

THE HISTORICAL SOCIETY OF THE NEW YORK COURTS

ORAL HISTORY PROGRAM

Honorable Richard C. Wesley



Found on exterior entrance to New York Court of Appeals

**THE HISTORICAL SOCIETY
OF THE NEW YORK COURTS**

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ORAL HISTORY

**Subject: Honorable Richard C. Wesley
United States Court of Appeals, Second Circuit
New York State**

An Interview Conducted by: Tiffany Lee and Brian Feldman

Date of Interview: May 7, 2012

Location of interview: 48 Main Street, Livonia, NY 14487

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2 program to document the recollections of retired Judges of the New York State Court of Appeals
3 (New York's highest court), retired judges and justices from other courts in the State, and
4 prominent New York lawyers (Subjects). Starting in 2009, all interviews were videotaped.
5 Interviews prior to that time were either audio or video taped. Interviews were conducted by
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24 It is recommended that this oral history be cited as "An Oral History of Richard C. Wesley,
25 conducted on May 7, 2012 by Tiffany Lee and Brian Feldman, at the home of Richard C.
26 Wesley, by The Historical Society of the New York Courts."
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Oral History Project

INTERVIEWEE: Hon. Richard C. Wesley

INTERVIEWERS: Tiffany Lee and Brian Feldman

DATES: May 7, 2012

TL: Good afternoon. My name is Tiffany Lee, and together with Brian Feldman, we will be interviewing the Honorable Richard C. Wesley as part of the oral history project for the Historical Society of the New York Courts.

Judge Wesley is currently sitting as a Judge with the United States Court of Appeals, Second Circuit. I had the honor and privilege of serving Judge Wesley, as his law clerk, between 1999 through 2002, when he was sitting as an Associate Judge of the New York State Court of Appeals.

BF: And I had the honor of serving as a law clerk to Judge Wesley from 2004 to 2005, when he was sitting on the Second Circuit Court of Appeals, where he still sits today.

TL: Well thank you, Judge, for inviting us to interview you in your lovely home.

RW: Well thank you both Brian and Tiffany, for doing this. It means a great deal to me that it would be the two of you to do this.

BF: Thank you, Judge.

TL: Thanks, Judge. You grew up not far from here, in Livingston County. Can you tell us some of your fondest memories growing up in a small town in upstate New York?

1 RW: Well, I was born and raised in Hemlock, New York. Judith Kaye¹ once referred to
2 Hemlock, New York as a suburb of Livonia. It's about 3½ miles from here. I grew up in a
3 very small house that my father built for my mother and my older brother -- I have one
4 sibling, Don -- at the north end of town.

5 Until I was in the seventh grade, I went to school at the Hemlock School, which was a
6 teeny school. There were only five kids in my class and there were two grades in a room.
7 A very, very small town and everyone knew your business and everyone knew you, but
8 for me, a wonderful place to grow up. The backyard was hayfields and cornfields, and my
9 brother and I used to roam down through the fields a lot and get into all kinds of trouble
10 that my mother would give us the dickens for, but a very wonderful, caring home
11 environment, an environment that I found to be very nurturing. [0:02:14.7]

12 Hemlock is a beautiful community, set in the Finger Lakes, beautiful hills, and I enjoyed
13 the outdoors a great deal. I have exceptionally fond memories of winter nights when the
14 neighborhood -- three or four families -- would get together and do sliding parties, and I
15 can remember my father offering to pull the sleds back up the hill, which I was always
16 grateful for.

17 Dad was a fuel oil delivery driver and mom worked in a butcher shop and later on became
18 a practical nurse. I always thought there was an interesting correlation between working
19 in a butcher shop and becoming a nurse. They were children of the Depression. My dad
20 was very good with numbers, probably would have been an accountant if he had had the
21 chance to get a college education. He was drafted shortly after he graduated from high

¹ Judith S. Kaye, Chief Judge of the New York State Court of Appeals, 1993-2008;
Associate Judge, 1983-1993.

1 school and served in the Second World War. Mom was a very good student, in fact
2 skipped a couple of grades in school and graduated early, and always I think wanted to be
3 a nurse but had to delay her dreams for about 15 years or so, until I was old enough that
4 she didn't feel the need for her to be close to home when I was coming home from
5 school. A wonderful place to grow up and a place that I'm glad I haven't left, to be honest
6 with you.

7 TL: How did those experiences growing up in Hemlock shape who you are today?

8 RW: I think that I've always valued personal relationships, and I think when you grow up in a
9 small town, you feel a part of it, and I think that there is this kind of natural tendency to
10 reach out to people because you expect them, as part of your community, to be familiar
11 with you. I think that that really happened and really stimulated me as a young person.

12 [0:04:14.3]

13 I have lots of aunts and uncles on my mom's side and they live in the area, and so I had a
14 lot of relatives that also lived in that community and the adjoining community to the east,
15 in Honeoye, and so I spent a lot of time there. My mother was very, very good at meeting
16 people, it's interesting, kind of an interesting relationship. Mom was very, very outgoing,
17 much like my grandfather Belcher, who was a public officeholder in the town board, of
18 the town of Richmond, and my dad was a shy kind of retiring fellow, didn't like crowds,
19 didn't really like to travel. If I wanted to be talked into something, I asked my mom. If I
20 wanted to be talked out of something, I asked my dad. I didn't ask my dad as much
21 because of that. I think growing up in a community where you were kind of known early
22 on and felt comfortable within the community was an enriching thing for me.

23 My parents were also very typical, I think, of parents in the late fifties, early sixties. I was

1 born in '49. There was an absolute certainty that both my brother and I would go to
2 college, I mean it was just a given in our lives. It was also an absolute certainty that
3 anything that we were going to engage in, that we would do it as well as we humanly
4 possibly could, and there was also a certainty that we would never quit from anything.
5 These were the rules that were imposed by my parents. They really underwrote the
6 importance of a solid education and moral integrity, and I think those were tremendously
7 good building blocks for both my brother and I. So when I went to high school and then
8 decided to go on to college, I was imbued with a sense that things were within my reach.
9 [0:06:15.5]

10 TL: That's really cool.

11 BF: Judge, did you have any role models growing up?

12 RW: Well, I had several role models. My father was a role model of particular importance to
13 me. My father was one of those folks who could fix anything. He had a high school
14 education but he could fix anything. We did all of our own repair work on our cars in my
15 dad's garage. We never took the car to have the oil changed, you always changed the oil
16 at home. I won't tell you what we did with the oil, it was probably a violation of the law
17 at the time or it would be today supposedly. So he was very good at that and as much as I
18 talk about the fact that he would talk you out of things, he gave really good advice. He
19 also was a wonderful kind of sounding board for me at times that were difficult for me.
20 Just before I graduated from high school, I had second thoughts about going to college
21 and I thought about enlisting, and of course Vietnam was really starting to bubble up at
22 that point in time and my father was dead set against it, and we had a long talk about his
23 service in the military.

1 My dad was what they call a brittle diabetic, and so he had diabetes where his insulin
2 levels would fluctuate wildly and he would go into insulin shock very easily. Diabetes is
3 also a difficult disease on the circulatory system and he would often talk about the fact
4 that he would have cramping in his legs, and he used that as an excuse to wait up for me
5 on nights when I was going out and about, traveling about.

6 My grandmother Wesley passed away and left me a 1955 black Chevy sedan, and that
7 was really something. I was a man about town with that car and I would come home at
8 night, late sometimes, and there in the darkness of our living room was the glow of the
9 cigarette. My dad was a smoker and there would be my father, and I knew that I would
10 have to sit down and have a conversation with him, and so anticipating that he was going
11 to be there was a great safety valve or safety check I think, on my behavior before I got
12 there in terms of alcohol consumption. [0:08:25.4]

13 I remember those conversations with him late at night, always very supportive and
14 encouraging me to do things that I thought were important to do and carry on with. My
15 father has been dead for 32 years this fall and I can still hear his voice. I can still hear his
16 voice talking to me at times and kind of a bittersweet thing for me with my dad is that
17 none of the really terrific things that happened in my life happened in his lifetime, other
18 than my marriage to Kathy and my graduation from law school, but all the kind of public
19 service things came long after he passed away.

20 I also had a couple of teachers that I really was fond of. There was a teacher in fifth and
21 sixth grade by the name of Ms. Blank, Mildred Blank, and she today would be looked
22 upon as a caricature of the Wicked Witch of the West in the "Wizard of Oz." If you
23 recall, the teacher becomes the witch when you get to Oz, and she looked just like that

1 lady and she was mean as a tack, but she was a stickler for precision. We had a writing
2 assignment in fifth grade about tying a square knot, and I was a Boy Scout and so I wrote
3 about tying a square knot, and she had to be able to do it from your essay, and so you
4 would read the essay and then she would proceed to do it. She was unable to tie a square
5 knot on my first three tries and I was very frustrated. I was the smartest kid in the class or
6 at least I thought I was, and I was pretty frustrated, and she would smile at me when the
7 knot wouldn't take. But what I learned from her was the need for precision and careful
8 thought. [0:10:20.2]

9 I had one other high school teacher, a fellow by the name of John Finster, who was my
10 social studies and American history teacher in high school and also my football coach.
11 John was a Rooseveltian Democrat, believed in big government, and he had a very heavy
12 Rhode Island accent. He was the one that introduced me to William Buckley and Up
13 From Liberalism. And so it's interesting, he was kind of contrary to his own viewpoint,
14 was exposing me to a number of things that he thought would be interesting to me. John
15 Finster was the fellow that I always went and saw as soon as I got home on college break,
16 to have a political discussion with him.

17 BF: Interesting.

18 RW: I would take one view, he would take the other. We remained good friends until he
19 passed away a couple years ago. So yeah, there's several people that I think played very
20 important roles, particularly up through high school.

21 TL: I understand that for your portrait at the New York State Court of Appeals that's hanging
22 there, there's something significant which ties into where you're from.

23 RW: Yeah, you know it's interesting, as you know Tiff, and Brian you know from my talking

1 about it, the Court of Appeals has this wonderful tradition of having a portrait done, and
2 so when I left the Court in the summer of 2003, Judge Kaye talked with me about the
3 possibility of having a portrait done and I was certainly amenable to it. The nice thing is
4 that you get to pick the artist who does you, and I was very fond of the portrait that was
5 done of Judge Bellacosa.² [0:12:06.3]

6 Judge Bellacosa has a very meticulous, organized mind and he's very step-by-step, he's a
7 process fellow, and so I called Judge Bellacosa and asked him who had done his portrait
8 and how he had come to decide upon this fellow. The fellow's name is John Martin. He's
9 from Overland, Kansas. He's a professional portraitist. I looked at some other portraits
10 that he had done -- there's a place in New York City where there's an agent for all these
11 folks -- and thought that he would be the right guy. It's a very interesting process. Martin
12 came here. In fact, both of you met him. I don't know if you remember this or not but he
13 was at a clerk picnic.

14 BF: I remember.

15 RW: He came to a clerk picnic, because I had suggested to him that that would be the best time
16 for him to come and get a sense of who I was. So he came, he enjoyed the clerk picnic
17 enormously, and then he asked me to take him to two or three places that I thought were
18 the most important places in my life. I took him to the Livingston County Courthouse,
19 because that was where I tried my first case and is one of my favorite places in the whole
20 world, and I also took him to Hemlock Lake. The reason why I chose Hemlock Lake is
21 that from the time I was a young boy, I had a friend whose dad was -- Hemlock Lake is a

² Joseph W. Bellacosa, Associate Judge of the New York State Court of Appeals,
1987-2000.

1 source of water for the city of Rochester, as both of you know -- and there was a
2 superintendent of the waterworks there and he had a young son who was my age, and so I
3 spent a lot of time up at the lake as a young boy. Then into my teenage years and being
4 able to drive, I used to go up there all the time. It's forever wild and it's a beautiful,
5 lovely place to be and to kind of think, and so the lake is a very kind of important image
6 and place in my life. [0:14:07.6]

7 John took pictures and then did a sketch and then sent me two or three proposed portraits,
8 and I had told him that I wanted something in the background. Traditionally, it's a judge
9 holding a book or some silly thing, and if the purpose is to really show something about
10 yourself and it's going to be there forever or for a long period of time, then there ought to
11 be something to it. And I picked the picture -- the window that's behind me is from the
12 Livingston County Courthouse. It's the clear glass and the arch, it comes to an arch.

13 BF: Right.

14 RW: And the lake outside is Hemlock Lake, looking from the very north end of the lake, south,
15 along the lake. I'll be honest, I was concerned about how Judge Kaye would react to it.

16 TL: What was her reaction?

17 RW: What happens is that he goes back and he does the portrait and then he brings it here, so
18 he set it up right behind me. I wanted Kathy to look at it. And he had me sit down again,
19 because there were a few kind of fine details that he wanted to finish, probably add a little
20 extra gray to the hair, and then he packs it all up very meticulously and sends it to Albany.
21 When it got to Albany, Brian Emigh, who is the head of maintenance there, unpacks it
22 and puts it on an easel in the Chief Judge's office, and it sits there, so that she can have a
23 chance to look at it.

1 I waited for the call, because Judge Kaye, she has opinions about things, and if she has an
2 opinion that's not favorable to you it's not always a pleasant experience. So I thought, oh,
3 what is she going to think? And she called and she said, "Richard, I'm looking at you." I
4 said, "Oh " and she said, "It's magnificent, I love it." So I was so relieved, because I
5 thought, oh, you know, I'm kind of breaking the mold a little bit, but she liked it.

6 [0:16:16.6]

7 TL: It's kind of interesting, because of where you ended up for your undergraduate work, it
8 was kind of your first excursion to Albany.

9 RW: Right.

10 TL: Which ends up being a place that comes back again and again in your career. What was
11 that experience like, going away for undergrad and going to a place like Albany?

12 RW: Without either of my parents having had a college education, we pretty much relied upon
13 a guidance counselor to kind of help us sort through. In fact, he's my next door neighbor,
14 he's still alive, Max Thomas is his name. I didn't want to go close to home. I wanted to
15 get away a little bit and experience the world. We had never taken any big vacations or
16 anything, so the most I'd ever traveled was up into the Adirondacks with my folks. I
17 wanted a good school and yet, my parents were of very modest means, and the state
18 university seemed like the right thing for me. In those days, if you had a Regents
19 scholarship, which I did, that paid your tuition, \$200 a semester, think of that.

20 BF: That's amazing.

21 RW: Room and board was \$750 a semester, so for about 1,500 bucks and some spending
22 money, you could go to college in 1967. Albany seemed to fit the bill. UB was too close, I
23 didn't want to go to Stony Brook, that was too far, Binghamton-Harpur was just

1 becoming a part of the state university unit, and Albany seemed kind of like the right
2 place. I went and visited the school and it made sense to me. When I first went there, I
3 think it would be fair to say that I was overwhelmed. It was very big and even though I
4 had gone to school in Livonia, as if that's something big, it was kind of overpowering in a
5 way, and I had not been exposed to kids from different regions, the kids from New York
6 City. The only Jewish person I knew before I went to Albany was my doctor, Dr.
7 Yanowich, and I had never had any contact with any African Americans, believe it or not,
8 so going to Albany was a real eye-opener for me. But I have to say, it turned out to be
9 perfect for me. [0:18:41.8]

10 I've often referred to it as the gateway in my life. I think it's one of the most significant
11 choices I've made in my life. I liked learning, I was in love with learning, and I was very
12 interested in American history. I was not interested in politics, quite frankly. I was really
13 interested in American history and I was very, very fortunate early on to take a course
14 from Professor Roberts, Warren Roberts, who is now a retired distinguished professor. It
15 was intellectual history, it was European history, but it was taught from an intellectual
16 perspective, so we read great works -- Erasmus, Descartes -- and then we would write
17 papers. It was a new way of thinking about history, by looking at how people were
18 understanding their world at that point in time, and I really loved that, and so those four
19 years were a time of enormous intellectual and personal growth for me.

20 I ended up staying in Albany over the summers, after my first year, and so I very rarely
21 came home. Developed wonderful friendships that I maintain to this day and the last year
22 that I was in college, actually played college football, because it was the first year we had
23 football. It's ironic, I have a clerk right now, Matt Laroche, who also played for the same

1 college football coach that I did. Albany was an eye-opening time for me. [0:20:14.2]

2 I also, in the start of my sophomore year, got my first real taste of politics, because my

3 then Assemblyman, a man by the name of Jim Emery,³ who became a very important

4 force in my life, asked me to come and work for him. My dad had had his first heart

5 attack, brought on by the diabetes, and Emery knew that. My mother was very active as a

6 Republican committeewoman for Livingston County, and so he knew of our difficulties,

7 and he called up and said, "Would you like to come to work?" And it was unsolicited on

8 his part. I started working for him and have a relationship with him to this day, but that

9 was where I really first got started, stamping things. "I read about you in the newspaper."

10 And I'd cut out all the little things and send it out to constituents, or sending out birthday

11 cards to people, or "I've heard you had a baby, congratulations, Jim Emery." I could even

12 sign his name. It was kind of fun.

13 BF: Judge, you were in college at a very interesting time in American history and in chambers

14 still today, you have a photograph that you took, I believe with some of your friends from

15 college.

16 RW: Fraternity buddies, yeah, yeah.

17 BF: Could you tell us about that?

18 RW: It was the spring of 1968, there were four of us -- Paul Yesick, Mike Golub, Mike Glass

19 and myself -- and we decided that we wanted to go to Fort Lauderdale. Our interests were

20 not of any historic proportion; we were interested in beer and women, most likely in that

21 order I would suspect. [0:22:00.8]

³ James L. Emery, Member of the New York State Assembly, 1965-1982; Minority Leader, 1979-1982.

1 So we were on our way, Paul and the two Mikes, they were all Jewish guys. Mike Glass'
2 dad is from Brooklyn, Mike Golub was from Brownsville, within Brooklyn, and Paul was
3 from out on the island, Long Island, and we're driving along. I mentioned this to you
4 Brian, we had a TripTik from the AAA, and when you flipped over the page and you
5 started to get into North Carolina, there was this warning about speeding. Sections of I-95
6 were being built at that time but mostly it was old U.S. 1, which was at times a two-lane
7 highway. We're driving along and this is in the spring, this is before the Robert Kennedy
8 assassination and the Martin Luther King assassination, and all of a sudden this sign
9 comes up. It's just outside of Jericho, near North Carolina, and it's a big, huge red
10 billboard, as you two know, and in the center of the billboard is a man riding on a horse
11 and the horse is draped in white, and he's draped in Klan garb and he's holding a burning
12 cross up like this and it says, "Welcome to Jericho, North Carolina, join the United Klans
13 of North Carolina." Either "fight " or "stamp out " integration and communism.
14 Immediately adjacent to the sign is a sharecropper house up on cement blocks, with little
15 black kids playing out on the porch. I had never seen or even been exposed to the ugliness
16 of segregation or the South's perspective at that time to African Americans and the need
17 for segregation, et cetera. [0:24:00.3]
18 It terrified me, it scared the hell out of me, and it deeply saddened me. Mike got out and
19 took a picture and I remember we talked about that sign for hours as we drove farther
20 south, and it took a little bit of the shine off of the trip, to be honest with you.

21 BF: Sure.

22 RW: I've thought about that picture for years. Then, when Governor Pataki⁴ nominated me for

⁴ George E. Pataki, Governor of the State of New York, 1995-2006.

1 the New York Court of Appeals, Mike sent me the picture, because I had talked with him
2 about the picture repeatedly, and I keep that picture, as you both know, in chambers. It
3 still troubles me to see it and yet I think it's important for people to see, because it shows
4 you how significant a change can come through the hard work of men and women and the
5 law. We are a very much different nation. We have many things to do, but I think to say
6 that we haven't made light years of progress from 1968 is to ignore the obvious, and so I
7 keep that there to remind the clerks and myself of from where we've come and how we
8 managed it. It daily reaffirms for me the value of the judicial process.

9 TL: Was an event like this part of the decision-making process in terms of life after
10 undergraduate, going to law school?

11 RW: I don't recall it as such. The best I can piece that together -- I really wanted to be a history
12 teacher. I really wanted to teach history. I just was in love with the American experience
13 and it was a great time to be a history student because African American history was just
14 kind of springing up, and so there was all this new information that no one had ever
15 known about, and there were all these new resources in terms of slave diaries and --
16 [0:26:17.8]

17 I remember reading the Richmond Gazette back in 1868 and kind of really experience and
18 trying to understand what it was like to live in the South during the Civil War and prior to
19 the Civil War, and so I really wanted to do that. I had this terrific history advisor, a guy by
20 the name of Richard Kendall, American historian. I would come in and I'd meet with him
21 about the courses I was going to take and every once in a while the conversation would
22 get around to, "Well Dick, what do you want to do with your life?" I'd say, "Well, I really
23 want to teach," and he'd say, "You know, you're a great student but, you know, there's

1 going to be a million history professors out there.”

2 I was active in student government at Albany and I had been active in student government
3 in high school, so I was interested in governance of the institution of which I was a part,
4 but I was never really all that interested in national politics other than generally. So he
5 said, “I don’t know, you’re good talking with people and I love the conversations that you
6 and I have.” He said, “Have you ever thought about law?” I didn’t know a lawyer, I did
7 not know one lawyer. I knew the lawyer that had done my mom and dad’s wills, but that’s
8 all I thought -- I mean, I knew nothing, and there wasn’t CSI and all this other stuff with
9 lawyers all over the TV. There was Perry Mason, that was it.

10 He gave me great advice. He suggested that I go down and watch the courts in Albany
11 work, and I did, I went down and watched a couple of night court sessions. Then I had a
12 break and I came home and I watched a trial in Livingston County, a dog bite case of all
13 things, but I was transfixed by watching that process work, and that really kind of gave
14 me a sense of maybe this was what I wanted to do. [0:28:19.9]

15 So this occurred around the end of my sophomore year, beginning of my junior year, and
16 the great thing about it, as Professor Kendall told me, he says, “Look, you don’t have to
17 take any education courses, you can take whatever you want now the last two years of
18 school, take whatever interests you.” So I would sign up for more than the number of
19 classes I needed and then I would go and audit the first day and then pick which classes I
20 thought would be most fun, it was a really kind of eye-opening thing for me.

21 I then took the -- I guess they called it the LSAT then, and did OK, not great. The final
22 decision came down between Michigan, Georgetown and Cornell, and Cornell made the
23 most sense because dad had gone back to work but still had health issues and I didn’t

1 want to be too far from home. I decided that would be a good idea, so that's how I ended
2 up at Cornell.

