ORAL HISTORY OF ROGER E. ZUCKERMAN
Ninth Interview
November 25, 2014

This is the ninth 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 November 25, 2014.

Zuckerman: We have now reached the iconic and momentous date of around the year 2000. The year 2000 I turned 58. The firm turned 25 – something like that – and I had reached a point where I was relatively senior in the Bar and began a period from 2000 to the present in which I and the firm were consulted by senior executives of relatively significant firms on matters that were very serious. There are, according to my "cheat sheet" as Judy calls it, a dozen or a dozen and a half who are on the list for problems, many of which are civil and some of which are criminal. There are criminal anti-trust cases and the like which we can talk about as filler, but there are 3 dominating cases that took periods of years – indeed, one took a decade – that really filled the landscape of the period from about 2000 to 2011. The first of these three cases, as we have discussed, involved Lou Pai, who was the highest, most senior executive at Enron to escape prosecution, and he did so keeping 90% or so of the proceeds of $271,000,000 in stock that he was able to liquidate in the year before the termination of Enron.

Granof: I guess he did have to share it with his wife or his former wife.

Zuckerman: He had to share it. Well, the reason he was able to keep it is because he did share it with his wife. That was the reason. The demonstrable, incontrovertible reason for the liquidation of his shares – not any insider information. He had misbehaved, was getting a divorce and needed to pay off his wife, which he did. It was an extraordinary stroke of good luck. This is something that has been commented on publicly in the press. But Lou's case was the first dominating case I handled in the 21st century. During the

representation of Lou, we became very good friends. He is a very decent person – these events notwithstanding, and I believe that he has succeeded admirably in his life since then. The representation of Lou ran from the end of 2001 oddly enough until the present. Even now there are still some loose odds and ends with the SEC that are being wrapped up. That's 13 years of travail; most of it, however, was wrapped up, I think, by 2010. The second dominating case and one that I may have talked about previously and if I have, we'll simply strike this. But the second case is a case that began in about 2004 or 2005 with a company called REFCO. The second case involved Tone Grant. What I describe to you now is a matter of public record, since the case was tried and commented on extensively in the press.

Granof: It's spelled Tone?

Zuckerman: Tone – it's the Scandinavian spelling. Tone Grant was a great, accomplished American whose background I will describe. He became the first president of a company that was a brokerage company that sold and traded in futures issues in New York. The tale I will tell involves the growth of the company, the demise of the company, and its sale in about 2004 or 2005. The discovery that the books of the company were inflated when the company was sold resulted in the prosecution of at least three senior executives, the then existing president, several financial officials and Tone, REFCO's first president. The matter involved 3 trials – 2 trials of Joe Collins, the General Counsel of REFCO, who was convicted. But for our purposes, we will focus on the approximately 5-week trial of Tone in 2008, in which he was convicted and received a 10-year sentence of which he is about halfway through. We still represent him and are trying to get him a compassionate release. Let me describe that, and you will get a sense of my life in New York. I think I've commented on this: my life in New York in a major fraud trial in the mid-2000s, an event that occurred about 25 years after my life in New York in the Herman Friedman tax fraud trial in the early 80s – a case that was lost as well. The background facts: Tone Grant went to Landon

High in Bethesda, Maryland; was a storied athlete; went to a prep school for a year; and thereafter I think was recruited as an athlete to go to Yale and went to Yale.

Granof: In other words he went to Landon and then went and spent a year at another prep school?

Zuckerman: Yes – I think so – a New England prep school.

And then went to Yale where he was the quarterback of the football team immediately before Brian Dowling. One of Tone's teammates in the mid-60s when he was the quarterback at Yale was Calvin Hill, the great NFL running back. Another one of his friends, who was also a fraternity brother, was George W. Bush, who was then at Yale. Tone was a good student. He had a fine career at Yale; he was well-liked and well-known. After college, he joined the Marines - he went to Vietnam and saw combat. He then went to Vanderbilt Law School, and when he left Vanderbilt Law School he went into banking and then the financial services industry and became fairly noteworthy. He was philanthropic. He supported various entities in the inner city, and had an altogether admirable existence. He went to work for a company called REFCO in the 1990s.

Granof: So, let me see if I can get the timeline right. If he fought in Vietnam, he had a twenty-something year career?

Zuckerman: Long enough – yes. And his work at REFCO was essentially focused outside the main offices of the company, on various other offices and divisions. It was a large company with locations outside New York and in many respects outside the United States. And the financial affairs of the company were an area that Tone was not conversant with, and an area in which he did not have particular skill. It was not part of his skill set; he was not a finance guy. The company's financial affairs were managed by other

senior officials, the CFO and by others.

