NINTH JUDICIAL CIRCUIT HISTORICAL SOCIETY

ORAL HISTORY PROGRAM

INTERVIEW OF JACK STUTMAN, ESQ.

of Stutman, Treister & Glatt, Los Angeles

and

with KENNETH KLEE, ESQ.

of Stutman, Treister & Glatt, Los Angeles

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SUBJECT: BANKRUPTCY PRACTICE

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SHUTAN: We are gathered here in the Sidley & Austin offices on May 9, 1989. The speaker is Robert H. Shutan of Sidley & Austin who has been asked to be the moderator in this process for the Ninth Judicial Circuit Historical Society. Our interviewee and main participant here is Mr. Jack Stutman, a partner of Stutman, Treister & Glatt of Los Angeles together with his colleague and partner Kenneth Klee of the same firm. We have been asked to explore in an informal way the recollections and remembrances of the bankruptcy practice in the Los Angeles area and in the Ninth Judicial Circuit for the last 40 years or so, actually since about the end of World War II. Jack Stutman is a prize selection to do this because he has been there all of this time and been at the forefront of the bankruptcy practice.

SHUTAN: Jack, before we get into the heart of it, let's take a brief moment to talk about your background, where you got your legal education and when you came to Los Angeles and when you started in Los Angeles.

STUTMAN: I came to Los Angeles at the end of 1945, beginning of 1946, my background is Harvard law school and I went into the entertainment business,

entertainment practice that is to say, at which time I got involved in a couple of bankruptcy cases and the subject fascinated me so I left my then firm and joined Francis Quittner. The name of the firm was Quittner, Stutman & Shutan. Shutan left after a number of years and the firm was then Quittner & Stutman and it began to grow from there. In 1947, bankruptcy practice was looked upon as not of equal quality with other branches of the law. The practice was in a bad state in the sense that the so-called referees in bankruptcy were no longer on a commission basis, that is to say, prior to this time they got a commission on assets handled in their estates. That practice was stopped and they were put on a salary basis. But even in those days, the amount of salary, which was $10,000 a year, was ridiculous particularly because they had no retirement benefits.

SHUTAN: That change, Jack, actually took place somewhere right around 1947 or 1948.

STUTMAN: That's correct. Consequently you couldn't attract what we would suggest are higher types into the job of referee. In those days the district judges used to appoint the referees in bankruptcy and

they looked down on them actually. One of the problems that we have had in trying to raise the standards of the practice was the federal district judges, who for their own purposes and own reasons, did not want referees in bankruptcy to become judges and be of equal stature with them. The practice at that time had some stigma attached to it. It was an unpleasant process. Creditors did not get what they were entitled to, and debtors were scared and the whole practice had a kind of stigma to it. Now, of course, there no longer is any stigma since all the major firms have bankruptcy departments.

SHUTAN: Jack, in connection with that, before you and I arrived on the scene to practice bankruptcy law, the stigma that you talk about was apparent to some of the congressional people and investigators during the 1930's. And as I recall, just as background, there was an investigation in the early 30's of the relationship between U.S. District Court judges and the receivers that were appointed. And there was some sort of unpleasantness as far as illegalities going on there which the Congress tried to correct, and maybe that was some of the background of the Chandler Act in 1938. That's all before our time

but those investigations did participate in airing some of the stigma.

STUTMAN: There actually were some scandals and some judges were removed and that was part of what led to the Chandler Act in 1938, of course. Our purpose at the beginning was to try to raise the standards of the practice. In fact, we used to joke about the fact that some of the practitioners had not looked in a book since 1898 and we wanted to put this practice on a proper basis so that it could hold its head up and it would be carried on as a legal practice. At the beginning, in 1947, there was a monopoly insofar as the Credit Managers, formerly known as the Board of Trade, was concerned. They gave all of their claims to Craig, Weller & Laugharn. Mr. Laugharn, who was a very capable former referee, used to represent at least 90 percent of the trustees in bankruptcy.

SHUTAN: That was because those who held claims got to do the electing -- the voting of those claims at the first meeting of creditors.

STUTMAN: That's correct. That system no longer prevails. With the introduction of the United States Trustee -- but I'll let Mr. Klee talk about that. We did

everything we could in those days to keep out of the bankruptcy court because it was not a very pleasant place and because the judges were not that wonderful. At least 60 percent of my practice was out of court. I used to use what I called "friendly persuasion." It was really relatively simple. All you had to do was hold up your hand and ask the creditors assembled at any particular meeting how much they had received lately from a bankruptcy proceeding. They went along with out-of-court extensions.

SHUTAN: You're talking of your perspective of usually representing debtors at that point.

STUTMAN: That's right, that's right. Of course, there were some cases that were too complicated to be handled out of court. When you had a case involving 56 stores -- you could not -- you had to have court power to stop such things as turning off the lights in one of the stores. In any event, we tried to improve the practice; and one of the people who was very active in this was Francis F. Quittner, who was actually a pioneer in debtor representation. There was some question as to whether or not one could make a living at this practice but Francis showed us the way. Both

Shutan and myself were interested in improving the practice and we did look in a book once in a while, which was rare among the people who were then in practice who were primarily collection lawyers who used their claims to elect the trustee and then the trustee would employ them as counsel -- a system which was very bad.

SHUTAN: Jack, let me interrupt you. You remember the time I'm sure when I had a legal matter before Referee Hugh Dixon -- somewhere about 1947 or 48, and it was really a question of law -- and my matter was on a crowded calendar. And when my case was called, I came to the counsel table with two or three case books. And Referee Hugh Dixon leaned over and said, "I'm not going to have any of that in my courtroom" -- (much laughter. . .) -- and wouldn't let me refer to it. And this is literally true. You remember that? But Jack, I want to ask you a question because lawyers today think of the bankruptcy court as a court of somewhat broad jurisdiction and I wanted to ask you to make a comment or two about the limit of jurisdiction under the Bankruptcy Act.

