Oral History of STEPHEN J. POLLAK
Eighth Interview-June 14, 2005

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 Katia Garrett. The interview took place at the Goodwin Procter law firm at 901 New York Avenue, N.W., in the District of Columbia on June 14, 2005. This is the eighth interview.

Ms. Garrett: When we last spoke, at least for purposes of our interview, you had just left the government, and I wanted to start today talking about your entry into private practice. What the change was like, what you anticipated from the firm, and how it unrolled for you.

Mr. Pollak: Do you want me to memorialize on the tape the attachment of a memorandum that I did the night of September 29, 1967, of a flight to President Johnson's ranch where he announced his intention to nominate me head of the Civil Rights Division?

Ms. Garrett: Yes, why don't you do that.

Mr. Pollak: I thought the experience was sufficiently noteworthy and memorable that I dictated a memorandum on my return home. I brought it along and decided to make it an attachment to my oral history, so I'm passing it to you.

Ms. Garrett: Okay, great. That will be attached with the other materials.

Mr. Pollak: After the election of 1968, which was won by Richard Nixon, Richard Kleindienst was designated to be the transition chief for the Department of Justice and may have been nominee-designate to be Deputy Attorney General. He called me, and I understood all the other presidential appointees in the department, and

interviewed us about our positions and intentions with an understanding that the President-elect would let us know whether he would invite us to stay on in his Administration or ask for our resignations. There was no indication requested, and I gave none, whether if asked I would stay on. Early in 1969, I received word that I would not be asked to remain, and I tendered my resignation effective at noon on January 20. That's the way my service in the Department came to a conclusion.

I had had no discussion with anyone about post-government employment up to that time, and no one had sought me out to have any discussion about post-government employment. I was unemployed and feeling quite deprived and adrift after the activity of government and the responsibilities of government, which were very much to my liking. The very week I left government, Archives telephoned and asked if I would sit for an oral history. I did so, and that history ran over four days in one week, January 27, 29-31. The history is in the Johnson Library and can be accessed on the Internet. I have a copy also.

The major question for me when I came out was whether I would seek a position in a law firm or seek a position in a social activist organization. It turned out that John Gardner, who had been Secretary of Health, Education and Welfare in Johnson's Cabinet, was running an organization then known as the Urban Coalition. He asked me to come in and talk with him and ultimately asked whether I would take a position as his deputy. I said I would consider it. At the same time, Bill Gorham, who had also been an official in the Department of

Health, Education and Welfare, was running something called the Urban Institute, which exists to this day. Incidentally, the Urban Coalition morphed into Common Cause, which also exists today. Gorham's organization was engaged in research relating to urban problems, whereas Gardner's organization was actually working with urban communities to address their problems and better the lives of the residents. Gorham wanted me to become his No. 2. I considered seriously both offers.

After a time, Gardner advised me that he couldn't follow through on his offer. He explained that his funding came one-third from labor unions, one-third from management or corporations, and one-third from the public. The unions, he said, had objected to his hiring me. Their explanation was that John Doar and I were anti-union. Their evidence was that we had brought civil lawsuits alleging employment discrimination against building trades unions. I was left with the offer of Bill Gorham, which I seriously considered. My wife Ruth and I took a long-delayed vacation in February or early March 1969 while both jobs were still on the table. We went skiing in Aspen, and then to Mexico City and Cozumel. It was on that trip that I learned – I think we were passing through Dallas – that Gardner's offer, or almost-offer, was withdrawn. On my return, I began thinking more definitely about law firms.

I had agonized over Bill Gorham's offer and interest in bringing me into the Urban Institute. Its work was exciting. Bill was broadly capable, had broadly capable colleagues, but in the end I concluded that I wanted to be a practicing

lawyer. Bill's office was on L Street around 19th or 20th, and I made an appointment with him. He didn't know what I was going to say. There was a liquor store in the ground floor of his building. I bought a bottle of outstanding brandy, Napoleon brandy, and took it with me as a gift. I told him I wasn't going to take his job and I felt his regret and my own. It was, again, a decision that was the right one for me.

Ms. Garrett: So, then you started at Shea & Gardner as their youngest partner. What was your practice like?

Mr. Pollak: I didn't have any clients, and no one ever talked to me about being a client. In the five-plus years at Covington, I can't recall that any clients came to me. Now, Frank Shea assigned me my first piece of work, which was an interesting problem of the Democratic Party. The Party had been represented by Bennett Boskey and Ellis Lyons who had a small firm. The Party had published, I believe in connection with the 1968 or 1964 election, a glossy Fortune magazine-size book of ads by corporations and other supporters and questions were being raised respecting improper fundraising. Ellis Lyons, I think, was handling it. It seemed to be headed toward litigation, and Bennett and Ellis asked Frank Shea if he would take it over. Frank said he would. Frank had a rule of practice, which at least he gave verbal support for, that anyone who would pay his fees would be represented. Frank asked me to work on it and so I bore deeply into everything about the collection of these funds and the presentation in the magazine. My memory is that one way or another, we resolved the problem favorably to the

client. That kept me busy. I believed in the client's position. I think that, like a lot of lawyers, I generally believe in my clients' positions, but most of the clients who have come to me have had positions that looked in the directions that I believed in or that were congenial with my social and ethical outlook.

Frank was certainly interested in whether clients would come to me. It was a small firm and he was taking a chance in bringing in a partner who hadn't begun with the firm. I think all the other partners had moved through from associate to partner.