Granof: When he went with REFCO – went into his career – did he ever practice law?

Zuckerman: He practiced law briefly in the 70s in Tennessee.

Granof: But at least as far as when you saw him, he was an executive and had been?

Zuckerman: Yes, he had been an executive and was a terribly nice person and a decent person, and his skill as an executive came from the force of his niceness. He was magnetic in the degree to which he seemed genuine, honorable and people liked him. His skill set did not involve, as I said, finances. REFCO had bank relationships and regulatory relationships that required that at year-end it show a financial statement and balance sheet free of debt, or at least free of an amount of debt that would have created insolvency. Its assets had to equal or exceed its liabilities. And what began to occur in the 90s was that REFCO sustained, for a variety of reasons, various trading losses which in many respects were severe.

Granof: What exactly did the company do besides trade?

Zuckerman: That's what it did – it was a big company – it traded. It was a brokerage. It had clients who traded. It traded.

Granof: So it had a retail operation in essence?

Zuckerman: Yes, and its stock-in-trade was the futures market. Because of positions that it took, and because of positions that its clients took that it backed, beginning in the late 90s its year-end financials, if accurately portrayed, would have shown that its liabilities exceeded its assets, which would have put it at risk and in violation of its bank covenants with certain financings that it had.

Granof: The banks would call the loans?

Zuckerman: And it would have put the company in various types of regulatory jeopardy. Therefore, it conceived through its financial officer a plan by which at year-end, in essence, it would engage in a series of financial machinations called round-tripping, in which a liability would be paid by a short-term loan made by an outside controlled entity. The loan would show up on the books as being repaid as of December 31st, and the liability would disappear as of December 31st. Because they had borrowed money to pay it, the liability would reappear on January 1st. Thus, there was a series of circular movements of money that occurred at year-end. The last day or two of the year funds would be transmitted in such a way that those funds would void or eradicate the liabilities to the point where the books were at least in a positive state on December 31st. Then the monies would flow out again on January 1st or 2nd and the books would once again show themselves the liabilities. Don't ask me about the particular mechanics of the so-called round-tripping because I can't give you the details 6 or 7 years after the fact.

It was a kind of maneuver that purportedly large publicly-traded entities engaged in at year-end to cleanse their balance sheet for year-end purposes, but it was decidedly wrong. These actions were intentionally engaged in for the purpose of masking the fact that there was insolvency at year-end, and the practice of doing this masked what became known in the company as "The Hole." The company was short $100,000,000 to $200,000,000 – some large amount of money – it was in a hole, but "The Hole" was obscured at year-end from anyone who might scrutinize the company's accounts. And it became increasingly apparent to these strategists – not to Tone, but to the man who was Tone's partner, whom I will describe in a moment – that the only way out of this dilemma was to sell the company. It was a kind of – not truly conscious – but it was a kind of thing where one was operating a company that simply had an insolvency that could not be eradicated, but the company seemed to be solvent and profitable. If one could only find a willing buyer, then one could take in dollars, take a share of the profit, put

some of that new money back in the company to fill the hole, and take the rest and put it your pocket. Nobody would be the wiser and the company would be solvent. But you couldn't raise – you follow me – you couldn't raise the capital sufficient to fill the hole except at the end of the day by selling the company and taking the profit that you were able to make and putting part of it back in the company to fill the hole. Without a sale, you were trapped in an insolvent company where you were continually masking the insolvency at year-end without ever solving the problem.

Granof: When some company is going to pay more than the company is worth?

Zuckerman: But the company is a good company.

Granof: But the company is a good company?

Zuckerman: And you will then take your profit out of that, put it back into the company, the company will once again be solvent and a going concern and no one in theory will be the wiser.

Granof: But the buyer was at some point –

Zuckerman: Going to discover it.

Granof: The buyer would say wait a minute, I paid $3 billion dollars for this company and –

Zuckerman: You're quite right on and you'll see what happened. The company was owned 50% by Tone and 50% by another man who was a bit senior to Tone, but they split the company. Tone knew little, if anything, about "The Hole" because that was a financial matter. Our position during this litigation was – and I think it was a fair one – that the complicated finances of the company were really handled by others, not Tone. Those finances were, in fact, handled by the other owner and by some financial managers. Tone had been forced out of the company essentially because he was thought to be

