ORAL HISTORY OF ROGER E. ZUCKERMAN
Fourth Interview
February 11, 2014

This is the fourth interview of the oral history of Roger Zuckerman as part of the Oral History Project of the Historical Society of the District of Columbia Circuit. The interviewer is Gene Granof. The interview took place in the office of Mr. Zuckerman at his law firm in the District of Columbia on Tuesday, February 11, 2014, at 2:30 p.m.

Granof: The last time we talked, we had discussed for a good part of the time your stint at the U.S. Attorney's Office as an Assistant U.S. Attorney. The one thing we didn't cover and we are going to talk about this time is the riots in D.C. in 1969.

Zuckerman: Okay. It is perhaps useful to talk about the riots both in terms of my personal memories and the personal experiences that my wife and I had, and to talk about them in the context of the U.S. Attorney's Office. First, here is a little background that might be useful. When I was a young fellow and a student in high school, I worked for a year, at least, as a clerk and learned the business of selling things at the Kay Jewelry Store at the intersection of 14th & Irving Street. It was a wonderful experience marred only by the fact that amongst the people who came in was my French teacher who absolutely disliked me in the extreme and I was very cowed by her. Isabel Cotton was her name. I learned to deal with the public. It was a nice experience, and I became very familiar with the area around 14th & Irving. There were various stores. There was a diner. I would take the bus from Silver Spring down 16th Street. If you fast forward for many years, when the riots came, Irene and I were living on Veazey Terrace on Connecticut Avenue in Van Ness North. She was working as a young occupational therapist in the Washington Hospital Center, and would drive down Irving Street to get to work and drive back. She was probably twenty-two or twenty-three at the time, and, I think, basically paid no or little attention to the experience which included, among other things, the

complete decimation of that area around 14th & Irving, where I had worked several years earlier as a clerk at this jewelry store. So there was a personal component, I think, that Irene and I experienced in that regard that we always think about whenever we are in that area, which is pleasantly and happily now the subject of an incredible renaissance. 14th Street is a spectacular area – many of the young lawyers in the firm live near 14th Street up in that area. Further east – we've driven around there – they have new condos and new offices. It's spectacular.

Someday the same gentrification will occur east of the river in Anacostia. It's another 25 or 50 years, but that's just the nature - the way development goes. In terms of my memories, apart from putting my wife in that oddly harrowing position, planning your drive to work every day, I don't have particularly vivid memories for the following reason. When I was in the U.S. Attorney's Office in '69, I think the riots occurred when I was still doing appellate work. You had a lot of line Assistant U.S. Attorneys who were tasked with working up the cases that came in that were connected to the riots. I just don't have a vivid memory of that. I don't know that I was involved with the "papering" of new cases at the time.

Granof: I said the riots were in '69 but I think I misspoke. I think it was 1968.

Zuckerman: Yes it was 1968. In 1968, I was in the Appellate Section of the U.S. Attorney's Office and a lot of the Assistant U.S. Attorneys who bore the brunt of the work "papering" these hundreds or thousands of cases trying to figure out how to handle the massive stuff were young people of my age and experience in the Office, save that they had gone through the General Sessions entry, and therefore had enough experience that they could be given the responsibility for trying to do this. But those of us in the Appellate Section were not tasked with that effort. It's a professional experience that passed me by, guess I would say. I have a memory of it. It was a horrific time and a hurtful time in a lot of respects, but one that

professionally I was not engaged in in a significant way.

Granof: I know my memory of it and maybe this will jog yours. I worked at the National Labor Relations Board and I would walk home in the evening from 17th & Pennsylvania to Capitol Park in Southwest, and I will never forget the lines of police cars with their sirens screaming and you could see the shotguns sticking up in back. That was a very vivid memory.

Zuckerman: Yes, I have those memories around the Courthouse area. Most of my private life was spent whipping up and down Connecticut Avenue and Pennsylvania Avenue and those areas were largely immune from difficulty. The person who should be interviewed with the vivid memories is probably Irene, my wife, who literally got in her car and drove from Connecticut & Irving to the Washington Hospital Center to go to work, and did not think twice about it at the time. That's the best I can do.

Granof: At some point you had decided that you were going to leave the U.S. Attorney's Office.

Zuckerman: It's interesting as I think back. I had come right from law school, as I had earlier said, in the summer of 1967. By the summer of 1972, I had been there five years and I thought it was time to leave. There were a couple of judges who contacted me and indicated that they had recommended me to certain law firms and these firms were interested in speaking to me. I cannot begin to give you the reason – maybe it was hubris or maybe it was foolishness – but I didn't want to do that. I didn't want the feeling of beginning at the bottom again in a law firm and felt at the time – I was probably 29 in the summer of 1972 – and I felt like there was enough work out there that I could get and I wanted to see what it would be like if I hung out a shingle. From the summer of 1972 until the end of 1974, I practiced with three – also former Assistant U.S. Attorneys – who to this day, are amongst my best friends: Jim Lyons, Phil Kellogg and Edwin A. Williams.

The name of the firm was Kellogg, Williams, Lyons & Zuckerman. There were four of us, who literally went out and subleased space in the Woodward Building, which was at the time in great disrepair. We were on the top floor of the Woodward Building subleasing space from Command Financial Corporation. Each of us had a small office. There was a gym – I'll never forget this – circa 1972 on the top floor of the Woodward Building at 15th & H. It's the Woodward from Woodward & Lothrop.