Ms. Garrett: How many partners were there at that time? You said there were about twenty lawyers.

Mr. Pollak: Maybe there were under twenty. I think that there were probably ten, eleven, something like that. Many had been Supreme Court clerks. Frank had been Dean of the Buffalo Law School. He had been an Assistant Attorney General in charge of Alien Property, the precursor of the Civil Division. Warner Gardner had been Acting Solicitor General and First Assistant to the Solicitor General at Justice as well as Solicitor of Labor, Solicitor of Interior, Acting Deputy Secretary of Interior. He and Frank had started the firm in 1946 and had hired many Supreme Court clerks. Frank was known for being a good judge of lawyers and seeking to hire the best quality.

Frank always counseled me to have patience. "Clients would come," he said, "it didn't matter; the firm was happy to have me on board and we'd have plenty to do."

Ms. Garrett: What kind of practice did you envision yourself developing at that point, when you started off with no portfolio?

Mr. Pollak: I envisioned a litigation practice. I had no desire to turn my civil rights experience into representations of persons or corporations or unions charged with violating the new civil rights laws. I never sought that kind of practice and almost never did it. Indeed, the only defense-related work that I ever did in civil rights was for the railroads which were a client of the firm, one of the first clients of Shea & Gardner. The firm represented the National Railway Labor Conference, which was the collective bargaining representative of the railroads for national bargaining with the unions. Certain railroads had been charged with employment discrimination by the Department of Justice. I think I had brought cases against railroads, or at least those cases were in preparation during my time in the Division. The railroads asked me during the 1970s to counsel with the National Railway Labor Conference respecting the equal employment laws. I recall preparing memoranda and meeting with the railroads. Out of that came a representation in a private employment action, a class action against the St. Louis Terminal Railroad which I defended along with John Rich, my partner, a younger partner. It was presented before Judge Harlington Wood, of the Alton Division of the United States District Court for the Southern District of Illinois, who went on from the District Court to the Seventh Circuit. There was a large amount of discovery, and we put up a very active defense. We had appropriately aggressive counsel for the plaintiffs, and ultimately settled the case at a modest figure which

we considered a very good settlement. Those were the only times in a long private practice that I was approached to represent persons or corporations defending themselves against complaints of employment or other civil rights violations.

Early in my return to Shea & Gardner, Northwest Airlines telephoned me when I was in Chicago for something – maybe on a case – and flew me on an empty 747 to Minneapolis and interviewed me about becoming its counsel on equal employment matters. I thought that was an exciting possibility. I must not have fit their bill because I left and never heard another word.

I thought my practice would be a litigation practice. I didn't have any idea what field. I knew my way around the courts. I engaged in no marketing. I just did what came along. Then David Rubin, who had been in the Appeals Section of the Civil Rights Division when I was there, and had moved to the Civil Rights Commission as Deputy General Counsel or General Counsel, had left government and become Deputy General Counsel of the National Education Association and counsel for the NEA's DuShane Fund, the focus of which was protection of teacher rights. David called me and said that the DuShane Fund and NEA wanted to have a special counsel representing the organizations on desegregation issues affecting education. He asked me to get my thoughts in order, possibly writing them down, and to come to Puerto Rico, where the DuShane Fund Board was meeting, to be interviewed.

Ms. Garrett: When was this?

Mr. Pollak: Early 1970 or late 1969. I had joined Shea & Gardner on March 18, 1969. I went to Puerto Rico. The lead person for NEA in heading up the group for which I would be serving as counsel was a black man named Sam Ethridge. I remember making a presentation before him and others. I recall feeling that the desires of NEA in respect to school desegregation appeared to be somewhat diffuse. I was uncertain whether I had made an effective presentation and what the outcome would be. Very shortly, or maybe while I was still in Puerto Rico, I was advised that NEA wanted to go ahead with me, and that began a full decade of representing NEA in school desegregation and teacher desegregation litigations in the Supreme Court and the federal appellate and district courts. It was one of those representations that anyone – at least of my stripe – dreamed of. During that decade, Shea & Gardner, with me at the helm, had amicus briefs in the Supreme Court in virtually every case affecting school desegregation, all the race cases. We represented NEA in numerous related proceedings in the lower courts. There was a great Supreme Court case in that period involving the separation of church and state in funding of education. Lemon was the petitioner. Ralph Moore, who had clerked for Chief Justice Warren, was one of my partners at the firm. He took the lead in drafting that brief.

David Rubin was deeply committed to school desegregation. Richard Sharp, one of the younger associates, and I teamed up working with David on all of these briefs. The Civil Rights Commission had come out with a report on "Racial Isolation in the Public Schools," even with desegregation, and we worked

on briefs in the Michigan case, *Milliken*, involving racial impaction in the center city and white schools in the suburbs and the power of the courts to award interdistrict relief. The issue was whether state action had caused the racial makeup of the largely black center city district and the almost totally white surrounding suburban districts, so that the court was empowered constitutionally to order interdistrict busing for desegregation. The issue came down to whether the existing segregation in the public schools of Detroit was caused by state action or was the result of non-state action, so-called de facto segregation. We were presenting arguments drawing on all the factual evidence to try to show that the racial makeup of those schools was the result of state action, de jure, rather than de facto.

Besides the appellate litigation, NEA retained me to represent teachers in school discipline situations. Some of those I litigated. One involved a teacher in Dade County, Florida. A lot of Shea & Gardner lawyers were kept busy with these NEA-funded litigations.

