ORAL HISTORY OF ROBERT P. TROUT

Fourth Interview
February 12, 2015

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 Robert Trout, and the interviewer is Stuart Pierson. The interview is taking place on February 12, 2015, in Bob Trout's office at Dupont Circle in Washington, D.C. This is the fourth interview.

Stu Pierson: Okay. It is February 12, 2015. We're at Bob Trout's law office in Washington, D.C. This is our fourth session. And when we last left off you, Bob, were talking a little bit about a reflection back to your projection of what your legal career would be and how your reflection and your projection may be different and what that tells you about your life in the law.

Bob Trout: Yes, I left a big law firm and I don't know whether I was having fun or not. I certainly enjoyed many relationships that I had, and some of the cases were more fun than others. Holland & Knight was very generous to me, and I certainly felt very welcome there when Dunnells Duvall firm merged into Holland & Knight. But I don't think I felt as fulfilled as I thought that I should feel in the practice. That plus the fact that I had met my future wife, my wife now, through the merger, and I didn't want to be married to my law partner. She was very prominent in the firm. And it just made more sense for us not to be practicing in the same firm. So it occurred to me, the more I thought about it, I thought it would be a challenge—but it would be interesting to just set up a small firm. So John Richards and Barbara Nichols and I started out together in our small firm, and we have been practicing together ever since. We will be going on 19 years this July the 1st. I don't think there is any question about it, I have enjoyed more success outwardly and more satisfaction inwardly in the small firm setup that we have created. And I think there are a

number of reasons for that. I think when you're in a big firm, you can get comfortable with the way it is: whereas in a small firm, if you don't get the business in, you can't pay the light bill and you can't pay people and you can't pay your mortgage. So it forces you to be more entrepreneurial and be more aggressive about getting out there and networking and making relationships and staying in touch with people. In a small firm practice, they are really not coming to the firm so much; they're coming to the lawyer. And there are certain cases that you are just never going to get. The general counsel of a major corporation is never going to hire a small firm to handle a big case, in part because a large case usually requires more bandwidth than a small firm can provide, and in part because the general counsel can never be criticized by the CEO or the Board for hiring the name brand large firm. And so in a small firm you have to figure out what is your sweet spot; it is very much dependent upon a referral practice, I think, at least in the nature of a litigation practice that we have. We do not have, and have really never had, an insurance company coming to us to handle all of their cases of a certain stripe. That is just not the nature of the practice that we have had. And, frankly, if we had that sort of practice, they would be driving down our rates a lot. So it is not to say that we haven't gotten repeat business, but it is to say that it is not routine. So you have to work hard to develop the business. I didn't know anything about the Edward Bennett Williams Inn of Court, for example, and a friend, Laurie Miller, mentioned that I ought to think about doing that. And so I did that. While I certainly knew many lawyers in town, including many lawyers who were in the Inn, I was able to meet a lot of people that way whom I had not known before, including judges. Who knows, for example, whether I would have been able to practice law with Amy Jackson if I had remained in a large firm. I suppose one can ask what people I might have met or

opportunities that I might have had if I had remained in a big firm. You never know. When I left Holland & Knight, John Richards and I had spent a fair amount of time making sure that we left correctly. We saw a lot of people who we thought really didn't. And we didn't understand why you wouldn't. We understood that there were people who were unhappy with a given situation and they would leave in a huff. And we just didn't understand why you would do that.

Stu Pierson: It's a small town.

Bob Trout: Yes, it is. I think I mentioned before that when Chesterfield Smith arrived in Washington with the goal of building the Washington office, and before the merger with the Dunnells Duvall firm, he had thrown a hodgepodge of lawyers together with the hope that it would all work out but with the knowledge that some would not make it, and others would decide it was a bad fit. Some people thrived and some people didn't. And some of the people who didn't, as I said, would leave in a huff. And so John and I made a conscious effort that they were going to be regretful that we were leaving, as opposed to glad that we were leaving. Of course it wouldn't have been good form if I left in a huff with my wife still there. But I don't think that was really a motivating factor. I think John and I both recognized that we had had a good run at Holland & Knight. They had been good to us. There was no point to be served by leaving on bad terms or in a selfish sort of way. So if they wanted us to stay for thirty days because that is what the partnership agreement said, we would stay for 30 days without complaint. At the end of that time, the members of the Directors Committee of the firm came to Washington and took me out to dinner as a goodbye. It was a very nice thing. We were actually going to be taking, with the blessing of the firm, several of the cases that I was then working on. And there were some cases

where I was working with other people besides John. And so we would work collaboratively together on those cases. It was just a very easy transition out of the firm. And I have often said—I don't know whether it is still true—but I have often said that when we left the firm, Dick Duvall would wake up every morning wondering what he could do to help us. And we continued to get very good work as referrals from the firm. If they had a conflict situation, we would get a call. It was very important to us, and we ended up getting—really in collaboration with them—into some sizeable cases that were very good income producers for our firm, cases that we probably wouldn't have gotten into if we had not maintained such a warm relationship with our former firm.

Stu Pierson: So did Amy come during the first five years?

Bob Trout: Yes, she came in 2000.

Stu Pierson: And by the time she came, what was the mix of types of cases you had?

Bob Trout: We had some criminal cases, but probably more civil. One of our earlier cases was a referral from Hank Schuelke. It involved representing the Deputy Director of the Immigration Service in Miami. There was a big scandal relating to the fact that a congressional delegation had gone to Miami to review the situation—crowding, how customs was handled, what the crowds were like, what the waits were like. It was a congressional fact-finding mission. The Deputy Director was involved in arranging the visit and making sure everybody was well taken care of. At the same time there was apparently a union leader or activist, I gather, who was about to be fired and decided that the best defense was a good offense. He decided he needed to be a whistleblower. And so the congressional delegation came to Miami, they had a nice visit, and then this guy throws in this whistleblower complaint that they had created a "Potemkin village," and had

essentially defrauded members of Congress into thinking that things were hunky dory when they really weren't. You can imagine, there was all outrage on Capitol Hill. And so at the Department of Justice the IG decided he needed to get in the game and sort it all out. There was an Assistant U.S. Attorney from the Southern District who was assigned by the Inspector General to go down and investigate it.