STUTMAN: In those days we had what we called summary and plenary jurisdiction and the referees in

bankruptcy only had summary jurisdiction, which meant that you had to go to another court to recover a voidable preference, for example, or collect accounts receivable or setting aside transfers. You had to go to another court. And that made it relatively easy for counsel for defendants to settle these cases; in addition to which, of course, the rules on preferences were quite elaborate and required reasonable cause to believe that the debtor was in financial difficulty, which, of course, has been changed now but that was very hard to prove. In fact, Judge Yankowich had one case where he actually got off the bench and Mr. Shutan was trying an avoidable preference action. He actually got off the bench and accosted the bankrupt on the witness stand and said "You're a Big Shot, you didn't tell anybody that you were in financial trouble" and, therefore, Mr. Shutan lost that case. (laughter...) One of the problems was that the federal district judges -- and one cannot be too critical since they had their own calendars and their own problems with the Speedy Trial Act and so on -- decided that they didn't want to be bothered with bankruptcy and so they appointed one of their number to sit on all bankruptcy reviews. Unfortunately....

SHUTAN: The review is when somebody aggrieved by a ruling of a bankruptcy referee wanted to appeal, he had to go up by way of review, is that right?

STUTMAN: That is correct. We kept track of these so-called reviews, and the district judge affirmed -- over the period of time that we checked these numbers -- 94.6 percent he affirmed the referee. That many times. As one who practiced in this field and came up before the district judge, it was very disheartening. As a matter of fact, that judge, in addition to not understanding his position as a reviewing judge, would call the referee and get his opinion as to whether or not there were any merits to the appeal.

SHUTAN: May I speculate a guess as to which U.S. District Court Judge -- named Harry Westover you're talking about?

STUTMAN: That's him.

SHUTAN: Jack, I remember being before Judge Westover on review and he would turn to one or the other of opposing counsel and say, "Counsel, you know the bankruptcy referees are our experts on that, the

District Judges look to the bankruptcy referees for their guidance in bankruptcy law so I don't know why I should reverse him." Remember that?

STUTMAN: Yes. Well, as I was suggesting, it was relatively easy to get creditors to go along on out-of-court extensions. Maybe we were ahead of our time because this was a form of alternate dispute resolution which has come into vogue recently. But, we stayed out of the bankruptcy court whenever we could because of the nature of the practice at that time. Little by little, we were helpful, I hope, in improving the practice by getting raises for the bankruptcy referees and by trying to add to the dignity of the court. At one time they were permitted to wear robes which they had never had before. Of course, one district judge said, "they should also wear wigs while they're at it." But that was their attitude, they looked down upon the bankruptcy practice, they didn't want to have any part of it and they weren't helpful. As I have suggested, there were complicated matters where you simply had to file. There was no way around it. When you ran into situations where -- while the spirit of the Act called for debtors to be left in possession, they usually appointed receivers in Chapter 11 cases.

I recall one of your cases Bob, where the referee said, "I'm going to close this business up unless you consent to the appointment of a receiver." Whereupon you said, "Fine, appoint a receiver." And the next day the receiver closed the business. (laughter...) Well, that was nonsense because the Bankruptcy Act provided, you know, that the debtor be left in possession unless there was adequate cause for the appointment of a receiver. Consequently, every time you filed a Chapter 11 and we filed a lot of them -- you had to fight to keep the debtor in possession. Or, if you had a receiver, he was useless insofar as the operation was concerned because he didn't know anything about the business as such.

SHUTAN: Jack, I'm having a tough time trying to recall instances in the 1950's and the first part of the 1960's where there was any extended operation by debtor-in-possession -- out of a Los Angeles bankruptcy.

STUTMAN: Well, those cases were really a handful.

KLEE: Is that because the receivers were appointed under a patronage kind of system and they would just shut down the businesses?

SHUTAN: If I can take a crack at that, I think that the bankruptcy referees were distrustful of operating cases. In those days the bankruptcy referees had to countersign all the checks. It was a big production for them to be involved in an operating case. They finally worked out a procedure to have a separate payroll account and they countersigned one check from the general account to the payroll account, with a list (seeing a list) of the people that were to be paid. They were involved in every operation. These were not just judicial functions. The bankruptcy referees were very much involved in the administrative functions and they were uncomfortable. New York bankruptcy referee Aza Herzog came out to one bankruptcy judges conference and very roughly chewed out the Los Angeles or the California referees for appointing receivers all the time. They didn't do that in the Southern District of New York. They used creditors' committees for control.

KLEE: Section 332 of Chapter 11 said that the court could appoint a receiver on application of a party

in interest. Did the courts do this sua sponte in Southern California?

STUTMAN: Yes.

SHUTAN: Yes.

KLEE: And was this a Los Angeles phenomenon or did this happen in San Francisco and other parts of the Ninth Circuit as well, do you remember?

SHUTAN: I don't remember but I don't remember being aware of having called to my attention a discrepancy within California. That's the best way I can answer that. And the receivers were patronage receivers, I don't mean that as a dirty word, I just mean that each of the referees -- and incidentally, when we are talking about the 1950's, we are talking about four referees in the City of Los Angeles, not the multitude that we have now.

STUTMAN: But then, we had four times as many cases as New York City.

SHUTAN: And each referee had like two favorite bankruptcy lawyers that did administrative work that he used

as receiver and trustee -- not for any improper reasons at all but because these receivers knew what the bankruptcy referee wanted and didn't give them any lip at all and did exactly what they wanted. But like in the case that Jack cited before in an operating case a business that might well have been saved -- the Judge's initials are Joseph J. Rifkind -- appointed one of his regular receivers in this operating case and the receiver -- we had to get court approval to pay his salary to the officers and the Judge sat on that for a long time, and the receiver through whom it had been presented said he couldn't do anything about it. Finally, when we pressed, the receiver closed the business. I don't say it was directly related and the receiver apologized (I'm not naming him) ... he apologized to me and said "the Judge wanted to close." When I say the Judge, even in those days the referees were given the complimentary title of judge.

KLEE: By the practitioners who appeared before them certainly not by the district judges. O.K. Now were the receivers compensated out of the estate? Did they get a percentage of the assets they administered?