The decade saw two of what I would call great trial-level, and in one instance, appeals cases. I'd like to put them on this record.

One of the very earliest assignments that NEA brought to me was to challenge efforts that were percolating in Deep South school systems to use standardized tests and minimum scores on those standardized tests to requalify teachers in public school systems following orders of the courts that the faculties must be desegregated. Where school systems had maintained black faculty for

black students and white faculty for white students, the court orders meant that black faculty would be teaching white and black students alike. This was considered unacceptable by school boards and teachers in some school systems. NEA sought me out for two systems in northeastern Mississippi that resorted to ETS – Educational Testing Service – tests with a minimum qualifying score to requalify their teachers. One system was the Starkville Municipal Separate School District which for the fall of 1970 required all of its teachers to make a minimum score on the Graduate Record Examination. A second school district just down the highway from Starkville, the Columbus Municipal Separate School District, employed the more appropriate National Teachers Examination with a minimum score to requalify all its teachers. The black teachers scored low on these two tests, probably at levels that were 50 percent of the scores posted by the white teachers. Although many of the black teachers had taught for long periods and taught with high approval ratings, the institution of the testing meant that they were going to be fired. Mixed race groups of teachers complained to the NEA, and the NEA asked me to represent them. David Beers, my partner at Shea & Gardner, and I went to Mississippi to find local counsel. We hired Hal Freeland out of Oxford, and we came home and drafted complaints and filed lawsuits before the United States District Court for the Northern District of Mississippi, Judge Orma Smith.[1] I spent a great deal of time in Mississippi interviewing these

1/ *Armstead v. Starkville Municipal Separate School District*, 461 F.2d 276 (5th Cir. 1972), affirming 325 F. Supp. 560 (N.D. Miss. 1971); *Baker v. Columbus Municipal Separate School District*, 462 F.2d 1172 (5th Cir.

teachers, learning the cases, and then deposing officials of the school systems. We had preliminary injunction hearings before Judge Smith, and we prevailed. The use of the tests to quantify teachers for the 1970-71 school year was enjoined. Along the way, I worked with the Educational Testing Service, including their expert on these examinations whose name was James Deneen, as well as Winton Manning who rose high in the organization. ETS believed that the uses being made of the tests were not appropriate. That was particularly so with the GRE, but it was also true of the NTE which had not been drawn to test for effectiveness of experienced teachers. I had Deneen and Manning as experts supporting the plaintiff teachers and made this full record; had the superintendents of each school district on the stand before the Court examining them as to why they were doing what they were doing. I had my teachers on the stand. The school districts appealed to the Fifth Circuit and we briefed and argued the cases and the Fifth Circuit affirmed the rulings of the District Court. I do not recall that certiorari was sought.

Subsequently, we brought two state-wide federal court actions, one on behalf of the South Carolina teachers, and the other on behalf of the North Carolina teachers, challenging institution of requirements that all teachers take the National Teachers Examination and make a stated score. Each state laid on the test score requirement coincident with court orders for desegregation of faculties.

1972), affirming 329 F. Supp. 706 (N.D. Miss. 1971).

These two cases were presented to three-judge district courts. The managing judge for the North Carolina case was United States District Judge Tam Craven who later went onto the Fourth Circuit. We prevailed in the North Carolina case. However, the state school superintendents had learned a thing or two from the Mississippi litigations and had configured the use of the test more to ETS's standards. This was particularly so in South Carolina where ETS was represented by Wilmer, Cutler & Pickering.

It's worth saying something about that. Winton Manning, whom I had presented as an expert in the Mississippi cases, asked if I would represent ETS in what he correctly anticipated would be a series of challenges to its examinations on racial grounds. I looked at the situation and advised him that I thought that soon enough ETS and my client NEA were going to be on opposite sides of this issue, so that I shouldn't represent ETS. I recommended my Yale Law School classmate Howard Willens at Wilmer, Cutler. So it turned out in the South Carolina case that Wilmer, Cutler and Howard were representing ETS as an amicus. They gave ETS effective representation. The court in the South Carolina case was led by Circuit Judge, former Senator, Russell of the Fourth Circuit. Senator Russell was a very smart judge and he was hostile to our case from the standpoint of the facts and the issues that we presented. He disagreed that there was any remedy that was appropriate, and in the end, we lost before the South Carolina federal court on four or five or six different issues. We appealed to the Supreme Court but it was pretty clear that the Court was never going to take a

case in which the appellant had lost on six grounds. A motion to affirm was made by the state and granted by the Supreme Court. That led to reversal of the favorable decision in North Carolina and pretty much finished NEA's challenge to the use of the ETS NTE test for teacher requalification. We had endeavored to prove in the North Carolina and South Carolina cases that the National Teachers Examination had not been properly validated for the uses by the two states. And of course ETS valiantly tried to prove otherwise. I think we had the better of the issue. We satisfied the North Carolina court, but we lost before the South Carolina court. Those were great litigations, and there's no question that the scores that black faculty were making on the test, which were around the 11th or 12th percentile, presented a great hurdle to overcome. Those scores say a lot about the education and background of the black teachers, who were the products of segregated schools and segregated societies. All of them had been teaching black children in segregated schools, many doing so to the satisfaction of the state for many years.

Later in the 1970s, NEA brought me a representation which came from its General Counsel, Robert Chanin, that was more of a labor law case. The NEA and the American Federation of Teachers, led by Albert Shanker, had had discussions of a never-ending nature about the possibility of merger. Indeed, I think those discussions go on even to this day. The NEA's state affiliate in New York and the AFT affiliate in New York had merged. The joint state affiliate was called the New York State Union of Teachers, I believe, NYSUT.