Stu Pierson: Which Southern District?

Bob Trout: No, I'm sorry. From the Southern District of New York.

Stu Pierson: Don't trust those folks in Florida.

Bob Trout: Right. So she went down and took a ton of depositions, did just a huge amount of work. And she came back and laid it all on this woman who would become our client, the Deputy Director, and she was going to be fired.

Stu Pierson: So the IG goes and gets somebody from the Southern District to go down to Florida to do the investigation.

Bob Trout: Right. And as anybody that has thought about the way Independent Counsel investigations go—and how these task force investigations go—well, the outcome was writ at the moment that Congress decided they were going to hold hearings and express outrage. And so, sure enough, they came down on this woman. And she was to be fired.

Stu Pierson: And she was to be fired because she hid bad stuff?

Bob Trout: That was the allegation. And so she was going to be fired, and there was going to be some sort of criminal investigation, and there was going to be a congressional investigation. And that is when Hank called me and said, "You're just starting out. You're going to charge her less than I am going to charge her. And, so I think I'll send this over to you." So she came in, and we got a modest retainer. It was probably not so modest back

then, but by today's standards, it would be. And, of course, it didn't last all that long. In time, she maxed out on every credit card. We started looking into it, and we saw what they had relied on to make these findings. And we thought, this is ridiculous. They had spun every fact, they had taken a torque wrench to turn every fact into something that was nefarious when, in fact, the natural meaning wouldn't have been so nefarious. It was so typical. With the political headwinds we were facing, the facts didn't matter. We couldn't make any headway. We had a meeting at the Office of the Deputy Attorney General.

Stu Pierson: Who was that?

Bob Trout: That was Jamie. We actually didn't have a meeting with Jamie—Jamie Gorelick—but we had a meeting with her assistants, and we made a lengthy submission, with extensive documentary backup, explaining just how wrong the IG's report had been. We didn't get to first base. So then we were going to go to a hearing before an ALJ from the Merit Systems Protection Board. We were basically warned that the person who was going to be our ALJ was . . .

Stu Pierson: Not inclined to listen to you.

Bob Trout: Right. And so we could forget this process. We had our hearing before the ALJ, and Dave Margolis testified for the government as to the decision-making to fire her. In the meantime, she had been put on administrative leave with pay. And she had been allowed to get other work, or do other work, while she was staying away from her job. So she decided that she was going to become a real estate agent. So all this time, she got the cash flow from her salary while pursuing this alternative career, which was a wonderful thing. She could develop her business while still . . .

Stu Pierson: Having an income stream.

Bob Trout: Right. So, as predicted, we lost. Now, by this time we were so far underwater in terms of fees. And John Richard's attitude was, in for a dime, in for a dollar, so let's keep going here. And having lost before the ALJ, I said, "Well, I'm done here." And John basically said, "Well, I've got time."

Stu Pierson: Let me keep on.

Bob Trout: Let me keep on. And so we went before the Merit Systems Protection Board. And damn if we didn't finally win up there and get her essentially reinstated. We prevailed. We didn't win 100 percent—we should have—but we won enough to prevail. She got what she needed, and then we got the attorney's fees as the prevailing party. And we ended up negotiating our fees with a young lawyer at the Department of Justice, whom I knew because she had been a paralegal at the Dunnells firm. We recovered 100 percent of our fees, which at the time was the largest single fee that we had collected. By now it was about 1999, some three years after the matter began. It was a fun story. I've never had a conversation with Jamie Gorelick about it, because I chose not to, but it was a lesson that if you keep at it, who knows? So it was fun. Even if you call that case part of the criminal practice, I would say it was still not 50/50 civil/criminal. We were probably mostly civil at that point. As I say, we got some really good civil work from . . .

Stu Pierson: Holland & Knight.

Bob Trout: From Holland & Knight. We had a case that caused us to need some additional talent, so we looked to a temp agency, which led us to Patricia Connelly, who had been in practice here for a while and then had left to go to New Mexico with her husband. Her relationship there ended, and she came back to D.C. And to reintegrate, she was just working on a contract basis. Eventually we hired her from her agency, so that she

joined our firm. We were starting to outgrow our space. And that was particularly true when Amy discussed joining us. We were in a townhouse on N Street; we had started with two of us, plus Barbara Nichols, and now there were four of us, plus Barbara. We needed to move. And with the four of us, for Barbara that is just making the treadmill go a little bit faster, doing it all, not just for two people, but for four people. I happened to be having lunch with Plato Cacheris. Plato had been my law partner at the Dunnells law firm and we continued to stay in touch with each other and deal with each other and do cases with each other, and so we were having lunch. Phil Inglima had left, and a couple of other people had left. Preston Burton was still there. John Hundley was still there. But he had a bunch of empty offices in the suite that he was committed to, at least through the end of his lease, and he was complaining about that and thinking, "Maybe I'll go to Virginia; I'm not sure what I want to do about carrying too much office space." And I said, "Why don't we move into your extra space? That might work for us." And from the happenstance of having lunch with Plato, we found ourselves essentially working side by side with Plato with all the benefits that come with that.

Stu Pierson: What year are we in now?

Bob Trout: We are in the year 2000.

Stu Pierson: Right about the time that Amy comes, right?