3 TL: And how did you like it? How was that law school experience?

4 RW: Terrible. The first year was absolutely dreadful. It was six days a week. I remind my son,
5 who graduated from the Cornell Law School, how easy he had it. It was six days a week.
6 There were three classes on Saturday morning. I don't remember being in a bar my whole
7 first year of law school; quite a different experience from my senior year of college. It
8 was rigorous. My thinking was sloppy, I realized. It was all Socratic. I had some terrific
9 professors. [0:30:06.9]

10 I had a fellow who taught me procedure by the name of Rudolf Schlesinger, who was
11 really one of the great civ pro guys in American jurisprudential thinking and whose
12 thoughts on teaching me about res judicata, as you and I both know about res judicata, we
13 did that case together, and a lot of other things.

14 BF: Sure.

15 RW: But it was very, very hard for me and my grades -- I think it was several things. A state
16 university degree at that time was still viewed as a teachers college degree. I had one
17 other classmate in my class from Albany, and there was one fellow two years ahead of
18 me, a good friend of mine by the name of Jeffrey Mishkin, and those were the only three,
19 so we were the only three people. The guy who sat next to me was a Harvard grad who
20 had been an economics major, who had had Galbraith,⁵ you know what I mean? So there
21 were all these people in the class who had all these pedigrees in terms of their education

⁵ John Kenneth Galbraith, Paul M. Warburg Professor of Economics and Emeritus Professor of Economics at Harvard University, 1959-2006.

1 and I was a little bit overwhelmed again, I think, and so the first year was a very difficult
2 time for me.

3 I came home that summer and as you know, Tiffany, I couldn't find a legal job and so I
4 worked on the New York State Thruway at Exit 45, from 11:00 at night to 7:00 in the
5 morning, as a toll collector. I was the only person on. I read the complete works of Kurt
6 Vonnegut that summer because there was not a lot of traffic. After about 2:00 in the
7 morning, things got a little light and I got adept at tossing coins into cones that stood on
8 their ends and things like that. But I also then volunteered at Monroe County Legal
9 Assistance Corporation and I actually co-wrote a brief challenging restrictive zoning in
10 *Metro Act v Town of Huron*, and it had a standing component to it that we wrote on. Then
11 I went back to law school. [0:32:21.1]

12 TL: And which court was that brief for?

13 RW: The Second Circuit. If you look, it shows me on the brief in 1972, I think it is.

14 BF: Is that right?

15 RW: We lost. We didn't have a major impact. Then I went back to law school for my second
16 year and some of the confusion had been removed I think, and I really enjoyed my second
17 year. I was working in the Legal Aid clinic at that time, doing a lot of fair hearings.

18 TL: Legal Aid?

19 RW: Legal Aid yeah, Mr. Conservative in Legal Aid, can you believe that? It was really good
20 work because you got to go to court and you got to do hearings and you got to question
21 witnesses. I interviewed in the fall for some jobs and I wasn't law review; in fact, I
22 definitely was in the middle of the class, and my dad has his second heart attack, which
23 was totally disabling, and then Cornell stepped up for me. Cornell then gave me a needs

1 scholarship and helped me find work, and I did some clerk work for a member of the
2 Committee on Professional Responsibility, so I was reading the canons all the time, for
3 Gray Thoron, who was a professor at the law school, and I tended bar at night. So I was
4 busy and I did really well, I was shocked. I mean, I did really well, but I couldn't get a job
5 with any of the Rochester firms, including yours. I've forgiven them. [0:34:10.9]

6 BF: Thank you, Judge.

7 RW: This little law firm in Geneseo offered me a job and while I was working for them that
8 summer, I got a call from the dean of the law school who said, "Are you aware of the fact
9 that you were one of the top three students, based on your second year grades alone?" I
10 said, "No, you're kidding?" I thought I did well but I didn't think I'd done that well. At
11 that time, they had a provision that you could go onto law review based on your second
12 year grades alone, and so I was offered a position on the law review. It was obvious to me
13 that the law review would be good for me and my career, and so I went onto the law
14 review and wrote a note. We did a symposium on developments in public assistance law
15 and I co-authored a note with a fellow by the name of David Rothenberg, who you've
16 met.

17 BF: Sure.

18 RW: Who you both know very well, a very distinguished Rochester lawyer who became a very
19 dear friend of mine. I think that was a great experience because I was interested in trial
20 law, but the law review stuff made me pay attention to style. I thought I'd had pretty good
21 writing skills from all the courses I'd taken at Albany, starting with Professor Roberts on,
22 because I always did a lot of papers, but legal writing and the precision that's required of
23 lawyers is another matter. So I think it was very, very good for me to have that

1 experience. After that, I got a job at Harris Beach, your competitor.

2 BF: How long were you at Harris Beach, Judge, and when you were there, did any of the
3 attorneys you worked with make any predictions about where you might be down the
4 line? [0:36:01.9]

5 RW: You've heard all these stories.

6 BF: Of course.

7 RW: This is not fair.

8 BF: We've set you up, Judge.

9 RW: I was there from late August of '74 until, I think, the first week of March in '76, so not
10 really two years. At that time they had a rotation program, and so you rotated through
11 different departments. I've thought back about this experience a lot, because both of you
12 -- well not you Tiffany, because you're still an Assistant U.S. Attorney -- but almost all
13 my law clerks go through a situation where they'll start in a firm or something, and then
14 there's a point in time where they're not completely happy. I can relate to that because
15 that's exactly what happened to me, and I think part of it from my standpoint was that I
16 was not so willing to work for someone else as I was willing to work for myself. So I
17 think that doing a piece of something and not seeing the whole of the thing was not really
18 very satisfying to me, and I also think that I was probably arrogant enough to think that I
19 should be doing more. And so I strongly suspect that there may have been times where
20 viewpoints that I may have expressed -- I'm doing this delicately -- were not always fully
21 appreciated by the people I was working for, but I mean I found the associates very
22 engaging and wonderful but I did have an instance towards the end of my time there,
23 where we had a summary judgment motion. I had prepared the paperwork and the

1 supervising lawyer had gone through everything and thought we had everything in order.

2 [0:37:56.1]

3 We were asking for a summary judgment and we lost in an oral decision from the bench,
4 following the oral argument, and the partner that I was working for was most unhappy
5 and most unhappy with me, and I can remember distinctly, being in his corner office at
6 the Crossroads Building, on about the 14th or 15th floor, and having him kind of really
7 light into me. He really lit into me and at the end of it he said, "You know I want you to
8 know something. I don't think you're ever going to amount to anything as a lawyer." And
9 it was like he had burned those words in my mind, you know?

10 Tiff and I talked about this the other day when we were getting ourselves prepared for this
11 thing, and she asked if that hurt me, and I honestly don't recall feeling hurt. It's weird, for
12 some reason I just wasn't willing to believe what he said, he was wrong. That could be
13 very bad, I mean it could be foolhardy because you don't want to be too smug about these
14 things, but I don't remember feeling bad. I just remember being upset that he would say
15 that to me and maybe that was a good thing, because it really kind of stimulated in my
16 mind that I would never allow anyone ever to suggest that I hadn't made the supreme
17 effort on their behalf. And so I think there was a good thing to that. History has a -- as my
18 granddaddy used to say, it's a long worm and be careful, because what's going around is
19 coming around.

20 Curiously, about, I don't know, 15 years later, fast-forward to 1991, I'm now a Supreme
21 Court Judge, there's a civil trial, and mister partner is in front of me and he asks for a
22 brief moment of an ex parte communication and I went into the jury room with him and
23 he said, "Judge, I'm a bit uncomfortable." And I said, "Well mister so and so, why would

1 you ever be uncomfortable?” He said, “Well you know, in a fit of pique many years ago,
2 when you were working in my firm, I said something that was not” appropriate or
3 indelicate -- I’ve forgotten what he called it. I said, “Whatever are you talking about?” I
4 knew exactly what he was talking about. He said, “Well, do you think that that would
5 preclude you from being fair? I’m wondering if maybe I should think about asking you to
6 recuse yourself.” And I said, “Oh Henry, how could you ever say that, you know that’s
7 the furthest thing from my mind; no, I don’t think that’s necessary at all.” And so we
8 went out and we tried the case and I’ve seen him since. I don’t harbor any ill will towards
9 him, but I do think that probably he motivated me a little bit to prove him wrong, which I
10 think probably was a good thing. [0:41:09.1]

11 TL: Yeah.

12 RW: If that was his intention then -- I’m not so happy with his methods but I’m certainly happy
13 with the result I guess.

14 TL: And then after Harris Beach, I guess this came during a point of time when you’re still
15 kind of questioning whether or not the big firm was for you anyways.

16 RW: Right, yeah.

17 TL: So you didn’t stay at Harris Beach long.

18 RW: No. In fact, I left within months after that. The firm that I had worked for the summer
19 after my second year, in Geneseo, was looking for someone. They had hired a classmate
20 of mine because they wanted me to come back, but I decided I would try the big firm. He
21 wanted to come to Rochester, I was willing to leave Rochester, and so I just switched --
22 not switched places, because he didn’t go to Harris Beach, but I came back to Geneseo in
23 March of 1976. [0:42:06.9]

1 There are several points in time in my life where, very early on, it becomes apparent to
2 me that I've done the absolute right thing. It was very early on in my time back at Welch,
3 Streb and Porter, was the name of the firm at the time, that it was obvious to me that I had
4 done the right thing. I walked in, there was a fellow by the name of Ron Cicoria,⁶ who
5 you know quite well.

6 TL: Yes.

7 RW: Ron had just become a County Court Judge, and so there was -- and he had done all the
8 trial work for the firm, or a large portion of it. He had done the major portion of
9 matrimonial work and all the negligence work, and so there was this group of files, I
10 mean several hundred files, that needed someone to attend to them, and my job was to
11 familiarize myself with those files and begin to handle them. I did that in conjunction
12 with a fellow by the name of Roger Streb, who was a partner.
13 Roger Streb and Jon Porter were like older brothers to me. I had known Jon for a while,
14 he had worked for Jim Emery, had been Jim Emery's counsel, and Jon was also an
15 encouraging force towards becoming a lawyer, also a Cornellian I might add. Roger was
16 this huge man, had to weigh 300 pounds, but just a sweet, wonderful, kind man. Roger
17 was a great negotiator and people hired him to really drive a bottom line bargain. He was
18 really tightfisted with a buck, an old German who was tightfisted with a buck. I never had
19 an argument with him in all the years that we were affiliated together, about money. In
20 fact, I always thought he paid me a little more than I thought I should be paid. [0:43:53.3]
21 So I came back there and it was heaven, and I found myself working seven days a week,
22 long hours, into the night, I was single, and just loving it, absolutely loving it. I had

⁶ Ronald A. Cicoria, Judge of the Livingston County Court, 1975-2005.

1 relatives and friends that I'd gone to high school with and all of a sudden I had clients of
2 my own, real people that wanted me to represent them, and so it was really the best of
3 everything that could be. I already had some established cases to work, there were things
4 to do, and people were coming in the door asking, "I'd like to hire Richard Wesley." If
5 they'd known me from birth, they would call me Dick or Dickey, which I absolutely hate,
6 but relatives always call me Dickey. So it was a wonderful, wonderful time and I started
7 doing a lot of night court work and stuff like that.

8 BF: Judge, you were trying cases in various courts around Livingston County. Could you tell
9 us about some of the trials you had, especially experiences with non-lawyers as judges.

10 RW: You're referring to the story that I always tell about the town of Ossian. Very early on --

11 TL: (Laughs)

12 RW: You've heard this story too. Very early on, I was down in Ossian trying a speeding case
13 or something -- it couldn't have been a speeding case because there was testimony from
14 someone else -- and the DA had a witness on the stand who starts testifying to statements
15 made by another person, an offer for the truth of their content, classic hearsay, as both of
16 you know. Being the smart aleck young lawyer that I was, I said, "Your Honor, I object,
17 that's hearsay." The judge was a sheep farmer, a nice guy -- the only heat was this
18 potbellied stove over to the side, down in the town of Ossian, up in the hills, the southern
19 end of the county -- and this worried, terrible look came across his face and he kind of
20 looked to the district attorney who by the way, is now a County Court Judge, and he said,
21 "What do you think about that Bob?" And I thought wait a second, I'm Mr. Wesley, he's
22 Bob, he's looking at Bob, I said hearsay, he has no idea what the hell I'm talking about.
23 And Bob says, "Oh, that's clearly not hearsay, Your Honor." "Overruled" he says and so

1 we go on. [0:46:19.9]

2 And so I got -- I was angry. Wait a second, this clearly is hearsay, he got away with this.

3 And I thought wait a second, the judge doesn't know what hearsay is, and so I resolved --

4 this was no great revelation, I wanted to win cases. And so I resolved that from that point

5 on in time, I would never make an objection, even in front of a law judge. If I had a jury

6 there, I would get up and I'd say, "Your Honor, why would you allow this person to say

7 what someone else said when we could have that person come in here and sit in that chair

8 and have you look at that individual and tell if they're telling the truth or not, doesn't that

9 make more sense to you?" All of a sudden the wisdom of the ruling becomes apparent to

10 the judge and I start winning cases. Then I realized well, you know, these non-lawyer

11 judges, they want to do what's right.

12 And so, I would Xerox copies of cases that I thought would be very, very important, you

13 know if there was a questionable stop, you know what's reasonable cause mean, things

14 like that, and then I would highlight the language that I was going to cite -- and I would

15 always make three copies -- one for the DA, one for myself and one for the judge -- and

16 I'd make my objection and I'd say, "Your Honor, look at this, this is the New York Court

17 of Appeals, this is the law of this state. I realize it's a tough job, but you have to adhere to

18 the law." And you know, they started coming my way.

19 BF: That's great. [0:47:55.6]

20 RW: Then, to finish it, I started to get calls from judges and it was no longer Mr. Wesley,

21 they'd say, "Dick, I've got a case and it's got this legal issue, do you have any thoughts

22 on it?" I'd say, "Well, let me do a little research for you Judge," and so I started clerking

23 for him in a way, indirectly you know? So my practice flourished in the night courts and I

1 learned a lot. I learned to be an advocate as opposed to just a lawyer, and it made me a
2 much better lawyer and I think it was good training for when I went into public office too.

3 TL: During this same time period, Jim Emery comes back into your life. So not only are you
4 doing the law practice, you end up serving as his counsel. Can you talk about your
5 political life?

6 RW: I don't think I was registered Republican until '78 or so, and so when you think about it, I
7 had worked those three years as an undergraduate for him, and never -- so it was purely a
8 patronage job. But I had never registered Republican and he knew it, but he never -- in
9 retrospect he told me he knew it, but he never said a word to me about it, never said a
10 word to me about it as if I was doing something wrong, which I think says a little
11 something about Jim.

12 Then, in 1978, Jim won reelection for the fifth time, I think it was, and he had become
13 kind of a force within the legislature, and he decided he was going to try to become the
14 minority leader, the Republicans were in the minority at that time, and he was successful.
15 And so in January of 1979, he became the Republican leader, and he asked me to be his
16 personal counsel, and what that job entailed was I did all of his legislative stuff. I had
17 done a little bit of that back when I was in the assembly, working for him as an
18 undergraduate. I also managed constituent problems and also, on a very rare occasion, if a
19 difficult message was to be delivered to another member from the Republican conference,
20 I was the guy who delivered the message because I was Jim Emery's guy. [0:50:20.8]
21 That was a great job, it was a wonderful job. It took me back to Albany again and I really
22 came to learn the legislative process inside and out and enjoyed the constituent work too.
23 So now I was doing my law practice and at the same time was busy doing a lot of

1 constituent stuff. Very frankly, I found the constituent stuff to be fun. It was problem
2 solving and a lot like lawyering, except now you were doing it as a representative of the
3 state legislature. It added a dimension to my professional life that I'm sure I had thought
4 about a little bit, but it had never been like this lifelong ambition of mine.

5 I did that for four years and got closer and closer to Emery, and traveled with him a fair
6 amount, and then in the fall of 1981, I remember the Jets were playing the Redskins, it
7 was a Sunday afternoon, and Jim called. We were still living in Geneseo and it was pretty
8 well-known that Jim was thinking about running for governor at that time, in the '82
9 election, and he called and asked me if I would come up and talk with him. So I got in the
10 car quick, because I figured, oh, he's got something great he wants me to do in the
11 campaign, this is going to be really cool, a statewide campaign. And I got up there and he
12 starts to tell me he's going to run for Governor, and I said, "This is great Jim, whatever
13 you need me to do I'll do," and he said, "Well, what I need you to do is run for
14 assembly." [0:52:06.3]

15 I was kind of taken aback. He had a couple of senior aides that I thought would want the
16 job and I said, "No, I think Stan Gutowski would want the job" -- Stan is no longer living
17 -- and he said, "No, Stan doesn't want it." I said -- well -- and I imposed an obligation
18 that we had to have lunch with Stan and Stan had to tell me to my face. And he said, "I
19 can't help you because I think they'll be a primary, there's a fellow in the southern tier of
20 the district that will want it and so I can't endorse either one of you, but I'll see you every
21 weekend when I'm home and we'll go over what you're doing and I'll give you some
22 suggestions."

23 So I went back to the house and told my wife that he wanted me to run, and that was the

1 beginning of my public life in terms of the assembly.

2 TL: How was that first campaign?

3 RW: Very, very tough. I had a very formidable opponent, a wonderful man, John Hasper⁷ from
4 Belfast, New York. He was chairman of the Allegany County Legislature, he had been in
5 politics for a long period of time and he knew the county very well. I had known him and
6 we were really pretty good friends, and we both ran real hard campaigns. There was
7 nothing personal in it at all and, in fact, we had lunch once a week at the Loafin' Tree in
8 Hornell, where we would talk about what was going on, to try and smooth off some of the
9 rough edges and excesses of our campaign workers. I won by 460 votes in the primary
10 and then the election, the Republican overlay in Democrats was so large that it was a
11 pretty easy election, so the election part was easy. John and I have remained close friends
12 and John was my successor. [0:54:03.1]

13 TL: How big is the district?

14 RW: The district at that time was 107 miles long. It went from Canandaigua to the
15 Pennsylvania border, and so it was quite a journey. There were many nights where I was
16 on the road late into the night, going from the Angelica's founder's days, back over to
17 Naples to do an event at the Grape Festival or something like that.

18 TL: And what was it like campaigning with a family?

19 RW: Well, the campaign was a family event. Matthew Wesley showed up on April 15, 1982,
20 so he was in a Snugli, and Sarah Wesley was two years old, and it was very, very
21 exciting. I wish Kathy was sitting beside me because, poor Kathy, it taxed our marriage to
22 no end because we were always traveling on the fly. Sarah would go out and hand out

⁷ John W. Hasper, Member of the New York State Assembly, 1987-1992.

1 brochures and Kathy would walk along the parade route and hand out brochures, and I got
2 the luxury of riding in a car. Sarah walked up to a fellow one time and went to hand him a
3 brochure and said, "Will you vote for my dad?" He says, "I'm not going to vote for your
4 daddy!" And everybody looked at him, and she started bawling, crying her eyes out.
5 (Laughter) Oh Lord.

6 CREW MEMBER: About two minutes.

7 RW: Two minutes, OK. We've got two minutes.

8 TL: All right. Well then, what was it like serving -- well, I was going to ask you what it was
9 like serving in the assembly. This is going to take longer than that.

10 RW: This is going to take a while, so why don't we take a break now.

11 TL: I'll take a break now.

12 BF: Holding back my questions.

13 [Break in Recording]

14 CREW MEMBER: All set.

15 BF: Judge, we took a break. Before our break, you had mentioned that when you started your
16 law practice you were unmarried.

17 RW: Right.

18 BF: And by the time you were in the assembly campaigning, you had a family. Could you tell
19 us about meeting your wife Kathy and starting a family together?

20 RW: I was busy there for a few years, for six years. I met Kathy in the summer of 1976, which
21 is another good reason for having come back to Geneseo. Kathy was working in the DA's
22 office as what they called a CETA employee: Comprehensive Education and Training

1 Act⁸. It was a federal program for young folks who were transitioning from college to
2 getting a job, and so she was working in the DA's office as a paralegal kind of thing, and
3 I was a young, smart aleck defense attorney and I was up at the DA's office to talk with
4 an assistant DA about a case, and I walked into this room and here's Kathy and another
5 young lady and it was like somebody hit me with a hammer, I mean I was just totally
6 smitten with how beautiful she was.

7 It turned out she was working on the case too, chatted with her. I don't think I made a
8 really great first impression, because I think I pretty much told her that she didn't know
9 what she was talking about and that I did, at least that's what she's reminded me and I
10 take it that she's more accurate about that than I am. I really wanted to get to know who
11 she was, and I ran into her a few nights later and she said that she was going down for a
12 group of rehearsals; the summer players were putting on South Pacific, and she played
13 Princess Leia. They were short of male voices and she'd heard that I had done a lot of
14 singing in high school and in college, and would I be interested. Well, this is terrific,
15 she's kind of -- I thought, well, she's kind of looking a little interested here and wants me
16 to come down, so sure! I went down and I tried out and she's sitting out in the audience,
17 sitting next to a guy, and I get a part. [0:58:32.0]

18 BF: Great.

19 RW: I'm going to do the men's chorus and stuff. And as I'm standing there, after they now
20 assigned stuff and did the auditions and stuff, I said to one of the guys, "Who's that
21 sitting next to Kathy?" She says, "That's her boyfriend." And I thought, oh, this is crazy, I
22 don't want to do this play, you know? So I left that night after rehearsal and then I called

⁸ Comprehensive Employment and Training Act, 29 USC former §§ 811-822.

1 up the director and said, "I can't do it, I'm too busy." She ran into me a couple nights
2 later at the Big Tree and said, "What happened," and I professed to be too busy and stuff.
3 Our paths didn't cross very much from that point on until December. We saw each other
4 at a party again in December and started dating shortly thereafter, and we were married on
5 July 22, 1978. Sarah Elizabeth Wesley showed up on November 26, 1979 and Matthew
6 Wesley showed up on April 15, 1982. So yeah, Kathy and the kids, they're the
7 cornerstone of my life.