STUTMAN: Yes.

KLEE: So really this might have been a plum for them to get into the bigger business cases -- a way to reward them for taking some of the other cases as trustees.

SHUTAN: Yes. There certainly was the feeling that the regular receivers on the referees panel took every case, just about every case that the referee gave them and a lot of it was no asset cases, and they got like $5.00 out of the filing fee out each of the "no-assets." So the referee would feel that to keep these guys happy and working for them as receivers that when there was a juicy one around, by that I mean, that provided assets that would provide a fee to the receiver, that they owed it to their receiver to put him in that even though the attorney for the debtor was saying this will be destructive and there won't be any chance of reorganization or arrangement if we are saddled with the receiver on that.

KLEE: Well, it's interesting because today some people think that the U.S. Trustee does the same thing. In Chapter 11 cases today there is no requirement if a trustee is going to be appointed that the

trustee come off the panel that serves in the no-asset Chapter 7 cases. But the U.S. Trustee as a way of inducing people to serve on that Chapter 7 panel -- will only rarely appoint a Chapter 11 trustee who doesn't sit on the panel.

SHUTAN: Yes, well, that's right. It's called "Morale Building."

I want to go back to the late 40's and 50's when you were representing debtors or even creditors and trying to keep a liquidation or a settlement, a composition out of the bankruptcy courts. There was an alternative route that was frequently used. Do you want to say anything about that?

STUTMAN: Well, one of the ways of liquidating a business was through a general assignment for the benefit of creditors. We used this occasionally, but that was an act of bankruptcy and prompted people to file involuntaries against the debtor. There was a thought that assignments paid less than -- had less expense and cost less to operate than a bankruptcy. But those statistics are not accurate because the bankruptcy court has to take everything, whereas assignees -- responsible

assignees only took cases where there was a benefit to the creditors.

KLEE: The unsecured creditors.

STUTMAN: Yes. The monopoly by the Credit Managers Association was dissolved around 1950 as a result of persuasion of the new management to the effect that the Association, which was a nonprofit association, could make more money by spreading their work among lawyers instead of handling all of their cases through one firm. Thereafter, quite a number of assignments for the benefit of creditors were made to the association and they worked out very well but there is a serious question as to whether they cost less or not because of what I've suggested. The truth is that assignments stood up generally because there was the problem of double cost of administration of the assignment and the bankruptcy and creditors were persuaded to leave the situation as it was. However, occasionally involuntaries were filed against the debtor. I remember one case where there was a general assignment for the benefit of creditors. Three creditors filed an involuntary petition in bankruptcy. Francis Quittner filed a Chapter XI plan which called for a general

assignment for the benefit of creditors and they confirmed it. (laughter..) And Judge Rifkind said, "Can we do that?" Francis said, "Yes." So they did. But that was rare.

SHUTAN: Jack, as I recall, you and I were more frequently debtor lawyers and were able to get some mileage for our debtor-clients out of the poor ways that liquidations were handled in the bankruptcy courts and the poor returns to creditors. And frequently debtor's lawyers would call a general meeting of creditors informally, there in the lawyers' offices or maybe under the auspices of the Credit Managers Association, and would propose some sort of a settlement program, a payout program or a composition. And the alternative would be a very real threat of a voluntary bankruptcy and liquidation in the bankruptcy courts and it was almost always -- we were pretty well able to judge that we could provide more to the creditors by a settlement that really was of some benefit to the client-debtor and its new sponsor, let's say, and to the creditors than a bankruptcy would be.

STUTMAN: That's correct. Of course the recent legislation has taken away a potent weapon which we had in those days as counsel for debtors, namely

"suicide." Now creditors can propose a plan. In those days only the debtor could propose a plan and that was a very potent weapon because if the debtor threw up his hands and said to hell with it, there was very little that the creditors could do. They weren't about to put in fresh money and operate the business.

SHUTAN: Jack, you referred to the fact that Francis Quittner and others of us worked hard in the late 1940's and early 50's to improve the legal quality of the bankruptcy practice in Los Angeles. Are you able to elaborate on that at all?

STUTMAN: Well, one of the things that we did was to found the Bankruptcy Study Group. That was around 1950, I don't remember the exact year. But Francis Quittner was a driving force in this and regularly reported to the group what the National Bankruptcy Conference was doing. We also had a publication which reported unreported cases of the referees which was helpful to practitioners. This was all part of our effort to improve the quality of the practice. The Bankruptcy Study Group, unfortunately, was composed of lawyers and non-lawyers because many of the receivers, or at least some of the receivers, were non-lawyers.

Thereafter, it was determined, in order to be effective, the Bankruptcy Study Group should be dissolved and the County Bar Association started the Commercial Law and Bankruptcy Section which was a committee at the start of 25 people, all lawyers, which I chaired in 1952. That committee became a section and there are now approximately 730 lawyers who are members of the Commercial Law and Bankruptcy Section of the Los Angeles County Bar Association. The theory being that the legislature would not pay any attention to proposed changes in the law which came from layman so that we needed an all-lawyer cast. Here again our purpose was to improve the quality of the bankruptcy practice and to make suggestions for reform of various sections of the act.

SHUTAN: Also at the meetings there were often panels or speakers that would provide education and updating on bankruptcy and insolvency topics to the membership, wasn't it?

STUTMAN: That is correct. One of the driving forces for forming the Commercial Law and Bankruptcy Section was the fact that at one of our final meetings, Referee Brink said that he observed there was more

drinking than studying in the Bankruptcy Study Group and we terminated that.

SHUTAN: He stated that more as an observation than an objection, I think, though.

STUTMAN: Yes, that's correct. (laughter...)

SHUTAN: Jack, have you observed over these years a change in the manner in which lawyers who are engaged in the bankruptcy practice practice? By that I mean, whether there were more single practitioners or small offices practicing. And as it changed, where big offices are in it, was it more limited to specialists before? Do you want to comment about the transition into major firms of the bankruptcy practice transition?