ineffectual. He was perceived, at least, as ineffectual in about 2000. So from 2000 onward although he owned half the company – this futures brokerage – he was not involved in its management. Tone was not involved in the company. It was run by Phillip Bennett, the other owner, and it was run by the financial managers. And as "The Hole" grew bigger, the year-end machinations to move money around by various documents continued, so that for technical accounting purposes, Ernst & Young or Arthur Andersen, when they looked at the year-end books would say, "It's a solvent company, it's got so much in assets, so much liabilities and everything is fine." Then, the money would be repaid to the outside controlled entities in early January and the company would look sick as a dog. That process continued. In about 2005, through a broker, the senior executive, Tone's partner, found a glowing buyer in Thomas H. Lee Partners –Tommy Lee – a big investment house that was willing to head a syndicate that through it and its ability to raise capital, and through some banks and their financing, put up somewhat in excess of $2 billion. They reviewed the books, and the books that they reviewed showed that the company was clean. "The Hole" was masked and could not be identified from these books. Thus, the company was sold and out of that sale, in theory, Tone as half-owner of the company, over time, should have reaped in excess of $100,000,000. The reality was, that in order to make the company solvent, much of that – that he stood to make and much of what the other executive would have stood to make – had to be in some fashion that you and I find hard to imagine funneled back into the company in order to make sure that these concealed liabilities disappeared and were no longer liabilities. In other words, most of the money was needed to fill "The Hole" before it was discovered by the buyer. How you would do it, of course, is hard to imagine. The due diligence was done. The company passed due diligence and the new owners came in. Some of the old financial guys stayed. Tone received very little in the way of money, because he couldn't get very much in the way of money since –

Granof: It all had to be brought back?

Zuckerman: It had to be brought back and life went on.

Granof: Well, at that point he didn't know anything about it?

Zuckerman: I'm going to get to that in a second. About 6 months to a year after the company was sold, the new financial team, during the course of its financial analysis, realized that the company had huge liabilities which had been hidden from them. At that point, "the shit hit the fan" – to use the vernacular. It was reported in the press. The company made an immediate statement that they had found a bunch of concealed liabilities. The company went into a chapter proceeding – a bankruptcy proceeding - a criminal investigation ensued and the financial people were indicted and the then existing president at the time of the sale was also indicted. Tone had not been active in the company for 5 years, and there was no evidence at the time that Tone either knew of, or participated in, the masking of "The Hole." The presumption – or the assumption – in the U.S. Attorney's Office was that Tone had been gone for 5 years and that all of this stuff maybe occurred after he left. There was an SEC inquiry into the matter, and Tone was represented by two attorneys in Chicago – a father and a son, whose names I will not use here – and the SEC subpoenaed from Tone all of his personal files about his experiences at REFCO. Tone had assiduously maintained his files; he'd done nothing wrong.

And the lawyers looked over the documents that Tone had kept and amongst the documents was a handwritten set of notes which became known as "The Notes" and the "The Notes," which were notes of a meeting that Tone had had with his partner. The partner came to Tone and said, "Tone, we're selling the company. This is how the proceeds are going to be distributed. You haven't been around for a long time. I want you to know what's what." And Tone listened to the partner and then made notes of what the partner

said.

And "The Notes" appeared to show to Tone, who had not been in this company for 5 years, that what the then owner/president was saying to him was – and I'm trying to be illustrative here, so the following is not a verbatim quotation – "This is what the books show; this is reality. There were two sets of numbers and while the books showed plus, plus, plus – a lot of money – the reality was minus, minus, minus. Therefore, at the end of the day, Tone, you're not getting hundreds of millions of dollars, you're getting much less over a much longer period of time." The clear, regrettable, inference from "The Notes" – is that Tone received from his partner about as clear an explication to the listener that REFCO had two sets of books. Don't expect to get a lot of money. We have got to fill 'The Hole' first." Those notes that Tone took and kept in his private file would have allowed the government to argue that he took and saved those notes because he wanted to make certain that when the time came, he understood how much money he was supposed to get and when he was supposed to get it. When the SEC subpoena came along, the Chicago lawyers looked at the documents, including "The Notes," and found nothing wrong with them. Indeed, Tone said, "I have these notes of a meeting that I had with the president. I assume they're okay – is there anything wrong with them?" And the son said, "They're fine. They just show you cared about the deal." And the documents, including these incendiary notes, were handed over to the SEC. Now, you might say to me, well, suppose they had identified these notes as being problematic – being virtually a confession. Wouldn't one still have had to turn them over? There's no Fifth Amendment right not to. But, of course, the answer is a creative lawyer would have searched for ways not to turn "The Notes" over. One of the ways was that "The Notes" arguably – arguably is an important word here because it's not clearly, but arguably – were prepared in anticipation of a meeting that Tone was to have with one of his attorneys. "Attorney Granof, my company is being sold. This is the way the money is being cut up. I need some legal advice." If "The Notes" were

