



# THE CORPORATE COUNSEL

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SPECIAL SUPPLEMENT

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## 35 Years!

### Colleagues' Reminiscences

*Part 2 of Jesse Brill's Reminiscences will be continued with the July-August issue of The Corporate Counsel. In the interim, we thought our readers would find of interest, the following reminiscences of the early days of The Corporate Counsel that were sent in by notable colleagues. Readers wishing to send their reminiscences can do so at the 35th Gala portal on TheCorporateCounsel.net or email us at info@TheCorporateCounsel.net.*

#### **John Olson:**

I first got to know Jesse shortly after the adoption of Rule 144 in 1972, when my law partner, the late great Frank Wheat, who, as an SEC Commissioner and author of the "Wheat Report," had been one of the fathers of 144, dragooned me into being the young Gibson Dunn partner responsible for determining what opinions we could give to brokerage firms asked to handle 144 sales for corporate affiliate clients. I had gone down from Los Angeles to start a corporate practice in our fledgling Orange County office a few years earlier and had a number of young public company clients whose founders were interested in liquidating some of their stock as soon as permitted by the new rule.

The problem in 1972 was that most brokerage firms were finding their way on the new rule and practices varied as to what each firm would require to handle 144 sales. After some trial and error, Frank and I discovered that there was a lawyer at Dean Witter in San Francisco who really understood the rule and Section 16 issues as well and had set up a user friendly process that worked to get sales done. That was Jesse. Once we found Jesse, it was an easy decision to recommend Dean Witter as the go to firm for affiliate secondary sales. We knew he knew his stuff.

When Jesse sent me the initial edition of *The Corporate Counsel*, I was hooked and haven't missed an issue since. I felt duty bound to tell my clients that they could save money they would have otherwise spent with me by subscribing to the newsletter, as it would keep them up to date better than any other source I knew of on the latest nuances of Rule 144 and Section 16 lore. That is still true today, although the newsletter has now expanded to cover the full range of regulatory and disclosure issues of concern to corporate executives and those who advise them. I'm very proud indeed to have been present at the creation of *The Corporate Counsel* and to have had the good sense to recognize that Jesse was then, as he and his team are today, the go to source for the most timely and reliable information on these issues.

#### **Stan Keller:**

I recall in the early days, which can truly be referred to as the Dark Ages, before the instant communication of the Internet, blogs and C&DIs, *The Corporate Counsel* was the only source of current information about securities law developments, even on a bi-monthly basis. This is illustrated by the SEC staff suggesting, on an issue I was discussing with them which they wanted to be made known since it involved a change in position, that I see if Jesse Brill would write about it (which you did).



**Herb Wander:**

The fact is I don't remember when I first met Jesse Brill. I think it was shortly after the adoption of Rule 144 in 1972. The Rule was a huge step forward in solving the mysteries of the '33 Act—we thought. But the devil is always in the details. And, we needed someone to work through these details and make the Rule operate smoothly and efficiently. That person was Jesse, who at the time was at Dean Witter in San Francisco. He was always available to answer questions personally and to provide practical solutions.

Jesse has continued through his publications to be at the forefront of being ahead of the game in terms of both answering day-to-day practical questions under both the '33 and '34 Acts and in anticipating future questions and developments. Moreover, he has expanded his repertoire to now include executive compensation. We are all indebted to Jesse!

**Ed Fleischman:**

My copy of *The Corporate Counsel* (I maintained my own subscription) wasn't the only one in the SEC building in the late 80s and early 90s, but it certainly was the only copy on the 6th floor where the then Commissioners were billeted. And people often came into my room to borrow copies of individual issues, particularly if I had previously made reference to something *The Corporate Counsel* was quoting from Bill Morley or even Linda Quinn. To this day I skim my *Corporate Counsel* as soon as it comes through the door, saving the long read for an evening train ride.

**Stan Sporkin:**

Congratulations on *The Corporate Counsel's* 35th birthday. As my writing contribution I thought I would give a little history lesson about Rule 144. To the best of my recollection (Lawyer Talk) the Rule came about as the result of a conversation I had with our late friend and fellow Yale Law School graduate Alan Levenson. At some point we were discussing the great number of no action requests we were receiving at the Commission from persons who wanted to sell their private placement stock.

