigin: Do you have a sense of the optimal size of a law firm?

Mr. Aldock: No. I think it's really a function of what the firm seeks to do and how it is managed. If you're going to do certain kinds of things in a global world, you're going to have to be big. Goodwin Procter started as a regional New England firm. It then moved to New York and to DC. The clients on the West Coast said, "We love you, but there's a three-hour time difference. This is not going to work. You either open an office out here or we may have to send the West Coast work elsewhere." So we also moved to California. The Goodwin position is that we don't have to be in the middle of the country. The firm has no intention to have lawyers in Texas or Atlanta or Chicago. We can service Chicago from the East Coast and even fly in for lunch. But California is too hard. We have small offices in London and Hong Kong, both of which are experiments. At some point, I believe the transactional global practices will require expansion abroad. It is less of a litigation issue; it is a corporate practice issue.

Ms. Feigin: Are there different managing groups in each office?

Mr. Aldock: It is done in different ways. For some firms, each office is a different profit center. The Goodwin model, which I believe is the majority model, is one firm and one profit center managed by a diverse executive committee, and with office chairs and representatives of major practice groups resident in each office.

Ms. Feigin: In the new firm, you began your role in management and continued to litigate. Before we go on to what you're doing now, I'd like you to tell us a little bit about your role with the American College of Trial Lawyers, when that started, and what that involves.

Mr. Aldock: I was elected a Fellow of the American College of Trial Lawyers in 1998. It is more of an honor than a role, but for a trial lawyer it is the best professional recognition you can achieve. The College is by invitation only; you don't apply. You must be a real trial lawyer and have tried a significant number of cases; many litigators in this town never have tried a case to verdict. You must be out of law school fifteen years. Somebody recommends you without your knowledge; you are not allowed to be told that you are being considered. The process is for a present member of the College to call every lawyer in every case you have ever tried, both on your side and on the opposing side, and then try to call every judge before whom you have appeared. On that basis, they make a decision as to whether it is worth advancing and, if they decide to move forward, the candidate's name is presented to a referendum of the members of the organization in your jurisdiction. It is not a blackball but, if somebody says the person is unethical and supplies examples, the candidacy ends. If the candidate passes the local referendum, it goes to the national for final review. The process takes more than a year and, only at that point, do you receive an invitation to join.

Ms. Feigin: How large an organization is it?

Mr. Aldock: Nationally, it is a fair number of people. There are Canadian members. In DC, I would estimate about 180.

Ms. Feigin: Is it only private practice lawyers?

Mr. Aldock: No. I was inducted with A.J. Kramer, the Federal Public Defender from DC. There are judges, but they have to be invited before they become judges; you can't come in as a judge. It took a while for the organization to have significant numbers of women and minority lawyers, but now they work at it. For the first time, the president this year is a woman. A lot of my friends are Fellows in DC, and many are former Assistant US Attorneys from the Flannery years when I was in the office. There are, of course, plenty of good trial lawyers who are not members. But to my knowledge, there are few members who are not very good trial lawyers.

The organization takes positions on some legal issues affecting trial practice and sponsors moot court competitions but, from my standpoint, the organization is mostly social.

Ms. Feigin: Do they have annual meetings? What do they do?

Mr. Aldock: The DC Chapter has an annual dinner and cocktail party. The DC Chapter has a committee that does the due diligence on new members. The national meets twice a year, always at a nice place and sometimes abroad. We had dinner at Hampton Court when I was inducted in London. Usually, Supreme Court justices

and other legal luminaries speak at the meetings, which also have discussion panels on timely trial issues.

Ms. Feigin: Before we talk about more litigation that you're doing, why don't you tell us a little about your work as an arbitrator.

Mr. Aldock: I always have thought that arbitrations were interesting. Unfortunately, they have not met at all times the promise that they should have had in this country in the sense that they were supposed to be a quicker, cheaper way than the courts to resolve disputes. And most times they are neither. I have been associated for some years with the Center for Public Resources (CPR). They have rules, promote arbitration, and have groups by city of "distinguished neutrals" who are available to act as arbitrators and mediators. I am one of about 40 "distinguished neutrals" in Washington, DC. There is no bureaucracy like the American Arbitration Association. If you get appointed as an arbitrator, you are bound by the rules, but you and the other arbitrators and the parties work out the schedule.

I have acted as an arbitrator in a couple of cases annually over the past fifteen years. I have tried to limit myself as a matter of discipline, and the firm doesn't encourage it.

Ms. Feigin: Why?