The merged affiliate then split apart, and NEA retained me to sue the AFT affiliate for funds that NEA had invested in the merged entity which NEA believed were due to be returned. We brought suit in the U.S. District Court for the Northern District of New York in Albany and there ensued a lengthy, and actively pursued on both sides, litigation in which the Shanker affiliate was well represented by John Callagy of the Kelly Drye firm. Many depositions were taken, mostly in New York City. I litigated the case with the help of a paralegal at Shea & Gardner, Dorothy Landsberg, who had been in the Civil Rights Division. Her husband, Brian Landsberg, had spent a career there and then became a professor at McGeorge Law School, which is part of the University of the Pacific. Dorothy completed a law education later in her career and is now the head of a major law firm called Kronick Moskovitz in Sacramento.
Ms. Landsberg and I prepared these depositions and did a great deal of fact-finding in the records. Ultimately, we worked with NEA General Counsel Chanin to settle the case with return of a significant sum to NEA.

That was an active period for me in representing NEA all the way up to 1980 when Bob Chanin determined that he was going to join a law firm but remain as NEA General Counsel. He considered Shea & Gardner and a union-side labor firm, Bredhoff & Kaiser. Ultimately he decided to join Bredhoff & Kaiser where he has had a distinguished career and remained as NEA General Counsel down to this day. I discussed with Bob the merits of joining our firm versus Bredhoff. I remember telling him that while Shea & Gardner would make

a good place for him, the union firm might be a more congenial or supportive home, and he chose to go there. When he moved to Bredhoff, I never did another stick of NEA work. Now my son is a partner of Bob's at Bredhoff & Kaiser.

Ms. Garrett: Is that right? Which son is this?

Mr. Pollak: This is Roger. Roger's a labor lawyer.

Ms. Garrett: Does he do any work for the NEA?

Mr. Pollak: He did one case with Bob. I had a great time representing NEA, and I have very fond feelings for all of the NEA people, including Bob Chanin. It was a very special representation.

It wasn't long after I joined Shea & Gardner that another client came to me, the Trustees of the United Mine Workers of America Health & Retirement Funds. The Funds were a collectively-bargained pension and welfare fund for coal mine workers and their dependents. I think they first came to me in 1970, and I continue to represent them today. But it is fascinating what led them to me.

Ms. Garrett: Why did they come?

Mr. Pollak: Coincidence. And this says something about marketing, which is a big thing in law practice today. When I was at Covington & Burling, before going into government, I worked with Gerhard Gesell on antitrust cases. He of course later became an outstanding judge on the U.S. District Court for the District of Columbia. When I was in the Civil Rights Division as First Assistant to Assistant Attorney General John Doar, I did the hiring of young lawyers, particularly under the Honors Program. One of those I hired under that program was a number one

graduate from the Law School of Washington University in St. Louis named Monica Gallagher. Monica served with distinction in the Civil Rights Division and later moved to the Labor Department to handle pension and welfare matters under the supervision of a lawyer named Ian Lanoff. Lanoff moved to the UMWA Funds as General Counsel, and Monica moved with him. There were two lawyers in the General Counsel's office there.

The Funds had a system of hospitals qualified to provide care and be reimbursed by the Funds, but the hospitals had to meet certain requirements. So when the Funds refused to qualify a hospital in, I believe, Kentucky, Webster Hospital, it sued the Funds claiming an antitrust boycott. The Funds wanted outside counsel, and Monica remembered that I had done antitrust work, so the Funds retained me as their antitrust lawyer. I defended the case successfully before District Judge Tom Flannery in the United States District Court for the District of Columbia. The hospital appealed to the U.S. Court of Appeals, and we prevailed there.[2/]

In 1974, the UMWA and the coal companies entered a new collective bargaining agreement known as the National Bituminous Coal Wage Agreement of 1974. It continued funding for the Health and Retirement Funds, providing for a per-ton royalty on coal produced as well as a comparable royalty per-ton of coal purchased on which the per-ton royalty had not been paid. The latter provision was called the "purchase-of-coal clause" and it, or a comparable provision, had

2/ *Trustees of UMWA 1950 Welfare and Retirement Fund v. Webster Hospital*, 536 F.2d 419 (1976).

been in the successive national labor agreements since 1946, but it had never been complied with by the operators or enforced by the Trustees of the Funds. The UMWA said that the purpose of the clause was to protect the work of the UMWA mine workers by evening out the cost of non-UMWA coal with that of UMWA-produced coal. The cost of UMWA coal was elevated primarily because of the cost of the health and retirement benefits, but also because the terms and conditions of UMWA employment exceeded those of non-union companies. As a result, the cost of non-union coal, referred to as non-signatory coal, was cheaper. The coal companies rejected those justifications and challenged the clause as a boycott of non-signatory coal aimed at forcing non-union companies to recognize the UMWA, unlawful under the antitrust laws and under section 8(e) of the National Labor Relations Act, the so-called "hot cargo" clause of the labor statute.