Bob Trout: Yes. She arrived, and we literally were out of room. I would say we were primarily doing civil work at that point. And then I got a call to represent an individual in a corporate criminal investigation being run out of the Eastern District of Virginia. And I was going to be representing one of the employees. And there were a whole bunch of other lawyers who were involved representing different clients, either corporations or

individuals. This may have been the only criminal case I had at this time. I was representing an individual who had a marginal role, so it was not going to be a big money maker for our firm. And then September 11, 2001 came. I remember thinking to myself, "It's a really good thing that we're not known as a white collar shop because those FBI agents are going to be chasing terrorists; they're not going to be doing white collar work." So that was September 11, 2001, but within six weeks, Enron starts to melt down. As you may know, a lot of the Enron subjects, targets, you name it, were coming to D.C. for representation. There were going to be congressional investigations as well as criminal investigations and parallel SEC investigations being run out of Washington. I got a call from a lawyer in Houston who was representing a very senior officer at Enron. They needed . . .

Stu Pierson: Did you know the lawyer?

Bob Trout: I did not. But I guess he had called someone in Houston, who called his partner in D.C., who gave him my name. And so I received a call from this lawyer in Houston, who was calling me to team with him as Washington counsel in representing the client, who was scheduled to testify before the Congress, about a week later.

Stu Pierson: Is the testimony in the Senate or in the House?

Bob Trout: Probably Senate. And so I got this call, and as I considered why we were being hired—simply to assist in the congressional hearing—I was thinking to myself about the upcoming congressional hearing, "This is not about fact finding; this is about theater." That was one thought I had. The other was that I didn't know what was out there in terms of the facts that might bear on the client. I knew that there were going to be criminal charges brought, and this person was very senior. And I couldn't imagine why he would testify, or should testify. Or at least I didn't know enough to say he should and, in that circumstance,

my view was he shouldn't. I'm not going to be able to advise someone knowing as little as I knew.

Stu Pierson: Where the risk is so high.

Bob Trout: Where the risk is so high. I think the lawyers were looking for some comfort from me that there was really not a meaningful risk from his testifying, since I assume they were starting with the idea that taking the Fifth was not an option for reasons related to the client's self-image. I didn't know enough to give them the comfort they were looking for—and given the circumstances, I probably would have advised any high-ranking Enron official to take the Fifth, regardless of the depth of my understanding of the facts. In any event, the client was just not of a frame of mind to accept our advice on the matter. And so we disengaged. Happily we had not had enough . . .

Stu Pierson: Involvement.

Bob Trout: Involvement, or exposure to client confidences that we were going to be conflicted out of future matters related to Enron. And as luck would have it, a short time later, I got a call from an individual in Houston, who had gotten my name from a lawyer in Houston, who gotten my name from his partner in D.C. And this was an individual who was a very senior banker at Merrill Lynch. As it happened, his wife also wanted our representation because she was a very senior executive at Enron. And so they came up and they hired us, and we got clearance from the previous client that they were perfectly happy for us to take this engagement. No problem. About two weeks later I got a call from the former President of Enron, but couldn't do it because . . .

Stu Pierson: You were already engaged.

Bob Trout: We were already engaged in the matter. Both this banker from Merrill and the former President of Enron been involved in one of the transactions under investigation, so there was no way we could represent both clients. That was fine, because Merrill was standing behind its employee. The person who was really at risk was the banker from Merrill. He was the head of the Houston office and probably their largest producer in investment banking in the firm. Although his wife had been a senior executive, she was far removed from the financial side of Enron's business and had no real involvement in anything under investigation. They both reeked of integrity. They are a wonderful couple, as straight as you can imagine.

Stu Pierson: And he knew nothing about the accounting?

Bob Trout: No, he had nothing to do with the accounting. There were transactions that Merrill Lynch engaged in with Enron. His role was more as senior relationship manager on the Enron account. One of the other bankers in the office was, by title, the designated relationship manager, but he was the senior guy in the office. And he and his wife had a friendship with Andy Fastow and Andy Fastow's wife. Given all the entanglements, it was understandable that they felt exposed even though neither had done anything wrong. With all the various proceedings—a criminal investigations, a New York Stock Exchange proceeding, a suit brought by the SEC, numerous civil suits—the client matter did not finally conclude for close to ten years. It was just one of the most wonderful engagements that I have enjoyed in the practice of law, because they were both such wonderful people and great clients. And it went on and on and on.

Stu Pierson: And they didn't get sucked in?

Bob Trout: Um . . .

Stu Pierson: Or did they?

Bob Trout: They got sucked in about as close as you could want to get. They had figured it out that they needed a lawyer, and with Congress conducting investigations, they had figured out that they wanted a Washington lawyer. Merrill Lynch had long since identified who needed lawyers and had hired lawyers for them. But because Merrill was located in New York and the lawyers handling the matter for Merrill were in New York, the lawyers who were being hired to represent its employees were New York lawyers. And when Merrill was hiring lawyers for their employees, they were not thinking of this banker in Houston, the head of the Houston office, because he was not operationally involved in doing the deals, and besides, he was as straight as an arrow, he was not the first person one would think of as needing a lawyer. So Merrill didn't immediately put him on the list of someone who needed a lawyer. But he figured it out on his own that he was going to need a lawyer, and that he was going to need a lawyer in D.C. because there were going to be congressional hearings and the like. And so he ended up with me. And about two weeks after he hired me, the light went off at Merrill, and they said to my then client, "I think you need a lawyer, and we'll bring in a lawyer to represent you." And he said, "I've already got a lawyer." In the meantime, after initially hiring me—Amy and I had the initial meeting with the clients so I don't discount the importance of Amy's involvement in getting this business to me—I think the client wanted to double check his judgment in hiring us; he wanted to be sure that was the right call. Happily, he ended up talking to or having someone talk to Bob Bennett, and Bob was very supportive. And so they stuck with our small firm, rather than going to some large brand name firm. In due course, it was the investment banks' time to give testimony before the Senate's Permanent Subcommittee on

Investigations about transactions in which the banks had been involved. This was in July 2002. And the subject was going to be the so-called Nigerian barge deal. My client had been very much involved in that. Not really operationally. He was supportive of the transaction as a way to build a stronger relationship between Merrill Lynch and Enron, which at the time was flying high. So he had just put the parties together, and then he had gone skiing at the end of the year. He is a very impressive person, very articulate, very smart, very well spoken, very attractive-looking person; he has it all. And so I think they had in mind that he was such a presentable person, reeking of integrity, that he was going to be the guy Merrill wanted to talk about this. And I was listening to the story and I was thinking that there didn't seem to be a problem here.

