STANDING ON THE LINE

"There's one overriding rule in the merger wars that must be observed: take no notes and avoid leaving a paper trail."

Stanley Sporkin, the man in charge of the Enforcement Division of the SEC, spent his days pursuing swindlers, cheats, frauds, and other miscreants. Blessed with more than ordinary cynicism, he was better able than most to recognize con artists, even those clothed in conservative business dress. In his world, liars had agreeable manners and avoided gold chains and other ready signs of irremedial sharpness. This deepened his distrust of everybody. Like all prosecutors, he knew that there was no end to scoundrels, but that awareness, enervating to many, hadn't sapped his energy or efforts.

This endless villainy, however, affected Stanley physically. The weight of it seemed to have lodged on his shoulders. They sagged as if he'd never be able to unburden himself. His waist had spread from fast-food meals taken at his desk and his eyes, always ringed by dark circles, looked like he'd spent too many nights in sleepless vigilance. He often growled when he talked. And when he was angry, he was like an Old Testament prophet railing against de-

clining values. Looking at Stanley, you saw a forbidding moral force, which made him seem twice his rather average height.

Despite his air of constant irritation, he had a sense of humor. There was even an illustrative anecdote, told as gospel. The story begins in Stanley's office, where it was his usual practice to collect suspects and lecture them about their transgressions. There were always plenty of misdeeds. The SEC monitored the sale of securities (common stock and debt instruments) to the public and the purchase of securities from the public, and required fair and accurate disclosure of financial information so that public investors (and not just insiders) could make informed decisions. In takeover offers the SEC required raiders to disclose information not only about themselves but also about the target companies. Considering the high stakes, many raiders were tempted to misstate damaging facts, omit them altogether, or trade on information before it became publicly known. Accordingly, Stanley was always busy and his office full. Others, next in line, waited in the anteroom to his office in full hearing of his booming voice. Snared in his room, there was little opportunity to deflect his anger. Even good defense lawyers couldn't get a word in in opposition. In the course of one of Stanley's harangues, the object of his anger had a heart attack, probably while trying to sputter a protest. An ambulance was called, a stretcher was brought in, and the prostrate victim was wheeled from Stanley's office as the crowd, businessmen and their lawyers, beheld the effects of his vehemence. Immediately after the stretcher passed, Stanley entered the waiting room to face the assemblage. As if unaware of their concern, he smiled, put his hands on his hips, and impatiently inquired, "Okay. Who's next?"

That kind of reputation created and concentrated power, and Stanley used it. Lawyers weren't immune. Indeed, we all came under his special scrutiny. Many a lawyer was lectured by him to stop trying to stand on the line. In matters of judgment, it's easy to go astray, and if you're standing on the line, it's hard to see it. Stanley wanted lawyers to be in the forefront of enforcement, part of his task force. In his view, if the leading lawyers pushed their clients to make early disclosure of important pending matters, others would follow and the securities markets would function more efficiently. But a lawyer's stock-in-trade is his judgment of the

applicability of rules. No lawyer was willing to cede that judgment to Stanley or the government. As a result, there was growing tension between Stanley and certain practitioners who refused to heed his exhortations.

In 1979 Stanley brought an action against William Carter and Charles Johnson, senior partners of Brown & Wood, a prominent Wall Street law firm, for failing to make early disclosure in press releases and in quarterly financial reports with respect to the failing financial position of a company to which they were legal counsel. The stock market, in Stanley's view, was trading in the company's securities without fully appreciating the declining value of the company. As punishment, he sought to have Carter and Johnson suspended from practice before the SEC for as long as one year. It was the first case of its kind challenging the judgment of lawyers. After a hearing, an SEC examiner found against the lawyers, and suspended Carter for one year and Johnson for seven months. They appealed, insisting that they had both acted properly. In 1981, the case was awaiting review by the full commission.

The case against Carter and Johnson was a warning from Stanley, letting all lawyers know that he'd monitor their behavior. His next major case, we all suspected, would be against a leading law firm over a merger matter. Stanley was more than a tough traffic cop, making sure that rules were followed. He wanted to impose strict constraints on a rough-and-ready marketplace which was largely ordered by lawyers for participating parties. Sure enough, at the end of 1981, before the case involving Carter's and Johnson's suspension from practice was decided, Stanley started an investigation of the lawyers involved in the acquisition of a company named Belden, in which I was actively engaged.