The no action process developed some key criteria and if you used the formula you could sell your stock so long as you did not purchase it with a view to distribution, you were not in management and you held it for a reasonable period say two years in order to show you held the stock for investment. With this background we came up with the idea to do away with the flood of no action requests by creating a mini registration statement.

Rule 144 was to serve that purpose. The concept was that the person seeking to sell his/her unregistered securities would be required to make a filing with the SEC in which the person would identify the securities to be sold and, among other things, would have to show that he/she had held the stock for two years. In addition, I insisted that the person would also have to state that he/she did not possess any material non public information about the company. This was how Rule 144 came into being. I repeat it was to be a mini registration statement.

Jesse I have never seen anything that gives this legislative history. Perhaps you know something about this. I would only add that Alan Levinson was one of the SEC's great leaders. He was a joy to work with.

There are a number of other landmark rules and laws that we collaborated on.

**Roberta Karmel:**

I first got to know Jesse in June 1967. It was a pleasure to have Jesse in the New York Regional Office in the 1960s when the enforcement staff was chasing securities fraudsters. You then went off to California and on to create *The Corporate Counsel*. I hope your experiences in the NYRO played a part in realizing your journalistic success. I remember that you were from a family of six children and your Dad told you that you had to become lawyers and then could do whatever you wanted. I think you did just that very well.

**Carl Schneider:**

Hi Jesse—I got a kick out of your 35 Year review. It was something of a trip down memory lane for me as well. I think I was among your earliest readers as well as touters. Your publications have always been very timely, helpful and authoritative, and I have cited them frequently in things I have written. You should be quite proud of the publishing empire that has grown from your modest initial efforts. Best regards and keep up all the good work.

**Joe Grundfest:**

Thinking back to the early days of Jesse's publication also brings us back to a simpler time when CEOs thought that \$1 million was a heck of a lot of money, and when some companies handed out "fringe benefits" like hot dogs at a Fourth of July barbeque. Indeed, just thumbing through a sample of the publication's stories over the years provides a wonderful snapshot of the evolution of governance practice and of the governance debate in the United States. So it's no surprise to suggest that *The Corporate Counsel* and its progeny have become the publications of record in the world of compensation.

**Keith Higgins:**

*The Corporate Counsel* didn't (and doesn't) merely report on developments in the law: it was an agent for change. In the 1990s when transferable stock options had become the new, new thing, we realized that the underlying shares needed to be registered on Form S-3, even though they may already have been registered on Form S-8. It seemed cumbersome to have to file an S-3, but what added insult to injury was the fact that you had to pay another fee for the shares. I raised that issue in one of my periodic emails to *The Corporate Counsel*. Imagine my surprise when several days later I received a call from a senior staff person in the Division of Corporation Finance telling me that the staff would be willing to entertain an interpretive request to address the issue. That was the genesis of Use of Form S-3 for Transferred Options (Aug. 7, 1997), brought to you by none other than the man behind the curtain!

**Peggy Foran:**

As a young associate, and then later as a young in-house lawyer, I would put *The Corporate Counsel* on the very top of my "must read" pile. Interestingly, it still is.

**Peter Romeo:**

Jesse and I first crossed paths in the late 70s when he called me frequently at the SEC raising thorny Rule 144 interpretive questions. So often did Jesse call that he and my secretary soon were on a first name basis. I thought he was just a highly sophisticated practitioner with an uncommonly large Rule 144 practice, not realizing that many of my responses were being memorialized in *The Corporate Counsel*, a publication that none of us at the SEC even knew existed in those early days but which soon became must reading when we became aware of it. After I left the SEC in 1984, a well-known publishing firm invited me to prepare a book on Section 16, which led me to call Jesse for advice because of his publishing expertise. He paused briefly after I explained why I was calling and then offered to publish the book on terms better than those presented by the other publisher. Knowing of his devotion to quality, marketing ability and pleasant demeanor, I quickly accepted. Shortly thereafter, I recruited Alan Dye to come to Hogan & Hartson (now Hogan Lovells) to work with me on the book project because of its magnitude and my personal knowledge of Alan's outstanding ability, work ethic and personality when he worked in my office while I was Chief Counsel of Corp Fin. The rest is history.