Stu Pierson: No problem with the deal or no problem with his perspective?

Bob Trout: Yes, I would say. I mean, I understand why they would look at it. But if you looked at it, based on everything that we knew and what all the evidence was that I could see, there was no problem with this transaction and certainly no problem with whatever he did. So we sat down with the investigators from the Permanent Subcommittee and went through everything during an informal interview. The actual testimony before the Permanent Subcommittee would come later. In the meantime, two other banks, CitiBank and Morgan Chase, had their day in the sun before the Permanent Subcommittee talking about prepays, which was a particular type of transaction that these banks had helped devise for Enron. These were incredibly rich for Enron. But those transactions had been blessed by Arthur Andersen. To get a sense of what was in store for Merrill and my client two weeks later, I went to the hearing about the prepays, where CitiBank and Morgan Chase were in the hotseat. And it was incredibly ugly . . .

Stu Pierson: Who was the Chair of the Committee at this point?

Bob Trout: As I recall, it was Carl Levin.

Stu Pierson: Probably.

Bob Trout: Anyhow . . .

Stu Pierson: The Democrats were the nasties.

Bob Trout: Yes, as I recall. So, anyway, we were there, and there were all these emails that were being showcased, much worse than any email that I had seen in the Merrill transactions, and I was thinking, "Why are these people testifying?" So my eyes were bulging, and the in-house lawyer from Merrill was also there. And I was looking at him and he was looking at me, and we were looking with crooked brow about, holy cow, how ugly is this? And happily, probably two days later I got a call from the Deputy Chief of the Enron Task Force at the Department of Justice saying that he was looking at the Nigerian barge deal as a criminal case. He didn't identify my client as a target.

Stu Pierson: He called you.

Bob Trout: But it was clear that he thought this was a bad transaction and that my client was a champion of it. And so this began a very difficult conversation, because we were scheduled to give testimony about this transaction two weeks hence.

Stu Pierson: Two weeks hence.

Bob Trout: Two weeks hence before the Permanent Subcommittee on Investigations, televised nationwide. It was to be followed two days later by an appearance before the SEC.

Stu Pierson: Two days later?

Bob Trout: Yes. And he was going to be the face of this transaction, the Nigerian barge deal. So there was really only one call at this point. It was clear. And I knew the consequences of his refusing to cooperate. Because Merrill was insisting that all of its employees cooperate with the government's investigation, he was going to be fired. And so one of the reasons he was such a wonderful client is he had to get his head around, in a very short period of time, the idea that he had to take the Fifth in front of a nationwide audience, where essentially his social group—the people he would hang around with, the people that he cared about—would assume taking the Fifth meant he committed a crime. Oh, and by the way, this brilliant career that you have started at Merrill where you are among the most, if not the most, successful banker in the entire organization, it is about to end. And oh, by the way, you've got family members who are prominent lawyers, not experienced in criminal investigations, who can't imagine that you would ever take the Fifth if you hadn't done something wrong. As hard as it would be to get your head around that idea in a matter of a few days, he got it. So the Friday before he was to testify on the following Monday, we made the decision he would not testify. The Subcommittee then issued a subpoena, at which time we advised Merrill and the Senate that he would invoke his Fifth Amendment privilege. Merrill then placed him on administrative leave, which I was later told was almost never done—usually Merrill fired anyone who took the Fifth—but was done in this case because our client was viewed as such a superstar. So the next Monday, we appeared in a very crowded committee hearing room, and our client took the Fifth. We had a statement for him, briefly explaining his decision. The lead Senate investigator on Levin's staff was a pro. We had very candid, very cordial, very professional conversations, and the committee staff wasn't hell-bent to make it worse than it had to be.

And so we made our statement and then we were excused. Someone who had nothing to do with the transaction was put up to be the Merrill mouthpiece. That afternoon the New York Stock Exchange issued a subpoena for him to come testify, because they supposedly were going to do an investigation. They weren't really going to do an investigation. All they were going to do was . . .

Stu Pierson: Hammer him.

Bob Trout: Yes. We're going to get this guy out. The way we're going to get him out is, he is going to come in and he is going to refuse to answer questions. And because we are a self-regulatory organization, not a government entity, we are not bound to respect his Fifth Amendment privilege. If he refuses to answer our questions, we can suspend him. And so they sent him a subpoena and went through the charade of saying that they were doing an investigation of their own. Well, in the meantime, as more and more people from Merrill started taking the Fifth, Merrill was feeling the heat. So Merrill fired my client after first putting him on administrative leave. We saw it coming, and so we resigned. And they said, "You can't resign; we're going to fire you." It didn't matter. They were not going to try to take away whatever his financial . . .

Stu Pierson: Indemnification?

Bob Trout: Yes, indemnification, options, retirement, whatever it is that he was entitled to—they weren't messing with that. So I didn't much care whether they called it a termination or a resignation at that point. At this point, there were a number of bankers who had asserted the Fifth and were then being subpoenaed by the New York Stock Exchange. Others just blew off the New York Stock Exchange, thinking, what's the point? They were not only suspended, they also received a reprimand. I suppose you could say,

what difference did that make. In our case, we decided to engage with the New York Stock Exchange. We actually went there and our client answered a number of background questions, refusing to answer only those questions that dealt with Enron. So at the end of the day we didn't get a reprimand, we got a suspension. As it happens, it might not have made any difference. But we didn't know what the future would hold, and we couldn't rule out the possibility that we would soon get greater clarity that our client had no criminal exposure so that he could then testify and have the suspension lifted. But we didn't get that clarity, so after a year of being suspended and without any employment in the industry, he lost his Series 7, he lost his licenses. In the meantime, a number of Texas plaintiffs who had sued Merrill had also named him as a defendant for the purpose of defeating diversity jurisdiction in federal court. Working in tandem with Merrill, we were able to get those cases removed anyway, under the theory of federal question relating to Enron's bankruptcy.