Mr. Aldock: The firm prefers that I supervise major litigation, which is highly leveraged. If I'm an arbitrator, I'm the only one working on the matter. There is no leverage at all so, from the firm's standpoint, that is not the best use of my time in terms of

maximizing income. The firm would not ask me to turn down an arbitration I wanted to do; the limitation has been my own.

From among the arbitrations that come to me, I try to pick the ones that seem interesting. The most fascinating and the most unique one that I've had was an arbitration for Orbital Sciences, a rocket company. This was rocket science. [Laughter] Orbital was in a dispute with its former affiliate, Orbital Imaging. The imaging company puts telescopes on the rockets to take pictures for mapping and other services. This arbitration came with the strangest arbitration agreement I had ever seen. It called for a panel of three arbitrators. The chair would be a lawyer and the other two people would be scientists, one a rocket scientist and one an imaging scientist. They would be appointed by the respective parties. The panel then attended operating sessions of the launch teams. It was like NASA or Cape Canaveral in the movies where there would be a man on the stage proposing some aspect of the launch, and the audience of about fifty other engineers and scientists would critique him. It was obvious there were going to be delays in the launch, and the contract between the rocket and the imaging companies provided for significant delay damages. Therefore, each party wanted to make any delay the other party's fault. The arbitration panel sat through these sessions because we were supposed to evaluate what was happening and because a dispute was likely to arise during one of these sessions. We attended about six days of these sessions. Also, I think the parties believed people would be better behaved, because "the panel was watching." [Laughter]

At some point the parties teed up an actual dispute. When I looked at the procedure, I was astonished to see that it expressly provided that neither party could be represented by counsel. There could be no lawyers in the proceeding except me. People would be represented by business executives. Of course, the parties had lawyers but, at the beginning of each proceeding, I would state, "We're about to begin the proceeding, would all the lawyers please leave." I loved saying it. My two co-arbitrators who were not lawyers were told that they were not party arbitrators but were neutrals. Unlike lawyers who are appointed by parties, these guys, having been told they were neutral, were going to be 100% neutral. [Laughter]

We decided one dispute after another and everything unanimously. All the presentations were oral. No papers except exhibits were submitted. We also rendered orally our initial decisions. We did this for about two days. I loved being the only lawyer in the room; everyone deferred to me.

Ms. Feigin: [Laughter] Dream world.

Mr. Aldock: After about twelve disputes – with about fifty to go – I got the approval of my colleagues on the panel to address the parties saying, "You have seen how we've decided these first twelve disputes. You can figure out what principles we are applying. We are going to get some of these decisions wrong and we are going to miss things. You all know exactly what you have to have and what the engineering means. Now, you should decide the remaining disputes. You'll do better than we will. If you have trouble, you can come back to us, but you

shouldn't. Remember, we may screw it up." [Laughter] They never appeared again. It was rocket science and it was fun.

I had another interesting arbitration involving whether a basketball player for the then Washington Bullets was disabled. The player was a 6'9" center who had had two knee operations. Was he disabled so that the insurance company should pay? Or was he just not good enough to play anymore? Wes Unseld, the legendary former Bullets player, testified for the team. It was a very close case that met my test for an interesting arbitration.

I was one of three arbitrators this year in a case involving Utz Potato Chips. It was a small company that only had a few professionals on staff. The other party was Ernst & Young. An important tax deadline had been missed. It was a question of whether Utz had a right to rely on Ernst & Young to alert it to the deadline. It also was interesting.

I like arbitrations and generally prefer them to mediations.

Ms. Feigin: Why?

Mr. Aldock: I am better at deciding than I am at begging. [Laughter] I lack the patience. My temperament for mediation isn't as good. I do them on occasion, particularly for lawyers whom I know. Sometimes the lawyers can settle the case, but the clients are being stubborn. I will mediate cases like that because I feel that I am doing the judicial process a favor by keeping the case out of court. For example, in one mediation I told the party, "Look, if you continue with this litigation, it will cost

you a fortune in attorneys' fees. How many billable hours will that be?" They figured out that it was going to cost $500,000 to try the case, per side. And then I pointed out that they were only $180,000 apart. The colloquy was something like, "Now, are you going to settle or am I going to call your boss? Whom do you report to?" "I'm a vice president." "Well, there is somebody higher, right?" "Yeah." [Laughter] "I'm going to make that call. It's an $180,000 dispute that is going to cost you $500,000 to try. What business justification are you going to give for your position?" By then the lawyers were laughing, and the case settled.