Everything went wrong from the start in the Belden merger with Crouse Hinds. The business combination made sense, which was a rarity and reason enough to believe the deal would follow a straight path. Crouse Hinds made circuit breakers and electric safety devices, and Belden fabricated electric wire and cable. They served similar markets and their products generally complemented one another. The rationality of the joining of the two companies encouraged a conventional and workable agreement. Crouse Hinds would acquire Belden solely for its common stock. So structured,

Belden shareholders would swap their stock for Crouse stock, tax-free. Skadden Arps represented Crouse, and Wachtell Lipton represented Belden. There was little that was adversarial, and nobody remotely contemplated anything like all-out warfare or Stanley's investigative ire.

The agreement was signed on September 8, 1981, and announced immediately thereafter. When a stock deal is announced, the stock price of the acquirer invariably drops. Declines of as much as 10 percent and even 15 percent aren't unusual, because the acquirer is issuing a quantity of stock which sharply increases supply over demand in the marketplace. Also, arbitrageurs and other speculators will sell the acquirer's stock short (that is, selling stock they don't yet own) in anticipation of covering the short sale with the surplus of stock that will be available when the transaction closes. Such sales also put downward pressure on the acquirer's stock.

Contrary to conventional expectations, Crouse's stock price rose sharply. At first the feeling was that the market had applauded the transaction and saw the synergies inherent in putting the two companies together. My image of the average market maker was a plump man (formerly a cigar smoker) who now ate too much, spent his days watching the computer screen, and was skeptical that any deal made sense and reluctant to buy when others were logically selling. Pleasing these market skeptics was highly satisfactory: it showed true insight in conception. Everyone likes to participate in a deal that is well received. In those moments it's as if you've produced a play that gets rave reviews. The glow of the favorable reception carried us forward for a number of days and addled our minds. But the stock price continued to rise beyond the fundamentals of the deal. Finally everyone realized that no one could be applauding for that long, and we tried to account for the aberration.

Once we probed, we found that Internorth, a midwestern natural gas distributor, had been buying the Crouse stock from all sellers. Crouse had been trading in the mid-20s immediately before the announcement of the Belden merger; by September 11, it closed at $36⅞. On September 12, 1981, Internorth announced a cash tender offer for Crouse at $40 a share. How had Internorth gotten ready in only four days? Such decisiveness was notably

unusual—and why was it interested in Crouse? Not until much later did we find out that Internorth had been preparing for an acquisition of Crouse Hinds for about four months. It wanted Crouse without Belden, which it had never previously considered acquiring and knew relatively little about.

Facing what it viewed as a lost opportunity if the merger between the two companies went through, Internorth accelerated all its plans. The novel aspect of its tender offer was its announcement to the Crouse shareholders that it wouldn't buy the Crouse shares unless Crouse dropped the deal with Belden—or the Crouse shareholders rejected the Belden merger by voting against it. Internorth had a winning hand. It was axiomatic that the Crouse shareholders would prefer the cash offered by Internorth to the merger proposed by Crouse.

A two-pronged defense against Internorth was worked out. On behalf of Belden, Wachtell Lipton brought a lawsuit in state court in Chicago, where Belden was based, claiming that Internorth's tender offer for Crouse was wrongfully interfering with an advantageous contract for Belden, which wanted to merge with Crouse. On behalf of Crouse, Skadden Arps sued in federal court in Syracuse, where Crouse was headquartered, arguing that Internorth's coercive tender offer had violated certain disclosure requirements of the federal securities laws. Wachtell Lipton and Skadden Arps were now acting together against Internorth. It was a satisfying moment to work with the most polished of your adversaries. Wachtell Lipton had consistently attempted to be on the opposite side of Skadden Arps, which meant representing target companies, as Skadden Arps was noted for its offensive strategies. Wachtell Lipton's position was meant to assure the business community that in every hostile takeover there would be access to first-rate legal help, since there were only a handful of firms as experienced in takeovers as Skadden Arps. As a marketing tactic, it was brilliant, for it defined Wachtell Lipton as the antidote to Skadden Arps, setting Wachtell Lipton above its competitors. The marketing ploy was Marty Lipton's idea, and helped generate substantial defense business.

With litigation on two fronts, well situated in hometown courts for the local advantage, we hoped to win a skirmish against Inter-

north. The better of the cases was the Wachtell Lipton challenge in the state court. Takeovers had already gotten to the point in the marketplace where no deal was honored until closed. This was definitely against us. And there were decided cases from which inferences could be drawn that deals, subject to a shareholder vote (like ours) to approve the issuance of shares to effect the acquisition, could be interrupted by competing bidders before the shareholders voted. But there were no cases directly bearing on this point. Our argument was that something more than the morals of the marketplace should govern. It was an appeal to the high-minded. The case was promptly heard, and the state court judge found, to our delight, that Internorth was improperly interfering with the merger and enjoined it from continuing its hostile tender offer. As expected, Internorth promptly appealed to get the order reversed.

