Oral History of STEPHEN J. POLLAK
Eleventh Interview-May 7, 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 Stephen J. Pollak, and the interviewer is William Schultz. The interview took place at the Goodwin Procter law firm at 901 New York Avenue, N.W., in the District of Columbia on May 7, 2010. This is the eleventh interview.

Mr. Schultz: We're going to talk about a few other matters in your private practice, and the first one I want to ask you about is being the Special Master in the Vitamins Antitrust Litigation, Misc. No. 99-197; MDL 1285. Why don't you just tell us about that.

Mr. Pollak: That was a fascinating four-year effort, and I'm pulling off my bookcase a compendium of opinions that I wrote.

Mr. Schultz: Which is about 8-10 inches thick.

Mr. Pollak: Yes, but I have three of them. First let me tell you how I got named. The Vitamins Antitrust Litigation had been multi-districted for pre-trial discovery in the District of Columbia. The claim was price fixing, boycott, by manufacturers, exclusively foreign manufacturers of vitamin products primarily for addition to food and animal feed. There had been criminal proceedings and guilty verdicts or pleas, so these were follow-on treble damage civil litigations, class actions. It was originally assigned to Paul Friedman. The judge foresaw that there was going to be a great deal of active litigation, particularly over discovery, and asked the parties to suggest a special master to handle discovery issues and other related issues. Out of that came my appointment as special master.

Mr. Schultz: Who were the lawyers who had a role in selecting you?

Mr. Pollak: The lawyers were a roster of the major firms of the nation who represented the defendants, Mayer Brown; Bruce Montgomery of Arnold & Porter; Sherman & Sterling; Sullivan & Cromwell. I'm not certain how my name got into the mix.

Mr. Schultz: The plaintiffs lawyers, was that Dickstein?

Mr. Pollak: The plaintiffs' lawyers were Boies Schiller; Dickstein Shapiro, Ken Adams; a Texas firm, and Joe Sellers' firm.

Mr. Schultz: Cohen Milstein?

Mr. Pollak: Yes. Mike Hausfeld was a major player for the plaintiffs.

Mr. Schultz: What years was this?

Mr. Pollak: My initial appointment was 1999. I remained active in deciding issues up through 2003. It was a four-year assignment. I issued recommended decisions in perhaps 49 or 50 litigated matters, some of them extremely interesting issues. Of some interest respecting the work of the United States District Court, Judge Friedman had the cigarette multidistrict litigation, tobacco litigation. It was suggested either by the Chief Judge of the United States District Court for the District of Columbia or the Multi-District Panel that he shouldn't be handling both cases – cigarettes and vitamins – because it was too much, so after I had been named, the case moved to Judge. Judge Kennedy is an outstanding tennis player, had played tennis actively with Jonathan Schiller of Boies Schiller. Judge Kennedy, I believe, recused himself because of that relationship. So the case moved to Chief Judge Thomas Hogan, and stayed with Judge Hogan. I communicated with

Judge Hogan, who I didn't know, suggesting that he should feel free to select as special master someone with whom he was acquainted. He communicated to me that he wished me to stay with the assignment, so I served as Judge Hogan's special master throughout. It was one of the great opportunities and great experiences of my professional life. I found Judge Hogan to be an outstanding judge in handling this complex case and managing it. Indeed, there were hundreds of motions, thousands of docketed items, as many as 5,000 items in the docket. Judge Hogan managed to make it all look easy. I know that he spoke once about it to an ABA gathering. The case offers a good opportunity, just like the AT&T case of Judge Harold Greene, to observe a masterful judge handling a complex multi-party case. It wasn't one case; there were many different vitamin products involved, and each presented its own litigation, so while the defendants were often similar in each case, in some of the cases there were different defendants. Most of the cases ultimately settled. My responsibility was to handle all discovery disputes, and while I was a private practicing attorney, these disputes would be briefed to me, and then I would go to one of the federal courtrooms and the parties would argue them to me.

Mr. Schultz: In a federal courtroom?

Mr. Pollak: Right. I would sit on the bench. I never wore a robe, and I never endeavored to arrogate to myself any of the formal attributes of a judge, but the parties obviously took seriously the briefing and arguments, and I rendered written reports and recommendations which under the Federal Rules are subject to appeal

to the United States District Judge. They very, very often would be appealed and they would be very, very often be affirmed by Judge Hogan.