**Alan Dye:**

When I was in Corp Fin's Office of Chief Counsel in the early 1980's and had to field Rule 144 questions from outside callers when Ann Glickman wasn't available, I learned quickly that the best source for answers (and for prior staff positions) was *The Corporate Counsel*. Most of us in the office kept copies of back issues at our desks so that we could get up to speed quickly on the practical questions that came in every day. Two years

later, when I was working for Chairman Shad, Peter Romeo called to ask if I'd be interested in co-authoring a book on Section 16 to be published by the publisher of *The Corporate Counsel*. Team up with Peter Romeo and Jesse Brill? It was a securities lawyer's dream, and the easiest decision I ever made. It has been amazing to witness what Executive Press has become in the years since then—an unparalleled source for practical advice on SEC issues.

### Ron Mueller:

*The Corporate Counsel* was 10 years old when I started practice and it's hard to believe that there are now 35 years of learning. I quickly learned of and grew to rely on *The Corporate Counsel* when I first started in practice, but it was during my several year stint at the SEC when I first met Jesse. When an enforcement case involving Rule 144 was coming before the Commission, Ed Fleischman (the commissioner I worked for) said, "See what Jesse and Bob Barron think," and I was quickly on the phone with each discussing the abstract issue the case presented. From then on, Jesse and I would periodically discuss new issues and new developments. Because I had worked on the overhaul of the Section 16 rules both when in private practice (as a member of the ABA comment letter team) and from Comm. Fleischman's office at the SEC, Jesse graciously invited me to speak at one of his first live conference: the Section 16 rules conference. Thus, my first live speaking engagement was in front of a crowd of thousands that filled the ballroom of the Waldorf in New York and an equally large crowd at the St. Francis in San Francisco. (Years later, I heard SEC enforcement director Linda Thomsen comment that the 10b5-1 panel she, I and Alan Dye spoke on at Jesse's NASPP Annual Conference was the largest group she had ever addressed.) That following, the envy of many conference providers, is testimony to the continuing relevance and significance of the programs that Jesse orchestrates.

Back then, when there was no internet, Jesse was the Google, the Facebook and the Linked In of the securities bar. Because he constantly spoke to so many practitioners across the country, Jesse knew of new developments with 33 and 34 Act issues before many in private practice, both those developments resulting from new SEC regulations and new interpretations and those arising from rapidly changing practices in the marketplace, such as the evolution of stock options from a benefit awarded only to a company's most senior executives to a primary element of compensation given to all employees. *The Corporate Counsel* would dutifully and timely report and provide practical guidance on each of these, and I and others in the firm would anxiously await each issue. Not anticipating the benefits of email or the internet, we were frustrated by technology only in our desire for and efforts to develop an index to all the knowledge and tidbits contained in *The Corporate Counsel's* articles.

Beyond just reporting on developments, Jesse and *The Corporate Counsel* have been a driving force behind many changes. Like Geppetto wishing on his lucky star, Jesse would annually publish his "wish list," an appeal to the SEC and its staff for new interpretations or new rules that would remove needless burdens or technicalities or facilitate emerging practices. Many of these wishes were granted and are reflected in rules and interpretations that continue to apply to this day under Rule 144, the Section 16 rules, Rule 701 and Form S-8, among others. While continuing that advocacy, Jesse has more recently set his sights equally on his audience, championing the use of tally sheets, a review of wealth accumulation and disclosure of "walk away" numbers, and again his influence is borne out in many compensation committee meetings and proxies each year.

Jesse, you have been ahead of your time, have contributed to and changed the law and practices for the better, and continue to have a following like no other. Congratulations.

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The Publisher of *The Corporate Counsel*, **Jesse M. Brill**, is a member of the New York and California Bars and received his J.D. from Yale Law School. Mr. Brill, formerly an attorney with the Securities & Exchange Commission, is Chair of the NASPP, CompensationStandards.com and DealLawyers.com. Mr. Brill has chaired and participated on numerous panels and seminars. Editor: **Michael Gettelman**, LL.B. Harvard University (mike@thecorporatecounsel.net).

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