The Trustees, in 1974, asked me to prepare a memorandum on whether, if they enforced the purchase-of-coal clause, they would themselves be committing an antitrust violation. We did a comprehensive memorandum at Shea & Gardner. Ralph Moore worked with me on it, and Frank Kramer. Frank was an associate. The Chairman of the Board of Trustees of the Fund was a capable attorney named Harry Huge and the General Counsel, now deceased, was Martin Danziger. Our memorandum said it would not be a violation of the antitrust or labor laws to enforce the clause, provided the clause was a legal work preservation clause aimed at evening out the cost of non-union coal with union coal and thereby protecting the work of UMWA mineworkers. Shortly after providing that

memorandum, United States Steel sued the Funds in the U.S. District Court for the District of Columbia to enjoin enforcement of the clause, and we defended that lawsuit. After we got into the meat of the case with the commencement of discovery, U.S. Steel apparently became concerned that it was creating a record that might in the end be used by treble-damage plaintiffs against the company. It moved immediately to settle the case, and we ultimately did so favorably to the Trustees. Contributions were due on the coal that had been purchased in the amount of over $12 million. I remember that the check for the Trustees' recovery was so large that U.S. Steel sent it over to me by messenger riding a bicycle. I got it immediately deposited in the bank. That was in 1975. Thereafter, there was litigation challenging the purchase-of-coal clause that extended all the way into the late 1980s or early 1990s. Coal operators sued the Funds to enjoin enforcement of the clause, and we sued operators seeking recovery of delinquent contributions. Those cases were so numerous that we moved the Multi-District Litigation Panel to consolidate them for pretrial discovery, which it did, in the Western District of Pennsylvania before Judge Mansmann, who later went on to the Third Circuit. Another district judge was assigned the case, Judge Alan Bloch. We lost a motion for summary judgment before Judge Mansmann and appealed the ruling to the Third Circuit. The question was whether the clause was unlawful on its face. We prevailed on that issue[3] although the court left open the question whether the clause could be applied in ways that violated the labor or

[3/] *In re Bituminous Coal Wage Litigation*, 756 F.2d 284 (3d Cir. 1985).

antitrust laws. After that, there was a long run of litigations in which individual companies endeavored to prove that the clause was unlawful as applied. There was much paper discovery and many depositions.

After the Third Circuit ruled that the purchase-of-coal clause was legal on its face in *In re Bituminous Coal Wage Agreements Litigation*, some 40 to 50 cases that had been multi-districted were remanded to Judge Bloch of the United States District Court for the Western District of Pennsylvania for conduct of common discovery. Some judges who have multi-district cases in front of them look toward actually trying the cases once they have handled all the common discovery. Judge Bloch was determined that he would conduct only the common discovery and then remand all the cases. There was a large amount of discovery conducted but Judge Bloch would not hear any substantive issues. When Judge Bloch ruled on the discovery, he ruled orally in court, and his rulings were transcribed in the transcript but in no other way. He gave his rulings by citing the number of the interrogatory or document request and stating "yes" for approval of the request or "no" for denial, thus "Seventeen- A, yes; Seventeen-B, no; Seventeen-C, yes, Eighteen-A, no." The court gave no explanation of the grounds of the rulings.

Ms. Garrett: Interesting. Really did his best to not create a record, other than on the transcript.

Mr. Pollak: We tried to understand the foundation of the rulings by comparing the favorable and unfavorable rulings. Ultimately, all of the purchase-of-coal cases but the one,

Ohio Valley Coal Company, in which the Trustees prevailed on the merits, were settled favorably to the Trustees.

I should mention that before the cases that were multi-districted, we litigated the legality of the clause with Kaiser Steel, which had mines in New Mexico.[4] Kaiser was represented by Wilmer, Cutler & Pickering – Douglas Melamed. We countered Kaiser's effort to avoid its purchase-of-coal royalty obligations imposed by the Coal Wage Agreement by relying on a proposition, coming out of a Supreme Court case called *Kelly v. Kosuga* [358 U.S. 516 (1959)], that an antitrust and unfair labor practice defense should not be entertained when raised by the employer after all employee services had been performed. There were actually two suits, one against Kaiser, and another against Reitz Coal.[5] One case was heard by District Judge Flannery and the other by Judge June Green. They were consolidated before the United States Court of Appeals for the D.C. Circuit where we prevailed in an opinion by Judge Abner Mikva, with Judge Wilkey writing a vigorous dissent. Kaiser petitioned for certiorari which was granted, and the Supreme Court, with Justice White writing the opinion, in *Kaiser Steel Corporation v. Mullins, Chairman of the Board of Trustees*, reversed, six to three against the Funds. When we couldn't win on a *Kelly v. Kosuga* theory, which didn't put in issue all the panoply of facts about whether the clause was a "hot cargo" clause or a work preservation clause, we had

[4] *Mullins v. Kaiser Steel Corporation*, 466 F. Supp. 911 (D.D.C. 1979), aff'd, 642 F.2d 1302 (D.C. Cir. 1980), reversed 455 U.S. 72 (1982).

[5] *Mullins v. Reitz Coal Co.*, 105 LRRM 2776 (D.D.C. 1979).

to go into all of those issues and litigated for another decade and a half. Ultimately, over $100 million in delinquent contributions was recovered. In the one case, *Ohio Valley Coal Company*, that was ultimately litigated on the merits to a conclusion, Judge Graham of the U.S. District Court for the Southern District of Ohio upheld the legality of the clause as applied there.

Ms. Garrett: When did that case, the *Ohio Valley* case --

Mr. Pollak: That was almost the last purchase-of-coal case. It must have been decided in the late 1980s. The owner of Ohio Valley was very firm in his view that he would not settle. Both sides were well represented, lead counsel for Ohio Valley was the law firm of Polito & Smock of Pittsburgh, Pennsylvania. Ohio Valley failed to respond to our discovery requests, so the case was tried on the facts we set forth in the discovery. I've continued to represent the Funds on other issues.