STUTMAN: Well, in the early days, in the 50's, the bankruptcy practice was limited to small firms who did nothing else. Subsequently, as the practice grew and as major clients found it necessary to file chapter proceedings, many of the big firms, the major firms, developed departments of their own. And that's why I've jokingly referred to the fact that while there used to be "stigma," there isn't any more because the big firms are doing it.

SHUTAN: Back in the early 50's somebody from a major firm would call you up and say, "Jack, I've got one of these bankruptcy matters. Are you guys -- would you handle it for me? We don't want to get involved in that court. Can I send a client over to you?" And, as the cases got juicier and juicier from the standpoint of the amount of assets and the amount of fees, in the course of like the 1970's, maybe not much before that, the establishment firms realized that they were passing up a lot of good marketing and practice opportunities by referring on bankruptcy matters and they started obtaining bankruptcy experts to be part of their firm. That changed the nature of your practice a little bit, didn't it?

STUTMAN: Well, it did. I lost some very important clients. I had had some referrals from Gibson, Dunn & Crutcher for 30 some years and O'Melveny, and Latham, etc., but some of these firms have not as yet opened up their own departments and we still get referrals from them.

KLEE: When you got referrals in the 50's did they charge forwarding fees?

STUTMAN: Well, forwarding fees were paid and they were proper, according to the then Bankruptcy Act, calling for division of responsibility, but we put a stop to that practice. I don't remember exactly when, but we did. And we don't pay any forwarding fees now and we don't take any.

SHUTAN: But as I recall, Jack, in the 1940's and the 50's and maybe somewhere into the 60's, a substantial percentage of almost all fees that bankruptcy specialists got were shared with the general practitioner whose clients that the bankruptcy firm represented.

STUTMAN: That's correct.

SHUTAN: And that made a substantial negative impression on the annual returns of those bankruptcy lawyers.

STUTMAN: When I was a member of the Board of Governors of the State Bar of California, the subject of forwarding fees came up and I opposed forwarding fees on the ground that they cost a client more money. And I was overruled. So it is perfectly proper under the State Bar of California to pay forwarding fees.

KLEE: But Section 504 of the Bankruptcy Code now prohibits it on a federal basis and nationally.

SHUTAN: And the State Bar requires disclosure and consent.

STUTMAN: Of course. We are still getting referrals from major firms where they have a conflict of interest or the matter is one that they prefer that we handle. I know that Ken still gets cases from Gibson, Dunn & Crutcher occasionally. But there seems to be enough business for everybody because we are very busy.

SHUTAN: Well, hasn't -- in addition to the changes in the bankruptcy laws -- hasn't the nature of the bankruptcy practice from the standpoint of the size of the cases involved, and the importance of the cases involved, undergone quite an evolution over the last 15 years or so, Jack?

STUTMAN: Well, I had probably the largest failure on the West Coast in Fox Markets which involved only $17 million. That's relatively nothing now compared to the size of the cases today.

SHUTAN: What year was it?

STUTMAN: In 1961. We confirmed that one, you may recall, and I got what was then . . . (interrupted...)

SHUTAN: Only after making a satisfactory deal with my client-landlord. (both laughing...)

STUTMAN: Well, I always refer to Fox Markets as the first case of Chapter XXI -- that was a X on top of an XI, and we finally put it together. Believe me, I had ulcers and everything else in that case. The acquiring company, Food Fair, was very difficult to deal with. Fortunately, about 12 years later they filed their own Chapter 11, so they got what they deserved for being bad people. Anyway, you couldn't handle Fox Markets with 56 supermarkets outside of court; you had to go into a chapter proceeding. And, of course, there was a receiver appointed. Couldn't fight that. That was in the early 60's.

SHUTAN: Do you think if Fox Markets was filed today under the exact same circumstances that there would be a -- of course, it would now be a Chapter 11 trustee -- but do you think one would be appointed?

STUTMAN: No. First of all, the people who operated the business required fresh capital, and I devised an

arrangement where Food Fair, which was the acquiring company, could take over, suffer any losses, take any profits and they put in $3 or $4 million into the operation which was badly needed. The theory was that being on the inside they could see whether it was a good business or not, and they subsequently acquired it. Of course, the way they acquired it was through an issuance of stock for claims which was very salutary for all concerned.

SHUTAN: Let me ask you this, and Ken too, he may well have something to add in here. To illustrate the difference of being a bankruptcy lawyer under the Code in the 1980's and a bankruptcy lawyer under the Act in the 1960's -- and the question of continuing an operation, the question of receiver or trustee -- how would you highlight the main differences now from then?

STUTMAN: Well, in the 50's and 60's when you had an operating Chapter XI, the chances of avoiding receivership, particularly in large cases, was nil. You simply got used to that fact. Fortunately in the Fox Markets case the receiver did everything that the operator wanted him to do, and he was right.

KLEE: He actually operated the business?

STUTMAN: The receiver operated the business, yes. As a matter of fact, his fee in that case was in excess of $350,000 because there were millions of dollars going through the estate. The judge didn't have to worry about the administration. What they were concerned about were insolvent administrations and that's why the bulk of them didn't have the courage to permit the operation to continue with losses.

SHUTAN: Well, you had that kind of an experience in a case involving Titan missile bases, didn't you?

STUTMAN: That's correct. As a matter of fact, our client was the fourth tier subcontractor and the referee was looking for every excuse to close that business down.

SHUTAN: You're talking about Idaho-Maryland Industries?

STUTMAN: Yes.

SHUTAN: And the referee's initials were Joseph J. Rifkind.

STUTMAN: That is correct. They even had the receiver come in and demonstrate that we were losing money and all that the receiver had was a cash-in and cash-out. There was not a balance sheet and I had to litigate that. You can imagine having the receiver on the stand and pointing out to him that he had given no credence to accounts receivable, the working process or any of those other things and therefore, the so-called balance sheet was not a balance sheet. I have to say something important I think. In that particular case, knowing the tendency of the referee to close down the businesses and because this was a matter of national importance in the defense industry, I tried to get another referee for which I was soundly criticized by the federal judge.

SHUTAN: How did you do that? Did you go up to the district judge?