Granof: That's what I thought.

Zuckerman: It was at one time a fine old building and by that time it was in some disrepair. The four of us had subleased space within Command Financial Corporation, and for about two and one-half years we really scuffled around doing interesting work that our colleagues who had left the Office would send us.

Granof: First of all, did you talk to these guys – get together informally?

Zuckerman: There were others. We had talked to Chuck Work, who went on to a great career at McDermott, Will & Emery; John Rogers, whose father was a congressman; and there were a group of us who had talked back and forth about creating a law firm and going out on our own.

Granof: All Assistant U.S. Attorneys? Your contemporaries?

Zuckerman: All Assistant U.S. Attorneys without a pot to piss in. You should excuse me. We had nothing. We had our life savings – our retirement account.

Granof: You did not have kids at the time?

Zuckerman: I did not have kids.

Granof: You had a working wife?

Zuckerman: I had a working wife who was an occupational therapist. I just can't give you the reason. This was just what I was determined to do. I didn't want to become an associate at a nondescript law firm.

Granof: It does seem that it wasn't that you were such an outlier because you had other people – your contemporaries who had exactly the same idea.

Zuckerman: There were others in the Office who did this. I must say, part of the reason, those are dim times in the past - part of the reason - economically was this. There were established firms in town that did litigation, but they did not do much "white-collar" litigation or criminal litigation. First, it wasn't a big thing at the time, and second, there really wasn't a huge amount of demand in the marketplace for young lawyers coming out of the U.S. Attorney's Office. Nothing in my view like it is today. Even for, immodestly, someone who had a reasonably decent record and resume, it was not the easiest thing in the world. I intuited I could move ahead in life faster somehow, for some indescribably naïve reason, if I said, "Here I am – I don't have a boss – I understand my way around a courtroom in some basic ways, and I am here to do work for you." It struck me that I could be more of a presence, if you will, in the marketplace if I did that, rather than if I carried someone's briefcase as a junior lawyer.

Granof: The U.S. Attorney's Office from everyone I've talked to is high – a professional high – in the sense you are doing important stuff and you have a lot of independence.

Zuckerman: Well put. I adopt that.

Granof: And then to go work as a junior associate, going through files –

Zuckerman: It felt like it was almost a step backwards. I'll put it that way. It just didn't feel right. For the first year from mid-1970 to mid-1973, it was an awkward year because the engagements that we got, with one exception,

were minor engagements. The one case that was interesting and was a little bit impactful in my life involved the representation of three senior officials of the United Mine Workers, who were members of the Tony Boyle administration. Boyle had just lost an election to a reform group led, I think, by Arnold Miller. The general counsel of the new administration was Chip Yablonski, who has become a lifetime friend and is a great guy.

Granof: He was a colleague of mine at the National Labor Relations Board.

Zuckerman: Yes, a great guy, great labor lawyer, and he was a young fellow. At the time, he had some young colleagues with him. He went on to take his young colleagues out of the Mine Workers and they started their own firm, Yablonski, Both & Edelman. We sued the Mine Workers claiming that they had violated the Labor Management Reporting and Disclosure Act by firing, for political reasons, these three officials. It put us in contact, as our adversaries, with Chip and Danny Edelman and a third lawyer who is very bright and went on to teach at Harvard. We litigated well and won one of three cases.

Granof: How did you get the case?

Zuckerman: I have not the foggiest idea. It was a case ultimately on which we prevailed. It was a good experience. I think it made us feel as if we had, as it were, the right stuff in civil litigation and it was fun. The only other case of great significance during this period was a defining moment in my life in a lot of respects and it could be the subject of an hour-long interview. It was a famous case – the wire and mail fraud prosecution brought by the Postal Service and the Department of Justice in the Middle District of Florida against a very charismatic promoter by the name of Glenn Turner. Glenn had a cosmetics company called Koscot Cosmetics. You could either sell the cosmetics or you could sell distributorships. It

was an early example of a fairly sophisticated multi-level "Ponzi" scheme. He was a charismatic South Carolinian and had a very charismatic presence at opportunity meetings – almost old-time tent meetings that he would conduct with his South Carolina colleagues and officials. He would raise huge amounts of money from people who purchased distributorships. Those people would get money from others to whom they sold distributorships and from those to whom the successors sold distributorships. It was a classic "Ponzi" pyramid scheme. The State Attorneys General had tried to shut this down. It was quite popular. Glenn went out and hired as his advocate F. Lee Bailey. Lee being in 1971 probably 39 or 40 at the time. A part of Lee's fee was a Lear jet that helped Lee to do this - Lee being a pilot and somebody who loved these kinds of toys. Lee flew around and spoke at mass meetings about the propriety and legality of what Glenn and his people were doing. They had meetings in Madison Square Garden and elsewhere. A lot of it was videotaped or filmed at the time. The Postal Service, believing that this was a "Ponzi" scheme, began an investigation. Ultimately, Turner, seven or eight of his senior executives, and F. Lee Bailey were indicted. Bailey was indicted principally on the theory that he became not simply a lawyer, but a business endorser of the program knowing that it was an illegal "Ponzi" scheme. The nine or so defendants went to trial. The case was brought in Orlando, but transferred to Jacksonville. They went to trial before Judge Gerald Bard Tjoflat, then a district judge, later to become Chief Judge of the Eleventh Circuit, in a trial that occurred from the late summer or early fall of 1973 until the spring of 1974. Nine months of trial in which the government presented probably on the order of 150 witnesses, I would guess, prosecuted by Hugh Smith and two or three others – good lawyers in the U.S. Attorney's Office in Florida. Through the reference from a great friend and colleague in the U.S. Attorney's Office and a great lawyer in his own right – Ken Robinson – I and Jim Lyons, my partner at the time, were referred two of the nine defendants: Glenn's uncle, Harry