We assumed that Internorth had an excellent chance of winning on appeal, but the appeal would take about forty-five days to be heard. Having gained the advantage of that time, we regrouped to fashion a new set of defensive actions. Defeat was certain if we stayed with our original plan of seeking approval from Crouse's shareholders to issue shares to be swapped for Belden's shares, because it would take about sixty days to clear soliciting material with the SEC and to call and hold a meeting. By that time, Internorth would be free to continue its tender and the Crouse shareholders would favor Internorth and disapprove the merger with Belden. Completely ignoring Crouse's stockholders, however, wasn't possible. But Crouse could, under New York Stock Exchange rules, exchange up to 20 percent of its shares for Belden's shares without first getting stockholder approval. Belden's shareholders would gladly exchange their shares for the premium offered by Crouse. Since Crouse was more than twice the size of Belden, 20 percent of Crouse's shares represented, based on the exchange ratio, a majority of Belden shares. Such an approach had been rejected initially because approval of Crouse's stockholders would have to be sought anyway to finish the purchase of the minority interest in Belden. A two-step approach was an inefficient way to proceed under ordinary circumstances.

But reexamined in light of Internorth's tender, an exchange offer

would be powerfully effective. If Crouse were able to effect the swap and acquire a majority of Belden's shares, sensible economics required that the entire deal be completed. Crouse's stockholders would have to approve the remainder of the transaction; otherwise Crouse would suffer accounting charges to its earnings that would devalue the Crouse stock. Even Internorth wouldn't then interfere with the completion of the deal, for it would make no financial sense to do so. And if Internorth couldn't sensibly interfere, it would have to acquire both companies or quit and acknowledge defeat. Acquiring both was more than it was prepared to do. A transaction contemplated at about $500 million would escalate to approximately $750 million. Internorth would have to drop its tender offer. We'd found a winning gambit to use in the forty-five days pending the appeal of the state court case.

Internorth reacted immediately to the announced exchange offer. George Kern, of Sullivan & Cromwell, a knowledgeable and seasoned advocate, counterclaimed for Internorth against Crouse in the federal court in Syracuse, asking that the swap be enjoined. His argument was that Crouse was taking away from its stockholders the opportunity to decide whether they wanted to do the Belden deal. The exchange offer was an underhanded move: coercive of the Crouse stockholders, depriving them of the Internorth tender offer. George bellowed when he talked in ordinary conversation. Filled with indignation, he shouted. Skadden Arps's response was that Internorth had no standing to object, which translated to: Don't listen to him. Good litigators always try to impose procedural obstacles to keep their adversary from getting to the merits. Skadden Arps's argument was that Internorth had only become a substantial stockholder after the deal was announced. As such, Internorth wasn't representative of the other Crouse stockholders and was acting only to advance its own acquisition interests. Skadden Arps argued that Internorth's high-and-mighty claims about coercion ignored the finding of the state court in Chicago that Internorth was wrongfully interfering with the deal. And so on. The substantive argument that Skadden Arps made in favor of the exchange offer was that the Crouse directors could reasonably use their business judgment to pursue the acquisition of Belden as part of its business plan, even though it

would defeat the Internorth offer. After hearing everyone out, the district court ruled in favor of Internorth, enjoining the closing of the exchange offer. The decision was immediately appealed.

The outcome of the two cases in the trial courts was that we'd effectively blocked each other, since neither Crouse nor Internorth could finish its actions. The matter would be decided on appeal. And after hearing argument, both appellate courts reversed the trial courts. When the dust cleared from all the litigation, it looked like we were back to where we'd started (we each had won one case and were free to fight), but it wasn't all a waste. Internorth was a step behind. Crouse could close the Belden exchange offer the next day, which thwarted Internorth, leaving it to buy both companies or none.

It wasn't a waste in another sense: both cases decided fundamental propositions. The Illinois state appellate court sanctioned behavior that thereafter became quite common, raiders insinuating themselves into an announced deal by offering a better price. And the federal appellate court in New York found that boards of directors had the power to follow their business plans, even if it amounted to an end run around shareholder approval and defeated a favorable offer. These cases were the precedent for Paramount's attempt in 1989 to acquire Time Inc. and for Time's defense: acquiring Warner. Time and Warner had entered into a merger agreement, like Crouse and Belden, providing for Time to acquire Warner for its stock. Paramount tried to break up the deal and relied on Internorth's victory against Crouse in Illinois to make a cash tender offer for Time alone. Time Inc. followed Crouse's strategy by making a cash tender offer for Warner. By acquiring Warner, Time defeated the Paramount bid.