Stu Pierson: What was the principal federal court?

Bob Trout: Houston. The main class action, together with many civil cases were consolidated in Houston federal court. In the meantime, the Nigerian barge deal continued to be investigated, and we received a Wells notice from the SEC. The other individuals who received Wells notices basically blew it off, waste of time—there is nothing we are going to be able to say that is going to change what they are going to do here. And we decided we would put in a Wells submission. It would cause us to organize our own thinking about this, cause us to really drill down and understand all the facts and documents that were there to be understood, and cause us to really organize the narrative that we thought was true and completely, utterly innocent. And so we did that, and we put it in. We

didn't have any expectations. But we also had in our minds that this is not just going to be about the SEC. We're going to be dealing with the Department of Justice at some point. And so how would we talk about it if we were to make a submission to the Department of Justice? So at this point I would say we went pretty much overnight from a situation where a small fraction of our practice was criminal to a very large fraction was criminal in nature, if you lump all of Enron into the criminal field, even if there were civil parts of it. So that's what really moved a lot of our brand, if you will, from much more civil into a little bit more weighted white-collar criminal. It was only in the last year or two that all aspects of Enron were finally resolved for our client. What happened is that we put in the Wells submission at the end of 2002. I was supposed to go on the annual ski trip the following February, and I got a call from the Deputy Chief of the Enron Task Force saying he was going to . . .

Stu Pierson: Indict your guy?

Bob Trout: Yes, the next week. So we went in and we met with the Deputy Chief of the Enron Task Force. We provided him with a copy of our Wells submission. And then we followed it up with a meeting with him and the Chief of the Enron Task Force.

Stu Pierson: Who was that?

Bob Trout: Leslie Caldwell was the Chief. She is now the Assistant Attorney General. She runs the Criminal Division. Andrew Weissmann was the Deputy Chief. He is now the Chief of the Fraud Section—newly appointed. Anyway, I thought that we had successfully pushed back. By that time the pattern was that the Department of Justice would file a criminal indictment and the SEC would simultaneously file civil charges. In this case, the SEC brought civil charges against Merrill, which Merrill simultaneously settled. And they charged three other individuals, including my client, with involvement in the Nigerian

barge deal. There was another transaction that was also the subject of the SEC investigation. There were no simultaneous criminal charges, so we were convinced that we had been able to thwart a criminal case. But a few months later, as Merrill continued to look for documents that responded to the government's discovery requests, they stumbled upon a document, an email, that was a couple of years after the Nigerian barge deal. It was written by one of the people who was involved in structuring the Nigerian barge deal for Merrill, and in this later email he had referred to the earlier deal in a way that was different from how he had described it in his grand jury testimony and seemed more in keeping with the government's view of the transaction. And all of a sudden, it kick-starts the investigation. And they were back at it. So in the summer of 2003, it became pretty clear they were going to go after the Nigerian barge deal after all. And I had some further communications with the Enron Task Force. Our client unquestionably had a role—the government thought an important role—in influencing Merrill to go forward with the Nigerian barge deal, which the government was claiming was a parking transaction designed to keep the Enron share price artificially inflated when Enron's year end financials were reported early in the new year. Clearly the government was going to allege that Merrill and Enron management participated in a scheme to defraud the shareholders of Enron. We had a unique fact in our favor. As I mentioned, our client's wife had been a very senior executive at Enron. And she was paid a very sizable bonus at the end of the year. And their employees were allowed to get their bonus in cash or they could get their bonus in Enron stock. And at the very time that Enron was reporting its financial statements that the government was alleging to be falsely. . .

Stu Pierson: Inflated.

Bob Trout: Inflated. She took her bonus in stock. As it turned out, in the very first part of the government's opening statement in the trial of the criminal case that they eventually brought against certain individuals at Merrill and Enron for the Nigerian barge transaction, they were talking about how these defendants had defrauded the Enron shareholders. I was in the courtroom, but happily not as one of the defendants' attorneys. There were four individual bankers from Merrill who were on trial, but my client was not charged. And while I would like to think it was because I was such an effective attorney, I suspect it was because the government realized in the very first part of my opening statement, I would have been identifying my client as one of those shareholders.

Stu Pierson: The victim.

Bob Trout: Yes, the victim. It didn't come to that. Everybody around him was charged, and he was not.

Stu Pierson: Because?

Bob Trout: Because he had not testified before Congress. And because he hadn't given any statements himself, and because he was not operationally involved in any of the transactions.

Stu Pierson: Lack of knowledge.

Bob Trout: Yes. We made that point in our Wells submission, and I think they understood that they would have a hard time proving he thought there was anything wrong there, that he believed that these were fraudulent financial statements or that they were inflated or that Enron was in any way deceiving the shareholders. After all, he and his wife made an investment themselves—a very sizable investment in Enron stock at that very moment. I haven't had a conversation with the people who made that decision not to indict

my client, but he was not charged—which is not to say that he was completely out of the danger zone at that point—but he was not charged. Tragically, there were individuals who were charged. They went to trial in Houston. I would say that there was an appalling absence of the application of the hearsay rule, and they were all convicted. Everybody was convicted. So . . .

Stu Pierson: It was a conspiracy trial?

Bob Trout: Yes. So you have that element that gets in the way of the hearsay rule, the exception to the hearsay rule that says statements in furtherance of the conspiracy are admitted, an exception that seems to swallow the rule. It seems there was no hearsay that was kept out of that case. And so they were all convicted. At sentencing the government was making an outrageous demand for lengthy prison sentences. Fortunately, the judge did not follow the prosecutors' recommendation. Still, in my view, the sentences—substantial prison time—were excessive. And because the judge couldn't see the serious legal issues that were unquestionably going to be part of an appeal, he denied bail pending appeal. And these people went off to prison. And that is where they were until the afternoon of the oral argument before the Fifth Circuit, at which time the Fifth Circuit issued an order releasing them on bail.