prepared in anticipation of a meeting with counsel, they were privileged and needn't have been turned over and might have been withheld on grounds of privilege. That would have been the end of the matter. As a consequence of this inability to see the significance of "The Notes," they were handed over to the SEC here – I think it's here in DC. And Tone, who at that time was a nonentity in the criminal investigation, saw his status change 180 degrees overnight. As soon as the attorneys at the SEC looked at "The Notes" they said "OMG – Oh My God – send 'The Notes' to Chris Garcia and Neil Barofsky in the U.S. Attorney's Office." Garcia and Barofsky were the attorneys in the U.S. Attorney's Office in New York. Barofsky later became head of TARP, and Garcia went on to run the U.S. Attorney's Securities Fraud Section. At the time, they were the two best lawyers handling securities fraud prosecutions in New York City. They took one look at "The Notes," and they called the Chicago lawyers representing Tone. These federal prosecutors from New York said, "You know, we're the prosecutors in New York who had no interest in Grant, but we're now going to indict him because we now have evidence that he knew the REFCO books were cooked." At that point, Tone, about two weeks before his indictment, came to us. We immediately recognized that "The Notes" were incendiary. We figured out that what the government had done is, after seeing some evidence that in 2005 Tone knew of "The Hole," it probably went back and talked to some of the financial people more aggressively. By that time, two or three of the financial people had cut deals and were not only pointing fingers at the existing president, but also to some degree pointing fingers at Tone, and saying, in essence, that Tone knew that the books were cooked at year-end in order to get by bank covenants and get by regulatory rules.

Granof: And the deals were cut with the prosecutors?

Zuckerman: With the prosecutors and the financial people. So, we surmised correctly that the evidence against Tone was (1) a bunch of insiders who had made deals with the prosecution, which we felt we could deal with, and (2) "The

Notes" in Tone's hand, which we couldn't quite figure out how to deal with. "The Notes" were confounding as well as a mark of Tone being an innocent in a world of financial machinations. At trial, I tried to describe him as an ingenuous, nice person, not a clever financial guy. Indeed, if he was a devious person, he would not have retained "The Notes," or relinquished "The Notes" to the SEC, or remarked to his lawyers, "These aren't going to hurt me are they?"

Granof: I have a question. These notes were turned over five years right after they were made so when Tone's partners sat down with him and he made the notes and they said we've been keeping two sets of books, you don't have to be a financial genius to say "Wait a minute, what's going on especially since it's costing me a huge amount of money because I thought I had X amount of dollars."

Zuckerman: Basically, you're asking what was Tone's explanation for "The Notes?" What was he possibly thinking? And we'll get to that. But I can't invade the privilege.

Granof: It's a great story.

Zuckerman: So, I am engaged to try Tone's case along with the young cream of the firm, including (1) Aitan Goelman, who was a former Assistant U.S. Attorney on the Oklahoma City Task Force that prosecuted Timothy McVeigh for the Murrah Federal Building bombing – he was assigned there – he was an Assistant U.S. Attorney in the Southern District and very, very smart, and (2) Norm Eisen, who was a Harvard grad who went on to be the White House Counsel for Ethics and later served as the United States Ambassador to the Czech Republic. Also, some younger lawyers, lawyers younger even than they worked on the case. Given that the market loss at REFCO was $2 billion – the company people put $2 billion into this company and it still went belly-up – the sentencing guidelines covering potential conviction for a

massive fraud of this nature did not bode well for Tone if convicted. It was a major case. Tone insisted that he was innocent – believed in his heart that he had done nothing wrong. After all, he was a decorated Marine veteran who had lived a life of absolute rectitude, and thus there was no possibility that the case could be pleaded out. We ultimately went to trial before Judge Naomi Reice Buchwald, a former Assistant U.S. Attorney, a former federal Magistrate and now a U.S. District Court Judge, whose husband is Don Buchwald, a defense attorney in New York, whom some of my New York partners knew. Naomi was in the U.S. Attorney's Office at the same time as my Tampa partner, Sandy Weinberg. Therefore, she had, I think, an appreciation for the quality of the firm and the work that we did. Our strategy involved three elements: Element One was, "Get the damn notes back." Thus, we moved for their return on grounds that they were within the attorney-client privilege, and were inadvertently turned over to the government. We failed in that effort.

Granof: Well, you had to have had an affidavit, I guess, from Tone Grant to say "I prepared the notes in anticipation that I would be consulting counsel?"

Zuckerman: I must tell you that I don't remember the details of the effort, but I know we tried and we failed. The second strategy was to destroy by cross-examination the insider witnesses.

Granof: Let me ask you a question about the first. If "The Notes" are turned over voluntarily by Tone and his attorneys, isn't that a waiver of the privilege?