The Crouse contest with Internorth, however, took an additional turn. Since Crouse could close the Belden exchange, Internorth was faced with a very difficult decision. Did it withdraw or did it now offer to buy both Crouse and Belden? Contrary to all our expectations, Internorth announced that it would now go forward and acquire both. Sometimes, I wonder how those decisions are made: from anger and frustration or good business judgment. I could see the frustration and had experienced George Kern's anger. The argument for sensible reevaluation by Internorth was that the

merger of Belden and Crouse made sense. Internorth, stretched by the additional cost of the acquisition (purchasing all the new Crouse shares issued to acquire Belden's shares, representing about a 50 percent increase in the consideration required for the purchase), saw an opportunity to take advantage of the situation. Its new offer was $37 per share cash for Crouse, including Belden. Except for a similar gambit by Tom Evans when the target company made a small, frivolous acquisition in an attempt to defeat the Evans bid, none of us could remember a time when the raider lowered its price. If the two companies fit well together, then Crouse should be worth more per share—at least $40—not less. Internorth was seeking, and on the verge of getting, a bargain.

The management at Crouse was despondent. All the defensive actions had worked, but they were fighting a predator more voracious than ever imagined. Crouse, at this stage owning 50 percent of Belden and still in the process of acquiring the other half, now sought a buyer that would be willing to acquire both it and Belden. Crouse's board had to take such action to prevent Crouse's shares from being acquired for an inadequate price. Its defense had turned out to be a burden. How many buyers would do what Internorth was willing to do and acquire both companies? But Crouse's investment bankers, Lazard, were cautiously optimistic. In this heated merger market, if you put out a distress signal, recent experience showed, there was usually another buyer, at a higher price. The ebullience of the eighties had started.

For the Belden shareholders, the decision of Crouse to sell itself (and Belden) offered them a double dip: a premium in addition to the one they had just received from Crouse and a ringside seat at an auction as they waited for the Crouse stock certificates to be delivered to them, ready for sale to the highest bidder. What an introduction to corporate acquisitions! None of us could remember something like this ever happening before.

Finding a buyer for both, however, didn't prove easy. A number of companies considered bidding but then had second thoughts. Cooper Industries, a well-managed Houston conglomerate, finally emerged as interested in acquiring both companies. Cooper had a history of making acquisitions as a White Knight, and all had been successful. In this case, however, Cooper was cautious. It would

only offer its stock against Internorth's cash and was concerned about its chances of winning against a cash bid. Also, it faced a determined adversary that had shown resilience.

Cooper's stock was trading at about $60 to $61 a share, and the ratio it offered was a .725 share of Cooper stock for each Crouse share. At the contemplated ratio, Cooper's offer was worth about $44 a share. Cooper's bid would take two or three months to close because it had to be pre-cleared by the SEC. The bid price had to be discounted by the cost of money for the period and for the uncertainty of completing the transaction. These were all serious negatives. Cooper anticipated that on the public announcement of its offer its stock price would decline, that the downward pressure could be severe, and that if its stock fell below $50 its offer would fail. The ratio it proposed was its best price and it wouldn't change it. While Internorth was now offering $37 a share for both companies, it was possible for Internorth to raise to $40 for both (the price it was prepared to pay for Crouse alone), which would probably put it on high ground with a winning bid. Based on a $40 offer by Internorth, Cooper's stock couldn't fall below $55 to be competitive. Such a decline was very likely. Moreover, arbitrageurs prefer cash deals. For them, stock deals are risky transactions requiring them to speculate in two securities, those of the target and those of the acquirer. At comparable prices, the market professionals would choose cash and Internorth.

Realizing the risks, Cooper wanted a leg up, some advantage that would show that it was a wily competitor and had figured out a clear route to the goal line. Corporate prestige was at stake, which Cooper didn't want tarnished, and the perceived risks were bothersome enough to Cooper to raise doubts about the common sense of making the offer. Poised to commit, Cooper drew back.

Cooper asked Skadden Arps and Wachtell Lipton to attend a meeting, seeking our tactical advice. The request immediately made me wary. Cooper and Lehman Brothers, its investment banker, and all their lawyers didn't need us as tacticians or critics. At the meeting, we learned that Lehman Brothers, responsive to Cooper's concerns, had come up with an approach that they thought would drive the deal forward. What they had in mind called for Crouse and Belden to attempt to induce key holders of Crouse and Belden

stock to agree to tender to Cooper and not to Internorth. Crouse was a New York corporation, and a two-thirds affirmative vote of the outstanding shares was required to approve any merger transaction. If one-third of Crouse's shares could be tied up in some fashion in favor of Cooper, then Cooper would be willing to be a White Knight. Looking at blocks of stock held by various trusts close to Crouse management, Lehman could only account for about 20 percent of the stock, a significant shortfall. If the plan was to work, arbitrageurs would have to be asked to commit. What Lehman Brothers had in mind required that the lawyers for Belden (Wachtell Lipton) and the lawyers for Crouse (Skadden Arps) call arbitrageurs holding large stock positions in both companies and get them to commit in writing not to tender their shares to Internorth but to tender them to Cooper. The arbitrageurs could be induced to play because their commitment would produce a higher bid than Internorth's offer.