STUTMAN: I went to the district judge and I said, "This referee likes to close down businesses...."

SHUTAN: You didn't do that alone, now did you?

STUTMAN: Well, I had general counsel with me who knew the judge well and there were other people there, too.

SHUTAN: I think you had counsel for the various creditor groups with you too. There was a whole delegation.

STUTMAN: And the judge really tore my head off for even suggesting that he could vary the low number rule, and I told him that, you know, this was a matter of national importance. And he said, "You should have known better than this. You should know better than to ask me to disqualify that referee." And then he softened up and he said, "but if you have any trouble with him, let me know, come up here any time." So we had to live with this judge who sought every way he could to close this business down.

SHUTAN: You mean the referee?

STUTMAN: Yes, the referee. Finally, we confirmed the plan in spite of the judge, in spite of the referee. And president Kennedy wrote a letter to each one of the companies involved, in which he said that but for the completion of those missile sites, he

would not have been able to deal as firmly as he did with the Russians in Cuba. And I should tell you that referee was very upset because he didn't get one of those letters.

SHUTAN: What about back at the start of our story, like in the late 40's and 50's? You want to recall any of the personalities, the few referees we were familiar with in Los Angeles and the informality of the relationships between the attorneys and the referees?

STUTMAN: Well, if you're referring to chambering, there was a lot of that going on. And in one case, Referee Dixon -- the last one who spoke to him in chambers was the one who prevailed. In any event, we used to try to keep Tom Tobin of Craig, Weller & Laugharn, occupied so that he didn't show up at the first meetings -- we'd talk to him out in the hall about the so-called "Gold" case which involved the concealment of assets. I'm not going to say where they were concealed. We would elect the trustee.....(interruption)

SHUTAN: Are you talking about gems concealed on the person?

STUTMAN: I'm talking about dollar bills...$100 bills concealed on the person, which were subsequently found by a federal marshal lady who discovered them.

KLEE: Sounds like a dirty business.

SHUTAN: Sounds like a body search.

STUTMAN: In any event, the only way we could out vote them was to keep this lawyer occupied while the first meeting went on, and we also had to keep him out of the judges chambers because that was usually fatal. Now we've had better referees since then. One of the very good ones was Benno Brink. David Head was reasonable. A hearing that I once had indicating what the federal judges thought about the bankruptcy practice at that time. This was in San Bernardino in the basement of the building with the exposed pipes. It was in February, the exposed pipes were banging. The judge was Reuben Hunt, referee. He was deaf. His reporter was deaf, McLain, and the guy on the other side of that hearing was deaf and I was the only one who could hear and, of course, I had a World War II hearing problem. And he sent various trustees to

the corners of the room while the pipes were banging and nobody could hear anything.

SHUTAN: You mean to examine the debtors and their respective cases while the litigation was going on in the front of the room?

STUTMAN: That's right.

SHUTAN: I remember that.

STUTMAN: But he was deaf, my opponent was deaf, the reporter was deaf. It was a great morning!

SHUTAN: Well, Jack, I remember one time being in Reuben Hunt's court in the regular courtroom in Los Angeles and Mr. McLain with a hearing aid was his reporter. He wrote with a pen, took shorthand notes with a pen. Reuben Hunt didn't want to wear a hearing aid and my partner, Frank Quittner, was arguing a case and Frank didn't like to be interrupted, even by the judge, so the judge was saying something, Frank Quittner was saying something, and they are both talking at the same time and poor McLain stood up and threw his hands up and said, "Only one at a time, only one at a time." It was quite a scene.

STUTMAN: It was a riot! I found out early on that Reuben Hunt could only hear when you stood at a certain distance away from him and pitched your voice in a certain way. And, frankly ....

SHUTAN: You never told me.

STUTMAN: I never told anybody. I won every case I ever had before him. In fact, he got so fond of me that he invited me to dinner at his home and I didn't know what to do. I mean, that wasn't right.

SHUTAN: What would happen if he didn't sit you where he could hear you? Jack, one of the complaints we used to hear from the general practitioners and one of the reasons they hated the bankruptcy practice and didn't participate in it is that they would say, "Nothing really destroys their morale so much as to be sitting in the courtroom waiting for the bankruptcy referee to come out, and the courtroom full of lawyers and witnesses and so forth, and the judge not coming out until about ten after the hour. And just as the judge comes on the bench opposing counsel, bankruptcy counsel, comes through the doorway, out from having

apparently been in the chambers." And that used to discourage the general practitioners.

STUTMAN: Well, I would like to say that half of the lawyers who referred to me were previous opponents in bankruptcy matters and they said, "I'll never show up in the court again, you can take care of it for me." Now that speaks a lot. Yeah, the quality of justice.

SHUTAN: Yeah. But that was the old days and its changed for the better in quite a great degree, hasn't it?

STUTMAN: That's true, it has.

Well, there are rules today that prohibit ex parte contacts but there are still parts of the country where people who remember the old ways nevertheless go in and "chamber" judges. It doesn't happen much in Southern California.

SHUTAN: No, it doesn't. But one of the excuses in the old days here was when the bankruptcy referees had administrative duties and you'd have a receiver and trustee who had to consult regularly and properly consulted with the judge, and he'd have maybe six or seven matters -- maybe one or two of

which on a given calendar -- he would be a lawyer in a case and in a contested case. So he'd go in and ostensively only talk to the judge about his administrative matters. But it didn't make his opponent in the contested legal matter feel at all comfortable.

KLEE: Well, the referees in those days countersigned checks, didn't they?

SHUTAN: Yeah, and the receiver would go in with the package of checks to sign or talk about or give a proper informal report. That was not improper to do that. How to draw the line between that and talking about the next matter on the calendar they may have had difficulty in drawing that line.

STUTMAN: Well, I remember under the Bankruptcy Act having a bankruptcy judge call me into chambers -- it was a referee -- and he'd start asking me questions about the case. You can remember Judge Moriarity used to do that on a regular basis. (laughter...)