Zuckerman: That's what we confronted. He had counsel. He reviewed the documents. I cannot remember the details of the effort. I think that we were confounded by the waiver problem and what we would have been required to prove, as I recall. I'm speculating a little here and my memory is hazy. In order for this to fly, what we needed was the acquiescence and an abject apology delivered on the record by the Chicago lawyers who represented him at the time, to the

effect that they had not properly perused the documents, and had failed properly to inquire of Tone about the details of his meeting with his partner, Bennett. And one of the things that we were concerned about is that there was some intimation that Tone had said things to the Chicago lawyers that would not be helpful if the privilege were waived, and they would have been required to testify about explanations that he had given them. Thus, in varying respects, we were boxed in and our effort was constricted. The judge ruled against us. For that reason, it was a precursor of what we were going to confront in trial. So, we failed at getting "The Notes" back. I and Aitan, in my respectful opinion, destroyed the insider witnesses, and I will tell you that we had confirmation from the jury that we did destroy those witnesses' credibility. Then we get to "The Notes." We get to your question and your question, and the question that anyone would ask, and the question that we asked ourselves and Tone – that we need an alternate explanation for what this piece of paper says – "What is it?" Tone doesn't have to testify to it and we don't have to put him on the stand, but we can certainly suggest the alternate explanation to the jury.

Granof: That's a lot of money.

Zuckerman: Yes, and we could come up with nothing, and without invading the privilege, Tone was no help. He basically had no memory of these events. And it got to the point where in order to create an epiphany, I took "The Notes" and blew them up on 32 x 48 inch poster board, and put the poster board right smack in the corner of my office in front of my desk – where it was for months - believing that if I spent long enough looking at it, long enough thinking about it, that at some point as sometimes happens in the middle of the night when you least expect it, you get this crazy epiphany that it could have meant this. Week after week and month after month passed, and we could come up with no satisfactory explanation for what a person might have heard that would cause the person to write "The Notes" in this fashion. Now

the owner of the company didn't testify so "The Notes" were not –-

Granof: You say the owner – the new owner or the old owner?

Zuckerman: The old owner, who told Tone the information in "The Notes," did not testify. So "The Notes" were just one document buried in the record. The dynamic of the case was such that we had destroyed the witnesses; we, I think, clearly outargued the government in our main closing argument; but unfortunately the government, in its rebuttal, spent about 20 minutes on "The Notes." The prosecutor said, in effect, "You got to look at these notes because that's just the handwritten confession." We were told the initial vote of the jury was 7 to 5 for acquittal, because the 7 jurors did not look at "The Notes." One of the 5 voting for a conviction went to "The Notes," and the jury returned a verdict of guilty.

Granof: And you didn't put Tone on the stand?

Zuckerman: Tone did not testify. We put on seven character witnesses, including Calvin Hill, Carm Cozza who was the renowned coach of the Yale football team from 1965-96, a federal bankruptcy judge, a number of very prominent businessmen, and some philanthropists – an extraordinary group. Judge Buchwald could not have been more dismissive in her body language of the character witnesses. It was a very frustrating experience. The jury came back and convicted. We took an appeal to the Second Circuit and lost. Tone received a sentence of 10 years.

Zuckerman: Aitan argued the appeal. Aitan and I escorted Tone to the federal correctional center in the minimum security camp in Minnesota where he was designated to serve his 10 years. He adjusted well. About two years into his sentence, he developed problems with his hips and was transferred to the Federal Medical Center in Rochester, Minnesota, where he's been for the last three years having sustained a double hip replacement, having now some heart problems. We are trying to get him into the compassionate release

program that now exists for older inmates who have served at least half of their sentence, where the sentence is for a non-violent offense, and where they have very substantial health problems.

Granof: How old is he now?

Zuckerman: He is approaching 70 – 69 and change.

Granof: Should have a good case on that.

Zuckerman: And it was an awful case. It's a case that was awful – putting aside I think Tone fundamentally believes that he was innocent. I think you could argue that he was innocent. I think – I appreciate the intellectual force of the government's argument – that "The Notes" rather reflect that he knew something that he shouldn't have known and that technically pushed him across the line. What was so frustrating to me about the case, as you can imagine from my telling of the story, is how capricious his involvement in this case was.

Granof: How could Tone afford you guys? I mean it was a lot of legal talent at the time.

Zuckerman: He had D&O insurance – Directors and Officers Insurance. Again, I don't know that we've spoken about this before, but in the scheme of things, even more important than your factual innocence as an indicator of your ability to surmount criminal legal problems, is your ability to call on D&O insurance or advancement of legal fees by your company to support your defense. I think, in many respects, it is the single most critical circumstance that exists when an individual has a real serious problem. As witness my next story which is indicative of that.