This plan made me supremely uncomfortable. Getting the arbitrageurs to agree to a certain action in advance of making a tender offer had never been done before. Novel ideas aren't always bad, but this one would attract the SEC and get the direct attention of Stanley Sporkin. When carefully thought through, the plan didn't work because a majority of the shares couldn't be found in the hands of a small enough group to be definitively tied up, and therefore it wasn't worth the pain of confronting Stanley. This deal had already inspired cartoons of a series of mindlessly open-mouthed fish of increasing sizes lined up to swallow each other. It didn't need any more attention. If we weren't careful, it would be hard for Stanley to resist an opportunity to lay down restrictive rules for the eighties.

Talking to Cooper, I was unabashedly critical of the plan. So what if one-third of the shares agreed to tender to Cooper; a majority was needed to win. Commitments from one-third of the shares was no more than a push in the right direction. If Cooper's stock price dropped sharply, Internorth would get a majority of the shares. The majority could always force the minority to sell, even if the minority held one-third of the shares. Nothing that we could do would change the rules of corporate warfare. Cooper felt, however, that commitments from arbitrageurs could have a calming

effect on the market and ease some of the downward pressure on Cooper's stock. There was merit to those claims that my arguments couldn't fully dismiss. But the benefit was marginal and wasn't worth the detrimental effect of litigation and government investigations.

We all agreed to meet on the weekend in Houston, the second Saturday in November, to discuss the strategy. Waiting for the weekend, a delay of three days, would allow us all to calm down and decide which concerns were most important. The meeting was supposed to begin promptly at 9 a.m. on Saturday at Cooper's offices. I took an early-morning flight and arrived to find a three-ring circus already in progress. Cooper intended to make a go or no-go decision by Sunday, and all related issues were being debated in concurrent meetings in three different conference rooms. In one room, investment bankers, financial executives, and accountants were sifting financial information, recasting projections of earnings and cash flows. In another, operating executives and engineers were sorting business data to understand the health of the business and the benefits of the combination. And in the third, investment bankers and lawyers were analyzing strategic considerations in making the offer. Senior executives of Cooper participated in each of the conferences, walking from room to room to assess progress and problems in each of the sessions. Financial and operating executives also moved through all the conference rooms being briefed on all aspects of the deal. In their usual thorough fashion, all the senior Cooper officers would meet at the end of the day, share their assessments, express their doubts, and decide. In the third conference room, I was asked to discuss the background of the transaction and evaluate the chances of success against Internorth. Others also presented their evaluations.

I was told that the presentation would have to be repeated for the benefit of the other groups and the senior executives. People walked in and out of the room, however, as if it were a continuous showing, and no one seemed to have much time to fully focus on what was said. As new people came in, I would have to give a short summary and begin anew to bring them current. Often the attentive people began to lose interest. And so I was never sure that anyone heard fully all that was said. To be effective, I determined that the

best way to make a presentation that everyone could follow was to use the blackboard and outline all the information there. I was used to this kind of instruction from my regular evening teaching at NYU Law School. From the top left-hand corner down, I detailed all the considerations, making neat rows of information, and juxtaposed critical assessments. Dan Neff, the associate working on the deal with me, reviewed the display to make sure it was complete.

Seeing as well as hearing the message, I believed, would reinforce it: price would determine the outcome. As a corollary, and for emphasis, I firmly said that there was no way to lock up the transaction, the market would decide the winner. At every turn I tried to discourage suggestions that dealing with the arbitrageurs would be an artful way of proceeding. I didn't mention Stanley Sporkin, but my voice carried all the negative overtones of my discomfort.

The other message I gave was the overriding rule for the merger wars: take no notes and avoid leaving a paper trail. Many deals had failed because company executives had written to one another about the competitive advantages of an acquisition, naïvely making the government's antitrust case. The government was not the only one to be feared. A clever adversary can turn unguarded statements to his advantage. In litigation all notes and memos would be discoverable, exposing our doubts and weaknesses. Boldly on the board I wrote: "TAKE NO NOTES," and then added parenthetically for a bit of humor: "(including of this board)."