In the late 1980s and early 1990s, due to changes in the coal industry, the UMWA Health Benefit Funds went into the red, and the Trustees announced they would soon for the first time be forced to cut benefits. Congress reconstituted those funds into the UMWA Combined Benefit Fund and rebased the private funding by former and present companies signatory to Coal Wage Agreements. I've represented the Combined Benefit Fund in a number of long-running cases in which coal operators have contested the constitutionality and meaning of the statute, the Coal Industry Retiree Health Benefit Act of 1992 ("Coal Act").

Ms. Garrett: Of the federal statute that created the Combined Fund?

Mr. Pollak: Right.

Ms. Garrett: Were there any details that you wanted to provide about those litigations?

Mr. Pollak: The Coal Act spawned a plethora of litigation between 1993 and 2007. Issues relating to that statute, its meaning and constitutionality, have gone to the Supreme Court and have been heard on the merits in three cases. During this period, we have been litigating complex Coal Act cases for the Trustees. For example, we are now representing the Combined Benefit Fund in litigation over the meaning of the formula for calculation of the premiums the Coal Act requires coal operators to pay. At issue is the meaning of the word "reimbursements" as used in the formula. At least $209 million in premiums is involved. We litigated the issue successfully before Judge Kollar-Kotelly in the District of Columbia. On appeal, the D.C. Circuit, in a unanimous opinion by Judge Edwards for himself, Senior Judge Williams and Judge Rogers, held in part for the position taken by the Trustees but remanded it to the Social Security Administration which applies the formula and sets the premium. Imagine, this litigation over the meaning of one word in the premium formula still goes on, having been before several federal trial and appellate courts in Alabama, Virginia, Maryland, and the District of Columbia for nine years.

The representation of the Mine Funds has been fascinating in the legal issues it has presented, a textbook lode of intellectually challenging questions. The Trustees have been my longest running representation as a private lawyer.

Ms. Garrett: Have you recalled the name of the judge who dissented in the *Kelly v. Kosuga* case?

Mr. Pollak: In the *Kaiser Steel* purchase-of-coal case, where the issue was whether the court would hear a challenge to the legality of the clause in a contract action for recovery of royalties to a collectively-bargained health benefit fund, under the *Kelly v. Kosuga* ruling of the Supreme Court, the dissenting judge was Malcolm Wilkey. We prevailed before Judge June Green in the *Reitz Coal v. Mullins* case, which presented the very same issue. In the Court of Appeals, I remember the argument where Judge Wilkey was totally unaccepting of the reading we were giving *Kelly*, to the point where his face became red. Of course, Justice White vindicated him, as the Supreme Court ruled along the lines that Judge Wilkey had taken in his dissent.

At the time we were beginning to litigate the *Kaiser* case, the General Counsel of the Funds was Henry Ruth. I worked closely with Henry and ultimately, at my invitation, Henry joined our law firm as a partner and was here at Shea & Gardner several years. He then went back to Philadelphia, which was his home, to the Saul Ewing firm. Henry had been one of the Independent Counsels in Watergate. I shared some representations with Henry while he was at Shea & Gardner unrelated to the Mine Funds, including the representation of Hamilton Jordan, Chief of Staff to President Carter, and the representation of Billy Carter, the President's brother.

There are at least three levels at which the cases I've litigated and clients I've represented can be discussed. One is to speak about the cases and the issues and the rulings, and I've been doing that. The second level is to speak about

people that were involved. The clients, the court people, the opposing lawyers, the witnesses. All of that is richly textured in my experience. The people that I've related to stand out in my mind today almost as if I was still relating to them, even though some of the events occurred 35 years ago. Then, the third level is to talk some about my approach to litigation and oral argument. That I think is an area I could deal with in less time, but certainly it bears comment.

My feeling about case preparation stems from working with Gerry Gesell who believed that cases are won on the facts. I would even trace it back to Yale Law School where I was taught by James Moore, of the Bankruptcy Treatise and Moore's Federal Practice. Professor Moore said that if you have an issue in court and the facts don't permit you to win, then your obligation as a lawyer is to go out and find more facts; your responsibility is to look again at the issue and redefine it so that other facts become relevant which will allow you to prevail. Either way, I think the lawyer is challenged to define the issues in the cases he is handling and then to find the facts that will be favorable to his client relating to those issues. I have always worked hard on the facts side of case preparation, both in reviewing documents – I learned about "the romance of the documents" from John Doar who would peer into voting records endlessly in preparing the Civil Rights Division's voting rights cases – and in preparing for examination of witnesses, and keying documents to the questions to be asked in depositions. I think that's been a strong area for me and one that I've enjoyed a great deal.

In taking depositions where you don't know what a hostile witness is going to answer, I have often approached a series of question with absolute pain in my stomach, wondering what the witness would say. Often on a deposition, I have heard a witness's testimony and thought, "Well my case is over. That witness's testimony is going to sink me forever." And the day ended and I'm as blue as a blue stone. What always happens is that on analysis it wasn't ever as bad as I thought.

Ms. Garrett: We were talking about the pleasure you took in preparing the facts of your cases, and you had mentioned actually some of the desegregation cases and standardized testing cases for the NEA of going down and talking with witnesses and talking with the teachers and then deposing all the school officials. I'm wondering if there are any particular conversations that you had or witnesses that you can recall meeting with that were memorable or that sort of captured the tone of those cases in that time?