Or it's a business man who says, "I just hate these people." So I suggest he draw a cartoon of them and throw darts at it, but settle the case. [Laughter] "What's that got to do with it? You're going to hate them after you win, too." [Laughter]

I also would do a complicated multiparty mediation or one involving the USG, because they are challenging.

I appear as a lawyer, of course, in lots of mediations for cases I am litigating. One of the more interesting but difficult was representing the Massachusetts Institute of Technology (MIT) in two student suicide cases. That was a representation that didn't come directly to me. I was in a car with Regina Pisa, the managing partner of Goodwin shortly after the merger. Regina knew MIT's president who called her and said, "I have a terrible problem and I don't think my lawyers are any good. How do I get out of this?" Regina put her hand over the phone, explained the issue, and asked me, "Can you handle this?"

Regina then told the president that the lawyer she wanted was in our DC office and he was with her presently. "I will put him on," she said. [Laughter]

The president informed me that MIT was being sued by the families in two student suicide cases and that MIT's insurer said it would provide defense but no indemnity. Moreover, the prior president of MIT had publicly paid an exorbitant amount in a prior student suicide case. The president told me, "Your job is to settle both cases with insurance money and not to go to trial." I told her that I would need to litigate aggressively for a significant period of time before talking settlement, because the only way to get an acceptable settlement was to convince the other side that I might go to trial. As it turned out, we successfully settled both cases with a significant portion paid by the insurers. If it had been my decision, however, I would not have settled. I believe that we would have prevailed in the Massachusetts appellate courts. Except in the most unusual cases, schools have no duty to prevent a suicide by a student. We actually got the case to the Supreme Judicial Court of Massachusetts, and I am convinced that it would have ruled in our favor. We used that pending proceeding in the mediation to get the acceptable settlement that the client wanted, but I would have taken my chances with the appellate court. But then I was not the president of the University and whether to settle is a client decision.

The insurance issues also were interesting. The insurance company said that MIT was overpaying and was settling only to protect its reputation and to avoid publicity. I argued that one reason MIT bought insurance was to protect its reputation, and that is not an illegitimate reason to settle. We disagreed but

compromised on a dollar amount. Goodwin still represents MIT on various matters, but they now are handled in Boston, as they should be.

Ms. Feigin: What cases are you working on now?

Mr. Aldock: I usually have a docket of six to ten active matters. I am also in the mode of trying to reinvent myself and find new things to do. The rubric of class actions still seems to work well, because I can do different things and not get forced into substantive specialization. I have three or four cases for The Prudential Insurance Company that are the bread and butter of commercial litigation. Sometimes the cases involve companies Prudential bought or sold and the transaction didn't work out satisfactorily for one side or the other. Sometimes there are disputes under the warranties to the buy-sell agreements. Often these result in one side accusing the other of fraud. There are also a couple of class actions against Prudential that involve businesses that Prudential no longer has. Questions sometimes arise as to the impact on their former customers when they withdraw from the business. The Prudential Insurance Company of America has been a good litigation client for me and the firm for many years. At this point, several of my most able partners, Mike Isenman, Mark Raffman, Rick Wyner, and Adam Chud, manage these cases on a daily basis.

I also do a lot of work for CNA Financial. Often these are CNA's biggest cases, either because of the potential liability or because their reputation is implicated. Many of them are claims by their insured that the insurer somehow acted in bad faith. So far we have achieved very good results in every case we

have done for CNA. The case that I am presently working on with my partner, Mike Giannotto, involves the W.R. Grace bankruptcy in which certain residents of Libby, Montana, have asbestos claims that they believe are worse than the usual asbestos case. They are suing CNA in state court in Montana in a direct action against the company as Grace's workers' compensation insurer. Only a few states allow these direct actions, and Montana is one of them. The suit alleges that CNA failed to disclose the risks of working with asbestos. We are trying to get the Grace Bankruptcy Court to enjoin the direct actions or, alternatively, we want to settle the Libby actions within the bankruptcy context. It is complicated, and there are a lot of parties, so it is a challenge.

Ms. Feigin: As I recall, wasn't that rolled into the recent health care legislation?

Mr. Aldock: Yes. The asbestos issues in Libby, Montana, have been political issues in a variety of contexts, including the asbestos legislation, an Environmental Protection Agency (EPA) clean-up order to W.R. Grace, and a criminal trial in which Grace executives and lawyers were tried for environmental crimes. Ultimately, the Grace executives and lawyers were acquitted.