SHUTAN: His name was on the tip of my tongue. As a matter of fact, he was a very conscientious judge but he followed different rules. (Interruption: He had

a good heart!) Including calling up counsel on a matter and talking on the phone about a case.

KLEE: I remember looking at the speed dial in his office on his telephone. He had all the regular bankruptcy lawyers there so in case he wanted to talk to them about a case, he could just punch them right into the phone and get them on the line.

SHUTAN: I remember frequently at 5:45 to 6:00 at night getting a call from Jim Moriarity and I didn't feel like I was his exclusive callee at all. And yet nothing I say about that, or any of us say, would indicate -- he really did it in great innocence as far as -- I mean, I think it was not the right thing to do from the standpoint of ex parte contacts with one counsel, but he really was trying to do the -- make the best decision.

STUTMAN: He felt he could best dispense justice if he knew what the case was all about, and he didn't restrict himself to finding out about it because based on the rules of evidence he, at the beginning of the case, would call up and say, "Now, tell me what's this all about?"

SHUTAN: He also liked to chat. I've had him call me on matters that I was not involved in at all to say, "Bob, what do you think about this?" And at one time he called me and he said, "You know that 'X' (I won't name him) who used to work for you," and this was like 3 or 5 years later -- "he aggravates the hell out of me, you know what he did?" And he'd start talking like that. And I'd say, "Why are you telling me this?" And he'd say, "Well, I just had to share it with somebody and I know that he used to work for you."

KLEE: I remember once being in the back of his courtroom waiting to appear on a matter and he had something going hot and heavy in front of him. And all of a sudden he stopped and he said, "Well, Mr. Klee what do you think about this?"

He would solicit your view even when you were in court and you weren't involved in the matter.

SHUTAN: He didn't do that, but Reuben Hunt did that to me once in a contested matter where former Referee Laugharn was in the room. And Reuben Hunt used to really bow and scrape to Hubert Laugharn. And I knew that Hubert Laugharn had a matter similar to mine where he was on the other side, and as I'm

arguing it, Laugharn walks in and sits down. Laugharn, handsome, tall, steel gray hair, former bankruptcy referee, and he'd say, "Mr. Laugharn, what do you think about that?"

STUTMAN: Yeah. I've had it happen to me, too.

SHUTAN: What about the role of the various bar associations that related to bankruptcy like either the -- maybe not the Bankruptcy Study Group, but the Los Angeles County Bar Committee and Bankruptcy and Commercial Bankruptcy. As far as their role or yours in state or federal legislation and their contributions to improvement of the practice or particularly the bankruptcy practice.

STUTMAN: Well, primarily the County Bar Association was involved with local rules rather than substance (local bankruptcy rules?) that's right. What we did was, we had them study the rules and then had the work presented to the district judges as part of the County Bar Association. So at least they listened to that. They wouldn't listen to the bankruptcy practitioners. Their attitude is really confusing in the sense that one of them said to me recently, "I'm glad we have the

bankruptcy appellate division because if a bankruptcy appeal is made to me, I have to start from scratch. I don't know anything about the field and I haven't got time to learn." That's their attitude. And consequently, as Ken will relate, we have a situation now where the bankruptcy judges really are under the wing of the federal district judges which gives them Article III powers. Of course, we still have this distinction of core matters and related matters which represents almost the old days when we had summary and plenary. But the fact is that the district judges want bankruptcy matters to be handled by the bankruptcy referees. We call them judges now. And we have supported legislation for many years to improve the quality of the appointments and to give them adequate salary and retirement. But it doesn't make any difference what important matters they hand to the district judges, they still want a differentiation between them, the district judges and the bankruptcy judges, which is reflected in the salary arrangement. The bankruptcy judges get less money than the district judges even though they handle many matters which are more important to the community economically than matters handled by the district judges. I said that once in an article I

wrote and I was called by three separate district judges and they said "How dare you?"

SHUTAN: Oh yeah. And if he had seen it, Warren Burger would have called you, too.

STUTMAN: Oh sure.

SHUTAN: Jack, I'd like you and Ken to give me some comments about how you see the change and improvement, if you see it, in appeal procedures from bankruptcy courts since the enactment of the Code in 1978.

STUTMAN: Well, I think that I ought to defer to Ken who was minority counsel to the House Committee which drafted the Bankruptcy Code and he can, I think, tell us more accurately the differences.

KLEE: One of the few political issues that the members of Congress really became interested in was the subject of bankruptcy appeals, strangely enough. It was a question of stature. And one of the ways to increase the stature of the bankruptcy court was to have appeals go directly to the Court of Appeals. But the Court of Appeals judges weren't thrilled about that idea, neither were the

district judges and people who lived in outlying areas. For example, someone living in North Dakota didn't want to have to go down to St. Louis to take an appeal. On the other hand, the bankruptcy judges weren't thrilled with the idea of taking appeals to the district court because that would make them subservient to the district judges, something that was attempted to be changed by bankruptcy reform. So Shirley Hufstedler really had the idea to have sort of an intermediate level of appeal that was independent from the district court. And out of that suggestion, the Bankruptcy Appellate Panel was developed. It was tried on an experimental basis in the First Circuit and dropped, and it's been in the Ninth Circuit from the beginning primarily because of the sponsorship of then Chief Judge Browning, who liked the idea and promoted it. And as a result today we have a Ninth Circuit Bankruptcy Appellate Panel that has five or six bankruptcy judges who sit on it and a panel of three bankruptcy judges hears an appeal from a decision of a bankruptcy judge. And none of the appellate judges can sit in the same district where the bankruptcy judge who decided the opinion sits. And then from there the appeal, if it's from a final order, goes up to the Ninth Circuit.