Atkinson, who was a young company official; and a younger man, Jess Hickman. I became the principal attorney for both of those men and commuted from Washington, D.C. I had an apartment in Jacksonville, Florida and I commuted Sunday nights on an Eastern Air Lines flight to Jacksonville, spent the entire week there and came back Friday nights. I did have, at that point, a young daughter. I had Laura, my young daughter, who was probably two or three, and it got to the point where when Irene would pick me up, Laura could identify the different airlines – knew Eastern and United and all those. I commuted faithfully for nine months, often staying the weekends, mainly coming home, representing these two against an onslaught of evidence which the government brought.

Lee Bailey represented himself for about five months and then got a severance under the *"Echeles-Shuford*" doctrine, wherein he was able to show that one of the defendants had averred that he would testify for Lee in a separate trial, but would refuse to testify for Lee in a joint trial. That created a pickle for Judge Tjoflat and the government out of which they could not get, and Lee was able to get a severance. Before then, he appeared in court and simply represented himself. But in the main, I think, Lee disdained the proceedings and would often spend much of the day in a room that was made available to the defense during trial; it was actually an empty judge's chambers, which was somewhat adjacent to the courtroom in the old post office in Jacksonville. Lee absented himself from the courtroom in part to give evidence to the jury – to give the jury the impression that these proceedings, and the events they were describing, really had nothing to do with him and that he was quite disinterested in them. He was simply a lawyer.

Granof: This was a tactic on Bailey's part?

Zuckerman: It was a tactic on Lee's part, and indeed Lee slept and would take naps on a

big sofa in the chambers.

Granof: The jury didn't see this.

Zuckerman: The jury never saw it, but it was an interesting pose for a talented, brilliant, and, in his own right, charismatic young lawyer, who by that time had written the book *The Defense Never Rests*.

Granof: I didn't realize he was that young.

Zuckerman: Lee, to back up for a moment, I got to know Lee extremely well and became extremely close to him during the five months we were together.

Granof: He is an enjoyable character?

Zuckerman: He is a brilliant and wonderful person whose career began when he was in his early thirties. He had gone to law school after Korea, I think, where he had been a pilot, going to Boston University School of Law, and he hung out a shingle and had a succession of cases, involving: "The Boston Strangler," Dr. Carl Coppolino, U.S. Army Captain Ernest Medina of the "My Lai Massacre," and Dr. Sam Sheppard, which he took to the Supreme Court on grounds of prejudicial publicity. For a young man in his early to mid-thirties, he had established an incredible mystique and had a national reputation. He had a small firm and I met and became very close to a few of his younger partners, who would come down to see how he was doing. This was a terrible event in his life and put a big crimp in his career. But he survived to go on to his first big post-trial engagement – the representation of Patty Hearst. I was down there in Florida for nine months. Our fees and expenses were paid for roughly the first five months. The last four months, fees and expenses were not paid. The cast of folks in the foxhole dwindled somewhat. Periodically, the electricity in our apartments was turned off and it became something of a grim experience to make it through.

Granof: How could you afford to do that?

Zuckerman: Well it cost me and us, but I made it through. The closing arguments – if you can believe this, I will never forget this – the closing arguments in the case occupied a period of at least ten days. My closing was four hours – I was hoarse at the end – I would say the average closing was in the two-to four-hour range. The government's closing initially was much longer and the government's rebuttal was much longer. The jury went out and the jury deliberated for ten or eleven days, at the end of which two jurors were taken to the hospital suffering some sort of anxiety or exhaustion. The judge declared a mistrial. Nine months of trial went down the drain. We believed we had a majority of the jurors with us. You could tell after eight or nine months just by the affect of these jurors who they were rooting for. The thing that I find most amazing in retrospect – I find it mind-boggling in retrospect – is that the jury was sequestered the entire nine months. These are people who were forced away from their jobs, their homes, their families, to live in a dorm room for nine months - being allowed only one afternoon on a weekend to go home and re-establish their relationship. They were locked in.

Granof: And why was that?

Zuckerman: Turner was a charismatic fellow. The judge was concerned that he had a following that would not quite be described as a cult following, but he had a very active and loyal following, and the judge was concerned about publicity or about contact. The original estimate of the length of the trial was three months. The government, in retrospect, made massive mistakes in not paring its case down. There was too much overkill and it became kind of World War I trench warfare. It was awful.

Granof: What I was going to ask you, first, how do you pick a jury? This was I assume a cooperative endeavor?

Zuckerman: We had an early version of a jury expert as best I can recall.

Granof: How many lawyers did you have on the defense? You had how many defendants?