Stu Pierson: Now these defendants included Arthur Andersen employees as well?

Bob Trout: No. I think that the government brought the Nigerian barge case—it was miniscule compared with the prepays—because Arthur Andersen could argue that they were not involved, they didn't bless this transaction. When the case was indicted, it turned on a conversation between senior folks at Enron and senior folks at Merrill, and Arthur Andersen could claim they had no knowledge of that conversation. Enron was coming to

the end of the year and they expected to sell an asset, barges off the coast of Nigeria that were going to be used to produce electricity, as part of their effort to meet their earnings target. Apparently there was a snag in the deal with the prospective purchaser, so Enron asked Merrill to buy the barges. This was not the sort of asset that Merrill typically invested in, but Enron was assuring them that there shouldn't be any trouble finding a buyer early in the new year, either the original purchaser who couldn't get the deal done by year end, or some other purchaser. There was some dissent within Merrill, including a view that there was a reputational risk to Merrill if the transaction was viewed as aiding Enron in managing earnings. But there was another view that this would help the relationship between Merrill and Enron and help Merrill secure investment banking work from Enron, which generated large fees for the investment banks with which it did business. The key event in the case was the conversation between senior bankers at Merrill Lynch and their counterparts at Enron. The key participant was Master of the Universe, Andy Fastow, the Enron CFO who obviously had an interest in Enron meeting its earnings targets. The idea was that Merrill would convey its point of view that the only reason it was doing this was as a favor to Enron, obviously trying to enhance the relationship. In turn, Merrill wanted Enron to know that it did not want to hold the asset long term and was looking for Enron to commit to help Merrill find a buyer early in the new year. It was important for Fastow to hear that. So there was this conversation and there were several people on that call, including . . .

Stu Pierson: Your guy.

Bob Trout: My client. And then what happened was they were getting down the road and they didn't have a buyer. There was an affiliate of Enron that Andy Fastow was . . .

Stu Pierson: Controlling.

Bob Trout: Controlling. And so that affiliate ended up buying the barges from Merrill, and it was legally speaking an independent operation, but he had given the government enough to argue that this was a parking transaction, that the conference call at the end of the year was really a guarantee that Enron or an affiliate would buy the barges back if they couldn't find another buyer so that Merrill would not really be at risk. It turns out that that the affiliate, within two or three months, actually sold the barges to a completely different operation for essentially the same amount that had been paid. My client really had nothing to do with anything that happened after the year-end conference call. Right after the call he went skiing with his family so he had nothing to do with structuring or closing the deal at the end of 1999 or with anything that happened later. After Enron unraveled and the government began its criminal investigation, Fastow entered into an agreement to cooperate with the government and enter a guilty plea. The government had obviously gone after the accountants, it was going after Enron and its senior executives, and it clearly wanted to find a transaction that would allow them to prosecute the bankers. Although the Nigerian barge deal was peanuts compared with many of the transactions that led to Enron's demise, I think the government was thinking it was bite size, it could be made understandable to a jury, and the fingerprints of Arthur Andersen could not be found, so no outside accountants approved the deal. I think that is the reason they focused on the Nigerian barge deal. But there was a lot of ambiguity in the evidence, in particular what was said during the year-end conference call with Andy Fastow. The government had some sort of ersatz consolidated 302, which was a memo of various interviews that Fastow had given the FBI and the prosecutors during his cooperation sessions. Normally there is a separate 302 or interview memo for each session. But the government came up with this

ill-conceived idea of a consolidated 302. And it was clear from this so-called consolidated 302 that Fastow was trying to give the government something that was not inconsistent with their theory of the Nigerian barge deal, which was that he had guaranteed Merrill it wouldn't lose anything on the deal. But he stopped short of describing it as a guarantee. Who knows what he actually said to the FBI, versus how the FBI wrote it down. But I think that we do know that there was a difference between what was in the 302 and what was in the FBI notes. Much later, in connection with the case against Skilling and Lay, some notes ended up getting produced that showed that there was a different . . .

Stu Pierson: Retained FBI notes?

Bob Trout: Yes. My recollection is that in the Nigerian barge transaction, they tried to get the notes and the judge in that case refused to order the government to produce them to the defense.

Stu Pierson: And the Bureau was retaining the notes and not destroying them?

Bob Trout: Yes. And so eventually, I think, the notes got produced in the Lay and Skilling case, and after the convictions in the Nigerian barge case were all reversed on appeal and before the government decided, wisely, I think, to just dismiss the case on their own, there was a lot of *Brady* litigation . . .

Stu Pierson: This is after they blew up Arthur Andersen?

Bob Trout: Yes, long after that. All this discovery of the FBI's raw notes of the interviews with Fastow occurred well after everyone was convicted in the original Nigerian barge trial in the fall of 2004. And while my client was never indicted in that case, it was clear we were not entirely out of the woods. Shortly before the trial the government discovered a witness in London who had been a freshly minted banker for Merrill at around

the time of the Nigerian barge transaction. She had left Merrill and was working in London, I believe for another bank. She described an internal Merrill conference call among the senior people at Merrill who were deciding whether to buy Enron's interest in the Nigerian barges. This was just an internal call. It did not involve any Enron people. The government thought this was a very powerful piece of evidence, consistent with the theory of the government's case, which they said that they had not had at the time of the indictment. This witness who was young and inexperienced was apparently invited to join the call and she did. This young banker and my client did not know each other, but she placed him on this conference call. When the government brought the original indictment they did not have this evidence. I was in Houston for various parts of the trial and from sidebar comments that the prosecutors made to me, it seems that if they had known about this witness at the time of the indictment, they might have made a different decision about leaving him out of the indictment. So while my client had not been charged in the original indictment and therefore was not convicted as the other Merrill bankers were, I was nevertheless concerned. A short time after the original trial, our family had arranged for a big family reunion for Thanksgiving. We had rented several cabins near Montreat, North Carolina. I think we were flying out either Tuesday or Wednesday to Charlotte to then drive to Montreat. Shortly before I was to leave for the airport, I was in my office and I got a call from Bill Dolan, who represented the former President of Enron, who had been on the critical conference call with Andy Fastow related to the Nigerian barge deal. And he said, "I have heard that your client, my client, and this other person are going to be indicted next week on the barge deal. And it comes from a reliable source, or someone who has always been reliable." This was very unwelcome news, needless to say. So I got a cab to