The first issue presented to me was a unique issue on which there had been very little precedent: whether discovery by plaintiffs to establish personal jurisdiction over the foreign defendants must proceed under the Hague Convention on Taking Evidence Abroad or the Federal Rules. The Federal Rules are much more conducive to obtaining discovery than is the Hague Convention. This was presented to me as a discovery dispute, and the issue was fully briefed and argued. I rendered a recommendation that in the circumstances the discovery would be conducted pursuant to the Federal Rules. The issue went to Judge Hogan, and he reached the same conclusion in a Memorandum Opinion filed September 20, 2000. I thought the case would be, the ruling would be taken to the Court of Appeals because there was so little law, but it stayed with Judge Hogan's opinion.

There were many other quite challenging issues, very intellectually stimulating. One of the issues was sufficiently complex that I issued a Report and Recommendations that was a hundred and one pages long.

Mr. Schultz: Wow.

Mr. Pollak: It proves the wisdom of Judge Friedman's anticipation that a special master was needed. There was really no way that a sitting federal judge with multiple assignments on his or her docket could give these discovery disputes the attention which I could give as a special master.

Mr. Schultz: How much of your time did it take over those four years?

Mr. Pollak: It took a lot of time. I did the work with the help of one associate at the firm. Most of the time that was Tim Lynch, who had been editor-in-chief of the Law Review at Georgetown and was at Shea & Gardner. Subsequently, Tim went to be an Assistant United States Attorney. He performed in outstanding fashion. There were months when I would spend more than 100 hours on the assignment.

Mr. Schultz: So well over half your time?

Mr. Pollak: Right. I charged for my services at a reasonable rate under the Court's order appointing me and the parties divided the charges 50/50.

Mr. Schultz: What was your relationship to Judge Hogan?

Mr. Pollak: My relationship with Judge Hogan was a formal one on all the issues that were presented to me. I did not discuss them with Judge Hogan. They were presented to me, I rendered a written ruling. The parties would or would not appeal that ruling to Judge Hogan, and he would address the issue with my report and with their briefing in front of him. He limited the briefs to ten pages, considering that the matter had been fully handled in front of me and that he could give it summary attention based upon more limited briefing. The record was always a written one before Judge Hogan. I had a discussion with him early on in which I said that I thought the appropriate approach would be for me not to discuss the substance of these issues so the parties would have a full shot at the federal judge, who after all had the responsibility.

Mr. Schultz: So it was really like the relationship between a District Court and Court of Appeals.

Mr. Pollak: That's right. Now there was an occasion in which there was kind of a backup. Judge Hogan set a date for conclusion of discovery and stuck to it hard but then it had to be slipped once or twice. In an effort to wind up discovery, all the pending motions were catalogued, and I held a hearing at which all of the motions and the necessity of briefing them and having them decided by me was addressed so that we could identify what the real line up before the court was and put to one side those motions that probably never had to be addressed. The number may have been over 200. In approaching that sort of scheduling responsibility, I recall having discussions with Judge Hogan about how to approach it and manage it. Otherwise, while I had pleasant, for me, relationships with Judge Hogan, they were limited.

Mr. Schultz: Did he try some of these cases ultimately?

Mr. Pollak: He did try – the major cases settled, and some cases – the amount of money involved was tremendous. The criminal fines were the largest ever collected by the Department of Justice. One was $1 billion, or maybe over a billion. F. Hoffmann LaRoche, one of the defendants, had paid a big fine. But the cases that went to trial involved significant money but were for a long time more secondary cases. A few cases were tried. I haven't been active in the matter for five years. A few tag ends are still going on before Judge Hogan.

Mr. Schultz: Did he consult you or did you have any role in the trials?

Mr. Pollak: I had no role. When appeals were taken of my rulings, I generally went to the argument before Judge Hogan. It was of course a matter of interest to me, but also there were occasions when the outcome of the argument left something more for me to do after a ruling by the judge. I attended some of one trial just for the interest, seeing how it went. I had never wanted to be a judge and so this experience of serving as a special master afforded me a good window on what it would be like to be a judge. It was a challenging, decidedly interesting, and very rewarding experience. I found the briefing interesting. Sometimes I was intrigued by the briefing because there were often issues that went directly to the meaning of the Federal Rules, and sometimes for one reason or another the parties on both side of the issues seemed to avoid briefing what appeared to me to be the central matter at issue. I never asked them about it. There were obviously great resources put into the briefing, and often there had to be extensive affidavits about foreign law and practice, so a great deal of learning was presented to me. I learned a great deal from the case.