Zuckerman: We had nine defendants, I think. Lee represented himself, so we had eight represented by their attorneys. Turner was represented by a wonderful, wonderful Atlanta attorney who has gone on to great fame, Ed Garland. The other lawyers were very talented Florida lawyers. Ed probably had five lawyers on his team representing Glenn. The others had one or two. It was, by today's standards, not a huge group. There were probably between 12 and 20 lawyers who cycled through at some point. The prosecution team, I think, had four lawyers. All of this was done back in the day before anything remotely approaching electronic documents or discovery existed. There must have been ten file cabinets of documents in the case that were kept in a file room that was an adjunct to the courtroom. For the most part, I would say that the lawyers were well-behaved. There were some conflagrations that were memorable. It was an extraordinary experience. The reason that it was meaningful to me is because I saw the prosecutors, I saw the other lawyers on the defense, and I saw Lee. Again, I intuited – I was 32 or 33 – they were all very young – the whole crew was under 40, many were under 35 – and I said I think that I can do this about as well as they can. I don't think there is any real difference between them and me and, in many respects, I think I can do it better than most.

Granof: It gave you a huge amount of confidence?

Zuckerman: It gave me confidence and it gave me double confidence because Lee was looking for an ally (as I will describe in a minute) and basically asked me from the group if I would be his lawyer in his efforts not to be retried. He had been severed out and he didn't want to go back to trial; he wanted to

file double jeopardy claims. After the trial, Lee asked me to represent him. He also asked me to work with him on an antitrust case that he had gotten, and he asked me if I would write the motions for him in the *Hearst* case, which I did.

Granof: That's a lot of stuff to cover. I want to get to that, but before I do I want to ask you about this trial because trying to envision a trial with nine defendants and fifteen or twenty lawyers in a sea of ten filing cabinets full of stuff. That is sort of like trying to think of the fourth dimension. It's just so hard to imagine. How do you this physically? How do you seat nine defendants and their lawyers?

Zuckerman: Well, it was a very large courtroom. Remember, I had said we had done six weeks in the Ceremonial Courtroom. It was configured so that it held everyone. The trick for me, at least, was there is a pattern of activity and behavior that you establish for yourself. Some of the lawyers went out at night and caroused. I went back and tried to be conscientious. I took notes – I was a very good note taker. I reduced the notes to summaries at the end of each trial day so that by the end of the trial I had summaries of two hundred or three hundred witnesses that I could work with. Remember, I had no computer at that time. I was diligent and organized and committed. Somehow in a subconscious way I said to myself – and Irene, who put up with this craziness, stayed at home for nine months with a two-year-old kid, I think, intuited it as well – this probably is an important experience.

Granof: Was she working during the time?

Zuckerman: She was not, no. It was always her attitude I will give him free rein to do what he thinks is required of him professionally. I am sure there were moments of frustration and depression and thoughts like "what am I doing here." But in the main, particularly because we hung the jury, you look back on it as just a wonderful experience. One of the things I came to

learn in doing this for forty years is a trick of human memory that is very bizarre, which is that your experiences when you have them in these long trials are fixed. I have had a bunch of long trials. You either have a good dinner or bad dinner. You either have good friendships or bad friendships. But your memory, when it's all over, is massively colored by whether you won or lost. If you won, it's just the most wonderful thing in the world to think back on. You had the greatest time and your friends and colleagues and stories from the foxhole are spectacular. If you lost, notwithstanding that your experiences were just as great, the whole thing has a completely different feel to it. I have been on both sides. It's amazing. And this one is sublime and golden, because we fought off the government through a lot of hardship.

Granof: I have two questions. The first is the testimony with nine defendants is going to sometimes pertain to your clients and sometimes you really wouldn't care what they are doing.

Zuckerman: I would say, in the main, the principal categories of witnesses were either people who had invested – investors from different states – or State Attorneys' General. Those two were big clumps of witnesses. Then you had some insiders. And to be sure, a lot of the witnesses had nothing to do with Harry Atkinson or Jess Hickman. So there were periods of time where you would sit in the courtroom and days would go by. You would participate a lot in the legal arguments and the objections, but not in the actual cross-examination of witnesses. There would be a lot of time that would go by.

Granof: Were there any conflicts between the defendants?

Zuckerman: I would say no.

Granof: Did you guys talk strategy and who's going to object?

Zuckerman: Yes. There were very intense meetings at the beginning. Again, it's characteristic of a lot of long trials. Then the thing took a routinized aspect. It's another day, and there are another seven victims who will be appearing. It's another day, and there are three Attorneys' General who are coming in. I was given an Attorney General, you go find and interview him, and ask him the questions we ask. This is what we do. The thing had a routine, very much like a tennis match, and you understood where they are hitting their ground stroke and it was your job to hit it back. There were long periods of routine. No novelty. Then, of course, as the case begins to wind up, there is a ferment of activity, because you're dealing with instructions and closing argument and the like.

My vignette I tell for posterity is a cute one, and it shows you how the foibles occur in these kinds of situations. As I said earlier, I had very good notes and I had two defendants and a lot of good ideas for closing and I wrote – actually typed, I had my typewriter down there – about a 60- or 80-page outline of my closing argument. I had practiced it. It went for four hours. I had a rental car, and court began every day at 9:30 a.m. The day I was supposed to deliver my closing, I drove to the courthouse, opened my briefcase and my outline was not there. I had left the outline back at my apartment. If I had done this at the age of 70, I would have simply notified the clerk, you'll have to tell the judge I can't begin at 9:30, you'll have to give me some time. There are papers I absolutely need. The judge probably would have barked a little, but it was okay. But at the time, I was still young and was in a complete panic and must have driven 90 miles-an-hour back to my apartment to get my outline and 90 miles-an-hour back to the courthouse to get there by 9:30. Very, very bizarre and I will always, always remember it.