8 I promised Kathy, before we got married, that I was never going to go into politics.
9 Somehow we got to talking about it and I said I wasn't interested at all. Then when I
10 came back from that meeting with Jim Emery, I had to ask for -- because I really kind of
11 got interested in it. We had a long talk about it and Kathy was terrific about it. She
12 thought that it was something important that I wanted to do, and she proved to be a total
13 trooper. [1:00:18.4]

14 She's great campaigning. There would be times when you don't want to get out of the car
15 and don't want to shake people's hands, and every time you shake someone's hand
16 there's a judgment that's going to be made. She was very reassuring and balancing a
17 newborn and a busy schedule. Seven days after Matthew was born, we were at a
18 nominating meeting, so very shortly after the birth of Matthew, and she's been terrific.
19 She has great sensitivities with regard to folks and, as you two both know, she's a second
20 mother to every Wesley clerk there ever was.

21 BF: Absolutely, absolutely.

22 TL: Yes.

23 BF: Judge, you had your family here in Livingston County, but when you were in the

1 assembly, you also spent a good deal of time in Albany.

2 RW: An enormous amount, yeah.

3 BF: Could you talk about who you spent time with and who you roomed with ultimately out
4 there?

5 RW: Sure, sure. Very early on, actually before I was elected, I became aware of a fellow whose
6 district was immediately adjacent to mine, to the west of me, a guy by the name of Bill
7 Paxon,⁹ who was from Erie County but was running in Wyoming County as part of that
8 new district. In fact Bill and I had a little bit of a running debate when we first got to
9 know each other, because I thought some of his signs were in my district and he thought
10 some of my signs were in his district, but we became fast friends very shortly on and we
11 decided that if we did get elected, that we'd maybe think about getting an apartment
12 together or someplace to live together. Then, towards the end of the campaign, I met a
13 fellow from Seneca Falls by the name of Mike Nozzolio.¹⁰ Mike is first generation U.S.,
14 his dad and mom were both born in Sicily, and a really brilliant guy, and the three of us
15 got together and really became good friends, constant companions. We finagled getting
16 our offices next to each other, we had to bribe somebody to get our offices next to each
17 other, the janitor guy. It was really a great friendship. [1:02:27.6]
18 We spent an awful lot of time together talking about policy issues. Michael had worked in
19 Washington, Bill had been in the Erie County Legislature, and I knew Albany, and so it
20 was kind of an interesting dynamic for us and the policy perspectives we had. Michael

⁹ L. William Paxon, Member of the United States House of Representatives, 1989-1999; Member of the New York State Assembly, 1982-1988.

¹⁰ Michael F. Nozzolio, Member of the New York State Senate, 1993- ____; Member of the New York State Assembly, 1983-1992.

1 and Bill both had really keen, sensitive political minds, I think much better than mine. I
2 was kind of the issues guy and they were the politics of things, and we came up with a lot
3 of great ideas.

4 The Syracuse Standard ran an article about us in '83 or so, where we were called the whiz
5 kids, the three whiz kids, and there was a great article predicting that good things would
6 happen to us, and they did. Bill went on to Congress and Michael now still serves in the
7 State Senate, and I was fortunate enough to go to a judicial career.

8 We made a lot of other good friends down there. I mean Albany is a social place and
9 politics is a social profession and you get close to these people. We would be together at
10 budget time, for almost a full month together, and towards the end of the session, we
11 would be together there almost another full month, so we spent an enormous amount of
12 time. And I rode to Albany a lot with Bill. Bill would stop and pick me up, and Matthew
13 would stand at the door, pounding on the door, "Daddy, don't go, daddy don't go," and
14 we would ride down to Albany together. [1:03:58.8]

15 The beginning of our second term, the leader of the Republicans, a guy by the name of
16 Clarence "Rapp" Rappleyea,¹¹ assigned each of us to a newly elected member of the
17 assembly. I was assigned to a guy by the name of Dick Miller from Binghamton. I didn't
18 do too good a job, I think Dick only lasted two terms. I don't remember who Mike was
19 assigned to but Bill was assigned to this fellow who had been mayor of Peekskill, a tall,
20 lanky fellow by the name of George Pataki. The three of us immediately fell in love with
21 George, we found him to be very personable and a good soul, and George was notoriously
22 cheap, as you two know, I've told this story before.

¹¹ Clarence D. Rappleyea, Jr., Member of the New York State Assembly, 1973-1994.

1 George would feign that he couldn't get a hotel or a motel room and so he would ask if it
2 was OK if he slept on -- we had a convertible couch. We had by this time, the beginning
3 of our second terms, bought a townhouse out on the edge of Albany, that we owned
4 together, and we had this convertible couch, and so George knew that if he asked, we'd
5 let him sleep on the dang couch. As you both know, I'm an early riser and a runner, and
6 so I would get up every morning that I was there and walk downstairs to go for a run and
7 there's this crumpled figure laying on the bed. I saw that figure, I bet you I saw him 75 to
8 100 days in the two years that we were in session together, and not once did it ever occur
9 to me -- and I've told the Governor this -- not once did it occur to me that there lay the
10 next Governor of the State of New York, because he beat Mario Cuomo¹². Of course
11 Cuomo was the Governor at the time that we were there, but it never occurred to me.
12 What grew out of that I think, after I decided not to run for reelection, I remained pretty
13 good friends with those guys, and those friendships, as we'll talk about later, became very
14 sustaining and important to me as a judge, which you never anticipate that that's going to
15 be the case. [1:06:03.8]

16 TL: What was the best part of working in the legislature and what was your least favorite
17 part?

18 RW: The best part was working on policy. I was interested in the criminal law, because I was a
19 criminal law practitioner, and I had come to become pretty proficient in that and I was
20 pretty knowledgeable about a lot of insurance and liability issues; I was a personal injury
21 lawyer. I was very fortunate to get onto the Codes Committee, and the Codes Committee
22 has got a long tradition of being a kind of on-the-merits kind of committee, a lot of

¹² Mario M. Cuomo, Governor of the State of New York, 1983-1994.

1 lawyers on the committee from both parties. At that time, the Chairman of that
2 Committee was a guy by the name of Mel Miller,¹³ and Mel Miller was a very good, fair
3 Chair and would allow minority members to get onto bills that were important things, that
4 they might not necessarily be allowed on in the political environment that is Albany. And
5 so Mel was very, very good in that regard and I enjoyed very much the codes work,
6 because it was working on lawyer stuff that I knew about and so I felt comfortable with
7 that. I'd learned other things. I was the ranking member on environmental conservation,
8 and so I learned a lot about environmental issues too, but I really enjoyed the codes work.
9 What I didn't enjoy was the distance. I really missed my family terribly and my kids were
10 real young, and so that was very hard on me. The other thing that I really missed was it
11 required me to take a step back in my practice. We actually hired a young fellow, Jack
12 Sylvester, to kind of do my work, and so he would do prep work for me and then I would
13 do the trials and stuff, but I missed kind of being in from the beginning. [1:08:07.0]
14 I don't think you realize how much your work defines you as an individual in your sense
15 of self-worth until you stop doing it. It wasn't a complete cessation but it was enough of a
16 stoppage that I found that it wasn't as satisfying as I had hoped it would be. That and the
17 combination of the fact that you're in the minority and you don't really have a huge say in
18 some of the policy choices, led me to the conclusion that I needed to look elsewhere.
19 The family situation really kind of brought it to a head. Kathy had this calendar and on
20 the calendar was -- it wasn't like every day was X'd off. There would be like three Xs in a
21 row and then there would be a couple of blank spaces. I was home one night and I said to
22 her, "What are you doing with the calendar? Why aren't you just X'ing off all the days?"

¹³ Melvin H. Miller, Member of the New York State Assembly, 1971-1991.

1 And she said, "The Xs are days that you didn't have a chance to be a parent to your
2 children." She was beginning to have had enough of it I think, and it sounds harsh but it
3 was the right thing for her to do to me, because it made me think about it.

4 I told Tiff the other day, when we were talking about this, I had a picture of Sarah and
5 Matthew, and Kathy had made them Care Bear costumes, and they went around and trick-
6 or-treated in Care Bear costumes. I had it on my desk in Albany and it's a terrifically cute
7 picture, both of them. We were down there for some reason at Halloween. I don't know
8 why we were down there, it was some legislative thing that we had to be down there for,
9 and I'm sitting there looking at it and it struck me that in any child's life, your son Asa or
10 your kids, in any child's life the joy of trick-or-treating in a costume is probably got from
11 age three to age eight or nine, and then it might get a little old for them, you know, peer
12 pressure, et cetera. And I thought, geez, if that's the case and it's five or six years, I'm
13 throwing 15, 18 percent of this away tonight, and that was enough, that was kind of the
14 straw that broke the back for me. [1:10:34.2]

15 By February of '86, I had fully decided I was not going to run for reelection and
16 announced that. I was going to go back to the firm and in fact our firm was having
17 conversations with a Rochester firm about a possible affiliation. Then, Justice Kennedy,¹⁴
18 the Supreme Court Judge in Ontario County, tragically died in a tractor accident, and I
19 remember it as if it was yesterday. We were down in Albany and I'm sitting next to
20 Paxon and Bill said to me, "You should do this." I said I'm 36 years old you know, I
21 haven't had the number of years to -- I didn't know what all the requirements were yet.

¹⁴ Robert P. Kennedy, Justice of the New York State Supreme Court, appointed May 2, 1973.

1 And he said, “No, you should really do this, this will be perfect for you. This is policy
2 that you like, it’s learning, that you love, and it’s together, it’s melded together.” And
3 then typical of Bill Paxon he said, “Let’s go get the Red Book, let’s see what other judges
4 became judges at an early age.” It turned out that Dick Simons¹⁵ was about the same age
5 and Sol Wachtler¹⁶ was the same age.

6 TL: Oh really?

7 RW: Actually Simons was about a month younger than me, if I got the nomination. It’s vintage
8 Paxon, always willing to manage someone else’s campaign. [1:12:03.1]

9 So we began to kind of sift through thinking about it and got the requirements. You had
10 to be practicing for 10 years and I had the practice requirement. Bill said, “Look, you’re at
11 the height of your ability to be publicly known right now, you go back and practice law,
12 and this is the thing you should think about doing.” I went home and I talked with Kathy
13 about it, suggested that there would be one last campaign, but it would be on a multi-
14 county stage, as opposed to a two county stage, and she said it was a great idea. So that’s
15 really how the idea -- you know, it wasn’t necessarily just Bill’s idea, it was Bill’s
16 suggestion that really kind of got me to thinking about running for Supreme Court.

17 BF: How was running for the Supreme Court different than running for the assembly?

18 RW: Well, first of all, the district was six times larger.

19 BF: Sure.

¹⁵ Richard D. Simons, Associate Judge of the New York State Court of Appeals, 1993-1997, 1983-1992; Acting Chief Judge, 1992-1993; Associate Justice of the Appellate Division of the Supreme Court, Fourth Judicial Department, 1973-1983; Third Judicial Department, 1971-1973; Justice of the Supreme Court, 1963-1971.

¹⁶ Sol Wachtler, Chief Judge of the New York State Court of Appeals, 1985-1992; Associate Judge, 1973-1984; Justice of the Supreme Court, 1968-1973.

1 RW: So it was a real haul. But I was used to going to the Pennsylvania border and I only had to
2 go a little bit more east, to Corning. So it wasn't that much linear wise longer, but
3 substantively obviously. You can't talk about issues, you have to talk about
4 qualifications, and what you try to do is you try to engage people in the judicial campaign,
5 to identify you as a person of integrity and moral character, and so you're kind of
6 focusing on your life to date and what you've accomplished.

7 I had done a number of things in the legislature. We had removed the corroboration
8 requirement for children's testimony necessary to convict someone of sexual abuse. We
9 had done a number of other things in the DWI area, making it easier to take blood
10 samples after fatal accidents and things like that, and so I had some things that I could
11 point to, and I could talk about those. Then you just got out and you pressed the flesh
12 every day that you could and Kathy and I -- thank God my mother was alive and my
13 children loved being with grandma Wesley, because grandma Wesley just really was with
14 those kids. And I have a sister-in-law Kim, her name is Kim Manrow now, and both my
15 children look at Kim as like a second mother, because Kim was with us all during the
16 summers of those campaigns. That freed Kath and I up to do -- we did the gates at the
17 Corning Glassworks, we did the gates at Kodak, when there actually was a Kodak. We
18 did the gates at Delco and the GM plants up in Rochester, and so we did a lot of
19 leafleting, we did tons of parades. The kids just loved the parades and throwing candy and
20 stuff like that. But it was massive and of a much greater nature. [1:14:57.4]

21 BF: Was your mother involved in campaigning?

22 RW: Yes. A real political animal, loved a good fight, always loved a battle in the committee, of
23 which there were several, and also a very skilled campaigner. My mother, when I was a

1 freshman in high school, was diagnosed with a very rare disease called pancytopenia,
2 which is a depression of the bone marrow that causes the body to stop producing
3 platelets, which are the protein bodies -- Brian you, having a degree in biochemistry,
4 know that -- that allow coagulation, and so it's akin to hemophilia in a way. You bruise
5 easily, cuts can be difficult, and it can be fatal. She underwent a number of rigorous
6 treatments but then the disease vanished. [1:16:02.5]

7 BF: Wow.

8 RW: Shortly before it vanished, she gave her life to Christ, in the evangelical sense, and
9 became a very devout evangelical Christian. During the campaign, this was when the
10 evangelical vote was first really beginning to emerge as an important function, and there
11 was a guy by the name of Reverend Duane Motley, who was from Victory Bible Baptist
12 Church up in Greece, and he had a big candidate's night and he had 3,000 people in the
13 church.

14 BF: Really?

15 RW: And you had to fill out a questionnaire. I said to mom, I said, "Mom, how about coming
16 with me to this?" "Oh, I'd love to come with you to this." I said, "How about speaking for
17 me at this?" "Oh, I'd love to!" Mom is no wilting flower, she was all set to go.

18 The campaign, it was interesting because the evangelicals were pretty worked up against
19 my opponent, because he had written an opinion, a Rochester City Court Judge who had
20 said that the statute that made it a minor offense for a woman to take off her blouse and
21 expose her breasts was a violation of the equal protection because men could do it and
22 women couldn't. I think my opponent thought that this was a good thing, but it had the
23 evangelicals worked up into a total frenzy.

1 So we went to the campaign night, we went up to the stage and we got up on the stage
2 and I said, you know, “I’m honored to be here, but I brought my mom with me and I think
3 my mom is the best person capable of telling you a little bit about who I am.” Mom gets
4 up there and she starts talking about giving herself to Christ and believing in Christ and
5 that her son, you know she firmly believes in her son, and she had the place rolling with
6 amens and everything else. Then mom decided that she should have more speaking
7 engagements. (Laughter). It was quite a night. The place was just jammed and she had
8 them rolling, it was fun. We had a lot of fun on that campaign. [1:18:09.1]

9 TL: What was it like now, you obviously got elected and became a Supreme Court Judge.
10 What was it like, your first day as a Judge now?

11 RW: You know, it was like that first day walking into Streb Porter and knowing that it was the
12 right thing. I felt a little awkward with the robe on, I remember that. They assigned me to
13 go down and screen the jury pool before the venire was assembled for jury selection,
14 and so I was entertaining applications for excuses. I had a little copy of the Judiciary Law
15 and juror qualification stuff, and had never seen a pool screened, but fortunately the court
16 clerk was there with me, who led me by the hand through the whole process, kind of, you
17 know, like, yeah it’s OK, Judge, giving her excuse. I felt like that guy up in Ossian,
18 waiting for the DA to tell me what to do, you know?

19 Very early on, I got a group of cases and started doing motions and screening cases, and
20 eventually doing trials as they worked their way through the calendar. I have to say, the
21 seven years that I was a trial judge were watershed years in my life, as both a lawyer,
22 more than just a lawyer, and a judge, but also as a father and spouse and just a citizen in
23 general. It’s life changing. Judging is a way of life, not just a job, and it makes you look at

1 things differently in terms of strife and difficulties. I really warmed to it. I really enjoyed
2 the company of lawyers. I admired those who were working hard. I every once in a while
3 nudged a few that I thought needed to do better. I thought I owed it to them and to their
4 clients to be fully versed in all their papers, so I worked very hard at preparation.

5 [1:20:19.4]

6 I was blessed with terrific clerks at that time: Linda Lohner Pilato, who is now a support
7 officer, and Mark Davidson, who after public service for a number of years, is now a
8 private practitioner again, and they were just terrific. It was a wonderful time, it was just
9 an absolutely wonderful time for me.

10 TL: What was your proudest accomplishment during your time as a Supreme Court Judge?

11 RW: My proudest accomplishment was felony screening. I was on the civil docket for four
12 years, from '87 to '91, and in 1991, then Administrative Judge Charles Willis,¹⁷ who was
13 a very good friend, asked if I would become the supervising judge of the criminal courts,
14 and I took that job on, which meant that my responsibility was for all the criminal courts,
15 both the Town Courts and the County Courts and Supreme Courts, in the Seventh Judicial
16 District. My work was primarily in Monroe County, because that's pretty much where the
17 action is. I mean half of the population and more than half of the caseload is there.

18 Very early on, we realized that we had a significant backlog of cases. In Monroe County
19 at that time, if you were charged with a felony, awaiting trial, it took you two years to go
20 to trial, and it was bad for everybody. It was bad for the DA because they had a couple of
21 acquittals based upon absent witnesses. It was bad for the public defender's office
22 because they had people who couldn't make bail, who sat in jail for two years, only to be

¹⁷ Charles L. Willis, Justice of the New York State Supreme Court, 1988-1992.

1 acquitted. It was terrible for victims, who were waiting for the adjudication of the crimes
2 that had been visited upon them, and it wasn't good for public confidence in the courts.

3 [1:22:15.1]

4 The thing that stimulated me about it first, when you start really thinking about it, was I
5 had this defendant who was in front of me who had no prior criminal record, an African
6 American fellow, older fellow, who was charged with felony larceny, because he had
7 written a check for which there was insufficient funds. I couldn't understand why he
8 hadn't had a meaningful offer of resolution of his case. The DA didn't want to plead it
9 down to a misdemeanor because that's a bad statistic. So I really questioned his lawyer,
10 who had only been assigned in the criminal case. It turns out his wife had died, she had
11 done the checkbook. He had been arraigned in City Court, he was a good bail risk, he was
12 released. Third grade education, didn't know any better, and thought his case was
13 resolved, waived to the grand jury. Now waived to the grand jury, everybody is
14 entrenched. The DA wants a felony conviction, the defendant wants a misdemeanor, let's
15 go to trial. Fortunately, he got a misdemeanor conviction just before the jury came back,
16 which I had to bend the DA's arm a bit.

17 That case really started me thinking about it and then I realized that there was a
18 connection to that in the backlog. And so I resolved to try and understand how the system
19 worked. Judges know the law but they don't necessarily always think about how the
20 system works; clerks take care of that. So I got a group of clerks together and then I got

1 the DA and Ed Nowak,¹⁸ who was the Public Defender, and Howard Relin,¹⁹ who was the
2 DA, both of them were terrific people, forward thinking people, and we took apart the
3 system from being arrested to being arraigned in City Court. The reason why we focused
4 on City Court was because the vast majority of felonies come out of the Rochester City
5 Court, and how you ended up in felony court. [1:24:09.7]

6 We learned that if we interdicted at City Court when we had a chance to have some
7 meaningful conversations, and we focused resources there, intensified the availability of
8 probation, to understand who was or was not -- what their personal backgrounds were.

9 We also made a better effort at pretrial release, that we might be able to identify cases
10 faster. It required Relin to agree to open file discovery, it required Nowak to trust that
11 there was open file discovery, and there wasn't necessarily a willingness on some of the
12 deputy public defenders or the assistant DAs to agree to that, and so we agreed to a
13 dispute resolution mechanism. We had Ed Scanlan from the Public Defender's office,
14 Rick Keenan,²⁰ and now a County Court Judge, and they were the first assistants at the
15 time or second assistants, and they met with me every Friday about any problem, and we
16 started this felony screening thing. We used plain English written offers so that people
17 could take them home and show them to their family. We had them translated into
18 Spanish, we had one translated into Laotian, and we began driving at trying to identify
19 these cases and resolve them and get them out of the system quickly. More time for the

¹⁸ Edward J. Nowak, Monroe County Public Defender, 1977-2007. (*See e.g. Dunaway v New York*, 442 US 200 [1979].)

¹⁹ Howard Relin, Monroe County District Attorney, 1983-2004.

²⁰ Richard A. Keenan, Judge of the Monroe County Court, 2001-2010.

1 DAs to focus on the tough cases. Any violent felony, the DA didn't want to screen, it
2 went directly to the grand jury, and more time for the public defenders to represent and
3 try the tough cases, the cases that they really thought needed to be tried.

4 It required me to designate myself as an Acting City Court Judge, which I could do as a
5 Supreme Court Judge, and we did that and about I don't know, a month and a half into
6 this, like end of April, early May, into my courtroom walks a newly minted Chief Judge
7 of the New York Court of Appeals, Judith Kaye, vintage Kaye, dressed to the nines,
8 elegant, carries herself with great distinction, and the whole place stops. "Oh no, no, no,
9 please go ahead, Judge Wesley, I'm just here to observe," and she sits down and she stays
10 for an hour. And we're taking pleas and making offers and going through everything, and
11 then we take a break and she comes up and she said, "Would you mind if I walk back to
12 chambers with you?" We went back and we sat down, and there's a bit of a journalist in
13 Judith as you know. [1:26:36.4]

14 BF: Right.

15 RW: And so the questions started you know. "Have you thought about data, what are you
16 going to do? Are you going to issue a report? Have you thought about sending this out to
17 other people? Have you thought about applications to the Department of Justice for
18 grants," and stuff like this. She had a million questions, none of which I had thought
19 about, but very, very encouraging. I began a correspondence with her. We exchanged
20 letters about every two weeks and she just kept wanting stuff, and so we did do a report
21 and I sent her a draft of the report and she had some suggestions. It did get recognition
22 from the Department of Justice, from others, and it became a model and it has been
23 replicated throughout the state. So I'm very proud of that because we had a bad problem

1 and we were failing in our mission. I wasn't looking to give anybody a break if they
2 didn't deserve a break. I was looking to deliver justice and we weren't doing it. We
3 weren't user friendly in the slightest bit, and I know user friendly sounds odd in the
4 context of someone charged with a crime, but user friendly in a sense of fair, and I really
5 think we did -- you know it still exists. [1:28:00.5]

6 What was curious is the first day that Sarah Wesley was an assistant DA in Monroe
7 County, she was in the felony screening part. That's very interesting. And she didn't
8 know that I had created it.