But because the bankruptcy judges don't have Article III status, the appeal to the Appellate Panel has to be by consent of the parties. And the way its been set up is that the appeal automatically goes to the Appellate Panel unless one of the litigants chooses to opt out, in which case the appeal would then be heard by a district judge. The district judges much prefer the appeals to go to the Appellate Panel so that they don't have to be worried about bankruptcy appeals. And they are generally trial judges who don't have much experience with appellate jurisdiction in any event. So, I think in the Ninth Circuit lawyers who have appeared before the Bankruptcy Appellate Panel think that they are getting a much better hearing if the appeal involves an issue of bankruptcy law. On the other hand, if the appeal involves an issue of general law or involves an area where the bankruptcy law has a rule that a generalist would think is not a fair rule, then the litigants will choose to take their appeal to a district judge. And that's the way it works. Other parts of the country have not seen fit to adopt the Bankruptcy Appellate Panel, primarily as I understand it, because the district judges don't want to give up the jurisdiction even though they'd rather not do the work.

SHUTAN: Well, in the Ninth Circuit they haven't given up jurisdiction, they have just given up the work. Isn't that the best of all possible worlds for the district court judges?

KLEE: Well, the district court judges haven't given up jurisdiction over the bankruptcy matters because the bankruptcy judges are adjuncts of the district court. But with respect to appeals, the jurisdiction really has been given up to the Appellate Panel unless the litigants opted into the district court system. The Appellant Panel is a creature of the circuit, not of the district and the appeals go straight from there to the Court of Appeals.

SHUTAN: Is the Ninth Circuit now the only circuit that has Bankruptcy Appellant Panel?

KLEE: That's right, it's the only one that has the Bankruptcy Appellate Panel.

SHUTAN: I think the other circuits are missing out a lot. I've had considerable experience with the Bankruptcy Appellate Panels. It's always been a confidence building one in the sense that you

have three knowledgeable, and these days, conscientious bankruptcy judges who really are given the opportunity to pay attention to a particular set of issues, to think about it, and to confer with each other and to make a ruling on it. Even when I haven't been too happy with the result, I've greatly respected the process very much. I didn't realize it was not now current in any other circuit. I think they are missing it.

KLEE: There is a study underway by the United States Judicial Conference to determine whether the project ought to be assumed in other circuits.

SHUTAN: Because I kind of assumed, Ken, that it's a universal that the United States District Court judges don't like to get involved in bankruptcy matters -- still have a residue of disdain for it -- and would have a tendency to not second guess their expert, their bankruptcy judge.

KLEE: I think the only exception to that would be a few of the district judges who came out of the bankruptcy bench: Lloyd George in Nevada, Connie Cyr in Maine, John Copenhaver in West Virginia. But unless they have a background in bankruptcy, I think you are absolutely right.

STUTMAN: By the way, I believe that the appointive process is much better now than it used to be. One of the problems in the old days was that bankruptcy referees were appointed by the district judges who only knew generally assistant U.S. attorneys who appeared before them, and those were people who got what they thought was a promotion to the bankruptcy referee, and some of them were not that wonderful, to put it that way.

SHUTAN: I think we have seen a considerable improvement in the caliber and quality of those who get appointments to the bankruptcy bench.

KLEE: Well, today the appointments are made by the Courts of Appeals and they have a broad survey and I think they take their position as a conscientious one. They don't treat it as a patronage position.

SHUTAN: Ken, let me ask you this. Your work in bankruptcy was essentially started with your legislative work for the Congress, and you've remained in close contact with the legislative process. What is your observation, as far as the quality of the

input of practicing lawyers, to the improvement or changes in the law of bankruptcy?

KLEE: Well, I think there is probably less input today than there was in the 1920's and 30's, and that might be an astounding reply. It might not be something you expected. I think in the 1930's, from what I have seen, Congress didn't regard bankruptcy as a very political issue. It was a #1 problem they had to deal with and they turned to experts in the field to guide and shape their work. The Chandler Act, for example, was supported by a very lengthy report of the National Bankruptcy Conference and lawyers in those days had direct input with Congressmen and Senators who would pretty much take what they wrote, because it wasn't considered to be very political. Since the enactment of the 1978 Bankruptcy Code, there has been a lot more politics involved with bankruptcy legislation. Groups whose interests are affected by this increasingly important area of economic law have lobbied the Congress and used raw political power to influence the process. As a result, lawyers who might care about the issue academically have less input. The Congressmen and Senators are more interested in the political forces at work.

SHUTAN: Shopping Center Association lobbyists you mean?

KLEE: Well, its not just shopping centers, that was certainly a great example in the 1984 legislation, but the securities industry and the commodities industry have been able to get special interest legislation through. There are certainly efforts underway by the Pension Benefit Guaranty Corporation and some of the environmental groups to do the same thing. It has become much more of a mainstream political area of law.

SHUTAN: Are you aware of any differences in the role of lawyers in our Ninth Circuit than lawyers nationally on this level?

KLEE: Well, I would say with the advent of communications and the jet planes that lawyers in the Ninth Circuit have more input into this process than I'm led to believe that they had in, say the 1930's. But still the dominant influence in this area with the exception of some of us who were involved in the '78 reform who happened to live in California, still comes from the New York and Washington area because it's

closer to Washington D.C. and closer to the process.

SHUTAN: Jack, we've kind of covered the period from 1947 to the present generally; but I'd like to go back a little bit and get some of your recollections of the individual human beings that were involved in the bankruptcy practice in Los Angeles from back then forward, whether they're practitioners or whether they're referees or part-time referees or whatever. Do you want to look back into that a little bit?

STUTMAN: All right. In the 1950's, most of the attorneys who were involved in the bankruptcy practice were collection lawyers who used their claims, as I've indicated, to elect the trustee. That practice, of course, is gone now. And among them were people like Sam Miller, Nat Rosin, Russell Seymour and Barney Flaxman and Al Gittleson, Charlie Katz. And you will note that most of these people that I have mentioned were of Jewish extraction. This may have been the result of the fact that in the early days there were substantial anti-semitism in the establishment practice, which forced such people to go into small firms which handled

bankruptcies because they couldn't get positions in larger firms.

SHUTAN: Independently of the bankruptcy practice, wasn't it?