In another present case, I represent a company called Arrowood Financial. It is a runoff company of the former Royal Insurance Company. Eight thousand cases have been filed against them by the Peter Angelos law firm in Baltimore state court alleging that, in a settlement of asbestos cases many years ago, the insurance company misrepresented the extent of its insurance and defrauded Mr. Angelos's clients and others represented by other firms. It is an interesting case,

and I have some good people at the firm working on it. I spend some time on the strategic issues in the matter but thus far have left the courtroom work to my partners, Betsy Geise and Fred Schafrick.

I also have some law firm representations. The main one is representing the DC firm of Dickstein Shapiro in a malpractice case brought by Encyclopaedia Britannica (EB) alleging that Dickstein made decisions fourteen years ago in the US Patent Office that resulted in the invalidation of some of EB's patents. EB lost the infringement case and immediately decided it must have been the patent lawyers' fault. The case is pending before Judge Bates in the US District Court for DC.

Representing law firms is something that I enjoy doing. I've represented Dickstein on other occasions, but I never have had an IP malpractice case. EB is demanding a huge amount of money ($250 million), and that can be scary for a law firm even if it is believed the case is without merit. Pending are motions to dismiss that I think have merit. It is another one of those cases where the legal profession, not unlike society in general, can't deal with the fact that sometimes negative things happen and it isn't somebody's culpable failure. Every bad legal outcome is not malpractice. There is a tendency by courts to always find someone at fault. "Acts of God" do not seem to happen anymore. There no longer are honest mistakes that are errors only by hindsight but were just questions of judgment at the time. Congress specializes in hindsight blame, so why shouldn't plaintiffs' lawyers? I would love to get the court to say that

everything that goes wrong isn't somebody's fault, let alone professional malpractice.

Of my current matters, the main case is one that is going to trial this month. It is what we call a "bet-the-company case." It cannot be settled, so the only alternative is to win. The case arose out of hurricane Katrina in New Orleans. The biggest hurricane disaster in American history. It devastated the city of New Orleans and much of Mississippi. The day after the hurricane, the *Wall Street Journal* ran a short article stating that a barge got loose in the Industrial Canal in New Orleans and smashed through the levee, resulting in the flooding of the Ninth Ward and St. Bernard Parish. In today's world, an article like that results in six class actions within a matter of days. It's just the way that it is. I had been doing some work for Lafarge, which is the world's largest cement manufacturer. The general counsel called and said, "Open your *Wall Street Journal* and read this." He then said, "You didn't know this, but I had some heart issues and just came out of surgery a week ago. I can't go back to the office for a month. You know where my office is. You take charge of this. We think it was a barge in our custody and control. The president and the CFO have been told, and they're expecting you."

That was the beginning. The cases were filed in a matter of days. They had maritime law aspects, and that was an area of law that I knew nothing about. We sent some people down to New Orleans to investigate along with our local New Orleans maritime counsel. They had to get through the blockade with passes so that they could get to the cement terminal and find out if there were any

records. It wasn't our barge, but it was a barge in our care, custody, and control. We had to find our employees who had heeded the Mayor's order to evacuate.

There were barges all over the canal, but ours became a photo op because, when the water receded, it was on the land side of the levee on top of somebody's house. The water had retreated, so there was no way to get the barge out of the neighborhood. These are huge vessels, weighing thousands of tons. It could not be picked up and moved. Every visiting dignitary from the US President to the Speaker of the House to the entertainer Spike Lee had their pictures taken in front of our barge.

Ms. Feigin: George W. Bush?

Mr. Aldock: George W. Bush. We couldn't get the barge off the front page of the newspapers. It was not the kind of publicity that the company desired. Somebody else owned the barge, so we had to deal with them. The barge was evidence, and evidence can't be destroyed . All of this took more than a year. At some point, we got a court order that allowed the barge to be raised up on balloons and examined by everybody's experts. It then was photographed, cut into sections, and carted away to a warehouse where it remains today.

The judicial process moves slowly, and the case has continued for years. Katrina occurred five years ago. The first case is coming to trial June 21 of this year, 2010. There was substantial class action briefing, and we succeeded in defeating class certification. The judge ruled that there were individual damage issues, e.g., where the water was coming from, how close you lived to a particular

levee breach, whether you had a one-story or two-story house, etc. The court ruled that these issues were individual enough that a class action was inappropriate. That was a big victory. The class would have been 90,000 homes, and we would have had a potentially unbondable trial on the whole liability. Now, we have 22,000 individual cases which is a better although still significant problem.