9 TL: She didn't know?

10 RW: No. The curious thing about it is that in the long run, it helped me immensely when I
11 became interested in the Appellate Division.

12 BF: Judge, how long were you serving at the trial level, and how did you move from the trial
13 level to the Appellate Division?

14 RW: I was at the trial level for seven years.

15 BF: Seven years.

16 RW: Four years on the civil side, three years on the criminal side. I had applied for the
17 Appellate Division, I think within the second or third year that I was on the trial bench. I
18 had become interested in and kind of reconnected with my law review experience, and
19 thinking about the law as a broader thing. I saw the differences and I saw the problems
20 that were in front of me, and most of them fit within the standard deviation of the
21 principle of law that was primarily applicable to their difficulty. Some would just
22 replicate themselves, most matrimonial stuff replicated itself, and a lot of the criminal
23 stuff did too, but once in a great while you would get a case that was at the outer edge of

1 something and there you knew the law was working and kind of bubbling. Those kinds of
2 issues were intriguing to me and so I thought, early on, it would be kind of fun to be at the
3 table, kind of where those things were hashed out, and so I went and saw someone that I
4 really respected greatly, Jim Boomer,²¹ who was an Appellate Division Judge, and I said
5 “I know this is totally presumptuous of me, but when is the right time to apply to become
6 a member of the Appellate Division?” And Boomer, who was this no nonsense guy, who
7 everybody loved him and he was so smart, and he said, “Well the time is now because
8 you never know when the right time is.” He encouraged me to apply early and often,
9 which I did, and I think that was terrific advice, because it made me familiar with the
10 process and the people who were part of the process. Hugh Jones²² was the head of the
11 Governor’s screening commission for the Fourth Department. One of your partners, Tom
12 Smith, was on that panel. [1:30:40.8]

13 BF: Sure.

14 RW: And a number of other people. Phil Patti,²³ who is now a Court of Claims Judge, was the
15 counsel of that group. Phil is originally from Hornell. I was interviewed, I think three
16 times, the fourth time, when I got it, and each time the process got more familiar to me,
17 the conversation became more cordial and I was more relaxed, and so I think it went well.
18 Then in 1993, late 1993, the Governor had an appointment and called Judith Kaye and
19 said, “Hey, I’ve got this appointment to make in the Fourth Department and two people

²¹ James H. Boomer, Associate Justice of the Appellate Division of the New York State Supreme Court, Fourth Judicial Department, 1982-1993; Justice of the Supreme Court, 1971-1982.

²² Hugh R. Jones, Associate Judge of the New York State Court of Appeals, 1972-1984.

²³ Philip J. Patti, Judge of the New York State Court of Claims, 1996- ____.

1 have cleared the screening committee; one is a fellow from Buffalo that I've known for
2 quite some time, and there's this other younger fellow" -- he described me as younger
3 according to Judith -- "from Rochester," and Judith, without letting him finish says, "Oh,
4 that must be Dick Wesley." She said, "And Dick Wesley is the only one you should
5 appoint." I guess the Governor was a bit taken aback by how brisk she was, and then she
6 proceeded to talk to him about felony screening for a few minutes and stuff. Sure enough,
7 about a month or so later, Elizabeth Moore²⁴ called me and I was appointed to the
8 Appellate Division. I think it ended up early April or late March of 1994. [1:32:07.2]

9 BF: So a former Assemblyman, Republican judge.

10 RW: Yeah. One of three people to vote against the transportation bond issue that was Mario
11 Cuomo's signature piece in 1983, for which I got a personalized note from Mario Cuomo
12 that said, "Dick, sorry you couldn't be with me this time, but there will always be a next
13 time." And I thought he's really watching everybody. You know it's curious, I've seen the
14 Governor. I've had a number of occasions to chat with him and he's recounted the Kaye
15 story to me also, and he's been very kind and very nice to me in terms of saying that he
16 was happy to have done that. I think it says a lot about Mario Cuomo. I think he did a
17 very good job at judicial appointments. I think he worked very hard at doing them on the
18 merits. He's the one that made Sol Wachtler a Chief Judge and he's the one that made
19 Dick Simons his first appointment to the Court of Appeals. In fact on January 1, 1983,
20 was when Simons was appointed. So yeah, it was odd. I mean my first real appointment
21 was by a Democrat, who would have thought?

22 BF: At the recommendation of another Democrat.

²⁴ Elizabeth D. Moore, Counsel to Governor Mario M. Cuomo.

1 RW: At the recommendation of another Democrat, which my Republican friends have always
2 been a little suspicious about.

3 BF: Having been both a trial level judge and then beginning at the Appellate Division, an
4 appellate judge, what did you see as the differences when you first started at the appellate
5 level?

6 RW: At the trial level, you're working on your own, you don't really have much interaction
7 with your colleagues, you're pretty much working in chambers. You have a court clerk,
8 you have a law clerk, you have a secretary, and you're working with the lawyers on the
9 docket that you have and you're managing that docket. [1:34:02.2]

10 From a case standpoint, you're pretty much working, like I said before, within the
11 standard deviation, and there's always some play in the joints in terms of the problem,
12 and so you have some freedom to fashion what, in your view, is an appropriate and fair
13 resolution of the matter, particularly in family law matters.

14 On the criminal side of things, you're looking at people's lives who have become a crisis,
15 not only their own but those whom they've injured, and you're seeing an awful lot of the
16 human experience. I think trial judges are very great observers and individuals who
17 understand the human experience, and that was exceptionally rewarding. I felt very useful
18 and I felt very involved as a trial judge, with my trials.

19 Appellate judging is quite different. You're no longer alone, you're accountable to
20 colleagues, both on a particular panel and to a Presiding Judge or a Chief Judge, as the
21 case may be. You didn't choose your neighbors, the Governor did, and you're stuck with
22 them and you can't move out of the neighborhood, and so there's a small political aspect
23 of life on an appellate court. Every appellate court that I've been on has developed kind of

1 a culture, to deal with that dynamic of the fact that these are not people who necessarily
2 would freely associate with each other, but who also have to listen to each other and to
3 cooperate or understand each other and deal with each other. That lesson was made very
4 apparent to me very early on, when I was at the Appellate Division. [1:35:57.4]
5 There's a very dear man by the name of John Lawton,²⁵ who is still living, he's from
6 Syracuse. Very tall, very strong-willed, very strong and outspoken. He was on a panel
7 with me at the Fourth Department and, during a conversation with me at the conference
8 table, said to me, "Oh Dick, that argument is ridiculous." I didn't think too much of it, I
9 mean he didn't say it with an overly harsh voice, but it was in a louder voice that he said
10 it, and then the conversation went on. After conference was over with, I was back in my
11 chambers on the fourth floor of the Hall of Justice, and down comes John Lawton with a
12 bottle of scotch and two glasses. He came into the office and he said, "Listen, I have to
13 apologize to you." He said, "Dave Boehm²⁶ came up to me after conference and said, 'you
14 know Dick is new here and Dick doesn't understand, John, that you just speak with a loud
15 voice, and you could have offended Dick or hurt Dick's feelings, and Dick is brand new
16 here, he's only been here a month or so, and maybe you should think about that.' " So
17 John poured a little scotch -- I'm not a real scotch fan but I was a fan of it at the moment
18 -- and we had a drink together. I learned a big lesson that day. I began to understand the
19 word colleague, and that was my first real experience of collegial relationships.
20 So appellate judging, on the human side of things, is a group of strangers who become

²⁵ John F. Lawton, Associate Justice of the Appellate Division of the New York State Supreme Court, Fourth Judicial Department, 1986-2005.

²⁶ David O. Boehm, Associate Justice of the Appellate Division of the New York State Supreme Court, Fourth Judicial Department, 1992-1998.

1 family, and you spend an enormous amount of time with these people. At the Fourth
2 Department, the Court is all assembled around the conference table during the time that
3 they're -- that each individual panel is resolving cases. So people who are not on those
4 panels are at the table kind of listening to the dialogue, and so you're required to kind of
5 show respect to the conversation that's going on by not talking or getting into it with
6 other people and waiting your turn, but you also listen to see how other people react to
7 each other. So there's that. [1:38:08.2]

8 Then there are the inevitable disagreements that come and the mechanism of resolving
9 those disagreements obviously is with a vote and/or an opinion or a dissenting opinion,
10 and the tone of those opinions then kind of becomes the pressure upon the relationships.
11 People come to appreciate each other but they have to understand that they might
12 necessarily disagree with each other.

13 I think that Dolores Denman,²⁷ who was the Presiding Justice of the Fourth Department,
14 was very good at that. She never kind of squelched disagreements, but by the same token,
15 if somebody started to get a little heavy-handed, she might say something to you. I think it
16 was a good learning experience for me. I tended to have a sense of -- I guess
17 righteousness might be the right word, you know I was kind of convinced of my view and
18 it had some kind of bright light behind it, and I learned early on that I might not
19 necessarily be right, and it takes a while. If you recall, one of the things that I used to say
20 to you two and to your brothers and sisters was that the single best thing that you could
21 learn from working for me was learning how to listen. I think I learned how to listen

²⁷ M. Dolores Denman, Presiding Justice of the Appellate Division of the New York State Supreme Court, Fourth Judicial Department, 1991-2000; Associate Justice, 1981-1991.

1 better when I was an appellate judge.

2 From the law side of things it was terrific. We were grappling with a lot of issues on
3 contribution issues and joint tortfeasors, and matrimonial law was still in flux because the
4 equitable distribution law was still relatively new. It was 10 years in, 12 years in, but we
5 were still working our way through a lot of issues there. We had all kinds of criminal
6 issues. That's when the knowledge requirement had to be established with regard to each
7 element of the crime -- there had been a series of Court of Appeals cases about that.

8 [1:40:00.3]

9 The presence cases, the necessity of a defendant's presence as the material aspects of the
10 trial were still being litigated, and jury questions and jury questionnaires were all these
11 kinds of things that were percolating up. We had a series of cases involving the
12 reasonable doubt charge, out of Onondaga County, where we had this judge who was
13 totally resistant to appreciating that that case out of Nebraska that the Supreme Court
14 decided,²⁸ required him to give a different charge than that which he gave, and Judge
15 Green, Sam Green,²⁹ was writing opinions and I don't think the judge in Onondaga
16 County cared for it much. He started referring to Judge Green as "Judge Pink" as in a
17 communist.

18 BF: Oh, geez.

19 RW: But I mean the law stuff was fun, it was really fun, because there were all these other
20 judges at the table and they were talking legal issues and trying to understand what the

²⁸ *Victor v Nebraska*, 511 US 1 (1994).

²⁹ Samuel L. Green, Associate Justice of the Appellate Division of the New York State Supreme Court, Fourth Judicial Department, 1983-2011.

1 language from the New York Court of Appeals meant and how we were to apply it. The
2 conversations were just so dynamic and so enriching in terms of professionally, you know
3 that this was the kind of stuff that you would be doing, and so I really -- it was a very
4 short period of time -- I mean I was only there from April of '94 to December of '96, but
5 it was a rewarding time.

6 People used to ask me, did I miss the trial bench? I missed the company of lawyers and I
7 missed kind of that human dynamic to what I was up to, but I didn't long to return to it,
8 because I had found something else I found equally interesting.

9 TL: During this time you're a Supreme Court Judge, Appellate Division, you found time to be
10 a volunteer ambulance driver for Livonia? [1:41:54.4]

11 RW: You know it was interesting, because I was a Judge, I couldn't do anything with
12 fundraising, you know I had to stay away from that stuff, and I wasn't interested in
13 getting in trouble with the Commission on Judicial Conduct on that, and so I started to
14 think about what could I do within my community. I coached the kids in sports and did
15 the little league baseball and stuff like that, but as the kids got older, they moved on to
16 teams where I wasn't willing to be involved and didn't have the abilities to be involved.
17 And so I had a friend, Dan Vallone my plumber, who I went to high school with, both a
18 medic and a driver on the ambulance, and I was telling him about it and he said, "Geez,
19 why don't you think about driving the ambulance?" Well the ambulance had been there
20 for my family when my dad had had his heart attacks and stuff and so I thought, yeah. We
21 had owned a Winnebago at one time, so I knew how to drive a big vehicle. An ambulance
22 is no bigger than a Winnebago, so I thought I would do that. I went down and took the
23 training and stuff and started doing that and I have to say, of all the things that I've done

1 in the community, that and the Myers Fund, which we can talk about briefly if you want
2 to, were the two most rewarding things. When you're driving the ambulance, when the
3 ambulance pulls up to a house, things are pretty bad.

4 BF: Sure.

5 RW: Someone has had a heart attack or there's someone in critical care. Sometimes you're just
6 transporting somebody to the hospital, but the vast majority of these things are accidents
7 or other things and you're really needed. You also are kind of brought into a home
8 without any advance warning for the people, and so the ugliness of life is laid bare in
9 terms of you know. I didn't realize that there was so much poverty in Livonia, and the
10 circumstances under which some people lived, so it taught me a lot about my community.

11 [1:44:01.5]

12 I didn't want to be the medic, I didn't want to be the guy who called the shots. I wanted to
13 be the guy whose job was to get the ambulance to the scene, park in a location to
14 effectively extricate the individual from whatever it was they were in, get them into the
15 ambulance and get them safely to the hospital and get my crew safely to the hospital. It
16 was at times terrifying. I drove through one night, it was total fog, we couldn't see in
17 front of us. I drove through a number of blizzards. But geez, it was, you know? I really
18 felt like it was something that was worthwhile.

19 TL: Tell us about the Myers Fund.

20 RW: The Myers Fund was probably one of Livonia's best moments. In 1987, Bud Myers died
21 of a heart attack. Bud was a janitor up at the high school. His wife had died six months
22 before that, of cancer. They had three sons: Adrian, Kevin, and the last one, whose name
23 is escaping me right now, and the boys had no relatives in the area. Their only family was

1 up in Canada. These boys were great athletes and wonderful human beings, and the
2 community was at a loss, because we didn't know what to do. We were worried. There
3 were two boys still in high school. Jeff was the third boy's name -- I knew it would come
4 up.

5 So a group of us, a group of folks from the community decided that perhaps we would try
6 and find a way to keep them together. Adrian was going on to college. They were all
7 terrific athletes too, and so they were pretty high profile in the community. And a guy by
8 the name of Mike Haugh, who the high school principal and myself solicited, a high
9 school teacher who was single, to go and live with the boys, to kind of provide some
10 focus for the boys in their lives. [1:46:08.3]

11 Then we were confronted with a money issue. There was some money from their father's
12 pension. He had been an Air Force veteran, so there was some money there, some social
13 security money, but financially, they were in not good shape. And so we came upon the
14 idea that we would do a fundraiser, a community based fundraiser, and by that time Bill
15 Paxon, my friend from the assembly, was now Congressman Paxon, from Buffalo, and
16 Bill Paxon went to the Buffalo Bills and asked if Jim Kelly would participate in the
17 fundraiser, and Kelly graciously agreed.

18 Kelly came to Livonia and did a fundraiser, and the only requirement was that we had
19 Rolling Rock beer in the back of a limo for him. He came and we raised about \$37,000
20 that night, concluding with Kelly writing a check out of his own checkbook for over a
21 thousand dollars, to the boys. We raised more money than we thought we would raise and
22 it became quickly apparent to me that we needed a structure. And so I went in and
23 Chamberlain D'Amanda volunteered to draw up a corporate structure, a 501 (c) (3),

1 whatever, an eleemosynary corporation, and that's how the Myers Fund was created.

2 Well, people began contributing to it beyond just that fundraiser and we soon had more
3 money than we were going to need for the boys, and it became quickly apparent that after
4 the boys reached the age of majority, they would no longer need our help and we would
5 continue to have a fair sum of money. We didn't think it appropriate to give it to the boys,
6 they didn't need it, and so we altered our bylaws a bit and we became an institution for
7 the community of Livonia. Any child that lives within the Livonia School District, who
8 has a need for which there is no other resource available, as long as it's not insurance and
9 not public assistance, who is in need because of the death or injury of a parent, or of their
10 own injury or illness, is able to come to the Myers Fund for support. [1:48:10.1]

11 It's unique, I know of no other institution like it in Western New York. We have sent kids
12 to Children's Hospital in Boston and paid for their parent's hotel rooms. We have bought
13 cars for families that needed transportation. We have paid the grocery bills for families.
14 We had a fellow who's got a brain injury and we helped provide for the family for a
15 period of time. It's a number of people from the school and the community who monitor
16 these things, and we don't just give the money away. It's kind of a self-help, we want
17 something, a plan from them on how they're going to do it, and the Myers Fund today
18 remains very well funded. It is now in its 25th year.

19 TL: That's amazing.

20 RW: It is, I'm very proud of it.

21 BF: Congratulations.

22 RW: I know Mike is very proud of it too, yeah.

23 TL: I ended up being a neighbor to one of the Myers boys for a brief period of time: Kevin.

1 RW: Kevin, yeah, a terrific guy.

2 TL: He is now in Australia. I don't know how much time we have left, we have five minutes
3 left. Do you think you can talk about the appointment process to the New York State
4 Court of Appeals?

5 RW: No way. Why don't we take a break and we'll go to the next disc, how's that?

6 TL: OK, that sounds great.

7 RW: Great.

8 [Break in Recording]

9 TL: OK, Judge, we're back.

10 CREW MEMBER: All set.

11 TL: We're back and, Judge, you were about to tell us about the whole appointment process to
12 the New York State Court of Appeals.

13 RW: The vacancy was Judge Simons. He indicated, in 1996, that he would not seek
14 reappointment and the way the process works is that the Clerk of the Court certifies to the
15 Governor, I think in May, that a vacancy will occur in December, and that then starts a
16 constitutional and statutorily mandated process by the Commission on Judicial
17 Nomination for the New York Court of Appeals. [1:50:22.2]

18 I filled out a questionnaire. Frankly, I thought that I had a very good chance at it because
19 of Governor Pataki being the Governor, and the Governor and I had actually, to be frank,
20 had had conversations about it, both shortly after his election and on several other
21 occasions when I saw him. And I think I was identified early on as someone who the
22 Governor might be predisposed to select.

23 I filled out the application and sent it in. And a week or so before the interviews were to

1 occur, I remember I had been for a run, it was a Sunday morning. I'd been out for a run, I
2 was sitting out in back, in the backyard, next to the pool. We have a hot tub out there and
3 I like to sit in the hot tub after a run, then jump in the pool. Fred Dicker from the New
4 York Post called and I remember Kathy walking out with the phone saying, "There's a
5 Mr. Dicker on the phone." And I'm saying oh no, I don't want to talk to him, I don't want
6 to talk to him. She had already told him I was there, so I got out of the hot tub and I'm
7 sitting there beside the pool and Dicker says, "Judge, you know a lot of people have
8 identified you as a potential candidate." At that time, if you submitted your name it was
9 confidential, and so I said, "Well, that's nice to know." I mean I wasn't about to confirm
10 or anything and he says now, he says, "You know, Judge, people are associating you with
11 the death penalty. Is it true that you voted for the death penalty 17 times?" I said, "Well, I
12 know you Fred, I've known you for a long time, so I know you've already looked that up,
13 so I have no idea if it's true but I know you'll look it up and that will be in your article."
14 And he says, "Well, Judge, is there anything else you wanted to tell me?" And I said,
15 "Well, I'll tell you, if you want to, just call some of my colleagues, if you want to have a
16 better sense of who you think I am, if you think this is important, but I'm not confirming
17 that I'm an appointee." [1:52:29.7]

18 Two days later -- and I don't know whoever released that and whether it was an intention
19 to try and hurt my candidacy or help it. Paxon had always thought it was an attempt to
20 hurt it, because you flush out the leader first and that way everybody can take them on. I
21 remember Nozzolio called me and said, "I'm sending you a fax immediately, you're on
22 the front page of the New York Post." And then I sent somebody to go get it from a news
23 store across the street, in Rochester, and in the upper right-hand corner the headline is,

1 “PRO DEATH JUDGE GOV’S TOP PICK.” And then on the inside, when you read the
2 article, there’s a discussion of quotes from some of my Appellate Division colleagues that
3 say oh, he’s a nice guy, he’s very friendly and very courteous, and stuff like this. I
4 remember bringing it home and at that time Matthew Wesley was 14, and he read it and
5 he says, “Dad, you sound like the jovial Jack Kevorkian of the law.” I always thought that
6 was a pretty good expression you know? So that’s how things really got started in terms
7 of the process.

8 The interview was in New York. It was rigorous. There were obviously some people on
9 the committee who were very concerned about the fact that I had voted for the death
10 penalty and had supported it so strongly for a number of years when I was in the
11 legislature. My recollection of the conversations was that I expressed confidence that I
12 could follow the law as the law was delivered to me by the Supreme Court, in terms of
13 death penalty jurisprudence, that my voting for it was an expression of public policy and
14 not necessarily of constitutional determination. And a number of other things that we
15 talked about. [1:54:23.8]

16 It was a good process. Hugh Jones³⁰ was the chair of that committee also, so he was
17 familiar. And then I didn’t hear anything. The names are announced within 30 days, and
18 delivered to the Governor no later than December the 1st. I think they have to be
19 delivered on December 1st, so I think that’s when they were delivered, and it turned out
20 that I was one of the seven names. Judge Rosenblatt³¹ was also one of the names, a fellow

³⁰ Hugh R. Jones, Associate Judge of the New York State Court of Appeals, 1972-1984.

³¹ Albert M. Rosenblatt, Associate Judge of the New York State Court of Appeals, 1999-2006; Justice of the Supreme Court of New York, Appellate Division, Second Department, 1989-1998; Chief Administrative Judge of the New York Courts, 1987-1989; Justice of the Supreme

1 by the name of Guy Struve, from Davis Polk, who Brian I think you know, was on it. And
2 you would know him from arguing in front of the New York Court of Appeals. I don't
3 recall the other names right now, off the top of my head. I was very grateful to be on the
4 list, and we had already been interviewed by all of the bar associations, very rigorous, and
5 I thought the Association of the City Bar had done a very thorough job.