Mr. Pollak: My opponent in the *Starkville* case was an attorney named Thomas Tubb. He was from West Point, Mississippi, an area that called itself the "Golden Triangle," West Point, Columbus, and Starkville. I flew in a two-engine propeller plane into the Golden Triangle Airport. It was a very, very southern community. My beginnings there were in late 1969, which was really, for those school systems, the beginning of desegregation. I had a band of teachers in the Starkville system who were very courageous. The lead teacher was Carolyn Reeves, a white teacher who brought the case to the NEA. She was joined by another white

teacher named Jan Peterson and a number of black teachers and administrators, including Mr. and Mrs. Buck. Mrs. Buck was a teacher and he was a principal employed for many years in the black schools teaching black children. These teacher-clients were worried about the course they were pursuing, the hostility in the community. I never felt other than safe there, but I think some of my clients were concerned. I was impressed with the dedication of these teachers to the cause of desegregation, and I was interested in the officials of the school district who were the opponents. The Superintendent of the Starkville District was Paul Armstrong. I had him on the stand in a hearing before Judge Orma Smith on a preliminary injunction. We were challenging imposition of the requirement that all teachers achieve a particular score on the GRE as a condition of employment for the 1970-71 school year that was about to begin. In the course of his testimony in court on a point of significance, Armstrong testified in direct contradiction to his deposition, and I was able to bring it out. Undoubtedly that hurt him and his side of the case. The school officials in both districts, Starkville and Columbus, believed that black teachers who had been considered acceptable when teaching the black students were insufficiently educated to teach white students. The situation was difficult because of the segregated circumstances in which those teachers had been educated and the low expectations that had been the rule for black students and their teachers. So the problems were real, but terminating the blacks was not the answer. Thomas Tubb who defended Starkville was in most every way a gentleman. He was highly regarded in the

community. He may have been one of the trustees of the University of Mississippi at the time of the dispute over registration of James Meredith. I'm sure that he had deep roots in the segregation that was part of the life of his community. He was always fair and honorable in the litigation. He said to me once outside of court, "Steve, your position is correct, but we need 20 years to make the change." Of course, by then that was 16 or 17 years after *Brown*. Now it's 51 years after *Brown*. One can recognize that change has been very hard across the whole nation. It struck me that those cases in the heart of Mississippi – presenting them under the Federal Rules to Judge Orma Smith and to the Fifth Circuit – were really a measure of rule of law at work. It was a great example that southern school districts, Starkville and Columbus, had their full day in court and couldn't sustain their positions. The Court ruled, the appeal took place, the teachers were retained and grew in their jobs. Judge Smith was fair, orderly, impressive. At one point we were presenting part of the case to him in Greenville, Mississippi, and I brought my son Roger who was born in 1959, so he was 12 or 13. He commented that Judge Smith looked very "judgy." It was fascinating because the federal judges rode circuit. The district court in Greenville wasn't Judge Smith's home court. He was staying at the same motel where we were staying. He would eat with his clerk in the same dining room. I would have no exchanges with him, but I would see him, and often my opposing lawyer would be there as well. Those were very hard-fought cases, but I considered counsel on the opposite side to have been honorable. The discovery

was hard fought, and it was often difficult extracting documents from the school districts, but the system worked, and we were able to make our record.

I haven't said much about the Columbus case. Columbus was still rural, but more urban than Starkville, and the Columbus District was more cagey in choosing the National Teachers Examination in its efforts to avoid black teachers teaching white students. Unlike the Graduate Record Examination, the NTE was created to qualify teachers, but new teachers, not experienced teachers. I deposed Superintendent Goolsby, who had come up as an athletic coach and had a lot of executive ability. I respected him. He made a good witness for his side. Our group of teachers, they were equally impressive. The plaintiffs in the Columbus case were all black. Once the NTE score impediment to continued employment was removed, the School District proceeded against one of our clients on disciplinary grounds that Richard Sharp, my Shea & Gardner co-counsel, and I believed were trumped up. We had a whole separate litigation defending that teacher's right to retain her employment and succeeded in that.

The litigations turned on the efforts we made on behalf of those teachers in each district to discover the facts through depositions, discovery of documents, and use of the ETS experts. That was the fabric of the two cases. Each case was presented to the court on hearings on preliminary injunction in live testimony and submission of documents and depositions, followed by post-hearing briefs, and then oral argument. I remember crafting an order on the second floor of a non-air conditioned federal courthouse somewhere in rural Mississippi with Richard

Sharp. We were trying to draft an appropriate remedy for the orderly desegregation of the faculty and administrators without use of the standardized tests. I was deeply invested in those cases and issues respecting the proper uses of employment tests. Later, I commented on and participated in efforts of the civil rights organizations to get the EEOC to draft proper testing guidelines.

Ms. Garrett: What role did you have in that?

Mr. Pollak: The EEOC was drafting guidelines and put them out for comment. Through the National Lawyers Committee for Civil Rights Under Law, with which I was active following my departure from Justice, we commented on those guidelines. I thought that ultimately EEOC adopted a good set of guidelines. More recently, EEOC has been backing away and watering them down. I found the issue of test validation a challenging one. I never thought that the ETS was other than in good faith in trying to have tests that were not discriminatory. I think ETS made great efforts to protect against discrimination in its tests. I doubted that they were able to be successful because of the carryover of discrimination against the Blacks in education and in the separateness of their society. I've never had the feeling that court processes went the last mile in assuring that Blacks were not disadvantaged by those standardized tests.