Meanwhile, another group of plaintiffs' lawyers sued the Army Corps of Engineers/the US Government, which was the appropriate defendant to sue, because the levees were badly designed, constructed, and maintained. Suing the government, however, is not easy. There are difficult immunity issues: statutory flood control immunity as well as discretionary function immunity. We have been cooperating with those plaintiffs' lawyers who sued the government because we brought a third-party claim against the government. I already have argued flood control immunity twice in the District Court. The first of the government cases, where there is as yet no class, resulted in a plaintiffs' verdict and has been appealed with the immunity issues to the US Court of Appeals for the 5th Circuit.

We also moved for summary judgment in our cases. We lost, because the plaintiffs' lawyers said that they had three to four alleged eyewitnesses who they claimed saw the barge break the levee causing it to fail. We don't have any eyewitnesses to prove the negative but we do have numerous experts on meteorology, hydrology, levee design, etc., who opined that, as a matter of science, the barge could not have been at the breaches before they occurred and, in any event, that the barge was incapable of causing the flood walls to fail. The

scrapes on the bottom of the barge and the bent rebar show that the barge went through the flood wall after the flood wall already was down. The walls failed for reasons having nothing to do with the barge, and we are prepared to show how. On wall failure, we had roughly the same position as the plaintiffs who were suing the US Government.

The case is going to trial in New Orleans in the summer, which weather-wise is not ideal. [Laughter] The US Government has quantified the damages as roughly $8 billion. Well, $8 billion gets your attention. It's not an $8-billion trial because it's a "bellwether" trial of several individuals and a business. One is a death case. But there are 21,000 cases behind it. So the plan is to win, because the alternatives are not good. [Laughter]

I will be going down to New Orleans the 15th of this month and will stay there for four weeks. It is a tough trial in a tough venue in a situation where I could not be more morally certain that we are absolutely right. The barge did not cause the breaches; it went through an already existing breach in the flood wall. The plaintiffs have witnesses who say that they saw the barge hit the wall. We both have lots of experts. One of our experts is a major expert for the plaintiffs in the British Petroleum cases. In my opinion, our experts will carry the day.

Ms. Feigin: We should say that the British Petroleum problem is an oil spill.

Mr. Aldock: The biggest oil spill in history.

Currently, the *Lafarge* case is consuming the overwhelming majority of my time.

Ms. Feigin: Is this going to be a jury trial?

Mr. Aldock: The first case is going to be a bench trial, but the remainder will be jury trials. The plaintiffs made some mistakes, including pleading the early cases as nonjury maritime cases, and we succeeded in getting the nonjury case scheduled first. So we will have one nonjury shot. Fortunately, we removed the cases to federal court. Federal almost always is preferable to state court. A federal, nonelected judge with life tenure is preferable to an elected state court judge.

It is a tough case, not because we aren't, in my view, clearly right but because the science is hard and because of the venue and the issues. We have had to learn meteorology, how levees are built, the sound when concrete breaks, how barges are moored, the different strength of mooring lines, hydrology, and a host of other issues, all of which were new for me, as well as maritime law.

Of course, the food is good in New Orleans, [laughter] but it is also one of the few places that will be hotter this summer than Washington. It is going to be the most technological trial that I have done. Over the years, trials have become sophisticated with more technology involved. I never have had a trial like this. Every expert witness (we have fourteen and the plaintiffs have twelve) will have a Powerpoint with pictures and graphics. There will be a visual for every minute of the trial. Models of levees have been built with moving parts. We have a twelve-minute animation showing the barge movements juxtaposed against wind

movements. It is made to scale with water movements and even shows the effect of the flood waters on the neighborhood. Also, we have the ability to cross-examine a witness and say, "But you said something different at your deposition," and, instead of reading from the deposition, the video piece flashes on the screen with the witness actually contradicting what he just has said in court. It is very effective. There is nowhere to hide these days. [Laughter]

Of course, the barge has not left the local news which is troublesome for purposes of future jury cases. There's a new HBO series that now is being shown. I haven't seen it, but I have been told that the major character talks about the barge breaking the levee and that the barge is pictured in the credits that appear before every episode. Just what we need, [laughter] but at least the barge is no longer sitting on the house in the Ninth Ward.

Stay tuned. It will be an interesting case.

Ms. Feigin: I will. I suspect that we won't see you for the next interview for a while.

Mr. Aldock: It will be a while.

Ms. Feigin: Best of luck in the trial and thank you so much for another wonderful session.

Mr. Aldock: Thank you.