6 On December 6th, at about 6:30 in the evening, we had just finished dinner, the Governor
7 called and the Governor said, "Dick, you know this is going to be a big appointment, this
8 is my first appointment." He sounded very, very serious. "You know, there'll be an awful
9 lot of scrutiny of the nomination and if there's something in your background that would
10 be embarrassing, I would never want it to hurt your family or to hurt you." And I'm
11 thinking to myself, what is he talking about? I said, "Well Governor," I said, "I've known
12 you a long time, I consider you to be a good friend, and never, ever would have sought
13 the appointment if I thought it would cause you any personal embarrassment whatsoever."
14 "OK," he says, "Well, I want you to think about this and if there's anything that comes to
15 your mind, here's my phone number, call me back, or you'll hear from me." And he
16 hangs up. [1:56:39.4]

17 I came out of the phone room and I thought, what was that? I told Kathy and Kathy, with
18 her keen political skills says, "He's bluffing, he's toying with you. He thinks he's being
19 funny." It turned out that she was right, because he called back in about 10 minutes,
20 which seemed like an hour. He called back and he said, "Don't you think that was
21 funny?" And I said, "No, I did not think it was funny at all, you scared the daylights of

1 out me.” And he says well, “That was Jim McGuire’s³² idea.” He blamed it on McGuire,
2 his counsel, and then he offered me the position, asked if I would come to Albany the
3 next day.

4 We headed to Albany the next day, the kids and I and Kathy, and he introduced me to the
5 state. It was a great day, a wonderful day. Then we walked across the street and that was
6 only the second time I’d ever been in Court of Appeals Hall. Joe Bellacosa³³ was waiting
7 to welcome us and showed us around and Joe, being a great historian of the Court and
8 having been the Clerk of the Court, really knew the place. I can remember Matthew
9 standing in the courtroom and looking up at all the pictures, and Matthew the thinker was
10 kind of perplexed and Judge Bellacosa said to him, “Matt, what’s the problem?” He says,
11 “Do you have to be dead to have your picture up there?” Judge Bellacosa said no, and he
12 pointed out Judge Simons’ picture and Matthew seemed relieved, that maybe dad’s
13 picture some day would be up there, but it wouldn’t have to be until after dad was gone.
14 And of course it does hang there now. That was the first day, and it was a memorable day.

15 [1:58:36.1]

16 I had been in the courthouse once before. I had been down to Albany to see the Governor
17 on some things. The Governor turned out offering me the Division of Criminal Justice
18 Services while I was on the Appellate Division, which I turned down. I was grateful but I
19 decided it wasn’t the right thing to do. I was going out for a run, it was 5:30 in the

³² James M. McGuire, Justice of the New York State Supreme Court, Appellate Division, First Department, 2008-2011; Justice of the New York State Supreme Court, 2004-2008; Counsel to Governor George Pataki, 1997-2003.

³³ Joseph W. Bellacosa, Associate Judge of the New York State Court of Appeals, 1987-2000.

1 morning, and I'm in the Crowne Plaza, and I get out of the elevator and another elevator
2 opens up at the same time and there's Judith Kaye. She says, "Richard, what are you
3 doing here?" Of course I couldn't tell her, and so I made up something. I told her I was
4 going out for a run and she said, "Why don't you come up with me. Have you ever been
5 into the courtroom?" I said, "No, I've never been in the courtroom." We walked up the
6 hill together and we went into the building, of course it was all dark, and she had one of
7 the fellows open up the courtroom, and we walked into the courtroom. It was 5:30 in the
8 morning, quiet, the middle of February, and the courtroom itself has this wonderful smell
9 of leather and wool and wood, and it's rich and not overly ornate but you know a very
10 human dimension to it. It's the most beautiful courtroom I have ever been in. [2:00:00.5]
11 We talked for a few minutes. She was telling me about some of the portraits and stuff,
12 and then she turned to me. So this would have been February of 1993. She turned to me
13 and she said, "You know, you'll be here some day."

14 TL: What did you think when she said that?

15 RW: I was flabbergasted. If you asked her, she'd tell you that she knew that I was being offered
16 something, and that she was hoping that I wouldn't take it, because she was fearful that
17 maybe it would preclude me from some day coming to the Court of Appeals, and she
18 might have been right. It was the right thing to say to me, because that was on my mind,
19 so I was struck by what she said to me. So I'm back, two and a half, three years later I'm
20 back.

21 TL: As an Associate Judge.

22 RW: As an Associate Judge, yeah. January 1, 1997.

23 TL: So now you're in the courtroom there and with due respect to the federal courtroom,

1 which I have been in as well, it is one of the most amazing places to walk into.

2 RW: It is.

3 TL: Now you're walking in and you're stepping up onto the bench where all the chairs are for
4 the seven of you, and the spittoons on the side, you're wearing the robe, what are you
5 thinking, your first oral argument that you're listening to?

6 RW: I was in a dream world. Each of the Judges, as you know, has their own locker, which has
7 the name in bronze on the locker.

8 TL: Yes.

9 RW: They're all arranged in seniority and it's immediately behind the bench, and everybody is
10 assembled there 10 minutes ahead of time; the Judges' room is downstairs. I know exactly
11 what I said. This is hilarious that I said it to her, I can't believe I said it to her, but I'm a
12 Grateful Dead fan and I looked at Judith and I said, "What a long, strange trip this has
13 been for me." She kind of like looked at me like I was speaking Latin or something and
14 then she suddenly realized what it was and we kind of laughed about it. Then she rapped
15 on the door and out we went. [2:02:13.2]

16 TL: And where did you sit when you first -- ?

17 RW: The far left.

18 TL: The far left, yeah.

19 RW: Next to the window. I had the window seat. It was a great place to sit because if the
20 arguments got boring -- though not very often did they get boring, but once in a while
21 they did -- you'd see me kind of start to look off, out the window.

22 TL: Yes. You kind of turned.

23 RW: The clerks know that I would turn, to kind of be -- and when I was on the right side, I'd

1 turn and look at Cardozo³⁴ and say, “Was it this bad when you were here?” That first day
2 was a really memorable experience. The court was full, the furniture is beautiful, the
3 bench is not that high, so you’re not really towering over the litigants and it’s really more
4 conversational. I think the Court is really a strong reflection of the personality and style of
5 the Chief Judge, and so the Kaye Court was -- Judith would ask questions but not too
6 many, and she left free rein to all of her colleagues to ask questions.

7 There was a bet among my clerks at that time. Mike Nolan, who had been a clerk at the
8 Appellate Division, a staff clerk and who I liked very much, I asked him to join me, and
9 then Mark Davidson, who had been my clerk at the Appellate Division. And they said,
10 “Judge, we think you’re going to ask a question very early on.” I said, “No way, no way,
11 I’m going to be quiet today.” I had been a pretty vigorous questioner at the Appellate
12 Division. So they had a private bet among themselves, and I think Mark bet five minutes
13 and Mike bet three minutes. Mike won. I was in the oral argument early on and you
14 know, maybe a little rambunctious on my part, but I was on the oral argument very early
15 on, and that’s how it started. [2:04:09.0]

16 TL: How was the first conference?

17 RW: A disaster, it was a total disaster. You both know, the way it works is after oral argument,
18 you go into a room and you pick a card up, and that’s the case you report the next
19 morning. All the cards are face down on a table and if there are five arguments, there are
20 five cards on the table, and in descending order of seniority, you pick up a card. For some

³⁴ Benjamin Nathan Cardozo, Chief Judge of the New York State Court of Appeals, 1927-1932; Associate Judge, 1914-1926.

1 reason I was picking that day and I picked *Anello v City of Yorktown Heights*,³⁵ and it's a
2 takings case, based upon a regulatory zoning ordinance and as to whether it had cost the
3 property owner some loss of value on their lot. That's a very difficult -- in hindsight now,
4 it's probably one of the more difficult, obscure areas of the law, with a constitutional kind
5 of twist to it. The Supreme Court itself has had, what Justice Kennedy³⁶ admitted to once
6 upon a time, he once said that there's a certain circularity to the logic of our opinions, and
7 he's absolutely right.

8 So I really worked hard on the case that night, got it ready, and the next morning at
9 conference, it was the first case to be reported. I reported the case and I gave my spiel
10 about how I would resolve, and then in ascending order of seniority, the associates vote.
11 So Carmen was to vote next, Carmen Ciparick³⁷ was to vote next, or she was the other
12 way. Levine³⁸ spoke, he was the other way. George Bundy Smith³⁹ spoke and he was the
13 other way, and Bellacosa was the other way, and Titone⁴⁰ was the other way. And now
14 it's like five to one, and it comes to Judith and she's looking at me and like sad, saying
15 "Oh Richard, I'm the other way too." And so the very first case I report at the New York

³⁵ *Matter of Anello v Zoning Bd. of Appeals of Vil. of Dobbs Ferry*, 89 NY2d 535 (1997).

³⁶ Anthony M. Kennedy, Associate Justice of the Supreme Court of the United States, 1988-___; Judge of the United States Court of Appeals for the Ninth Circuit, 1975-1988.

³⁷ Carmen Beauchamp Ciparick, Associate Judge of the New York State Court of Appeals, 1994-2012.

³⁸ Howard A. Levine, Associate Judge of the New York State Court of Appeals, 1993-2003.

³⁹ George Bundy Smith, Associate Judge of the New York State Court of Appeals, 1992-2006.

⁴⁰ Vito J. Titone, Associate Judge of the New York State Court of Appeals, 1985-1998.

1 Court of Appeals, I lose. [2:06:12.2]

2 I think there's a theme here, I'm a slow starter. It took a little while at Albany, it took a
3 little while at Cornell Law School, didn't like that first job, I'm a slow starter. But it got
4 worse because there were two more takings cases. I was the lone vote in the next case and
5 finally, only because of a quirk in the statute, I agreed with the result in the third case, but
6 for a completely different reason. So in three of the five first cases, I was the odd man out
7 on the cases, and I'll tell you, that did crush me. Unlike the criticism of that partner at
8 Harris Beach, I was completely crushed. I really felt like I had perhaps gotten out of my
9 league. I didn't see it analytically the way they did. I didn't see the connections that they
10 thought they saw. I just felt like I completely missed the boat.

11 I went back upstairs after conference and talked to my clerks, who were all a little bit
12 shocked, and then I closed the door and I called Dolores Denman, the Presiding Judge of
13 the Fourth Department, who had been wonderful to me while I was at the Fourth
14 Department, and very, very encouraging to me, to go to the Court of Appeals, and I said,
15 "Dolores, I have made a terrible mistake," and I told her what had happened. It was a
16 violation of the confidence of the Court in hindsight. And I said, "I don't think I belong
17 here, I think I made a really big mistake." Dolores, who had a little bit of a gravelly voice,
18 said, "that's ridiculous," she says, "I know those people and you're just as smart as they
19 are. To hell with this, you get back in there and fight." And so it kind of bucked me up a
20 little bit, the schoolmarm in her, you know she'd been a teacher before she was a lawyer.
21 Kind of the schoolmarm in her kind of bucked me up a little bit and so I kind of hitched
22 my pants up and said well, you know I'm here, I may as well put up a fight, and put up a
23 fight I did and I wrote my dissents. I think I only wrote five more dissents in six and a

1 half years, but I got two of them out of the way the first day. Caveat, the Supreme Court,
2 four years later, in the Rhode Island case,⁴¹ took my side, so -- [2:08:36.3]

3 TL: Yeah!

4 RW: That's somewhat a justification. Judith won't concede that.

5 TL: What were the personalities on the Court like for the years that you were at the New York
6 State Court of Appeals? Who were they and how did you get along with them?

7 RW: Well, much like the experience at the Appellate Division, again it's a group of people, a
8 smaller number, who are picked by someone else and not by themselves, to be there, a
9 very wide array.

10 Carmen Ciparick had worked at the administrative office of the courts and then had been
11 a trial judge. A Latina woman, Catholic educated. Always used to beguile us with stories
12 of Sister Mother Mary Eucharistica, who I guess Carmen did battle with in grammar
13 school for years, her hands rapped with the ruler. A sweetheart of an individual whose
14 chambers was right next door to mine, who was kind of my confessor the first few years
15 that I was on the Court. If there was something that was troubling me, I might go and talk
16 to her about it. And a very good political sense, political in small "p," in terms of people,
17 relationships. [2:09:56.4]

18 Howard Levine from Schenectady. His father had been counsel to Ozzie Heck⁴² when
19 Ozzie Heck was Speaker of the Assembly. He'd been a District Attorney, a Family Court
20 Judge, a County Court Judge, a Supreme Court Judge, an Appellate Division Judge,

⁴¹ *Palazzolo v Rhode Island*, 533 US 606 (2001).

⁴² Oswald D. Heck, Speaker of the New York State Assembly, 1937-1959; Majority Leader, 1936; Member of New York State Assembly, 1932-1959.

1 seven times nominated to the Court of Appeals and only got it in the last time that he got
2 it. Brilliant, Yale educated, I think probably one of the finest legal minds I've ever seen.

3 Very thoughtful, very thorough.

4 Joe Bellacosa had studied to be a priest and then decided to become a lawyer, but very
5 Catholic, very much a man of his faith, brilliant, very smart. He had this unbelievable
6 ability to kind of see beyond the horizon on how an opinion might affect things, and so he
7 was exceptional in that regard. Could at times be a touch mercurial, had a temper that
8 could every once in a while manifest itself. A great writer. And he was a guy who had
9 kind of -- he was the author of the structure of the Court of Appeals as it's now
10 constituted, under Charlie Breitel,⁴³ when he was Clerk of the Court. So a terrific guy in
11 terms of structure and procedure and things like that, and he was the guy that was kind of
12 the clerk of the works of the Court itself. Set the dockets and did other things that the
13 Chief Judge traditionally would do.

14 George Bundy Smith, double Yale educated, brilliant, very, very quiet, always spoke very
15 quietly and very short sentences. African American who had been beaten and arrested in
16 Selma, Alabama, riding on a bus to desegregate the South, who was arrested for
17 disturbing the peace because a riot had erupted because black people dared to ride on
18 interstate transit, in the front of the bus. George was very quiet, I mean very quiet, as you
19 know, and I resolved that I would get to know him, and so he was my breakfast mate
20 every day for six and a half years while I was on the Court, and we really became pretty
21 good friends and we actually would have long conversations. I'm kind of a jabber jaws

⁴³ Charles D. Breitel, Chief Judge of the New York State Court of Appeals, 1974-1978;
Associate Judge, 1967-1973.

1 and George would endure me. I got to know a lot about his family and about his life. He
2 told me a lot of interesting stories. I learned an awful lot about him and that friendship
3 really tied me back into that billboard, because George was from that era. He had worked
4 for the NAACP Legal Defense Fund. He actually had an automobile accident while he
5 was trying a desegregation case, the Savannah, Georgia desegregation case in federal
6 court, and when he was injured, he was taken to a hospital that was segregated. Can you
7 imagine that? And so some of the stories he would tell me about the South, you know he
8 was raised in D.C., which had a segregated school system, even the District of Columbia
9 was segregated. Just to have a window, a personal window into that, and George, because
10 of his quiet manner and his reservedness, there was never any flourish on it. It was plain
11 simple truth that he was giving you and it was wonderful, wonderful. [2:14:00.3]

12 We were together the morning of 9/11, September 11th. I was sitting there waiting for
13 him, he was late, and he came in and said, "A plane has hit the World Trade Center." We
14 didn't know whether it was a commercial line or not, but we were together that day. I still
15 see George. I still have breakfast with him once in a while when I'm in New York. The
16 conversations are still short but always meaningful. A very kind man and I've always
17 enjoyed him.

18 Vito Titone, Italian, Staten Island, loved Democratic politics, New York City politics, and
19 impish. Judith Kaye used to refer to him as an imp, a little imp. If there was trouble to be
20 had, Vito would be more than happy to cause it. A really smart guy, very, very
21 knowledgeable on procedural stuff, on the CPLR and stuff. A lot of his writings, his
22 really good stuff was on that stuff. He took a shine to me. I don't know what I did to
23 deserve it but we remained very fast friends right up until the time of his death, and I used

1 to go and see him a lot in New York, when I was in New York on Court of Appeals
2 business.

3 After Vito left then Al came, Al Rosenblatt came. I had gotten to know Al really well
4 when he was the Administrative Judge, when I was a trial judge, and then Al had gone on
5 to the Appellate Division. A great guy physically. He's 10 years older than me and I
6 would never wrestle with him, because he's in such terrific shape. He's fascinated with
7 history -- the reason why we're doing this today is because of Al Rosenblatt and Judith
8 Kaye -- and just a lot of fun. He was very funny at the conference table. We had a case
9 once involving covenants not to compete, restrictive covenant, employment covenants.

10 [2:16:05.5]

11 BF: Sure.

12 RW: New York has a principle that in the learned professions, that you can have these
13 covenants not to compete, because you have a practice and so therefore if you kind of
14 acquire some of this guy's practice and then you leave him, you can't take his practice
15 with you. So these covenants not to compete are enforceable. So the question, we had a
16 question in one case about what is the learned professions. Howard reported the case and
17 then Al spoke next and Al said, "Well, you know, I think the test should be how would
18 your mother introduce you? If your mother would say my son the _____, then that's a
19 learned profession. Whose mother would say my son the carpenter, my son the plumber?
20 No, no, they would never say that. It's my son the lawyer, my son the accountant," and
21 that (overlapping; laughter) kind of laughter. And so Al always brought a little bit of
22 levity to the conference table.

1 And then Vicki Graffeo⁴⁴ took Joe's seat. I had known Vicki from when she was floor
2 counsel in the legislature, so I'd known her since '80 -- I'd actually known her since '79.
3 In fact, I encouraged her to seek the nomination when Al did, but she didn't feel she was
4 ready yet, which I think was a mistake on her part but it worked out. Steady, strong on the
5 law, a lovely colleague who had a good balance with regard to her experiences.
6 And then Susan Read⁴⁵ was the last person to come and took Howard's seat, and I was
7 only with Susan for six months. Susan had been in the Pataki administration, in counsel's
8 office, so we had a lot of friends in common. Very, very smart, University of Chicago
9 Law School, and very thoughtful, but I didn't have too much time with her. [2:18:04.4]
10 And of course lastly, Judith. I have known some really wonderful people who had a big
11 impact on the communities in which I've lived or the state in which I've worked, but I
12 have never known anyone like Judith Kaye. The amount of energy and vision that she's
13 brought to things, I mean her genius is the ability to encourage people to be creative and
14 to soar. If you think about it, a lot of the good that's come with me is because she walked
15 into that felony screening and kind of really encouraged me and mentored me in a lot of
16 ways. Unbelievably good legal mind. One of the best writers, in fact probably the best
17 writer I have ever worked with in fashioning opinions.
18 She had some great philosophies. She said ignore the dissent, which I continue to follow

⁴⁴ Victoria A. Graffeo, Associate Judge of the New York State Court of Appeals, 2000-____; Associate Justice of the New York State Supreme Court, Appellate Division, Third Department, 1998-2000; Justice of the New York State Supreme Court, 1996-2998; New York State Solicitor General, 1995-1996.

⁴⁵ Susan Phillips Read, Associate Judge of the New York State Court of Appeals, 2003-____; Presiding Judge of the New York State Court of Claims, 1999-2003; Judge, 1998-1999.

1 to this day. If you read *People v Owusu*,⁴⁶ you'll see me ignoring the dissent, a very
2 difficult and vituperative dissent against my opinion. I advise my Second Circuit
3 colleagues that way too, that the opinion loses its focus. Always thought that an opinion
4 should be extremely persuasive, and so one should cast the opinion and in a light where
5 the result should seem obvious, and I think really, I learned an awful lot from her.
6 The other thing that I think is extraordinary about her is she was of that generation of
7 women. Dolores Denman was also, and another woman by the name of Susan Robfogel,
8 who is at Harris Beach, who was a partner that was really helpful to me and was
9 supportive of me when I was there, and they all shared a common trait. They were all
10 exceptionally feminine and yet they were very tough. And I don't mean to say that
11 feminine can't be tough. [2:20:10.9]

12 TL: No.

13 RW: But at that point in time, in the mid-to-late seventies, early eighties, women were just
14 emerging in the legal profession, and they managed to be feminine in the way feminine
15 was understood at that time and yet tough enough to have their femininity not be held
16 against them. All three of them were exceptionally important in my understanding, but
17 Judith of the three, we have just remained very dear friends and I see her a lot. I'm on the
18 phone with her probably once or twice a week. I know Al calls her every morning, as
19 does Joe, and Howard is in touch with her all the time. I'm not so certain about some of
20 the other colleagues. I'm certain Carmen does. It's kind of an interesting thing about at
21 least that group of people, we have remained pretty much in contact with each other, and
22 I've been now gone, it's going to be nine years this June.

⁴⁶ *People v Owusu*, 93 NY2d 398 (1999).

1 TL: Oh my goodness. What were the differences between being a Judge at the Appellate
2 Division and now at the Court of Appeals?

3 RW: I could describe it best this way: When Mike, Mark and I were preparing for the very first
4 sitting, they picked their cases, which I've always let them do, they each picked cases that
5 they were going to work and get ready. We got the cases all worked up and I was reading
6 the briefs and getting everything ready, and then they came in and they sat in front of my
7 desk, and so I said to Mark, I said, "OK, Mark, you've got the first case, *Anello*, tell me
8 about *Anello*." "Well, this is a tough case, Judge, it's very, very close," and he starts
9 describing the whole thing and I said, "Well what do you think Mark?" And he says,
10 "Well you know, this is a really, really tough case." I said, "OK, let's set that aside,
11 Mike." "This is a tough case, Judge, it's really close and blah-blah-blah-blah-blah." And
12 then we went back to Mark, so we set that one aside and went back to Mark and I got,
13 "this is a tough case" again, and as soon as he said that I started to laugh and I said,
14 "Gentlemen, we're at the Court of Appeals, we're no longer at the Appellate Division,
15 they're all going to be tough cases." [2:22:31.0]

16 BF: Right.

17 RW: This is the outer edge of the law, this is the envelope, the edge of the envelope we're
18 working at here. The Appellate Division, like the Second Circuit, takes what comes to it.
19 The New York Court of Appeals decides what comes to it, the vast majority of its cases,
20 and so the Court of Appeals is a distinctly different function, at a very primary level. A
21 significant aspect of judging at the Court of Appeals is deciding what case to use as a
22 vehicle to explore a difficulty, the friction that's existing within the body of judicial
23 thought and legal thought, and as you know because you did this as a staff clerk, you

1 analyze the quality of the advocacy, the specific facts of the case, if there's something
2 unusual in the facts that might cloud the ability to reach the issue. How well was the issue
3 presented below, how well is it focused in the lower courts' opinions? Is there a
4 disagreement among the Appellate Divisions, those kinds of things, what we called leave
5 factors back then, the Supreme Court calls them cert factors, as Ruth Ginsburg⁴⁷ tells me.
6 That is a big portion of what you do, and so the biggest aspect of that job was something
7 the public wasn't really aware of, it was kind of underground, subterranean. That was
8 very hard to acclimate to at first, kind of doing the calculus of it. [2:24:14.8]
9 As you know, there's about 3,400 of those decisions that have to be made a year, in terms
10 of granting leave or not granting leave, and only one in twenty is going to come to the
11 Court, roughly, and maybe fewer than that. So that's a distinct difference. The panel is
12 larger, seven and five or three, and there is a lawmaking function that does not exist either
13 at the Second Circuit or at the Appellate Division, where you have to decide what
14 direction that law is going to take. It's a common-law court and so in tort law or contract
15 law or some aspects of property law, the Court is the body which will chart the course
16 with regard to new developments in the law. And it takes you a while I think, to kind of
17 come to grips with that, because as lawyers we're trained, we read precedent and then we
18 take that precedent and apply it to the problem at hand. What a common-law high court
19 judge is -- he or she takes the precedent and tries to understand its essence, and what is
20 the logical extension of that essence and how does one best express it. It is a craft of both
21 seeing where there are cross currents in the law, trying to decide which path makes the

⁴⁷ Ruth Bader Ginsburg, Associate Justice of the Supreme Court of the United States, 1993-____; Judge of the United States Court of Appeals for the District of Columbia Circuit, 1980-1993.