Granof: I would think so. Did you ever think you would do it without your outline?

Zuckerman: No, no.

Granof: That would be hard with four hours.

Zuckerman: It would be hard to go four hours without my outline. I had a very nice relationship with the judge who, for no particular good reason, favored me. It was apparent he favored me and one other lawyer on the defense side. Maybe it was a mark of how ineffective we were and how noncontentious we were. I think he favored us because he thought we were good lawyers.

Granof: As Irving Younger would say, straight shooters.

Zuckerman: Yes. It was that as well as my developing a relationship with Lee that gave me the feeling that I could really do this. As I said, Lee left after five months, and after the trial was over and the jury hung, I went back to D.C. – it must have been the spring of 1974. I began working with Lee on some of his matters, again representing him.

Granof: Can I ask you some more questions about this trial such as the mechanics of, the potential difficulties, in a trial that size with nine defendants and twenty lawyers? First the lawyers. They were all, perhaps not all, you said were some of the top trial lawyers in Florida?

Zuckerman: Yes, they were good. They were young, but good.

Granof: And trial lawyers have a lot of self-confidence. So, you have all these egos. Was that a problem? How do you work these things out?

Zuckerman: No, I don't think the egos were a problem. I think it was viewed as a plum case with publicity. You were getting paid what seemed like a substantial amount for a trial that was expected to last three months. Ed Garland was Glenn's lawyer and probably the preeminent defense personality. I think people respected that and respected their positions in the case. The case became problematic for many of the lawyers, who were sole practitioners

or small firm lawyers, when the money stopped. Several of them went out and got junior lawyers. Some may have even employed junior lawyers to sit in court with their client, with the client's consent, while they absented themselves, with the client's consent, and went on to do other paying work, which is technically permissible under the rules, but not the kind of thing that I thought would reflect well if I were to do it myself. I'm there for the duration. I care about these people. My job is to keep them out of jail and keep them innocent, and I've got to stay regardless of the financial situation.

Granof: Where did the money come from? Who was paying the fees?

Zuckerman: Turner's enterprises paid the fees and the bills were enormous. His enterprises apparently had a very substantial amount of money, but the money ran out. But in any event, they were re-prosecuted after the hung jury. We were not involved in the re-prosecution. Many, including our clients, took misdemeanor pleas and probation. Turner was actually tried and was convicted the second time around and went to jail.

Granof: Just selecting a jury, I mean, how do you select a jury? This was expected to be a three-month trial.

Zuckerman: The point you raise is really a good one. I don't have a clear memory of what was an earth-shattering event for these twelve jurors plus four alternates. They were initially selected on an assumption that it was a three-month trial and were somehow reassured that they could live with the burden for three months. My recollection is that although the judge set hours that were reasonable, he didn't do what I think a lot of judges would have done in the modern age, and that is he didn't badger the government to pare its case down. He didn't sense that this is spinning into a disaster for this jury and for the criminal justice system and for the result here. There was not enough of that pressure from the Court.

Granof: Did you interview the jurors afterwards?

Zuckerman: No. I got out of town.

Granof: Did anybody do that?

Zuckerman: I don't have a clear memory. I do have a sense that the split was something like 7 to 5 for acquittal. Either version would have been accurate.

Granof: For all of the defendants or just your clients?

Zuckerman: I think all. I think they were split by – it had become political – the prosecution and defense had become in essence political parties by the end. There were very fixed views I think the jurors got. It's the nature of trying a case. Well short of the end of a nine-month trial jurors have pretty much made up their mind. A lot had to do with whether they viewed the aggregate antics and behaviors of the defense as attractive and populist – that was who Turner was portrayed to be - or insidious and dishonest. I think for a number of the jurors they found the defense lawyers – none of the defendants testified – to be sufficiently attractive, and the prosecution to be sufficiently narrow and straight arrow, and to the modern world would be viewed as "corporate." It was more fun rooting for the defense than it was for the prosecution. It was an extraordinary trial. It certainly at the time was one of the longest federal trials ever to end in a hung jury. It got a lot of press.

Granof: Did you say the jury was hung or there was a mistrial?

Zuckerman: The jury hung and therefore there was a mistrial. Back to square one.

Granof: Two of the jurors had to be taken to the hospital?

Zuckerman: The judge, of course, having invested nine months, was determined to require this jury to deliberate until a verdict. The jury deliberated for ten

or eleven days and then two jurors became emotionally incapable of continuing at least without going to the hospital. It's at that point that the judge threw up his hands and said, in essence, we are going to have to declare this a mistrial. Can't have any more deliberations. We all went home.

Granof: Was the judge asked to give – don't they give –

Zuckerman: *Allen* charge? I don't have a memory. I am sure the judge gave something like an *Allen* charge. We argued over it. Again, as I said, the cement surrounding the affiliations that the jurors felt for either the prosecution or defense had so hardened by this point that it really didn't matter.

Granof: I could see why it was a defining experience for you.