Ms. Garrett: What more do you think the court could have done?

Mr. Pollak: I'm doubtful that there was more for the court to do. It was up to the parties and particularly on the civil rights side to present up records that could demonstrate that even if unintended, the tests had a discriminatory effect, but that proof was

difficult and complex. And ETS – I remember in the South Carolina case – had a great big notebook supporting its claims to validation, which we challenged unsuccessfully.

Ms. Garrett: I want to explore the same avenues with the UMWA Funds; the people who are involved and your relationships with them.

Mr. Pollak: One of the mistakes people often make is to believe that the Funds are an arm of the United Mine Workers of America, the Union. They are not. The Funds are trusteed, independent funds which, commencing in 1974, are regulated by ERISA. I found from the very first in representing the Mine Funds that they were always run in a financially open and honest way. There had been earlier challenges to the predecessor fund that was set up originally in an agreement between John L. Lewis who was the historically renowned chief of the United Mine Workers Union, and Secretary of Interior Julius Krug, called the Krug-Lewis Agreement in 1946. Krug was involved because President Roosevelt had seized the mines during World War II because of work stoppages by the UMWA. The earlier UMWA Welfare and Retirement Fund of 1950, so called, had been trusteed, but two of the three trustees were named by John L. Lewis. The trust then may have been more an arm of the Union, or at least under the domination of the Union, but I have no firsthand knowledge. As I knew it, the Funds were independent of labor and management.

There was a major challenge to the practices of the Fund in the early 1970s in the *Blankenship* case presented before Judge Gesell. Those challenging

the way the Fund was conducted were represented by Harry Huge, who later became chair of the Board of Trustees. Judge Gesell ruled in *Blankenship* that certain practices of the Fund were unlawful. He asked that Paul Dean, who had been Dean of the Georgetown Law School, be named as the independent trustee. Paul Dean was named, and continued to serve from *Blankenship* which was in the late 1960s, early 1970s, through 1992 or thereabouts. Paul, my client as one of the Trustees, was always independent of mind in handling his responsibilities. He was joined for a long time by Chair Harry Huge, who was named by the Union as a Union-appointed Trustee, and there were several different Trustees named over the years by the coal companies signatory to the Coal Wage Agreement. One of the later ones was William Miller who was a vice president or senior vice president of United States Steel. I must have known maybe 10 or 12 different trustees, some named by the Union, some named by management, the Bituminous Coal Operators Association, and all during that time Paul Dean carried on. Generally there were two Union-appointed and two operator-appointed Trustees, plus Professor Dean, Dean Dean as he was sometimes called. Of course, I dealt with the Trustees, but mostly I dealt with the Funds General Counsel and sometimes the Executive Director. There was a succession of general counsels starting with Ian Lanoff whom I've named, Henry Ruth, and coming down to the modern era in which the longest serving general counsel, David Allen, has been General Counsel now for some 16 years.

The Trustees have never engaged in collective bargaining, which, until the Combined Benefit Fund was established by Congress in 1992, determined what the guidelines were for the Trusts, the Pension Trusts, and the Health Benefit Trusts. However, issues between labor and management sometimes intruded on the decisions the Trustees were called upon to make. Their obligation under ERISA was to serve only the interests of the beneficiaries, not the interests of the settlors who appointed them. Sometimes what will serve the beneficiaries is viewed differently by labor and management. So the issues on which I've represented the Funds in litigation have often required presentations to the Trustees and their guidance on policy issues that come up. I like to think the Trustees always thought they got the best advice we could give them based on our understanding of the facts and the law.

My longest running and closest partner with whom I shared the Mine Funds representation was Wendy White, who is an outstanding attorney and now the Senior Vice President and General Counsel of the University of Pennsylvania. We had a long litigation over whether per-ton royalty contributions were required on moisture included in coal: as the Eleventh Circuit said in *A.J. Taft Coal Co. v. Connors*, whether coal means coal or coal means coal including moisture.[6/] That issue was raised in litigation in Alabama which was a favorite jurisdiction for the mine operators. In the first moisture case brought by Taft Coal, Wendy acted as lead counsel and I assisted her, we lost before Judge James Hancock of the U.S.

[6/] 906 F.2d 539 (1990).

District Court for the Northern District of Alabama who said coal is coal, not moisture, citing the dictionary. We argued that it meant something else based on the collective bargaining agreement, but we were unsuccessful and the case went to the Court of Appeals for the Eleventh Circuit, which affirmed Judge Hancock. We litigated the same issue in Washington and prevailed and ultimately settled most moisture cases favorably to the Funds.

Ms. Garrett: I think that my questions in this area are done, unless you had more issues you wanted to get into about the people involved in the Funds.

Mr. Pollak: The Mine Funds are authorized under ERISA to sue in the jurisdiction of their headquarters. We uniformly brought claims for delinquent contributions based on purchased coal in the District Court for the District of Columbia. I litigated these cases before Judge Gesell, Judge Harold Greene, Judge Joyce Hens Green, Judge Flannery, Judge June Green, Judge Stanley Harris, and possibly others. Often there was a race to the courthouse. I litigated the *Ohio Valley* case before Judge Graham in the Southern District of Ohio, a very fair, outstanding judge – maybe I'm influenced by the fact that he ruled in our favor on the merits of our contentions.

Ms. Garrett: Okay. Why don't we conclude here then?

Mr. Pollak: Thank you.