1 most sense. [2:25:57.9]

2 Now, some would say that that's judicial tyranny, but in the common law, unlike
3 constitutional common law, there's no document to examine to decide that this is
4 required. There's some history I suppose, but a lot of it is policy laden, and that is unique,
5 that is not an experience, with a rare one or two exceptions, at the federal courts, that I've
6 had.

7 TL: Are there any opinions during the time that you were at the New York State Court of
8 Appeals, of which you are most proud?

9 RW: Yes. I'm certainly proud of all of them. I was telling someone yesterday, after you and I
10 have had this talk and Brian and I had had this talk, that as you start to think about them
11 or you kind of walk through them, they trigger responses from you. I think there's several.
12 One, *People v Harris*,⁴⁸ a case you wrote with me, which is a death penalty case, the first
13 full death penalty trial review, and part of the reason for that is that it was the first time
14 the court had spoken, not on the issue of the death penalty, because we had already
15 spoken on that, but on how the trial was to be conducted. There had been a vacuum in
16 New York law for almost a full generation, because there had been no death penalty trials
17 after the *Lemuel Smith*⁴⁹ case way back in the mid-seventies, and so I'm proud of that. As
18 you and I both know, there were 86 issues. I mean it was a monster work and we worked
19 around the clock, seven days a week, for the better part of a month.

20 TL: I was dedicated to you for a year just to prepare for that one case.

21 RW: I know, it was a long --

⁴⁸ *People v Harris*, 98 NY2d 452 (2002).

⁴⁹ *People v Smith*, 63 NY2d 41 (1984).

1 TL: It was a long case.

2 RW: Think of all the learning we did. You used to do background memos. Do you remember,
3 you used to do background memos on juror qualification, because we had no
4 jurisprudence on death qualification, a lot of the other stuff. We had some tricky
5 evidentiary issues in that case too. [2:28:04.3]

6 So I'm very, very proud of that because it's unanimous, and I think there's kind of an
7 interesting irony that I would have had. There had been such a controversy about my
8 nomination at first, because of my death penalty thing, and one of the -- you know, in the
9 later part of my career there, I would write *Harris* that -- and it was the right result,
10 there's no doubt in my mind it was the right result, to vacate his death sentence.

11 TL: There was a sense of destiny when you guys came back from conference though, there
12 was, like amongst the clerks.

13 RW: Wesley's got it.

14 TL: Yeah. We were like it's probably going to be Judge Wesley who pulls that card.

15 RW: Now I'm going to ask you a question and you be honest. You were terrified when I drew
16 it.

17 TL: I was. (Laughter)

18 RW: I will tell you the truth. Part of the reason why I also like *Harris* so much is that there are
19 moments in each clerk's life when the clerk says, I don't know that I can do this but I will
20 do this, I will accomplish this, and they kind of get past their own sense of their own
21 limitations. I think that was a moment for you.

22 TL: It was.

23 RW: And that is as rewarding to me, I think as the opinion itself, to some degree. Likewise,

1 *Hamilton v Beretta*,⁵⁰ for Zainab Chaudhry, who was one of your co-clerks. *Hamilton* is
2 pure common law, liability of a gun manufacturer for the acts of third parties who were
3 not within their control, and we were laying the duty line down. Originally, the Court was
4 not of one mind and we spent a long month bringing a couple of the Judges back in the
5 fold. I think it's a beautiful opinion. It's the collective effort of a number of people,
6 Howard Levine and Judith Kaye included, and I'm very proud of it. It was also a very
7 learning experience for me, about how federal policy could have a real significant impact
8 in an area, the Brady Bill,⁵¹ which I knew nothing about. I think President Clinton⁵²
9 accomplished a great thing with the passage of the Brady Bill. [2:30:15.3]
10 There's another case that I didn't sign because it was a per curiam, but in which I was
11 significantly involved in crafting the opinion for the Court—*Silver v Pataki*.⁵³ That was a
12 question where Speaker Silver⁵⁴ had sued Pataki about Pataki's ability to line item veto
13 certain things, and the question was, was that constitutional, and there was a big question
14 about whether Silver had standing during the litigation. Zainab had taken the position that
15 indeed he did have standing, and I was vehemently opposed to that position. Zainab was
16 persistent and, as you both know, I expect you to hold your ground and to take a view and
17 be persistent in it. She wouldn't give and I must confess that my arguments weren't very

⁵⁰ *Hamilton v Beretta U.S.A. Corp.*, 96 NY2d 222 (2001).

⁵¹ Brady Handgun Violence Prevention Act (Pub L 103-159, 107 US Stat 1536).

⁵² William Jefferson Clinton, President of the United States, 1993-2001; Governor of Arkansas, 1983-1992; Attorney General of Arkansas, 1977-1979.

⁵³ *Silver v Pataki*, 96 NY2d 532 (2001).

⁵⁴ Sheldon Silver, Speaker of the New York State Assembly, 1994- ____; Assemblyman, 1977- ____.

1 good and finally -- I recall this very well, it was late at night, I pretty much told her it was
2 time for her to go home, I was going to have to report the case in the morning, and she
3 turned to me and she said, "Change the names, Judge. Make George Pataki the Speaker of
4 the Assembly and make Sheldon Silver the Governor of the State of New York and tell
5 me if the result is the same." Well if you think about it, it's a pretty insulting thing to say
6 but it struck me that she was kind of, in essence, challenging me to say, is this really part
7 of a reluctance because you had been friends with Pataki? It's not about that and, I
8 confess, I think that kind of freed me of it.

9 I didn't get mad at her. I took it as a serious suggestion and I went back through and I
10 pieced it all together and then I was convinced that she was right and I reported it, and the
11 case went down six-to-one, Judge Graffeo did dissent, and I think it's absolutely the right
12 decision, absolutely the right decision. [2:32:18.9]

13 A couple of other cases. *Superintendent of Banks v BCCI*,⁵⁵ the Bank of Credit and
14 Commerce International. I liked that case because it was a neat case about how money
15 trades itself around the world every day. The money moves from different banks. This
16 involved a bank in China. It was fascinating to me because it was an area of the law that I
17 didn't know anything about, and I ended up writing, I think a pretty neat opinion about
18 that.

19 *Blanco v AT&T*,⁵⁶ repetitive stress injuries, again in the common law, stuff like that, and
20 then *People v Owusu*. I've thought about this. *Owusu* is another shining moment for a

⁵⁵ *Matter of New York Agency & other Assets of Bank of Credit & Commerce Intl.*
(*Superintendent of Banks of State of N.Y.—CITIC Indus. Bank*), 90 NY2d 410 (1997).

⁵⁶ *Blanco v American Tel. & Tel. Co.*, 90 NY2d 757 (1997).

1 clerk. Owusu was charged with assault in the second degree. He caught his wife in pari
2 delicto with her boyfriend and took offense to it and got into a fight and bit the fellow's
3 finger off. It must have been quite a bite, he took a real strong bite. The question was,
4 were his teeth a dangerous instrument?

5 TL: Yes.

6 RW: Assault in the second is raised in degrees by both the level of the injury and whether
7 you've brought a weapon into the incident, and so that was the question. When the case
8 was first reported, it was unanimous to confirm that teeth could be a dangerous
9 instrument and Mike Nolan, who was my clerk, had written the case the other way, and
10 Mike was known to be passionate about his views. This was early on in my time at the
11 Court. [2:34:04.2]

12 TL: It was.

13 RW: I came back and I reported the case and Mike was just, "Oh, oh, this is terrible, this is
14 terrible, this is terrible, I hope you can live with yourself." I remember him saying that to
15 me and I thought, get off, you know, who do you think you are mister clerk, I'm the Judge
16 here. So he just huffed and puffed for like another hour, and we were getting ready to go
17 home, it was a Friday, and so I said to him, "OK Michael, if you're so smart and this is so
18 wrong, you have on my desk on Monday morning, you go home and you put together a
19 memo showing me why this is wrong, and you can't use your bench memo because your
20 bench memo didn't convince me." Well I have to hand it to Michael, he must have gone
21 home and spent hours working on it, because when I got into the office on Monday
22 morning, I had about 25 pages on my desk. He traced assault through the common-law
23 crimes and then through the Model Penal Code, and then into today's statute and showed

1 why, that the physical characteristic of the assailant could not necessarily -- common law
2 -- couldn't be an aspect of the crime. He then proceeded to give me a series of
3 hypotheticals which showed that, ultimately, it could lead to an absurd result under the
4 statute. It was absolutely clear that he was right and that we were just so wrong, but I
5 wasn't going to give him the satisfaction of immediately caving, so I said nothing to him
6 until late Tuesday afternoon. I said to him, I said, "OK, I think you're right, I don't like to
7 admit it but I think you're right, but now here's the challenge. You have to get it down to
8 about 10 pages and we're going to send it to the colleagues." He did. He got it down to 10
9 pages and, late on Wednesday morning, we faxed it out to the other chambers and by
10 close of business on Wednesday, the vote was six-to-one in favor of the Wesley-Nolan
11 viewpoint, and so I wrote the opinion in *People v Owusu*, and I think it's another instance
12 where a clerk -- I thought he did a great lawyering job, he managed a Judge well, and
13 definitely I think the right result. I don't think the world would stop spinning if we had
14 gone the other way, but I think we would have created an anomaly in the law that
15 somebody some day would have to explain. That's it, I think.

16 BF: Judge Rosenblatt, in his interview, talked about a case where you ultimately didn't have a
17 vote, *CFE*.⁵⁷

18 RW: Yeah.

19 BF: Could you talk about your experience with that case?

20 RW: *Campaign for Fiscal Equity* was argued in the June term of 2003. I had had my Senate
21 hearing but I had not had the confirmation, or I may have had the hearing right after the
22 oral argument. So I was on the bench for the oral argument and it was a very difficult

⁵⁷ *Campaign for Fiscal Equity v State of New York*, 100 NY2d 893 (2003).

1 case. It raised the issue of the constitutionality of the current funding scheme for primary
2 and high school education at schools, public schools in New York.

3 The problem I had with the case was that adequacy of education is an intense policy
4 ridden calculation and there's not an answer to it. There are a series of answers or
5 competing philosophies, and it's what they call a polycentric problem. It has a number of
6 sources of causation that overlap and interrelate to each other in a very, very complex
7 way. Karl Llewellyn⁵⁸ wrote about polycentric problems and said that courts were not
8 well adapted to resolving these kinds of problems because it takes the flexibility of the
9 legislative process and the give and take of public opinion to solving them, and cautioned
10 against courts involving themselves in that. [2:38:12.2]

11 I was very strongly of the view that the Court should not get itself into the fight of what is
12 a fair and adequate education, how does one arrive at it and how does one fund it. I
13 cautioned very strongly at the conference table, that it would draw us into a fight that we
14 did not have the skill or the tools to emerge with any kind of effectiveness. Ultimately,
15 that viewpoint did not carry the day and the Court engaged in that and quite frankly, I
16 think our view has been established because the legislature responded to an earlier
17 judicial mandate and no one has ever tested whether that was right or not and the Court
18 has shown no willingness to reenter into that area.

19 Now that's not to say that there aren't some social problems that don't have viable
20 judicial solutions, and one of those was school desegregation. There has been comparison
21 made to the desegregation cases and I think it's a wrong comparison and here's why I

⁵⁸ Karl N. Llewellyn (1893-1962), Professor of Law, Yale Law School; Columbia Law School; University of Chicago School of Law.

1 think it's wrong. Segregated education was a function of law, states mandated it, and it
2 flies directly in the face of the Fourteenth Amendment.⁵⁹ You know, *Plessy v Ferguson*⁶⁰
3 is just wrong, it's wrong headed, and so if one concludes that *Plessy v Ferguson* is wrong,
4 then there is a judicial remedy. Overrule *Plessy v Ferguson* and say separate is inherently
5 unequal, because it recognizes that we are somehow different and the Constitution is
6 color blind. And so it's wrong to compare that to what is a good or appropriate education,
7 because you could strike down the law that says a black school for a black child and a
8 white school for a white child, and you say all children go to school and then you decide
9 how you then rebalance that, and that does involve some policy making by federal judges,
10 but it's entirely different than deciding how much money should the legislature spend and
11 how do they find an appropriate formula for the distribution of that money and what
12 should be taught in first grade and what happens, why do kids in third grade seem to not
13 test as well in urban areas as suburb and rural areas. All the kind of multiplexual
14 difficulties. [2:40:40.9]

15 BF: Sure.

16 RW: So I think that the *CFE* is wrong, I'm saying it, and I know that there are some who will
17 say, "Well no, you can't turn your back on the children." Well that's the difficulty of
18 being a judge. Judges are not God. Judges have limited capabilities. Judges do have the
19 power to tear down that billboard in Jericho, North Carolina, by striking down the law
20 that allows bigotry and prejudice to be the coin of the realm, but judges cannot wave
21 some kind of magic judicial wand over every social problem and solve them and if we

⁵⁹ US Const Amend XIV.

⁶⁰ *Plessy v Ferguson*, 163 US 537 (1896).

1 think that we can, then we have undercut the legislative process and we have given
2 everybody an escape hatch for serious policy debate about where this country should go
3 or where this state should go, on some very, very important issues.

4 So this is not abdication of the resolution of those issues, it's a recognition that it's very
5 hard to drive a nail with a wrench. You can do it, you can do it, but driving that nail
6 doesn't always do so well. It may seem overly simplistic, but one of the things that's been
7 most frustrating in the years is once in a while you see something that you really think
8 cries out for meaningful resolution and yet you know full well that you don't have the
9 judicial capacity to do it. Frankfurter⁶¹ was right, judicial restraint is a painful and
10 difficult thing to exercise at times, but I think is necessary for the well being of the
11 Republic.

12 [2:42:21.0]

13 BF: Judge, you are now a Judge on the Second Circuit. Do you remember when you got a
14 phone call, informing you that the then President Bush⁶² was going to nominate you for
15 the Second Circuit?

16 RW: The great thing about having these two doing these interviews is they're repositories of all
17 my stories that I've told, so it's an easy inquisitor. Yeah I do, I was 1,700 feet above sea
18 level, at the top of Hunt Hollow Ski Resort over Naples, New York. I was with Katy
19 Carney Cole and Ryan McAllister, who were two of my law clerks, and Bill Taylor too, I
20 think was with us also. It was March 21, 2003. We had been through a very rigorous,

⁶¹ Felix Frankfurter, Associate Justice of the Supreme Court of the United States, 1939-1962.

⁶² George W. Bush, President of the United States, 2001-2009; Governor of Texas, 1995-2000.

1 difficult vetting process with the White House. I'd been down and seen Alberto
2 Gonzales,⁶³ I'd been interviewed. I had filled out a voluminous background check, I had
3 been through multiple interviews with the FBI and produced every single address I'd ever
4 had and every single employer I'd ever had, and it was in the papers that maybe there was
5 a chance that the President was going to nominate me for the Second Circuit. There's no
6 cell phone reception on the middle of the mountain, until you get up to the top where it's
7 clear, and my cell phone just starts exploding. The first call I take is from Sue Beachel,
8 who was my secretary at the time, and she said, "The Governor is looking for you, the
9 White House is looking for you, Bill Paxon is looking for you, don't you think it's time
10 that you came off that mountain and took a phone call?" [2:44:04.3]
11 And so we skied down quickly and I went into the business office of the Hunt Hollow,
12 it's a ski club and Kath and I belong there. I walk in and the business manager is there,
13 Arden is her name, and she says -- and you know, it was kind of known in the public. I
14 said, I really need to make a phone call and she says, "I suppose you're going to tell me
15 that you want to call the White House?" And I said, "Indeed I do, I have to call the White
16 House right now." Sue had sent me the phone number and so I called the White House,
17 and I held the phone out so that Arden and the law clerks could hear it, and I talked with
18 Judge Gonzales, who said the President was nominating me.
19 George W. Bush didn't make those phone calls and so I had a conversation with the
20 President's counsel, and hung up and turned around and everybody started screaming. I
21 drove home quickly to tell Kathy and then the confirmation process began.

⁶³ Alberto Gonzales, United States Attorney General, 2005-2007; White House Counsel, 2001-2005; Associate Justice of the Texas Supreme Court, 1999-2000.

1 BF: At that time and still today, there have been some very fierce battles over circuit
2 confirmations. How controversial was yours?

3 RW: About as controversial as a ladies social. I was very, very fortunate. We're drawing close
4 on time, so I'll summarize it and then we'll maybe cover a little bit more on the next tape.
5 Abortion was made legal in New York four years before *Roe v Wade*,⁶⁴ so abortion was a
6 matter of state policy and not a constitutional dimension in New York. The death penalty
7 is not a big deal in the context of constitutional decisions and so, therefore, there was no
8 third rail that I had touched in any way, shape or form. I had voted pro life and had a pro
9 life record, but there was nothing in my record that showed any kind of doctrinaire or
10 view, and to my great good fortune, Senator Clinton,⁶⁵ who was very close friends with
11 Judge Kaye, was very receptive after Judge Kaye had spoken with her about me, and
12 Senator Schumer,⁶⁶ who I knew vaguely from the assembly days but also who was very
13 good friends with my then Congressman, Tom Reynolds,⁶⁷ and a number of other people,
14 and Bill Paxon, was enormously receptive to me, and so my Senate confirmation hearing,
15 other than a disturbance which we can talk about in a minute, after they change the tapes.
16 [2:46:50.9]

⁶⁴ *Roe v Wade*, 410 US 113 (1973).

⁶⁵ Hillary Rodham Clinton, United States Secretary of State, 2009-2013; United States Senator, 2001-2009; First Lady of the United States, 1993-2001; First Lady of Arkansas, 1983-1992.

⁶⁶ Charles E. Schumer, United States Senator, 1999- ____; Member of the United States House of Representatives, 1981-1999; New York State Assemblyman, 1975-1980.

⁶⁷ Thomas M. Reynolds, Member of the United States House of Representatives, 1999-2009; New York State Assemblyman, 1989-1998.

1 Other than a disturbance by this protestor, was a love fest, with Saxby Chambliss⁶⁸ asking
2 me all these lob ball questions about do I believe that children should have a legal
3 education. It was wonderful, he was very kind to me and very sweet to me, but both
4 Senator Schumer and Senator Clinton were enormously helpful, and when we change the
5 tape, I want to tell a little story about Senator Clinton and my mom.

6 BF: Great.

7 [Break in Recording]

8 BF: Judge, you were about to tell us about a protest as part of your confirmation.

9 RW: Dolores Sassower is a woman who for years has been unhappy with the New York Court
10 of Appeals and with a lot of New York judges. Her mom and dad were attorneys, her
11 father had been disciplined by the Second Department when Judge Rosenblatt was a
12 member of the Second Department, and so Judge Rosenblatt was, in her view, somewhat
13 responsible for her father's difficulties. Her mother had difficulties also, with the
14 disciplinary committees, and out of that and out of her frustration out of that, I think she
15 took the view that there was a combination, if you will, of judges and politicians that had
16 produced the difficulties that her family endured. [2:48:30.1]

17 My only involvement with her case was a denial of leave on a case that she'd had
18 dismissed in Manhattan Supreme Court. I had never met her, had no contact with her, and
19 she did not protest or in any way involve herself with my confirmation hearing when I
20 was at the New York Court of Appeals, but she had been a vigorous writer with regard to
21 my nomination for the Second Circuit. Senator Clinton was aware of it, as was Senator

⁶⁸ Saxby Chambliss, United States Senator, 2003- ____; Member of the United States House of Representatives, 1995-2003.

1 Schumer, and the bar associations did the appropriate investigation and stuff, to
2 determine if there was any substance to it, as did the Department of Justice.

3 We know that Ms. Sassower had come to the confirmation hearing and what's curious is
4 that during my 10 minutes of interview in front of Senator Chambliss, there was nothing
5 that occurred. Nothing occurred at all and then we got up and we left. Curiously, poor
6 Mark Kravitz,⁶⁹ who was a District Court Judge in Connecticut, who was in the same
7 sessions with me and getting ready for the hearings and stuff, who I had become
8 enormously good friends with, he had all of his family there and they had the hearing for
9 them and at the end of the hearing, Senator Chambliss says, "now we're going to close
10 the record today, we're going to conclude these proceedings today, we're going to leave
11 the record open for written comments within five days" or some darn thing, and all of a
12 sudden you hear this rumble in the background -- I have a videotape of it that I show
13 some of the clerks -- and you hear this shouting, "I'm here to protest judicial corruption
14 and the nomination of Richard C. Wesley for the Second Circuit." Why she waited until
15 then I don't know but she did, and then the Capitol Police grab her and they take her out,
16 and you can see her head go past the video camera. [2:50:32.9]

17 It turns out she was charged with disrupting the proceedings of Congress, which is a
18 misdemeanor, in the District of Columbia. She had an assigned counsel, she demanded a
19 jury trial, fired her assigned counsel and was pro se, defended herself, and was convicted
20 by the jury. The judge went to sentence her and he was going to give her probation, and
21 without ever asking me, and I don't know if they asked Senator Schumer or Senator

⁶⁹ Mark R. Kravitz, Judge of the United States District Court for the District of Connecticut, 2003-2012.