Zuckerman: It was extraordinary. I actually became very good friends – the two relationships that were most significant to me were – the relationship that I began with Lee and the relationship I began with Ed Garland. I ultimately came to do a great deal of work with Ed in and around Atlanta, including the representation of essentially the Estate of Michael Thevis in the mid- and late 70s, who was probably the country's wealthiest and premier pornographer and who was prosecuted federally for a number of crimes. The government sought to forfeit, under RICO, a vast amount of money – something like 12 million dollars – that he had put in trust for his wife as well as other assets. We represented the trust and his wife. It was the first case that Bill Taylor did with me when he came and joined me in 1977. I will finish out this chapter thusly. I came back from the trial. It was the summer of '74. I had been exposed to fastball pitching and felt that I could hit the fastballs, and indeed hit the curves. I wanted to exploit what I perceived to be my new set of relationships and felt that I could do that. But I didn't feel comfortable that I could do that as a partner at Kellogg, Williams, Lyons & Zuckerman.

Granof: Why was that?

Zuckerman: I felt that it was easier for me to present myself as a presence, if you will, if I was not the fourth lawyer in a four-lawyer firm and if I were on my own. It's an intuitive feeling. I think it was also rational. So with a great deal of sadness in probably October or November of 1974, I went to my partners and I said, "Look, I think I am going to try this on my own." One of the reasons, I suspect, was that I had the feeling that I could attract and build something with other lawyers, but I really didn't have the autonomy to do that in a firm where I had three other equal partners. I wanted the feeling that I had more control. In the summer or fall of 1974, I took my furniture, which included, at the time, the desk on which we are now working, that plant behind you, and a few other odds and ends. I found a sublease office on the fifth floor of The Ring Building.

You can see the windows from where I am sitting. In the offices of a great, recently deceased, wills and estates lawyer, Ira Siegler. A great man, who subleased me an office in the Ring Building at 1200 18th Street, N.W. In October or November 1974, I established an office there and began to park at 1800 M Street, N.W., in the same parking lot where you may have parked today, and where I have been parking for, in October, what will be the last forty years. I have parked here every day that I have worked.

Granof: They should gold plate your space.

Zuckerman: They treat me like the Chief Judge. I hung out my shingle as "The Law Offices of Roger E. Zuckerman."

Granof: Did you have a secretary?

Zuckerman: I had a succession of secretaries until mid- or late 1975 when I hired the 21-year-old Judy Elam, who knew a secretary for Ira Siegler, named Joan

Spire. Judy was Joan's friend and worked for a trade association in The Ring Building. She had never before been a legal secretary. She grew up on a farm outside of St. Louis. She was a Missouri girl who had been in the big city for a year or two. I liked her and she was pretty detail-oriented and very conscientious. By the end of 1975, it was Judy and I. Then, I began to get work from Lee Bailey. I began to get other cases. I could sense that I would be able to support myself, and that this was working. Also, I had more freedom and flexibility and could spread myself more effectively than if I had remained a partner in a four-lawyer firm.

Granof: A few minutes ago, we were starting to talk about your relationship with F. Lee Bailey and some of the work that he was giving you and what happened after the trial.

Zuckerman: After the trial, Lee came to me and said that he thought there was an argument that double jeopardy should preclude his retrial. One normally in a criminal case cannot take an interlocutory appeal. However, one can take an interlocutory appeal if there is a claim that to put you on trial would subject you to double jeopardy, because that's an irreparable harm and you are entitled to go to the court of appeals whenever that occurs. At that time the law stated that the only basis upon which a double jeopardy claim could be made in connection with a mistrial was if the mistrial had been caused by deliberate government misbehavior. It was not an argument that we could make, or at least easily make, since Lee's mistrial was the result of an "Echeles" or "Shuford" claim that his co-defendant would testify for him, but only in a separate proceeding. I can't tell you the argument we constructed. We also made a speedy trial argument, which I think is not subject to interlocutory appeal, but as an appendage to the double jeopardy claim we could make it. I wrote the brief. We filed it in the Fifth Circuit. The case was set for argument. I remember I went down and stayed at the Royal Orleans in New Orleans. I had prepared, as I always did, my argument quite carefully, and I had rehearsed it. I knew

exactly what I wanted to say. I had not spent a lot of time counseling with Lee and met with him – probably the night before I was to give the argument – and gave him a sense of it. Lee who is very opinionated and has a very powerful personality said, "You got it all wrong. It can't be argued that way." Then he completely spun out the argument that he felt was appropriate. At this last minute, I had to completely rejigger what I was going to say. I went with Lee and argued the case in the Fifth Circuit.

Granof: Was that in the Old Fish & Wildlife Building?

Zuckerman: No, that was in the world's most spectacular courtroom with a beautiful purplish red rug – burgundy rug – in either the courthouse or the post office building. It was a palace, I thought. I argued the case and we lost.

My memory is hazy here, but I think what happened is Lee went back to trial, represented himself, and somehow obtained a dismissal on speedy trial grounds. He certainly never went to trial. He certainly was never convicted. I think he got a dismissal on speedy trial grounds; either that or the government dismissed against him. He escaped, as he should have, because in my mind, clearly he was innocent. He went on to his next adventures with me. His next adventures involved the following.

Granof: Before we you get to that, what happened to your clients? Did you continue to represent them?