Mr. Schultz: Did your experience make you think you would have liked to be a judge or confirm that you wouldn't?

Mr. Pollak: I probably would have enjoyed being a judge. I wasn't sorry that I had that view that I had. I never sought to be a judge. Judge Hogan assigned some settlement responsibilities to Magistrate Judge Kay and I occasionally talked to Magistrate Judge Kay about what I was doing. He led me to believe that I was shouldering a

lot of responsibilities that were valuably performed by me so as to relieve Judge Hogan.

Mr. Schultz: Yes, I'm sure.

Mr. Pollak: Magistrate Judge Alan Kay performed highly competent services in bringing the parties to settle some of the cases. It was a good example of a federal judge using the various tools that were available to him to deal with this immense litigation. The case proceeded a lot of the time under the radar. There was no major commentary, as there was about the AT&T case, that Judge Hogan was performing his very unusual service as there was commentary about Harold Greene. I think it was a comparable virtuoso performance.

Mr. Schultz: Did you have any other experience as a special master?

Mr. Pollak: I never did. I hoped to have another assignment, but I never did. I guess you get just one of those, and mine was a big one.

Mr. Schultz: So the next project I want to ask you about is your experience as Assistant to James McKay who was an Independent Counsel.

Mr. Pollak: Jim McKay was a partner at Covington & Burling with whom I had worked when I was there. Jim McKay was an outstanding trial attorney. In and about 1960, Jim and I together, possibly I was in the lead, sought from then-Chief Judge Bazelon a pro bono case to work on, and Judge Bazelon turned to the Chief Judge of the Fourth Circuit who had been Solicitor General, Simon Soboloff. The Chief Judge gave us two habeas cases under 18 U.S.C. 2254, state habeas. Men who were claiming that they had had constitutionally infirm trials and who had

appealed their convictions without success. Number one was incarcerated in Jessup, and the other was incarcerated in the jail in downtown Baltimore. Jim and I handled those cases which presented issues respecting the availability of federal habeas to these prisoners of the State of Maryland, issues that had not yet been determined by the Supreme Court. Shortly thereafter the Supreme Court decided a now-legendary case regularizing greater rights of the criminal defendants who had been convicted to post-conviction review. But those issues were then more open.

I knew Jim in that capacity. When he was named by the Division of the U.S. Court of Appeals for the D.C. Circuit for Appointment of Independent Counsels, the chief judge of which was D.C. Circuit Senior Judge George MacKinnon, a former Congressperson, my partner Wendy White and I volunteered our assistance.

Jim McKay was appointed in February 1987 to investigate whether Lyn Nofziger of the Reagan Administration had violated any criminal law. Thereafter, Jim's assignment was expanded to include related allegations possibly implicating Attorney General Edwin Meese III when he was counselor to President Reagan.

Mr. Schultz: What were the allegations?

Mr. Pollak: The question to be investigated was whether Nofziger, acting as an agent of Welbilt Electronic Die Corporation, violated federal conflict of interest laws, 18 U.S.C. § 207(c), by communicating with the President's office within one year of

being employed as Assistant to the President. McKay brought formal charges against Nofziger. McKay and members of his staff, including now Circuit Judge Merrick Garland, tried the case.

I remember that Jim had offices on 18th Street. Others working with him in addition to Garland included Lovita Coleman and Thor Halvorson. Wendy and I participated actively addressing legal issues that came up at the time the matters were being presented before the grand jury. In my private practice, I had taken many witnesses to the grand jury. I did that over the whole of my practice, including in the Monica Lewinsky affair. With Jim McKay, this was the only time that I ever had occasion to go into the grand jury for presentation of evidence. That was extremely interesting to me. Looking back on the role of the Independent Counsels and the comments and criticisms that have come on the extended issues that Independent Counsel Kenneth Starr addressed, Jim McKay was an experienced courtroom litigator and brought to his assignment some discipline growing out of his experience that centered his investigation and allowed him to move through it and complete it and make his report while focused on what the central matters were.