1 Clinton, but she was told that as part of her terms and conditions of her probation, she had
2 to write a letter of apology.

3 BF: Oh really?

4 RW: I certainly wasn't interested in that. She hadn't done anything to my hearing. She told the
5 judge that she would not do that and so he sent her to jail. She is the first person to have
6 gone to jail for disrupting the proceedings of Congress since the Puerto Rican nationals
7 shot up the House of Representatives back during the Truman administration.

8 TL: Oh my goodness.

9 RW: And then she wrote to the Village Voice from jail and the Village Voice came and asked
10 me about things and I told them what I knew of it and that was the end of it, there was
11 nothing that came of it. I've always felt bad for Mark Kravitz, my dear friend in
12 Connecticut, because he caught the wrong end of the protest. That was the only event of
13 any substance that day.

14 BF: Now, did your mother have a chance to meet Senator Clinton? [2:51:58.2]

15 RW: Yes. My mother had very strong views about President Clinton and they were not
16 favorable, so we were a touch concerned about mom. By this time mom was now 82 and
17 still quite vigorous. So I assigned Ryan McAllister, my clerk, to kind of keep an eye on
18 mom while I was up front. I had had to go see Senator Schumer for a minute or two,
19 because he was on the committee, on the Judiciary, before the hearing started, so I didn't
20 get a chance to see Senator Clinton right away, and Ryan was just supposed to keep track
21 of things.

22 Senator Clinton comes in and sits down right next to mom and starts up a conversation
23 with mom, and at some point in time, my mother turns to her, and Ryan just about

1 fainted, and said, “You know Senator Clinton, I prayed for you and Chelsea.” The
2 implication being is that she wouldn’t pray for the President and that she was not happy.
3 And Senator Clinton, without batting an eyelash, took my mom’s hand into her lap and
4 said, “Oh Betty, thank you so much, I believe in the power of prayer, I truly do believe in
5 the power of prayer.” My mother then just fell in love and they just started chatting and
6 chatting and chatting.

7 About a week later, a picture came, beautifully framed, of my mom and Senator Clinton
8 sitting there, and the look on their faces is terrific, I have it in chambers, and it said, “To
9 Betty, what a wonderful day for a proud mother. Love, Hillary Clinton.” I thought, oh my
10 God, you know here’s my mother, this dyed-in-the-wool Republican, who’s now got this
11 terrific picture. And as you know, because you clerked for me during a period of time,
12 mom later contracted a terminal illness and we cared for her until she died. Towards the
13 last few months of her life, I asked her, I said, “Mom, what about the arrangements? How
14 do you want the arrangements for your funeral?” She had pictures with President George
15 W. Bush and others, and she said, “You know, I really don’t want any political pictures.”
16 I said “Mom, but you knew Nelson Rockefeller,⁷⁰ you knew all these great politicians,
17 you don’t want any of those pictures?” “No I don’t want any pictures.” She said, “I want
18 one picture, and she said I want that picture -- I want a picture of you and your brother,
19 but the only picture of a public person is I want that picture of Senator Clinton.” She said,
20 “I want you to put it at the very end of all the pictures,” and I said, “You really want to do
21 this,” and she said, “Absolutely.” [2:54:38.7]

⁷⁰ Nelson A. Rockefeller, Governor of the State of New York, 1959-1973; Vice-President of the United States, 1974-1977.

1 So after mom passes away, we have the wake and through the line comes Congressman
2 Reynolds and Lowell Conrad, who was the Chairman of the Livingston County
3 Republican Committee, and mom was a great gal, loved your mother, a great Republican
4 and everything, and on through the line they go. About 30 minutes later, I suddenly
5 realize that they're back in the line and they're headed back towards me, and they get up
6 to me and Lowell says to me, "The picture, what about the picture?" And I said, "My
7 mother's wishes, nice to see you Lowell." And you know, Lowell wasn't mad or anything
8 but he was just flabbergasted that mom would have this picture with Hillary Clinton. So I
9 always thought it was mother's kind of last hurrah from the grave, that she would kind of
10 be a little bit controversial. Very typical of Betty Wesley, I think. (Laughter)

11 BF: That's a great story, Judge. When you'd gone on to the Second Circuit, things got off to a
12 very quick start and it's a very different court than the New York Court of Appeals.

13 RW: Very much so, yeah.

14 BF: What was that experience like for you? [2:55:55.5]

15 RW: Dreadful. Not dreadful, the people were absolutely wonderful and the court is a great
16 place to work and there's a lot of very able people there, but I quickly learned that there
17 was a lot of law I did not know. I had not been a federal practitioner, I had been a state
18 law practitioner. I made state law as a legislator, I had worked through the state courts, I
19 practiced in the state courts, and I had not been in the federal courts at all. I was totally
20 unfamiliar with the Federal Rules of Civil Procedure, other than that which I'd had back
21 in class at Cornell Law School. I couldn't tell you what rule 404 (a) was at that time, I can
22 now, don't ask me.

23 Trademark law, immigration law, antitrust law, all these distinctly federal areas of legal

1 activity were all unknown areas to me, and so it became apparent to me very early on -- I
2 didn't know anything about the sentencing guidelines, which were then mandatory. You
3 know all about the sentencing guidelines, so do you. And it seemed like every case. I
4 couldn't tell where the easy cases were, every case was just a bunch of information of
5 which I knew nothing in terms of the law side of things and it was painful and frightening
6 and very difficult.

7 I was blessed. Bill Taylor decided to stay on for a period of time. We brought in a new
8 clerk, Bob Knaier, from the Cornell Law School, who was brilliant, absolutely brilliant,
9 and Katy Cole and Ryan McAllister stayed on. I wanted them to have two full years with
10 me, as they would have had if I had been at the New York Court of Appeals, and they all
11 just dug in. As I mentioned to you the other day, we worked seven days a week. I worked
12 Christmas Day and I worked New Year's Day, and we finally, around Martin Luther
13 King's holiday, we took a day off and took a deep breath. [2:58:10.3]

14 So it was very, very hard, and because you're the junior judge, when you're in New York,
15 you're the applications judge, and so all this other stuff comes in. Again, I had a case
16 involving the sale of a racetrack in Maryland, and Ken Starr⁷¹ was on one side and Terry
17 Connors from Buffalo was on the other side, working for -- Terry represented Delaware
18 North and Judge Starr was representing the owner of the racetrack and it was a question
19 of whether there should be a stay of a lower court order. There I am, I've got the Federal
20 Rules on my lap and I've got Katy looking through stuff and we're doing this oral
21 conference on the telephone, they weren't there. I just felt completely at sea. So it was

⁷¹ Kenneth W. Starr, President of Baylor University, 2010- ____; United States Solicitor General, 1989-1993; Judge of the United States Court of Appeals for the District of Columbia Circuit, 1983-1989.

1 very difficult at first.

2 And culturally, it was different. You don't see your colleagues as much, you don't have
3 that day-to-day kind of in the same boat kind of idea that you had at the Appellate
4 Division or at the New York Court of Appeals, and so it was a rough kind of breaking-in
5 period for me. Very fortunately for me, Rosemary Pooler⁷² from Syracuse, who is not
6 necessarily on the same ideological page as I am a lot of times, was extremely helpful,
7 very kind, and I got into the habit of calling her and asking her about things. And Sonia
8 Sotomayor,⁷³ who for some reason, I ended up sitting with those two judges a lot the first
9 year. We once looked at it and I think I sat with Rosemary about 30 percent of the time,
10 and almost 40 percent of the time with Sonia. [2:59:57.9]

11 Sonia was very willing to take a call. You know, I'd say, "Geez, I'm trying to figure this
12 thing out" and "what do you think?" and she was very, very helpful, and just the work of
13 the court, the motion practice of the court, there's no handbook, there's nothing. We now
14 have kind of a mentor system that we employ to avoid this and we've had to because
15 we've gotten five Obama⁷⁴ appointees in the last couple of years. We didn't have that at
16 that time, so it was just kind of learn by doing and wonderful, wasn't that a lot of fun? I
17 didn't really feel at home there until about two and a half years in I think, and of all the

⁷² Rosemary S. Pooler, Judge of the United States Court of Appeals for the Second Circuit, 1998- ____; Judge of the United States District Court for the Northern District of New York, 1994-1998.

⁷³ Sonia Sotomayor, Associate Justice of the Supreme Court of the United States, 2009- ____; Judge of the United States Court of Appeals for the Second Circuit, 1998-2009; Judge of the United States District Court for the Southern District of New York, 1992-1998.

⁷⁴ Barak Obama, President of the United States, 2009- ____; United States Senator, 2005-2008; Member of the Illinois Senate, 1997-2004.

1 courts that I'd been on, it was the federal court that took the longest to kind of get
2 acclimated and oriented.

3 I was very, very fortunate, Sue Beachel had decided to stay in the state court system, my
4 secretary, and I brought on a woman by the name of Suzan Meyer, who had been my legal
5 secretary way back in 1976, and married to my law partner, Randy Meyer. She's terrific
6 and about six months in, right about that Martin Luther King holiday, she came in and
7 said you know, "We're doing this all wrong in terms of how we're managing the work of
8 the office." She resolved to then be completely in charge of all the information flow
9 through the office and took all of that off of my back, and that was the beginning of kind
10 of breaking through and getting a handle on things.

11 BF: One of your early sittings on the Second Circuit was a very high profile case, *Padilla v*
12 *Rumsfeld*.⁷⁵

13 RW: Right.

14 BF: Where you ended up writing a dissent. Could you talk about that?

15 RW: I remember Rosemary Pooler calling me, she was the Presiding Judge, and in the Second
16 Circuit, the Presiding Judge gets the briefs first, and the reason why the presider gets the
17 briefs first is because the presider has to set the argument times. The briefs are delivered
18 to the presider about eight weeks out, nine weeks out, and the presider then works their
19 way through them and is given about a week or so to assign argument times. Then, as
20 soon as he or she assigns those argument times, the briefs are then distributed to the other
21 two members of the panel. [3:02:18.6]

22 She called me the day the briefs arrived and she said, "The eight hundred pound gorilla

⁷⁵ *Padilla v Rumsfeld*, 352 F3d 695 (2003), *rev'd* 542 US 426 (2004).

1 has landed on us.” And I said, “What are you talking about?” And she said, “Well, we’re
2 going to do *Padilla v Rumsfeld*.” I was familiar with the case and I thought, oh my God,
3 here I am, this is October, I came on the bench in June, and I really started sitting in July,
4 so this is only like my third or fourth sitting I think. Unbelievable.

5 We started working on the case and Katy Cole worked on it with me, and then we
6 decided that it was of such importance and such magnitude, that we would kind of do a
7 full court press on it, and so Ryan took a piece of it and Bob Knaier took a piece of it and
8 Katy had a piece of it, and Bill Taylor had a piece of it, and then Bill left us in December.
9 The thing about *Padilla* was, is, that until September 11, 2001 national security law was a
10 very narrow, rarely considered issue -- and the whole intersection of the Hague
11 Convention and the concept of an enemy combatant and how an enemy combatant is to
12 be treated, and the whole set of issues that arise out of presidential war powers and the
13 exercise of those presidential war powers in a time of national disaster or activity upon
14 U.S. soil. The only corollary to that is the Civil War and of course the Civil War was of
15 substantially greater magnitude, not diminishing September 11th, but it was the nation at
16 war. And so there are no real kind of guideposts there and in areas of law that my
17 colleagues were equally ignorant of as I was, and it began a journey that has continued to
18 this day, of thinking about what are the President’s powers in times of national
19 emergency, military national emergency? What kinds of congressional responses are
20 necessary or constitutional and how are some of those things accomplished and what
21 analogies do we draw from two instances: one during the Civil War, *In Re: Milligan*,⁷⁶
22 and *In Re: Milliman*, are the two cases where the right of the President to suspend the writ

⁷⁶ *Ex parte Milligan*, 71 US 2 (1866).

1 of habeas corpus was in question, and then a case during the Roosevelt administration
2 where a group of Germans actually landed both in Florida and in Long Island, who
3 actually several of them were Americans of German descent, who had returned to
4 Germany at the beginning of the hostilities with the United States in World War II, and
5 their mission was to wreak terrorism, terrorist acts. They were to bomb the Tennessee
6 Valley Power Authority and a number of other things, bomb the aluminum plant, the
7 Alcoa Plant up in Massena, and a number of other things, and try to draw analogies from
8 them. [3:05:19.0]

9 Judge Michael Mukasey,⁷⁷ then Chief Judge Mukasey, who then later became Attorney
10 General Mukasey, wrote a terrific opinion, I thought, below and really kind of laid out a
11 lot of the considerations. I had a disagreement with Judge Pooler and Judge Parker⁷⁸
12 about that, but we agreed on jurisdiction and ultimately got the decision out. But I learned
13 an awful lot. I would say of all the cases that I've ever worked on, that was the greatest
14 learning experience for me, because it was an area of constitutional law that I knew
15 nothing about, and became very rich. It was like learning something -- you thought you
16 knew a lot about the Constitution and all of a sudden there's all this other stuff that
17 happens that you hadn't thought about. And it was timely because obviously, the "War on
18 Terror" continued and continues to this day, and we continue to have terrorism related
19 cases, both at the court and at the Supreme Court. And it has become now, you know

⁷⁷ Michael Mukasey, United States Attorney General, 2007-2009, Chief Judge of the United States District Court for the Southern District of New York, 2000-2006; Judge 1997-2006.

⁷⁸ Barrington D. Parker, Jr., Judge of the United States Court of Appeals for the Second Circuit, 2001-2009; Judge of the United States District Court for the Southern District of New York, 1994-2001.

1 everybody in law school takes a course on national security law, and what are the powers
2 of the President and all this other stuff; stuff that we never dreamed about talking about
3 back when I was in law school. [3:06:37.1] [3:08:43.8]

4 BF: You had several cases or issues that you decided in cases considered by the Supreme
5 Court. What were those?

6 RW: Several. There was *Billing v Credit Suisse First Boston*,⁷⁹ which is near and dear to your
7 heart since you were the clerk on the case with me about it, and that is a preemption case
8 about whether antitrust law is preempted by securities regulations. We said that it was not
9 and in kind of a tortured opinion by the Supreme Court, six-to-three, opinion by Justice
10 Souter, said that in essence that antitrust issues are so hard for juries to figure out, that we
11 had to defer to the expertise of the SEC in sorting through this contention that these
12 arrangements between brokerages and issuers of stock had requirements that if you were
13 going to buy this very lucrative tech stock, at the beginning, you had to buy some of these
14 other dogs along the way, which made huge commissions for them, but that was too
15 complex for a jury to understand, which I thought was an interesting view of the jury
16 system of the United States. [3:10:32.7]

17 I say these things but I don't have any personal pique about the fact that they went the
18 other way. That's their job and I did the same thing to my poor colleagues at the Fourth
19 Department very early on. When I was at the New York Court of Appeals, I had a judge
20 call me up from the Fourth and said, "Why in God's name did you have to reverse the
21 very first case, the very first week that you sat on the New York Court of Appeals?" Well
22 that's what you're sent there to do, to decide the cases as you understand them to be.

⁷⁹ *Billing v Credit Suisse First Boston Ltd.*, 426 F3d 130 (2005), *revd* 551 US 264 (2007).

1 I did have a case, probably the most interesting of the cases, was a case called
2 *Swedenburg v Pataki*,⁸⁰ and in *Swedenburg* -- every one of these cases, including all the
3 cases that we mentioned at the New York Court of Appeals, each one of these cases is a
4 history lesson, and I think that's why I love this job so much, on the law side of it, you
5 learn so much about the national experience. *Swedenburg v Pataki* is all about the
6 Twenty-First Amendment, which is the repeal of prohibition, and section 2 of that
7 amendment which says that Congress shall make no law -- no, the states shall be vested
8 with the sole responsibility of regulating the transportation, importation and use of
9 alcohol within their borders. And the question is, can a state pass a statute which is
10 clearly discriminatory to alcoholic beverages made out of state? [3:12:00.0]
11 When the amendment was first approved, Justice Louie Brandeis⁸¹ said yes, clearly said
12 yes, in a case in which California engaged in a discriminatory taxing scheme against beer
13 made in other states and brought into California, said that was the purpose of the statute,
14 to allow California to make that decision. It's a constitutional amendment, it's exempt
15 from the Fourteenth Amendment. How can the Fourteenth Amendment trump another
16 amendment? And that was the way it was, and we took that view, as did a judge out in
17 Michigan, and the two cases -- *Granholm*⁸² was the other case, went to the Supreme
18 Court, and in a fascinating five-to-four decision, the Supreme Court said no, the Interstate
19 Commerce Clause kind of cancels that state's ability to just regulate to its own internal

⁸⁰ *Swedenburg v Kelly*, 358 F3d 223 (2004).

⁸¹ Louis Brandeis, Associate Justice of the Supreme Court of the United States, 1916-1939.

⁸² *Granholm v Heald*, 544 US 460 (2005).

1 products benefit. It produced a group of dissenters, which during the time of the
2 Rehnquist Court, was never, ever duplicated. That was the only time these four judges
3 had joined in a dissent, and the judges were Stevens,⁸³ Rehnquist,⁸⁴ O'Connor⁸⁵ and
4 Thomas.⁸⁶ I suspect the differentiation there was the presence of Thomas and Stevens on
5 the same side of any issue. Justice Stevens, in an interesting opinion for the dissent, said,
6 "Look, I'm the only one here who remembers prohibition."

7 BF: That's right, that's right.

8 RW: And then kind of used that as a foil to say, "Look. If it was good enough for Brandeis, it
9 should be good enough for us."

10 BF: Right.

11 RW: Again, I think I'm proud of the things that we wrote, but I don't think the world stopped
12 spinning because I was reversed on that. The last case was a case that wasn't actually
13 reversed, it was a case I wrote called *Sompo v Union Pacific Railroad*.⁸⁷ [3:14:02.6]

14 BF: Mm-hmm.

⁸³ John Paul Stevens, Associate Justice of the Supreme Court of the United States, 1975-2010; Judge of the United States Court of Appeals for the Seventh Circuit, 1970-1975.

⁸⁴ William Rehnquist, Chief Justice of the Supreme Court of the United States, 1986-2005; Associate Justice, 1972-1986; United States Assistant Attorney General for the Office of Legal Counsel, 1969-1971.

⁸⁵ Sandra Day O'Connor, Associate Justice of the Supreme Court of the United States, 1981-2006.

⁸⁶ Clarence Thomas, Associate Justice of the Supreme Court of the United States, 1991-____; Judge of the United States Court of Appeals for the District of Columbia Circuit, 1990-1991; Chairperson of the Equal Employment Opportunity Commission, 1982-1990; Assistant Secretary of Education for the Office of Civil Rights, 1981-1982.

⁸⁷ *Sompo Japan Ins. Co. of Am. v Union Pac. R.R. Co.*, 456 F3d 54 (2006).

1 RW: Sompo was an insurance company in Japan. It involved the transportation of goods across
2 the oceans, to the United States, and then ultimate delivery by rail within the continental
3 United States, territories of the United States, and the question became whose law
4 governs. There's called an intermodal bill of lading, which is a document that begins
5 when the products were put on board to ship, and it's intermodal, it means it's supposed
6 to cover all the modes of transportation, all the way to the point of delivery, and that is a
7 document that is created under the Carriage of Goods Overseas Act, COGSA.⁸⁸ That has
8 one standard for liability, if the carrier breaks the product while it's transporting it.
9 There's another standard though, for interstate commerce, under the Interstate Commerce
10 Act,⁸⁹ and the question is which one governs.
11 In a great effort by Zack Gubler, who was a Wesley clerk, he was clerking for me, now
12 teaches at the Sandra Day O'Connor School of Law at Arizona State. We wrote an
13 opinion saying that COGSA does not apply, and that created a circuit split. The Ninth
14 Circuit, unfortunately for me, agreed with me, given the Ninth Circuit's record
15 (inaudible). And in an opinion written by Justice Kennedy, the Court said that our view of
16 the statute was wrong. [3:16:19.2]
17 I've sat on the high court and made those decisions and now I'm on a court, an
18 intermediate appellate court again, and you accept the fact that the high court may
19 disagree with you.

20 BF: Oftentimes when judges join the Second Circuit from other courts, it's described as an
21 elevation. You come from the New York Court of Appeals, the highest court in the land

⁸⁸ Carriage of Goods by Sea Act, former 46 USC Appendix §§ 1300-1315.

⁸⁹ Interstate Commerce Act, as amended, 49 USC § 11706.

1 within the state of New York, to the Second Circuit. Do you feel that it was an elevation
2 or something else?

3 RW: I shouldn't have let you ask that question. No, no, no, I'll answer it. No I don't. In the
4 context of New York law, New York law is made at the New York Court of Appeals. I
5 feel very strongly about that and my colleagues know that, and we utilize the certification
6 procedure regularly, this is another crowning achievement of Judge Kaye, who really
7 encouraged the certification process, and one of my colleagues, Guido Calabresi,⁹⁰ has
8 been very strong in encouraging that. And so if you read my opinions, and I'm talking
9 about New York law, you'll see that I tend to cite New York cases and not federal cases
10 on principles of New York law, and so I don't think that it's an elevation on the issue of
11 New York law.

12 I wouldn't consider it an elevation but a move, not necessarily up or down or even lateral.
13 It's hard to describe it but we just didn't do these federal issues. We did some preemption
14 issues, the Court of Appeals did, when we were trying to decide tort liability things and
15 whether there was implied preemption and stuff like that. [3:18:12.2]

16 It is definitely different and it is not a court in control of its destiny. Its product is
17 delivered to it or its raw materials are delivered to it by function of section 1291 of title
18 28 USC, and it does the business that's delivered to it, whereas the New York Court of
19 Appeals is much more in control of its destiny and charts the course of the law in New
20 York.

⁹⁰ Guido Calabresi, Judge of the United States Court of Appeals for the Second Circuit, 1994-2009.