It was a long day. The meetings went well into the evening. When I left, senior management was just getting together to pool their impressions and make a decision. I returned to New York on the last flight into JFK, arriving well after midnight. My car was at La Guardia Airport, and I took a cab from one airport to the other. At about 1 a.m., I found my car in the La Guardia garage, but it wouldn't start. Someone had stolen my radio and battery. At that hour the airport was closed and deserted, bereft even of cruising cabs. I found a phone, called a taxi service, and finally got home at about 2:30 a.m., tired and debilitated, feeling a cold coming on. More than one meal per day on an airplane is a health hazard, proven innumerable times to me and always ignored.

I was awakened at 7 a.m. on Sunday by a partner at Lehman Brothers who had stayed over in Houston. The energy in his voice

was more startling than the ringing phone. Beginning without apology for the early hour (probably he'd showed about fifteen minutes' restraint while waiting for the clock to strike the hour), he had the moral momentum of being in an hour-earlier time zone. Cooper, I was brusquely told, was prepared to go forward but only if it received positive assurances in writing from at least one-third of the shares that they would tender to Cooper. Hardly awake, I may have hesitated too long before protesting. My momentary silence was taken as consent and he began to issue instructions. I sputtered an objection which halted him long enough for me to recount the difficulty of getting agreements and what little effect they would have. My pitiful outcry was peremptorily dismissed. He'd prepared himself.

"This is the only way Cooper will go forward. It's your job to sign up the arbitrageurs."

"Give me a reason, just one, that makes sense," I said, trying to leaven my consternation with a reasonable tone of voice, realizing that I sounded shrill.

"If they agree to tender to us, it expresses a belief in the value of our stock," he said. Cooper and its advisers had come back to the cosmetic benefits of the action rather than the tactical aspects.

"All that the arbs will agree to is that at equal prices they'll prefer the Cooper stock." From their point of view that would induce an auction with little or no risk to them.

"That's enough for Cooper."

One more time, I tried to protest. He would have none of it.

I called Don Drapkin, my counterpart at Skadden Arps, who represented Crouse. I knew him quite well, since he'd been at Cravath during the time I'd worked there. He was knowledgeable, careful, and astute. Years later he went on to become vice chairman of Revlon. I found him at his mother-in-law's house in Bayonne (he'd married his Cravath secretary), and we attempted to devise a form of agreement to be signed by the arbitrageurs. Our solicitation of the arbitrageurs had to be completed in one day, Monday, otherwise there would be leaks. We concluded that we couldn't approach more than nine arbitrageurs, a magic number indicating that the solicitation was select and private. A letter agreement was needed to assure prompt approval. Keeping the letter simple, he

and I finally settled on one sentence which said that the arbitrageurs weren't free to tender to Internorth unless the price of the Cooper stock dropped below $50. If Internorth raised its price, the agreement terminated. Drapkin then undertook to get covenants from three trusts holding 20 percent of the Crouse shares and left me to deal with the arbitrageurs.

How to approach the market professionals was the next question. All their names were known, but not their stock positions, and we needed promises from the maximum number of shares held by the fewest number of people. I called Marty Lipton at home on Sunday and explained the situation to him. He called his friend Richard Rosenthal, then the head arbitrageur at Salomon Brothers. Rosenthal had a sizable stock position in Crouse, agreed to participate, subject to his lawyer's approval, and told us which other arbitrageurs to call. Following his lead, I called everyone on Monday morning. All agreed to participate. But first they all wanted approval of the arrangements by their respective legal counsel.

What ensued thereafter was painful. Each arbitrageur had his own lawyer, and each lawyer knew that the arrangements would be painstakingly inspected and vigorously challenged by Internorth (and perhaps by the SEC) as market manipulation. No one liked the letter agreement. Fearful, each had his own approach. My inclination was to agree to whatever each would commit to as a practical solution, but I soon discovered that such a technique wasn't possible. Everyone wanted his own version but also wanted to know what everyone else would do before fully committing. So after I finished with one and went to another, I had to go back to the first, who then wanted to make changes, which meant going back to the second. It was almost impossible to get to the third, let alone to all the others. The more time they spent on trying to reach airtight arrangements in contemplation of a challenge, the more uncomfortable they became with the validity of what we were doing. All this was exhausting and time-consuming. Most of the working morning was over before I concluded that I'd have to go back to the original sentence and insist on no changes.

Starting negotiations with a degree of flexibility and switching to total rigidity is a strategy that defies common sense. What I had going for me was the gamesmanship of the arbitrageurs. They be-

lieved that Cooper wouldn't go forward unless it got the affirmation of these agreements, and their lawyers were told to do everything possible to promote the transaction. How could a one-sentence letter prove so difficult to produce?