STUTMAN: That's right. Well, one of the enlightening features is that after graduating at the top of her class in 1952 at Stanford Law School, Shirley Hufstedler was offered a job as a secretary with Gibson, Dunn & Crutcher. And the Los Angeles County Bar Association did not admit Negroes until 1954. These people that I have mentioned apparently were unable to get positions in major firms, and therefore, they wound up in the bankruptcy practice which was looked down upon by major firms at that time. Some of the people who are active in the practice during the 50's and 60's were Hubert Laugharn, who was a very capable attorney. And, as I have suggested, they had a monopoly in the representation of trustees. Alfred Gittleson, subsequently became a Superior Court Judge. Charlie Katz came in only occasionally but he was really brilliant. I remember trying a case involving a civil matter before Judge Yankowich who had already crossed this threshold, and after three hours of argument by counsel, he asked me in

the civil matter, "How much bail should be set?" Which of course did not lend itself to appreciation of the process. Among other people who were in practice at that time....

SHUTAN: Let me just interrupt you to say that before Judge Yankowich got that elderly, I think he was regarded by us bankruptcy practitioners and others as a brilliant judge who knew more about bankruptcy law than all the other district judges combined.

STUTMAN: That's true. Although it's true that he never ceased to remind us of that when we were in his courtroom. Well, he used to say, "The law is so and so, I said so in the case of so and so." But he had already crossed his threshold and he was just a pale version of himself when this matter came on. I went to the Presiding Judge with this matter and he said, "Don't worry about it, we'll go in after he's gone home and get the papers and I'll assign it to another judge." Among the non-lawyer receivers were George Gardner, Crules Cheek, and -- who is the guy that Jimmy Smith used to work for?

SHUTAN: Jimmy Smith worked for Goggin, but Goggin was a lawyer.

STUTMAN: George Goggin was a receiver who only handled large cases. He subsequently became president of an oil company and he was very active in politics both on a local level and national basis. I employed him as special counsel in Guidance Technology and he opened the doors of the White House to us. Some of the district judges who were sitting at that time in the 50's, the 60's, were Judge Harrison, who was a crusty son-of-a-bitch, but he had a good heart. Mathes, who was known as "Maximum Mathes" because the blood used to flow in his courtroom on Mondays during sentencing day. Harry Westover, who was designated as the bankruptcy judge. Ernie Tolin and Thurman Clarke, who had a great deal of difficulty with the Fox Markets case because Adams, Duque & Hazeltine was on one side and Walter Ely was on the other side. I'm not going to say anymore. Does that cover people in the practice in judges? And Judge McCormick was then the chief judge. In those days you didn't get an automatic restrainer. You had to go in and ask for a restraining order. As I remember, rushing across his chambers and he said to me, "Come now, young man, what is this unseemly

haste?" I said, "There's a foreclosure at 10:00 -- it's 5 minutes to 10:00." He said, "Don't get excited, I'll call him up. Now tell me about it." And he did call the title company and he was very helpful. Of course he had a problem like all district judges, he hadn't kept up with the law in bankruptcy and he didn't know that the Debtor Relief Act for farmers had expired and the case that I had involved a man who was not only a farmer but he was also a silversmith and a blacksmith. And Judge McCormick wondered if I could file a chapter XI for this man because he was a farmer. Well, you had to file a chapter XI, there wasn't any Farmer Relief Act anymore. But that worked out very well.

SHUTAN: Did you ever have any direct relationship with Thurman Clarke and observe his personal reactions to matters?

STUTMAN: Yes, he was, as I have suggested, a judge in the Fox Markets case which was the largest case then filed in this district, in which I represented the debtor. I have to say that he favored Walter Ely, who subsequently became a Circuit Judge, in very important litigation. And when Walter applied for compensation for his services, for $200,000 for

handling two leases, he was awarded $180,000 by Thurman Clarke. Subsequently, the Circuit Court of Appeals reversed that to $50,000, and that gives you some idea of who his favorites were.

SHUTAN: Well, the story I got on that, Jack, and I'm not going to quote my source, is that Ely in his application didn't even set forth a particular sum he was requesting and was very loose about the hours that he spent, and Clarke simply set the amount, which may have embarrassed somebody even as hard to embarrass as Walter Ely because it was such a large amount. But during the chapter 11 receivership where Sulmeyer was the receiver, he was represented by a law firm of Buchalter, Nemer, and in my observation at first hand was well represented by it. When you converted the case to a Chapter X corporate reorganization and it went to District Judge Clarke, Clarke called people in and said, "I want to have my own counsel in that case for the receiver and they said, 'Well, Buchalter Nemer has a year-and-a-half of experience and they're experienced bankruptcy counsel and it would be destructive to take them out.'" He said, "Then I want them to have co-counsel, I've got to have somebody in there that

can drink with at the club." And I heard that from different sources.

STUTMAN: His words were "I have to have somebody in there on my social level so when we go to parties I can find out what's happening in this case."

SHUTAN: That's right. There are other stories about Thurman Clarke that may just as well be off this record rather than on this record. There are those of us who are not proud of him.

STUTMAN: I believe that the bankruptcy practice today is on a much higher level than it was in the 50's and 60's and 70's. I think the appointive process of bankruptcy judges is better. I think that lawyers come in prepared to try their cases that there is more scholarship; that appellate briefs are better. And I recall when I was Chairman of the American Bar Committee on Business Bankruptcy working with a group of people on the proposed legislation, we made many suggestions which wound up either in the National Bankruptcy Conference or elsewhere. But the important thing that we did was that we got a board of governors of the American Bar Association to approve the concept of the Bankruptcy Code, and when the Chief Justice

went to the President and asked him not to sign the bill -- really, I suppose for the same reason that the district judges wanted to keep a distance between themselves and the bankruptcy judges the President of the American Bar Association went to Jimmy Carter and said, "This is a good bill sign it." And he did, over the opposition of the Chief Justice of the United States. So from that point of view, we had a lot to do with the legislation in addition to talking about various sections of the proposed code which Kenny is more familiar with than I am.

SHUTAN: Well, Jack Stutman and Ken Klee, thank you very much. I think that we have probably wound up this interview. If we think of something rich and good, we'll simply prepare another piece of tape to go with this, but I think we have covered pretty much what we wanted to do and thanks very much for the Ninth Judicial Circuit Historical Society.

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