Zuckerman: No, we did not represent our clients for the second proceeding. They had court-appointed counsel with whom we worked. They entered pleas of guilty to misdemeanors and received probation, which was a good ending. They had originally, you might say, spent nine months incarcerated in the courtroom in Florida, and this was an appropriate ending. From that mid-70s period with Lee, the three cases of consequence which are interesting are these. I wrote the motions for him in the *Patty Hearst* case. He argued the motions. Also Lee and Gerry Alch, his partner, as young hotshots, had

represented in the Watergate period James McCord, one of the Watergate burglars. This representation occurred concurrent with the Department of Justice investigation of Lee to see whether he ought to be indicted for mail fraud in the *Turner* case. The representation was probably in 1971 or 1972. So there is an early 1973 investigation of Lee at Justice and he is representing McCord at the same time. When the Watergate tapes became available in the mid-70s, it's apparent that one of the things that Attorney General Mitchell is talking about is the fact that they believe that, in some indirect way in 1972, they had access to Lee. And McCord, in the mid-70s, went to a very fine lawyer, Rufus King, Sr. Rufus King, Jr., his son, was a good friend of mine; he worked on the case with his father, and later became the Chief Judge in D.C. Superior Court. Rufus King, Sr. and Rufus King, Jr. filed a complaint against Lee and Gerry Alch in 1975 or 1976 asserting that Lee and Gerry Alch had conspired with Mitchell to keep James McCord quiet and not let him cooperate with the prosecution of Watergate, which in all likelihood would have included John Mitchell as a defendant. In return for Lee's help, Mitchell allegedly gave his assurance that Lee would not be indicted in the *Turner* case. It was Mitchell helping Lee to avoid indictment if Lee helped Mitchell avoid indictment by keeping McCord silent. That's the allegation. There was a complaint filed in the United States District Court for the District of Columbia in or about 1976. Lo and behold, for a young fellow who is out there trying to earn a living, Lee had a malpractice policy, and the St. Paul Insurance Company was obligated to pay the costs of Lee's defense. Lee came to me and said, "Would you defend me?" The essence of the case was trying to determine whether Lee had been a member of the Watergate conspiracy, basically keeping McCord quiet in return for trying to get some favors from Mitchell and his cohorts. I, along with Roger Spaeder, defended Lee. Roger Spaeder had become my partner by early 1976. Rog, I love dearly, and we can talk more about him. I asked him to come to work for me in early 1976. He became a partner at some point thereafter.

The case probably went on for three or four years – went on for a long time – and it was a good piece of business for us. It was a particularly interesting case because the essence of Lee's defense was to obtain statements from, or at least confirm from, John Dean, Jeb Magruder, William Bittman, John Mitchell – all these people – that Lee was not in cahoots with them in connection with his work for James McCord. I, yours truly, at what was then, I think, paid $70 per hour. But it was a goodly sum of money.

Granof: Well, it was good money then.

Zuckerman: I went all over interviewing every significant human being that I could find who had participated in Watergate.

Granof: Who was the Assistant Attorney General for the Criminal Division at the time?

Zuckerman: Henry Petersen. Did not interview Henry. Either Mitchell was deposed or I talked to Mitchell. I went to California. I interviewed Jeb Magruder, who had entered the pastorate, I think, at the time.

Granof: You talked to Mitchell?

Zuckerman: I think I talked to Mitchell or he may have been deposed. I talked to Dean. We deposed Bittman and probably a half dozen others, whom I can't remember. It was extraordinary. On the other side were these perfectly lovely lawyers, Rufus King, Sr. and his son, Rufus King, Jr., who went on to become a judge and indeed a beloved Chief Judge. It was a wonderful case and ended up – I cannot describe to you the terms. We ended up essentially settling, on what I thought, were very favorable terms.

It was a very interesting case. Roger Spaeder argued Defendant's Motion To Grant Summary Judgment on collateral estoppel grounds before U.S. District Court Judge John Lewis Smith, sometime in late 1977 or early

1978. Spaeder won at that level as Judge Smith granted that motion. Judge Smith held that since the U.S. Court of Appeals for the D.C. Circuit, in affirming McCord's criminal conviction, had decided against McCord on these same precise facts when he claimed that he did not receive effective assistance of counsel from Bailey's law firm. [*United States v. James McCord*, 509 F.2d 334, 166 U.S. App. D.C. 1 (*en banc* 1974), *cert. denied*, 95 S. Ct.1656 (1975)] McCord was collaterally estopped from re-litigating these claims under the guise of a civil malpractice case. Judge Smith's decision in the civil malpractice case was appealed to the U.S. Court of Appeals for the D.C. Circuit, which upheld Judge Smith on all his findings, but one. It found that McCord still had a colorable claim under the first clause of 42 U.S. Code, Section 1985 (2) (Supp. II 1978) that had not been addressed in the appeal from his criminal conviction, and thus was not barred by collateral estoppel. The Court of Appeals sent the case back to the District Court on that issue. [*McCord v. Bailey*, 636 F. 2d 606, 204 U.S. App. D.C. 334 (1980)]. Sometime after the Court of Appeals decision, the case was settled.

I had an antitrust case with Lee in the folding carton industry in Chicago that I did in the mid-70s. My client who was Bill Hart, William S. Hart – not "the" William S. Hart, the cowboy – but a good guy, who became a friend for the next thirty years. We did a lot of work for and had a lot of good adventures with Bill. My connection with Lee and my connection Ed Garland were just terrific sources of exposure and business during that period and years and decades to follow and really were the cornerstones of my ability to grow the little business - first, by taking Roger Spaeder, and then a year or so later, teaming up with Bill Taylor and aggregating others throughout the remainder of the 70s. By the early 80s, we were probably ten or twelve. That was just an important high-octane aspect of it.

Granof: Up until you had mentioned this antitrust case for the folding carton industry, that's the first time you had said anything about a case that was

other than a criminal case.

Zuckerman: This was criminal.

Granof: Oh, this was a criminal antitrust case?