the airport. When I arrived at the airport, there was an email message from a lawyer in Houston who represented the third individual. I called him. He said, "I have heard from a reliable source that your client, my client, and this other guy represented by Dolan are going to be indicted next week." And we talked, and my blood pressure was starting to go up. I then got on a plane and flew to Charlotte. I got off the plane, and there was a voice mail from in-house counsel at Merrill. I called him back, and he conveyed the same message, that three other people who had been involved in the Nigerian barge deal, including my client, were about to be indicted. Again, it was attributed to a source who had always been reliable in the past. I think it was a reporter for the *Houston Chronicle*. No one ever told me who, but that is what I think. And I decided I was not going to ruin my client's Thanksgiving, so I didn't tell him. I think we all agreed that we were not going to ruin our clients' Thanksgiving. I think if I got four hours of sleep the entire Thanksgiving weekend, that would probably be a generous estimate.

Stu Pierson: This is all within your own brain.

Bob Trout: Yes. And I don't think, even the next week I called my client about this. I just figured, well, I would just wait for them, the prosecutors, to call me. I was sure they were going to call me. I was just going to wait for that call. But then it didn't happen

Stu Pierson: We've gone through to 2004.

Bob Trout: Right. Which is exactly five years after the deal, the year-end deal. And then we came to, I think, January 2005, and we were now past—

Stu Pierson: The statute.

Bob Trout: So I say. We were now five years past the time when the purpose of the so-called conspiracy had been achieved. Enron had issued its financial report in mid-January

2000, and that would have accomplished the goals of the alleged conspiracy. But there was a theory that said Merrill's sale of the barges back to this Enron affiliate was an overt act in the alleged conspiracy that did not occur until June 2005. So we had our theory that the statute has passed, but there was also another theory that, no, the statute would not expire until June 2005. I want to say that sometime in about March 2005, I received a call from the Enron Task Force, from Kathy Ruemmler, who at the time was the Deputy Chief of the Task Force. She and I are friends so we were able to have candid conversations about the case. She told me that the government was thinking about bringing another criminal case on the barge. She told me they needed to hear from me the next week, specifically addressing the evidence the government had found so powerful, the testimony from the banker from London who had participated in the internal conference call where the barge deal was discussed. Well, I had a vacation or some trip planned for the next week. So I pushed back pretty hard, and because Kathy and I knew each other and were able to communicate, I think she agreed to a pause. She told me not to do anything or change any plans, she would call be back if they needed to hear from me. In the meantime, I started putting together a submission addressing once again why they shouldn't charge my client and in particular this new witness whom the government did not know about when it brought the original indictment relating to the Nigerian barge deal. Obviously I was hoping not to hear from her again. And, happily, I didn't. And so June 30th came and went, and I think everybody recognized that the statute had passed. So he was off the hook on the criminal case. There were still a number of civil suits as well as the SEC's suit that had been stayed for quite a while at the government's request since Andy Fastow was cooperating and the government did not want the civil suit to serve as an opportunity for

the defendants to take his deposition. Because of the various appeals and also because the Lay and Skilling case was still pending, nobody was seeking to get that case reinstated. And so in the meantime, we were working on civil cases. And the class action was going forward. My client was not himself named as a defendant in the class action, but there were a number of opt-out cases or separate direct action cases that had been brought naming him as well. So we were working at this point with Shearman & Sterling, which was representing Merrill and was very aggressive in fighting the plaintiffs' claim that the banks could be found liable in a private right of action for aiding and abetting securities fraud. This was large multi-district litigation being run out of federal court in Houston, and the parties arranged for large deposition centers in New York—in the Chrysler Building—and in Houston. One party or the other would schedule the deposition of a witness and they would then negotiate the amount of time a particular party could depose that witness. Lawyers from all over the country would then travel, say to the Chrysler Building, to attend the videotaped deposition. There would be banks of tables, with maybe 30 lawyers or more sitting at these tables—not paying attention to the deposition but instead staring at their Blackberries—while one lawyer questioned the witness for a period of time, until it was time for the next lawyer to ask questions. And while I was not attending every deposition, nor even most of them, I was going to depositions in both New York and Houston. Very late in the process, and to the surprise of the defendants who had not settled, Fastow made an agreement to cooperate with the plaintiffs in the civil cases. The plaintiffs knew that the money was with the banks, and they were therefore anxious to prove that the banks were not mere aiders and abettors but were primary actors with Enron in its fraud. So they made a deal with Fastow where they let him keep what was left of his money—or most of it—

and he would provide evidence against the banks. It truly was a devil's bargain. Some of the financial institutions had already settled. Merrill was not going to do that, and so, all of a sudden, we got this affidavit from Fastow that specifically targeted the financial institutions and, more particularly, targeted Merrill and, more particularly still, described conversations supposedly with my client, once a good friend of his. By this time he has started serving his sentence so he was in custody. The plaintiffs made arrangements to pay for his security for him to come to the deposition center in Houston for up to nine days of depositions.

Stu Pierson: They being the plaintiffs?

Bob Trout: The plaintiffs. They had him locked in, so this was going to be nine days of . . .

Stu Pierson: Cross-examination.