Granof: I still have a question that's bothering me, and it is that Tone Grant is not a naïve bumpkin. I mean, he's well educated, been to law school, had experience as an executive even though not on the financial end of things,

but even so if a significant amount of his wealth or all of his wealth was tied up in this company and he believes his worth – I mean, first of all you would think that if you were worth millions of dollars –

Zuckerman: I hear you and again I don't want to invade the privilege so I will just speak in generalities. I think the vagaries of the human personality are such, that for many people they are just not sensitive to matters of money or their own personal wealth. They're excessively trusting, they're supremely uncritical when it comes to financial affairs and naïve, and there is not necessarily a correlation between (1) a Yale education, a Vanderbilt Law School education, some experience in the financial services industry, and (2) the acuity that's required to see that something may be amiss. That's all – that's all that I want to say. When you – bumpkin is the wrong term – but I am convinced that, in his heart, he did not sense that anything he did, or what his partner told him about, was violative of the law. He may have been wrong, but I do not believe that he felt that he had violated the law in any respect.

Granof: But, you know, I take your point on this because it seems to me that there are people who are smart and don't have a particular interest in finance. They say "I'm interested in X or this part of the business or this area that I'm really interested in and I do well in, and I trust these financial guys. That's why I don't have to pay attention because I think I've got really good people doing this." It really never occurs to them that the people that you trust would be engaged in fraud. But I can see that it's hard to explain.

Zuckerman: I respect Tone and indeed love him and feel very bad for what happened to him and don't want to invade the privilege. And I want only to discuss what's on the public record. But I do believe that he genuinely, genuinely in his soul, believed and still believes that he did not do anything wrong. I think what the case posed, what this fabric of evidence revealed that the jury could not look away from, what a common sense view of the case suggested one should conclude, is this: "Somebody who is told, in essence, that there

were two sets of books should have known that something was rotten there."

Granof: I've got another question. Did you consider putting him on the stand? You probably considered it, but did you seriously consider it?

Zuckerman: No.

Granof: Why not?

Zuckerman: Again, I want to preserve as much of it as I can – I mean all of it I need to preserve. We'd done some mock jury work – mock jury testing – and the results were such that we felt that we could not put him on the stand.

Granof: So he would not have come across as a very persuasive witness?

Zuckerman: That was our judgment.

Granof: I guess that's the judgment you always have to make and I think that hurt your case as well – it had to.

Zuckerman: Well, I think not. I think even if he had come across as persuasive – let me put it to you this way, the number of times that a witness takes the stand and helps himself is miniscule.

Granof: Oh, that's interesting.

Zuckerman: It's a rarity, and the conventional wisdom is and it's correct, that if the government has an iffy case, you're far better off keeping your client off the stand. In my experience I believe the conventional wisdom to be true - generally my experience is to honor the presumption of innocence. I don't feel that the defendant has to counter the element of scrutiny in order to be acquitted. The jury will acquit a defendant if the government's case is weak, even when the defendant does not take the stand. Indeed, 98% of the time when you're faced with a weak government case, and you put a defendant on

the stand, it moves the needle in the government's favor.

Granof: This is a fascinating case, and I have one final question. You didn't put Tone Grant on the stand, but did you tell the jury anything in your argument about "The Notes?" And if so, what did you say?

Zuckerman: That's really a good question and this is the answer. I had indicated before that "The Notes" came into evidence. I don't think they were published – they were not put up on the screen when they came into evidence - because they didn't come into evidence through a witness. Neither of the two people who attended the meeting testified. "The Notes" were part of a large package of documentary material that came into evidence. The "Notes" were also not a part of the government's opening statement, and the prosecutor did not refer to "The Notes" in his opening remarks. As a result, we were left with a choice – do we deal with "The Notes" or don't we deal with "The Notes" in our closing? Because to that point, although "The Notes" were in evidence, they were completely unmentioned to the jury.

Granof: So you sort of got sandbagged by the government in their closing rebuttal?

Zuckerman: We made a choice, and not the choice I would have made again. Obviously, I'm not hard-headed. But we made a choice to leave "The Notes" alone in the hopes that they would not occupy a significant part of the government's closing or the jury's thinking and, in retrospect, I would not do it the same way again.

Granof: This is a case where hindsight is wonderful.

Zuckerman: Yes. There was no good choice. There was nothing really useful to say about "The Notes," except that it was not clear what they meant, and there was no testimony given to clarify what they meant. If you were to see "The Notes," you would think that they were pretty clear in what they meant. We succeeded to a degree with our decision to avoid "The Notes" in closing

argument since, as I said, the first vote of the jury was 7 to 5 for acquittal. We were told of this split by another lawyer who had interviewed the jury. And that was, in a personal sense, the case. In both a personal sense and a professional sense, this case was very frustrating for me, very hurtful. I respect and care for Tone a great deal. I've told Tone that one of my obligations as a lawyer is to sit here at this desk until he can come into this office again, and that will happen sometime, I hope, in the next three years, sooner rather than later, if his health holds out and we will see.