More was at work, however, than I first realized. All the lawyers wanted to know what Charlie Johnson, representing the arbitrage department of Merrill Lynch, would do. They expected that he would be gun-shy, since he was still appealing his proposed suspension from practice. I'd avoided approaching Charlie early, wanting to get a number of lawyers representing substantial arbitrageurs to agree before talking to Charlie. I also expected that he'd be difficult to deal with, knowing Stanley Sporkin would be watching. Taking any undue risk could affect the commission's attitude toward him and hurt his pending appeal. In his shoes, I'd tread lightly and not too close to the line. If Charlie advised his client not to sign, the others might bolt and run. Indeed, they may have been expecting Charlie to object and were looking for a way out. Without Charlie agreeing, nothing would get done. Reluctantly, I called him.

"What do you think, Charlie?" I asked as he pondered the sentence.

"Stanley's going to bark."

"Do barking dogs bite?" I asked.

"Sometimes." His tone offered slight assurance. As we talked, however, I sensed that he wasn't rejecting the letter agreement. The problems covered by the agreement interested him. "What are the others going to do?" he asked.

"I've told them that there can be no changes in the sentence. They're waiting for you," I said frankly.

"It's one of those days," he said. He was a senior partner and used to people waiting for his opinion.

"Yes," I said.

"Am I wrong to think that the nine arbs can sell their stock to Cooper anytime they want?"

"You're not wrong," I said, responding although it was a rhetorical question.

"Can't they then agree on the terms under which they sell?" He

meant pricing and timing terms, if the sales were not immediately made.

"I believe they can. But it can be said their agreement with Cooper influences others to sell to Cooper."

"So does the sale," he said. "Am I missing anything?"

"Not that I know of."

"I'll recommend it to my client," he said.

"Do you want to make any changes?" I asked, impressed with his professionalism.

"I thought there could be no changes."

"I'd like to keep it simple, but if you have any I'll take them."

"It's fine the way it is," he said.

Nine arbitrage firms signed, but we fell short with 30 percent of the shares rather than the 33 percent that Cooper had insisted upon. Close was good enough, and Cooper committed by issuing a press release announcing the exchange offer. Special mention in the press release was given to its arrangements with the 30 percent of the shares held by arbitrageurs and trusts, all with the hope that the agreements would keep its stock price from precipitously dropping.

The predictable reactions followed. Internorth challenged the validity of the contracts in the federal court in Syracuse, and the SEC started an investigation. Ordinarily the Internorth lawsuit would be prosecuted vigorously, and the SEC wouldn't seriously investigate until after the contest was over, leaving the matter for the court and the marketplace. In this case, the SEC immediately began a campaign to invalidate all the agreements, and Internorth waited while the SEC acted.

Characteristically, Stanley said, "This smells. Everything about it smells. Those guys can't do that." Stanley had spoken. We knew that his concern was that the contracts interfered with the free market and he considered that manipulative. Stanley never gave his reasons, but prophets don't need or use justification, argument, or other forms of ratiocination. Their moral force obviates reason. Nevertheless, for the moment, we were satisfied that his fury was empty, for he didn't (and couldn't) point to any broken rules. Even Stanley needed fractures, if only hairline breaks, to claim

transgressions; otherwise his exquisite moral sense was merely personal, without the force of his office.

We underestimated him. Ever hardheaded and uncompromising, Stanley worked his will. He called Cooper's lawyers in Texas, told them to come down to his office in Washington. Confronting them, he asked Cooper to release the arbitrageurs from the letters. But he was met with stone-faced silence. So ridiculous a request didn't deserve an answer. Stanley then demanded that they be released and was met with headshaking. Lecturing the lawyers came next: Stanley reminded them that approval of the SEC was required before Cooper could begin its exchange offer. Slowly they understood.

If Cooper couldn't commence its offer with reasonable promptness, it would lose its credibility and Internorth would win. Stanley told them that he'd teach them about bureaucratic murder. The neatly printed exchange offer on fine white paper would yellow from age while they waited for his approval. No court could or would order the SEC to hurry. He didn't have to lecture for very long. Without Stanley's cooperation, Cooper's game was over. The lawyers told Cooper that Stanley had them blocked. Cooper wanted to make the acquisition and had no choice but to agree to drop the agreements. All our work was for nothing.