Zuckerman: Yes. In terms of your asking did we do much civil stuff, we did Lee's malpractice case. I guess you could say that was the biggest civil case that we had at the time. I am sure there are others that do not really stand out to the same degree. My recollection is that we, I and Spaeder, had a good reputation by the mid-70s. We were solid - still young - I was 33 - Spade's a year younger - still very young people - who had some pretty good experience and had some pretty good relationships.

Granof: You had gained a reputation in town?

Zuckerman: Yes, I would say – I don't think that's overstating it. I had a good reputation with a slice of the young bar, in the main. But as important as that was, I began to sense what I think has long been true, and that is it's not the people in D.C. who end up necessarily giving you the work that is important. It is prominent people outside the City, who are looking for D.C. lawyers – or looking for good lawyers – that decide if you can do the job and they can trust you, then they will often hire you for the important work. I think that proved to be true. The other thematic facet of my early apprenticeship, my early inculcation into the practice, was a sense that in the years to come the practice of law – I saw this in Lee – that the practice of law, or at least the kind of trial law that I thought we would do, was almost national in scope. You just wouldn't focus on your local courthouse. You would hold yourself out as somebody who would get on a plane and go anywhere and exist for nine months if you had to. That was actually more fun than going to the local courthouse. It was the away game. There was no exhilaration like being under the gun in an away game, in a foreign courtroom with a hostile adversary and putting up your

best fight and one hopes prevailing. That was just neat. And it made you feel good. I think in many respects that's – more about this when Bill comes along, because I think Bill felt it too – but that's the nature of the practice that we imagined. I think not just for ourselves, but we thought that's the way the law was trending. Local lawyers would do well, but that if you were a lawyer who had the ability to go to Montana or San Francisco or Dallas or Boston or New York, you could find a lot of work – people would ask you to do that. Increasingly, the practice of law, at least litigation, was becoming national. And lawyers were increasingly fungible geographically.

Granof: Litigation is hard on family life to begin with because it's so intense. But litigation nationally, where you're traveling and away, must be even harder.

Zuckerman: Yes. Again, as I said earlier, my wife, Irene, was and is extremely understanding of the sacrifice that's required of her for me not to be around for long periods of time. She has been wonderful about it, and, although you are not doing psychoanalysis, you could observe that it probably impinged on my skills and abilities as a father. I was very committed to the firm, very committed to my practice. I have two wonderful daughters to whom I tried to pay attention, but I suspect in many respects Irene was by far the dominant influence in the lives of my daughters until they were sixteen or eighteen. I got passed the ball at college age, I guess you could say. It is a sacrifice. I think that, in many respects, today's young lawyers who don't travel have it just as hard, in some firms at least. I hope not here.

Granof: Yes, because the hours are killing.

Zuckerman: The hours, the tension and the anxiety are killers.

Granof: And I think without the joy.

Zuckerman: Yes, that could be another interview on joy and the practice of law. It could be a fairly thin, short interview.

Granof: Last question – antitrust case. What do you know about antitrust and did you have to know anything, because essentially it's a criminal defense case?

Zuckerman: The question is a great question. It goes to the broader point that you end up leaving the U.S. Attorney's Office, in some sense an empty vessel. You have no significant substantive expertise, you understand a little bit about the basics of evaluating people, cases, juries, handling yourself in the courtroom, but the substantive expertise that comes is not there. It's really not there. You learned how to try cases and the thing that distinguishes, I think, really extraordinary trial lawyers is their ability to pick up the substance of what you are arguing about pretty quickly. In many respects, I have that, and in some respects, I don't have that. There are areas of litigation that I have absolutely no interest in or aptitude for when it comes to the underlying substance. I think antitrust – sort of the basic broad-gauge areas of corporate litigation, antitrust and that kind of stuff – you pick up or rely on somebody else. This was pretty easy. It was price-fixing. It was just a conspiracy. It was a standard run-of-the-mill conspiracy, except instead of selling drugs, like the *Tantillo* case or doing a "Ponzi" scheme, you're meeting with your fellow competitors and trying to fix prices. What is actually harder than picking up the substantive rules and trying the case is understanding the backroom policies that exist at the Department of Justice when the prosecutors are evaluating these different categories of activity and deciding whether or not they are prosecution-worthy. There is a mass of arcana and very opaque policy that exists in the antitrust area as to when you get prosecuted and when you don't. The same can be said for half-a-dozen other major areas, for instance the FCPA

area. That's the contest in which the lawyer who comes out of the antitrust division or the lawyer who comes out of the fraud section at Justice has a distinct advantage. Once the case is indicted, it's easy pickings for the trial lawyer. However, the ability to figure out what it is that will appeal to the head of the fraud section when you are asking for a declination in a FCPA case is a much tougher prospect.

Granof: FCPA?

Zuckerman: The Foreign Corrupt Practices Act.

Granof: I see.

Zuckerman: How it is and when it is to go into a criminal antitrust investigation, that has in the last decade become a much more complex undertaking and it's characterized increasingly by the creation of policy and memoranda that are substantive and that are a little bit like the Sentencing Guidelines. It's an effort to rationalize things so that your exercise of prosecutorial discretion doesn't appear to be so anecdotal or arbitrary – here's what we go after, here's how we go after it, here's how the process of review occurs – all very much hide bound in these memoranda. It is sometimes daunting to capture that and understand it and deal with it.

Granof: This concludes the fourth interview.