Granof: Was he the only defendant?

Zuckerman: In this case?

Granof: In that case – yes.

Zuckerman: Only two individuals went to trial. Two or three financial people pled. The president pled and got 16 years – his partner. He should never have received 10 years, but because the president got 16 years and had pled earlier and did not cooperate, his 10-year sentence was pegged to that. It was far too harsh. And the general counsel or the outside counsel, Joe Collins, who round-tripped the money at year-end – at Mayer Brown he was – by creating purportedly sham transactions.

Granof: Oh, so he was the general counsel, but he was a partner at Mayer Brown?

Zuckerman: He was the outside counsel at Mayer Brown who handled the year-end legal transactions that moved money in this circular non-functional way.

Granof: So he was a partner at Mayer Brown and he was engaged in this fraud?

Zuckerman: That's what the jury found. He was tried separately. He was convicted and received a seven-year sentence. The first time his conviction was reversed, retried, convicted again, received a one-year sentence from a sympathetic judge but he was – Joe Collins was convicted of being the lawyer who

technically handled the round-tripping. Very well-known case. Very sad.

Granof: Well, we spent a lot of the hour on this case partly because it's such an interesting case.

Zuckerman: Let me move to some non-legal stuff in my life that you should find, I hope, interesting and those who listen to this will find interesting. There are two items, and we can cover at least one today and that is the creation of what is now known as the Flannery Lecture Series, named after Judge Thomas Flannery, who died around 2007, and who was a sitting United States District Court Judge for 35 to 40 years – probably second in tenure to Bill Bryant, Judge William Bryant, who is the longest sitting Judge in the jurisdiction. Judge Flannery served as the U.S. Attorney into the early 1970s. He was, for many of us who came through the U.S. Attorney's Office in the late 60s and early 70s, an iconic figure, a mentor and just a terrific human being. After he died, there was a desire by that group of former Assistant U.S. Attorneys to memorialize his impact on the administration of justice in the District of Columbia by doing something. He was born in a section of Capitol Hill known as "Swampoodle". His father, I believe, was a carpenter. He did not go to college and went into the Army Air Corps, and then directly into Catholic University Law School or vice versa. It's one or the other. He was a practitioner from the mid-1940s onward. He went to the U.S. Attorney's Office in the 50s. He was part of a group of very storied prosecutors in the 50s. He went to a law firm called Hamilton & Hamilton in the 60s and was called back to be the United States Attorney for the District of Columbia in about 1969. He remained the U.S. Attorney for 2-3 years, and then became a United States District Court Judge. Referring back to the *Tantillo* case which I described earlier to you – the criminal wiretap conspiracy involving drugs with about fifty indictees that I handled as an Assistant U.S. Attorney – it was Judge Flannery who put me on the case and it was he who tried the case with me and two others. Therefore, I had fairly intense contact with the judge in 1970 and 1971. I

also came to know his daughter, Irene, very well. I always visualized him, for those who are fans of old-time movies, as having the mien of Gary Cooper in *High Noon.* He was a tall man. He was soft-spoken. He was very decent and he knew right from wrong. He was a man with a tremendous sense of integrity. And he touched many of us who were in the U.S. Attorney's in the early 1970s greatly. In 2009, a group of former Assistant U.S. Attorneys who had served under Judge Flannery set about to create a lecture series in his honor, believing, that it would be more of a living memorial than a plaque, and would have some functioning benefit to the City. Two of his acolytes were on the U.S. District Court bench at that time, Judge Paul Friedman and Royce Lamberth, who was the Chief Judge. They were extremely supportive, and indeed helped to engineer the process of the program. We had a number of our colleagues who also contributed their time. For this record I give you four – Jim Lyons and Phil Kellogg, who actually I was partners with in the early 70s for a brief sliver of time, Dan Toomey and Steve Grafman. I was nominally, I suppose, the chairman because I, unlike most of them, have a law firm and the law firm can cover the expenses and logistics of a lot of this stuff. It made sense that we do it here and it be superintended principally by me. This lecture series has become a successful institution in the life of the city. The lectures are now given in October and November. The first year we had Chief Judge Royce Lamberth who spoke. The lectures are given in the Ceremonial Courtroom. They are attended by anywhere from three- to four-hundred people. At times we use an overflow courtroom. We had Chief Judge Lamberth the first year. The second year it was Justice Scalia. The third year, I think, it was former U.S. Attorney Earl Silbert, who also was an Assistant U.S Attorney during Judge Flannery's tenure as the United States Attorney. The fourth year was former Senator George Mitchell. Last year was SEC Chair Mary Jo White, and this year was former FBI Director Bob Mueller. We've had preliminary speakers that have included Eric Holder, Ron Machen, Irv Nathan and others. It's a joyous event in Judge Flannery's memory. He is remembered.