Mr. Schultz: Roughly how long did the investigation go on?

Mr. Pollak: Looking at his published report respecting Mr. Meese dated July 5, 1988, he completed his investigation and the trial of Mr. Nofziger within 17 months of his appointment.

Mr. Schultz: What prompted you to volunteer?

Mr. Pollak: I was interested in finding something interesting to do in the way of public service.

Mr. Schultz: And you had worked with him before?

Mr. Pollak: Sure. Jim always treated the contribution that Wendy and I made as important. I'm not sure whether it was that significant. His report (page vi) says we served as his "counselors, successfully defending my office from attacks on the constitutionality of the independent counsel statute and attacks on my jurisdiction ***."

Mr. Schultz: I'm sure he was delighted to get the help. You mentioned that you represented a witness in connection with Monica Lewinsky. I can't let that go by without asking you about that.

Mr. Pollak: The wife of a Yale Law friend had been a volunteer in the Clinton White House, and in that capacity had had some contact at work with another volunteer, Kathleen Willey, who lived in Richmond, Virginia. Ms. Willey made allegations respecting the President which were apparently explored before a grand jury. My friend's wife was called before the grand jury in the U.S. District Court for the Eastern District of Virginia. I represented her in responding to that investigative request.

Mr. Schultz: Your role in that piece of history.

Mr. Pollak: Another of my occasional responsibilities touching on governmental investigations.

Mr. Schultz: I think what we'll do now is switch to your pro bono work and other kinds of work during your years in private practice, which is extensive. I don't think we'll cover it all. But there were I gather two Supreme Court cases that you argued on a pro bono basis. *Griffin v. Breckenridge* and the *University of Texas v. Camenisch*. So we'll have a chance to talk about those. Let's start with *Griffin versus Breckenridge*, how this case came to you and what it was about.

Mr. Pollak: When I came out of the United States government, I was asked to succeed John Nolan of Steptoe & Johnson who had been the first chair of the what was then called the Washington Lawyers Committee for Civil Rights Under Law. I readily accepted and was chair of the board of directors for two years, 1970 to 1972. One of the major accomplishments of that service was the hiring of Roderick Boggs as the director of the organization. He remains the director today, and he's made a unique contribution to civil rights and the representation of indigent people with civil rights and related issues in the District of Columbia and in the nation. Rod came to me with a case that became *Griffin v. Breckenridge*. It was a claim for damages stemming from an interference, alleged to have been on account of race, with an individual using the public highway in Tennessee. The claim was brought under 18 U.S.C. 1985. The question was what that statute, enacted initially in 1866 as part of the Civil Rights Act of the First Reconstruction, meant and what it required as a matter of intent on the defendant's part. We took it on and I did the case with Richard Sharp, an associate at Shea & Gardner and a lawyer who had been in the Civil Rights

Division, Gary Greenberg. We researched back in the proceedings of the United States Congress in 1866 the meaning of the statute and brought all of that learning to bear. The issue was a later presentation of a similar issue decided in the famous *Screws* case which dealt with a criminal statute, now 18 U.S.C. 241 or 242, interference with civil rights.

Mr. Schultz: Who is Breckenridge?

Mr. Pollak: I have to refresh my recollection. Why don't we position that for the next session.

Mr. Schultz: Was this a case against a private person?

Mr. Pollak: Yes it was.

Mr. Schultz: So that was the whole thing. It wasn't a state action, it was how far you could go?

Mr. Pollak: Exactly. When someone was interfering with your civil rights.

Mr. Schultz: But it was a private party.

Mr. Pollak: Yes it was.

Mr. Schultz: This was a pretty famous case.

Mr. Pollak: Yes it was. We prevailed nine to nothing.

Mr. Schultz: Could Congress under the 14th Amendment pass a law that dealt with private conduct as opposed to public.

Mr. Pollak: Exactly. It was a wonderful case for somebody coming out of the Civil Rights Division to have an opportunity to do.

Mr. Schultz: Did you take it from the trial court all the way up?

Mr. Pollak: No. I got it in the Supreme Court. My recollection is that cert had been granted, when I took the case. We filed briefs, and I argued the case.

The other case was *University of Texas v. Walter Camenisch*. I have spoken about it earlier in this history.