And Cooper, it turned out, didn't need the contracts. Once it began the exchange offer, its stock price dropped as expected, but the price remained higher than Internorth's bid and Cooper successfully completed the acquisition of Crouse, including Belden. That victory should have been the end of the matter, but Stanley wasn't satisfied. Nasty deals like this with the arbitrageurs could happen again. Continuing his investigation, he called in all the lawyers to take their testimony.

I was served with a subpoena by the SEC and directed to appear at the commission's New York office with all my, and the firm's, records pertaining to the matter. I wasn't prepared for this turn in the investigation. The context was wrong. In every action that I'd taken I thought I'd be fighting to uphold the validity of the agreements, but Cooper had conceded. Stanley had outmaneuvered us all, and there were no principles at stake. What was even more humbling, he was investigating why we'd gone astray, making us

targets. The investigative process was now part of our punishment. Bringing or defending a case for a client is the lawyer's role, but being the target in the case is different, not part of our training or emotional expectations. Sitting beside the client doesn't prepare you for being in the client's hide.

At least I hadn't taken any notes. Stanley would have to formulate his own questions, work out his own theories. When the subpoena came I assumed that our files would contain only public documents. I was wrong. Dan Neff, the Wachtell Lipton associate participating with me at every meeting, had made an extensive file. Every question I'd asked him had been recorded. All the legal uncertainties had been followed up with careful research, indicating all the doubts and none of the resolutions. And he had issues of his own, ones more remote than mine, something a cautious and inexperienced person might want to review. All the concentric circles encompassing the problem were documented, showing every aspect of our thinking. Ordinarily, much of the firm's work product would have been protected from the investigator's eye, but Stanley was one step ahead of us. Our client, Belden, had been absorbed by Crouse, which in turn was merged with Cooper, which waived all rights to confidentiality, knowing that it had settled with the SEC and that there would be no claims against it. Whatever we'd thought or had done was fair game. Seeing the file, I knew that my deposition was going to be a long and worrisome one. Looking back over the decision process, all the second thoughts were obvious.

My examiner was Gary Lynch, who subsequently became the head of the Enforcement Division and prosecuted such people as Dennis Levine and Ivan Boesky and Michael Milken. Stanley had brought in the first team. The New York examining room was a small, windowless conference room with a battered table, whose gritty undersurface held the remains of more than one mouthful of gum. The room smelled of other cases, acrid and sour reminders of distress. Gary Lynch sat facing the door, his papers arranged on his side of the table. As soon as I arrived, he locked the door so that we wouldn't be interrupted, retaining, like a valuable fixture, the stuffiness of the room. The stark, straight-back chairs were the final assurance of discomfort. A stenographer sat at the end of the table, equipped with both a stenographic machine and

a tape recorder. I'd come with two litigators, who were there to object to questions and to allow only crisp answers. The less said, the better.

Taped to the wall behind Gary Lynch was a large chart, practically blackboard size, which reproduced in full the blackboard that I'd drawn in Houston.

"Where did you get that?" I asked, unguardedly showing my surprise. On the chart, carefully reproduced, was my bold admonition: "TAKE NO NOTES (including of this board)." Lynch smiled evasively, letting me know that he'd be the one asking the questions, gratified by my reaction and satisfied that the subpoena had been effective. Someone from Cooper had taken careful notes, making sure that no word or number was lost. Even without testimonial evidence, Stanley had complete documentation of all that had gone on at the Houston meeting.

Of course, Gary Lynch began his questioning by asking me to explain the blackboard. He had all the time in the world to explore every nuance, more so than anyone attending the meeting. Under such scrutiny, there is no perfection, and even a smooth surface has its burrs. For eight hours he asked piercing questions. Answering carefully, I relived each decision in slow motion. Lynch even had the various drafts of all our false starts in formulating the letter agreement with the arbitrageurs. The care taken by us weighed against us. Each version was a probe, like burglar's tools, looking to make a passage. You could frame a case from our implements and what we'd tried to avoid. My distress added to the corrosive character of the room.

Where was this investigation going to lead? Would we too wind up in disciplinary proceedings just like Charlie Johnson? Would it depend on our answers to the questions? When the deposition was over, Gary Lynch and I shook hands. Interestingly, we'd gotten to appreciate each other. He'd gotten to see what we do. The shared experience, strained as it was, made a bond. I asked, as I felt I could: What did Stanley want? He was direct: Stanley didn't want us to do it again, ever.

Stanley was very effective. It took me almost four years before I tried anything like that again.

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CHARLIE JOHNSON'S CASE was decided a month or two later, in February 1982. The commission found in his favor and the case was dismissed. Stanley Sporkin left the SEC when William Casey, the chairman, was appointed to head the Central Intelligence Agency. Stanley became Casey's general counsel and then was appointed to be a federal district court judge in Washington, D.C.