The speeches are provocative at times. At times, they are recycled speeches that people have given four or five times earlier, but it's a nice thing. It's followed by a reception in the Atrium of the United States Courthouse. It has held this old group of assistants together and it's something that's – it's a nice thing. It's something I'm proud of. So, it has worked, I think, and we're going to do it again next year. We'll see how long we can do it.

Granof: It sounds like a wonderful thing.

Zuckerman: The second thing in my life that I want to talk about – we can talk about some more cases next week – is the development of our current New York office, because that is a signal event in the life of our boutique litigation firm, and it deserves a 5- or 10-minute discussion. It has been my desire that the firm have a New York office for twenty years. We began a New York presence in the early 90s with Ed Little and ran that office until about 2000 or 2002 when Ed departed for Hughes, Hubbard and Reed. After Ed left, the office fragmented, and we stumbled along with a skeletal group of lawyers. About three or four years ago, Steve Cohen, a colleague of mine who is probably a half generation younger, came to me and said that he was leaving his position as the principal aide to Andrew Cuomo. One of the options that he wanted to consider was re-opening our New York office. Steve had been an Assistant U.S. Attorney, had been a principal assistant to Andrew Cuomo when Cuomo was the Attorney General, had been a partner at Kronish Lieb, and was the Chief of Staff – and a very powerful person in that position – for Andrew Cuomo, when Cuomo was Governor. We hired Steve to be a major partner in our re-opened New York office – about four years ago, I'm guessing. We also hired a number of very prominent individuals – Paul Shechtman, who is a very prominent criminal lawyer in New York City, and Andy Tomback, who is a very prominent lawyer, Mitra Hormozi from Kirkland & Ellis, and a wonderful woman, Barbara Jones, who was a long-time and revered sitting federal judge in the Southern District of New York. The New York office, in the last four years under the tutelage of Jim Sottile,

who has really run the office, and under the tutelage of Graeme Bush in D.C., our Managing Partner, has grown to almost twenty lawyers. Barbara's practice has grown and, among other things, she has just concluded the Ray Rice - Roger Goodell NFL arbitration appeal, in which Mr. Rice and Mr. Goodell and others appeared and testified before her.

Granof: So, she was the arbitrator?

Zuckerman: She was the arbitrator and the hearing was in our New York office. It is pleasing to us and I think it is a mark of the success and growth of the firm that that office is very robust. The growth of the new York office is another event in the last 5 or 6 years that I'm very pleased about.

Granof: And, what role did you play? Did you do some of the recruiting?

Zuckerman: It's very interesting. I was the contact for Steve Cohen, but the –

Granof: And how did you know him?

Zuckerman: I have known Steve for 25 years from the time he was a young partner at Kronish Lieb, and we had done work together. I had referred him cases and thought the world of him, and we stayed in contact in one respect or another. But the lawyers who were around at the beginning of the firm are now 70 or older and have a position in the firm, forgive me if I've said this before, much like either the Queen of England or the House of Lords. There is a certain moral suasion we have, and there is a certain, not insubstantial, economic contribution that many of us make, but the management of the firm, like any institution, is best handled by people who are younger than we and invested for much longer periods of time in the future than we. Regarding the revival of the New York office, I made certain initial contacts, and then trusted the managers of the firm to really follow up on the project and make it happen. In answer to your question, I spent a lot of time with Steve, but the nitty-gritty of getting him back in was really in Graeme's

hands, and, at some point, we won't do it today, but at some point when you finish off this whole history, it will be interesting to you and to those who listen perhaps, because you will hear the perspective I have now forty years into the life of the firm from a time when it was just I, to a time in which I'm getting to the point where the firm will exist quite well, and perhaps even better, without me. You feel as if – "full circle" is the wrong expression. You've gone across an extraordinarily broad spectrum from being the creative force at the time of the "Big Bang" to being indispensable to being reasonably dispensable to being someone who should be dispensed with.

Granof: I think you're a ways from that.

Zuckerman: I don't know, but it is my closing chapter.

Granof: Well, it's something that you've created and you can look back on with great pride.

Zuckerman: Sure, but it's an interesting, intellectual and indeed emotional journey and topic that you wrestle with. Anyway, that's a good stopping point.

Granof: Okay. This concludes interview number 9.