Bob Trout: Cross-examination by the various other people, primarily the banks. Well this was a lawyer's dream. Andy Fastow had become almost this mythical figure in one of the largest corporate meltdowns in history, and he's going to be deposed. I think I was allocated 45 minutes. And I think that Merrill would have preferred for me not to ask any questions, because they clearly didn't want me screwing it up. But I was not going to do that. I was going to take advantage of my time to cross-examine Fastow. And I had no intention of screwing it up. My time came on something like day four. I had a pretty good cross lined up for this guy. But one of the key pieces of evidence was this conference call that my client was on with Fastow and others from Merrill and from Enron. From Merrill's perspective, there were no guarantees, Merrill would be at risk, the only assurance they got from Fastow was that he and Enron would use their best efforts to find a buyer that would

buy the Nigerian barges from Merrill within the next six months. The plaintiffs, like the government before in the criminal case, were trying to prove that Fastow had made a guarantee that Merrill would not own the barges more than six months, that Merrill had no risk in the transaction. Such a guarantee would have killed the accounting treatment for the transaction. Essentially, it would have been treated as not a bona fide sale so that the sale should not have been booked as part of the year end earnings. So when I finally had Fastow on cross, among the questions I had in mind to ask him were a couple that I knew presented a risk, but I thought were worth the risk because I thought he would deliver what I wanted. I asked him, "When you got on the call with the bankers from Merrill, did you want to make sure that you didn't say anything that would blow the accounting?" He said, "Yes." My next question was, "And when you hung up the phone after the call, were you satisfied that you hadn't said anything that would blow the accounting?" And he said, "Yes."

Stu Pierson: Your witness.

Bob Trout: Yes. Done. For the deposition, all the lawyers were using Realtime or LiveNote for simultaneous transcription. By the time this deposition was occurring, the criminal convictions in the Nigerian barge case had been overturned and the case had been sent back for retrial. The defendants were engaged in collateral *Brady* litigation, trying to get additional discovery that they hadn't had previously, and also engaging with the government to persuade them not to retry the Nigerian barge case. And while the Fastow deposition was going on, I was in touch with Larry Robbins, who was then representing one of the defendants who was facing possible retrial of the Nigerian barges criminal case. By email, I was sending excerpts of the transcript to Larry. And when I sent him that little segment from the cross of Fastow, Larry was thrilled. I don't know whether, at the end of

the day, that may have made an impact in the government's decision to just drop the criminal case and not retry the case. The momentum had turned, I think, a little bit in favor of the defendants. The government had brought a criminal case against Arthur Andersen, which had caused the company to go out of business and had created unemployment for many thousands of innocent people, and then the Supreme Court unanimously held, in effect, that the case should never have been brought. For the Enron Task Force a number of their initial victories had turned into not victories. And one of those had been the original criminal case involving the Nigerian barge deal. I was not privy to what the government was thinking and why they decided not to retry the Nigerian barge case. But what happened is that those individuals entered into a settlement with the SEC—probably paid them a little bit of money, I don't know—and then they dismissed the criminal case. So the Nigerian barge criminal case just went away. It ended up being dismissed.

Stu Pierson: And the shareholder litigation was settled eventually?

Bob Trout: No, Merrill had made the right bet, that legally under 10(b)(5) it would shake out that Merrill could not be found liable in a private securities fraud case for aiding and abetting the primary actor. But the district court was basically giving the plaintiffs whatever they were looking for. The defendants seemed never to win in the district court. So it went up to the Fifth Circuit. And around this time there was litigation headed to the Supreme Court on this very issue—could a third party in a private action brought under 10(b)(5) be found liable for aiding and abetting. The Supreme Court eventually made it clear that there was no such aiding and abetting liability. And the Fifth Circuit, I think maybe in anticipation that the Supreme Court would rule that way, said that there was no such aiding and abetting liability. So the Fifth Circuit reversed the decision of the district

court that had certified the class. And it just ended. The Supreme Court ruled in a related case, and the case went away for Merrill. Everything was done as far as my client was concerned, except the SEC case was still pending against him. It had been stayed because Fastow was cooperating, but that was long since over. A couple of the Merrill people had settled with the SEC as part of the government's agreement to drop the criminal case rather than retry it. So there was this loose end, the SEC suit, with my client. The lead lawyer for the SEC who had brought the case had long since left the government. It was probably in 2012 that I received a call from his successor at the SEC. He suggested that maybe my client should settle with the SEC. It was a short and frank conversation. By this time there had been the financial meltdown, and there was a lot of talk about why weren't any of the individuals—the miscreants who were involved in the subprime debacle—why hadn't they been called to task. So there was a lot of criticism about how the SEC was doing its job, or more pointedly not doing its job. And I'm sure I conveyed that if they pursued this, they would not hear the end of criticism from me about the utter waste of proceeding with this 10-year-old case and about how the government was choosing to deploy its resources. My client had been basically barred from the industry since 2002. He hadn't had his license. He had been out of the industry. They could not seriously be thinking about using scarce resources to go after this deal. As I say, it was a frank conversation, and I conveyed we were not interested. Of course I called my client to let him know about the conversation, and he approved. And I didn't hear anything back from the SEC. About six months later, the SEC formally entered a dismissal of the SEC case against my client. So my client avoided the criminal case, and any personal liability in the civil cases, and the SEC suit. Of course, he didn't avoid all of pain. There was a lot of stress, undoubtedly. There were a

lot of close calls. There was a lot of very bad publicity. But he is an elegant person, and he is very well grounded, so he survived. In fact, he has thrived. He has a great family, and he got to spend time with his children that he wouldn't have otherwise spent. And so he has been very philosophical about it. He has a wonderful life, and we continue to see each other.

Stu Pierson: So are we right about 2009 or '10?

Bob Trout: Yes, on that case. But the real serious work in that case was really done through June of 2005 when we knew that we were in the clear of the criminal case.

Stu Pierson: So why don't we take a break now and we'll do the next ten years in the next session?

[END OF FOURTH SESSION]