1 BF: Your Chief Judge now on the Second Circuit is Judge Jacobs.⁹¹ Could you talk about
2 him?

3 BW: A total character, very, very smart, another fellow who was an English teacher before he
4 became a lawyer, a libertarian. I call him the agent provocateur of the Second Circuit.
5 He's another Vito Titone, he's an Upper East Side Vito Titone, totally wonderful. He has
6 been a magnificent Chief Judge. He likes to occasionally say something outrageous and
7 hopes that his colleagues won't talk him out of it, when he puts it in a dissent. Once in a
8 while we do, once in a while we don't. He once said in an opinion, "I have not read the
9 majority," in a dissent, "I have not read the majority, there's no reason to read the
10 majority when you know it's wrong," which the New York Times took a real liking to
11 when he said that. But a fascinating guy, very respectful of the responsibilities of the
12 court, works very, very hard at getting it right. I've worked with him on a number of
13 tough cases where he's worked very, very hard to bring the language to within something
14 that I could live with. He's really become a very good friend, delightful, writes beautifully
15 but with an edge, but writes beautifully. [3:20:09.5]

16 BF: There are a lot of well respected Judges on the Second Circuit now and it's hard to pick
17 and choose. I won't ask you to talk about all of them because there are a lot, but Judge
18 Newman⁹² is a Judge who has been on the bench for a long time. I'm interested in hearing
19 your thoughts and your experiences working with that Judge.

⁹¹ Dennis Jacobs, Chief Judge of the United States Court of Appeals for the Second Circuit, 2009-2013; Judge, 1992- ____.

⁹² Jon O. Newman, Senior Judge of the United States Court of Appeals for the Second Circuit, 1993-1997; Chief Judge, 1993-1997; Judge of the United States District Court for the District of Connecticut, 1971-1979.

1 RW: The rule at the Second Circuit is that when you're in doubt, ask Newman. Jon Newman is
2 the lion of the Second Circuit. Ideologically, he's a bit to the left, but I think everyone in
3 the court takes him as being kind of the keeper of the flame of the court, and I think
4 everyone believes that Jon is always calling things on the merits. Jon is uniquely able to
5 at times arbitrate disagreements among chambers involved in a difficult decision. I know
6 that I have sought his counsel. This was early advice that I got from Rosemary Pooler,
7 who said, "Dick, if you are thinking about a problem and you're not certain that you're
8 doing the right thing, ask Jon Newman." So Jon has kind of like a moral compass for the
9 court. He has a delightful personality. He's a bit of a Yankee you know, he's a bit of a
10 blueblood Connecticut guy, although curiously, his family is from New Orleans, from
11 shipping stuff. But really smart.

12 Some of the stuff he writes on procedural stuff is just stunning, I mean he's written some
13 terrific -- he wrote a case called *Gelb v Royal Globe*,⁹³ which is about the finality of
14 judgments, which is just -- I cite it all the time. He's a real craftsman. So he's a guy that
15 everybody looks to with great respect, who when he speaks at the court, everyone listens.
16 [3:22:07.4]

17 BF: And Judge Newman, as I understand it, was very much involved in helping solve the
18 court's volume crisis on immigration cases.

19 RW: Yeah, right.

20 BF: And another Judge on the bench who is very interested in the immigration cases is Judge

⁹³ *Gelb v Royal Globe Ins. Co.*, 798 F2d 38 (1986), *cert denied* 480 US 948 (1987).

1 Katzmann.⁹⁴

2 RW: Yeah, Bob Katzmann. Newman helped create the thing that's called the non-argument
3 calendar, where the Protect Act of 2005 -- or the Real ID Act, excuse me, of 2005,⁹⁵
4 threw all those cases into our court for review, immigration cases, and so it immediately
5 threw about five or six thousand cases into our court that we had not anticipated and
6 opened up a whole new area of law that we had to lay out the landscape on, and we were
7 quickly overwhelmed with it. But after we kind of sorted our way through some of the
8 basic principles of the law, we saw issues replicating themselves, and rather than take all
9 of those to argument, which would then have crowded out all the other cases in terms of
10 age, we decided to create this non-argument calendar, and Jon Newman again, the person
11 that everyone says operates solely for the betterment of the court, was the guy who was
12 able to, and very, very able at crafting a procedure, crafted the procedure so that we now
13 can -- since 2007, we have resolved around 18,000 cases through that non-argument
14 calendar procedure.

15 BF: That's amazing.

16 RW: Judge Katzmann, a terrific guy, Daniel Patrick Moynihan's⁹⁶ right-hand man. Brilliant,
17 Yale Law School, Harvard Kennedy School, taught at Georgetown, a bright guy on
18 statutory interpretation stuff. A wonderful, sweet man. He and Judge Sotomayor both
19 took Matthew Wesley and Sarah Wesley under their wings when Sarah started out at

⁹⁴ Robert Katzmann, Chief Judge of the United States Court of Appeals for the Second Circuit, 2013- ____; Judge 1999- ____.

⁹⁵ Real ID Act of 2005, Pub L 109-13, 119 US Stat 302.

⁹⁶ Daniel Patrick Moynihan, United States Senator, 1977-2001; United States Ambassador to the United Nations, 1975-1976; United States Ambassador to India, 1973-1975.

1 White & Case and Matt's now at Sullivan & Cromwell. But Matt first worked in New
2 York, at a bank, and Bob would have -- Bob Katzmman had dinner with Matt once a
3 month for the first year or so that Matt lived in New York, so the kids are close to both
4 Bob and to Sonia. [3:24:23.4]

5 Just a wonderful, sweet guy, and he will be our next Chief Judge. The chief judgeship at
6 the Second Circuit is decided by seniority, but you can't become Chief Judge if you're
7 over 65. So for example, I'll never be Chief Judge, nor will Reena Raggi.⁹⁷ In fact, when
8 Dennis steps down, there are two people in between Katzmman in terms of seniority.
9 Cabranes,⁹⁸ who is already 72 or 71, and Pooler, who is 70. They can't be Chief Judge, so
10 it goes to Katzmman, and after Katzmman, it goes to Judge Delora A. Livingston,⁹⁹ so it
11 drops all the way down to below me, to Judge Livingston.

12 BF: There have been a lot of new additions to the Second Circuit under President Obama's
13 leadership. What are your relationships with those Obama appointees?

14 RW: I'm telling you, they're fantastic people, I'm really pleased with the President. There are
15 five. Gerry Lynch,¹⁰⁰ a brilliant professor who taught at Columbia, first in his class in

⁹⁷ Reena Raggi, Judge of the United States Court of Appeals for the Second Circuit, 2002- ____; Judge of the United States District Court for the Eastern District of New York, 1987-2002.

⁹⁸ José A. Cabranes, Judge of the United States Court of Appeals for the Second Circuit, 1994- ____; Chief Judge of the United States District Court for the District of Connecticut, 1992-1994; Judge, 1979-1994.

⁹⁹ Debra Ann Livingston, Judge of the United States Court of Appeals for the Second Circuit, 2007- ____.

¹⁰⁰ Gerard E. Lynch, Judge of the United States Court of Appeals for the Second Circuit, 2009- ____; Judge of the United States District Court for the Southern District of New York, 2000-2009.

1 everything he's ever done, clerked for Justice Brennan¹⁰¹ on the Supreme Court, clerked
2 for Judge Wilfred Feinberg¹⁰² in my court, and just very smart. Has a wonderful sense of
3 collegiality, who was a District Court Judge, was an AUSA in the Southern District, like
4 you and like you. He's very good at synthesizing solutions to people's difficulties and
5 very attuned to listening to other judges who might make a suggestion as to something
6 that he didn't anticipate. Very responsive, very, very collegial. [3:26:13.7]
7 Judge Denny Chin,¹⁰³ first Korean on the court, very savvy, had the *Madoff*¹⁰⁴ case. A
8 very savvy guy, a good District Court Judge, very pleasant to be with.
9 Ray Lohier,¹⁰⁵ first Haitian on the court, brilliant, stunningly brilliant, Yale Law School.
10 His wife teaches at CUNY Law School, two young boys, a delight to sit with. I've sat
11 with him a number of times and he's so prepared and he's so thoughtful. We have been
12 through several very tough cases together and I've always appreciated his thoughts on the
13 matter.

¹⁰¹ William J. Brennan, Jr., Associate Justice of the Supreme Court of the United States, 1956-1990; Justice of the Supreme Court of New Jersey, 1951-1956.

¹⁰² Wilfred Feinberg, Chief Judge of the United States Court of Appeals for the Second Circuit, 1980-1988; Judge, 1966-1991; Judge of the United States District Court for the Southern District of New York, 1961-1966.

¹⁰³ Denny Chin, Judge of the United States District Court for the Southern District of New York, 1994-2010; Judge of the United States Court of Appeals for the Second Circuit, 2010- ____.

¹⁰⁴ *United States v Madoff*, 2009 WL 8681361, 2009 NY Dist LEXIS 52676 (SD NY, Oct. 13, 2009, No. 09 Crim. 213[DC]); *United States v Madoff*, 2009 WL 3347945, 2009 NY Dist LEXIS 52676 (SD NY, Oct. 13, 2009, No. 09 Crim. 213[DC]); *United States v Madoff*, 826 F Supp 2d 699 (2011); *United States v Madoff*, 2012 WL 1142292, 2012 NY Dist LEXIS 48733 (SD NY, Apr. 3, 2012, No. 09 Cr. 213[DC]); see *United States v Madoff*, 316 Fed Appx 58 (2009).

¹⁰⁵ Raymond Lohier, Judge of the United States Court of Appeals for the Second Circuit, 2010- ____.

1 Susan Carney,¹⁰⁶ who was in-house counsel for Yale. She had clerked at the First Circuit
2 when she graduated, right after law school. She's a Harvard Law School graduate. She
3 was a dark horse. We didn't really know what we were getting there. I have sat with her a
4 number of times now. Of all the judges that I've sat with at the Second Circuit, I've never
5 seen anyone prepared as well as she's prepared. She's a wonderful writer and she makes
6 great suggestions. She reminds me of Sonia in that regard. Sonia was a very thorough
7 editor and always giving you a lot of good suggestions. And tremendously collegial. I'll
8 be honest with you, we were all a little suspicious of her at first, because her husband is
9 the editor of the legal section of the New York Times. And so we were all oh -- I mean
10 the Bush appointees are all suspicious of her I think, but she's just delightful. I'm sitting
11 with her on a very hard case right now and she's been enormously helpful to the panel,
12 with getting the case resolved. [3:28:01.4]

13 And then the last judge is Chris Droney,¹⁰⁷ who is a former U.S. Attorney for
14 Connecticut, trial judge, District Court Judge. Quiet, a bit reserved. The very first thing he
15 had to do was vote in an en banc, the poor guy, it was the first day he was on the court
16 actually sitting. He went into oral argument and he had to speak first, because we had
17 selected a process. We replicated the process that we had at the New York Court of
18 Appeals, where the junior judge speaks first, poor Chris, it was the first thing he had to do
19 was vote, after oral argument. But really, a very nice fellow.

¹⁰⁶ Susan L. Carney, Judge of the United States Court of Appeals for the Second Circuit, 2011- ____.

¹⁰⁷ Christopher F. Droney, Judge of the United States Court of Appeals for the Second Circuit, 2011- ____; Judge of the United States District Court for the District of Connecticut, 1997-2011; United States Attorney for the District of Connecticut, 1993-1997.

1 So I think a lot is made of -- you know you always hear well, he's a Bush appointee,
2 Wesley is a Bush appointee. Ninety-nine point nine percent of the cases are not a difficult
3 decision, the answer is obvious, and do not have an ideological bent to them. It's very
4 rare but once in a while there's a case that kind of falls between the cracks and is difficult
5 to define, where someone's personal ideology may color their view or how the law is
6 developed or where it's going, but I don't see that.

7 I have sat with Guido Calabresi now for nine years in a panel case, and Guido Calabresi is
8 as far to the left as I might be to the right, on our court. I don't consider that to be real far,
9 because Guido, I don't think is exceptionally liberal, with some restrictions. In a panel
10 case of three judges, he and I have never been on the opposite sides of an issue.

11 BF: Wow.

12 RW: Now, in en banc cases we have regularly, but in the hundreds of cases that I've heard with
13 him, I've never been on the opposite side with him.

14 BF: From your experience as an appellate judge, with the Appellate Division, the New York
15 Court of Appeals and at the Second Circuit, you have seen a lot of oral argument and a lot
16 of advocacy, running the whole range, from poor to terrific. What is your personal view
17 as a judge, of the importance if any, of oral advocacy and of oral argument? [3:30:17.8]

18 RW: I think for me personally, oral advocacy plays a very significant role. As both of you
19 know, I tend to be an oral learner. I like batting an idea around and exploring its value and
20 where it takes us, and so I'm very interested in exchanging ideas with people through
21 conversation, and so oral advocacy, I think is a time when I get to kind of see if there's an
22 aspect to the case that I haven't really thought through, and that comes many times with a
23 question that one of you suggest. My clerks, as you know, are always encouraged to offer

1 questions, to ask, probing for the weak side of the case and trying to figure out where the
2 Achilles' heel is in the argument, and quite often by colleagues.

3 Howard Levine had the unbelievable ability to ask a question about an aspect of the case
4 that just had not occurred to me, and it was startling to me how he would do that, and I
5 think that's what made us such great colleagues together, why we enjoyed each other's
6 company, because he just had a way of turning something 90 degrees and looking at that
7 crystal, and I'd never saw the crystal in that perspective.

8 So there are many occasions where I have found great advocacy to have altered my
9 appreciation or understanding of an aspect of the case. Not always necessarily
10 determinative, but it might reaffirm a view that I had, but with a different perspective and
11 made me even more certain that the result was right. So I think effective advocacy is not
12 always turning the tide as much as it is sealing the deal, and I think advocates overlook
13 that sometimes. [3:32:08.2]

14 I have been blessed, both at the New York Court and at the Second Circuit, to have seen
15 five former Solicitor Generals argue. I have seen some really terrific members of the
16 private bar argue very tough cases and it's exciting to me when someone comes in and
17 really makes a great argument. I remember seeing a fellow from Long Island who had just
18 represented this poor woman and her family for years, and came to the New York Court
19 of Appeals and said, "I'm just the family's lawyer, but this woman was murdered by her
20 husband because the Suffolk County Police told her to stay in her house and she'd be
21 safe, and they were wrong. And so I've just come here to ask for justice." Judith was
22 almost crying. We got off the bench and Judith said, "He has to be right about this, this
23 can't be --" I mean it was just an honest, sincere, well thought out plea that the law

1 needed to make a turn, and it did.

2 BF: How is the communication between Judges after oral argument and before a decision is
3 rendered, different between the New York Court of Appeals and the Second Circuit?

4 RW: Well there is no conversation -- well, after oral argument, there is, at the New York Court
5 of Appeals, there's no conversation until the following morning, where there's a
6 conference, but then there is extensive conversation. The case is reported by the reporting
7 Judge and then we go around the table in ascending order of seniority to vote and express
8 your view, and it's all done orally and it's all done conversationally. No one interrupts
9 anyone else when they're speaking, and of course that then means that the Chief Judge, if
10 it's three-to-three, breaks the tie, and I think that's the brilliance of that system.

11 [0:34:15.4]

12 It was very common in the Kaye Court, I can't speak for the Lippman Court. It was very
13 common in the Kaye Court, that if there were disagreements, Judge Kaye would bring the
14 case back and back and back, to try and narrow the differences, and we would go back
15 and she would almost give out assignments sometimes, to go back and think about this,
16 and we would perhaps even exchange a memo in advance of the next morning's
17 conference and stuff. I think that was a very effective technique and like I said before, I
18 think I'm a good oral learner or I learn better through conversation and discussion, and so
19 I found that very, very helpful, and of course the result then was I think our dissent rate
20 was less than 10%, I mean it was very, very low.

21 TL: That's very low.

22 RW: Because we were always able to kind of -- you draw the majority view down tighter and
23 then the disagreements about its implications were less, and so therefore, the dissents

1 would sort of just sift away. Sometimes people would write against the majority in
2 advance, this was a Hugh Jones technique. You'd let them know what your disagreements
3 were, so that if they could meet that, then that would draw the majority in. That wasn't
4 done in writing but that's part of the process of how *Hamilton v Beretta* became
5 unanimous.

6 At the Second Circuit, the conference is short, it occurs right after oral argument, it's led
7 by the presider, so I do a lot of it now. The vast majority of our cases are resolved by
8 summary, over 75% of our cases are resolved by summary order, a very short order that
9 allegedly doesn't have precedential value but now it does in the digital age where
10 everything is available. Then, there may be voting memos that occur after that. There is a
11 lot less oral discussion, conversation, about the opinion, about the cases, at the Second
12 Circuit, than there was at the Court of Appeals, and I miss that, frankly I do miss that. A
13 lot of the conversation occurs by memo now. [3:36:17.9]

14 I have, on regular occasions, called a colleague and said, I'm sending you a memo but I
15 want to tell you what's in the memo now, because I'd kind of like to know how you feel
16 about it, so at least you hear my view of it from me, as opposed to reading it in the memo
17 and misunderstanding something because of my inartful use of my language might
18 happen. And at first that was not well received, but it's fairly well received now. I think
19 the colleagues know that I'm going to do that and they just know that that's how I
20 operate.

21 BF: You have had, for many years, as we both know, great relationships with your clerks.
22 Could you talk about the importance of clerking as an assistance to you, as help to you,
23 and what role clerks play. We're very lucky to have reunions every year with you and a

1 close clerk family, as you call us.

2 RW: I wouldn't do the job if it wasn't for the clerks. Intellectually, it's engaging and
3 rewarding, but the most rewarding aspect of it is the relationships that I've developed
4 with my clerks. I don't hire my clerks by trying to find out who is the smartest, although
5 you're all smart and you're all very accomplished. That's how you get within the
6 consideration pool. I hire clerks that I want to get to know because their life stories are
7 somehow interesting, that they'll enrich my life. And so it's funny, I mean like I hire you
8 to work with me and you work with me and you explore the law and you kind of think
9 about the issues that are in front of us, but what makes it most meaningful is that I hire
10 you knowing that you're capable of that, but then when it gets down to the question of A
11 versus B to be hired, if A has this kind of interesting life story that I think will enrich the
12 year together, then I'm going to hire A and not B. [3:38:18.2]

13 So a lot of times, I don't hire the kid that I think is the smartest. I hire the kid that I think
14 is most interesting. I mean you're all good and there are some of you that have done work
15 that had a level of creativity or thoughtfulness that might have been different than others,
16 but I don't engage on some kind of value grid about who was the best clerk or not. You
17 come here and different from your standpoint, because you're from here, but Tiffany was
18 not from here. You generally come to a strange town and you don't know many people,
19 sometimes you stay, like Tiffany stayed, and you came back, but very rarely do they stay,
20 and so you're here and you don't know too many people, and so that's another reason
21 why we draw you in and spend a lot of time with you.

22 I don't know what it is. I think maybe it's a return to that desire to be a teacher too a little
23 bit. I told you this yesterday. It's hard for you to understand how strongly I feel about you.

1 I mean if you saw you through my eyes and to see how your career you know, has
2 developed, and your career has developed, and all of your court clerks have developed;
3 even some that decided not to do the law. I have a clerk who sells coffee now, has a
4 coffee shop down in Lower Manhattan, and I think he's terrific. I'm so proud of him
5 because it's a terrific coffee shop.

6 So I mean, you become like my children in a way. As I get older, my children are getting
7 younger. But it's an unbelievable experience and I know that my colleagues -- what's
8 interesting about it is that my colleagues, some of whom don't have as close a
9 relationship with their clerks as I do, treasure their clerks, treasure their experiences with
10 the clerks. [3:40:09.7]

11 You are such an unbelievably important cog in what we do. I don't ever think of those
12 words on the paper as mine. I always think of them as mine and someone's. The *MoMA*¹⁰⁸
13 case, involving the ability to subpoena artworks, is Katie Friedman's opinion and mine,
14 you know? *Billings* will always be yours and mine, *Bach v Pataki*¹⁰⁹ will always be yours
15 and me, you know we had so much fun writing that opinion.

16 TL: What did you think of the decision for both your children, your biological children, to
17 embark on the practice of law?

18 RW: I knew Sarah would always be a lawyer, there's no doubt about it. She was disagreeable
19 at an early age and so I know that she had strong pre-lawyer like tendencies. Matthew, I
20 think it took him a while to think about it, but Matthew has real strong skills, very

¹⁰⁸ *Matter of Grand Jury Subpoena Duces Tecum Served on Museum of Modern Art*, 93 NY2d 729 (1999).

¹⁰⁹ *Bach v Pataki*, 408 F3d 75 (2005).

1 analytical, very smart, and being the younger child, I think it took him a little while to
2 come to grips with that. To be honest with you, I'm totally and absolutely over my head
3 pleased with it.

4 Sarah, who is now practicing law back here, will call me and ask me my opinion. It's the
5 first time in 32 years of her existence, she ever wanted to know what my opinion is on
6 anything. Matt is always calling me and telling me about these billion dollar mergers and
7 using these leverage terms or tax principles that I have no understanding of whatsoever.
8 It's fun to have them as lawyers and appreciating the profession, and watching them, like
9 you, grow in their profession, understanding themselves as professionals. It's great, it's
10 really great. You know, what greater joy could one have than their child says that they
11 value the profession that you've come to love and cherish so much. [3:42:07.3]

12 BF: Judge, one of the constants for you and for clerks who come to work with you is your
13 wife, Kathy. Can you talk about her role in supporting you as a judge?

14 RW: All that is good in my life comes from her. I'm certain that I am a better human being
15 because of her, and I'm certain that I'm a better judge because of her. She has a
16 wonderful nature, being able to tell me things that I really don't want to hear, that are
17 necessary for me to hear. She has a wonderful caring nature that both of you have
18 experienced.

19 BF: Definitely.

20 RW: And so you know, she has been a great partner. The longer you stay married, Brian and
21 Tiffany, the more your lives intertwine, so that you come to the point where you can't
22 differentiate who is who and what is what. My life is so intertwined with hers that I know
23 what she's going to say sometimes, I know when she's going to raise hell with me. Her

1 willingness to kind of adapt to public life and take on the rigors of politics and stuff, and
2 she's always interested in what I'm up to, but also doesn't stick her nose in when there's
3 something that I'm writing or working on that may not necessarily be popular. So I mean,
4 she is the cornerstone. I think if there's a reason why people really like the Wesley
5 clerkship is that they get a chance to work for me, but life becomes very enjoyable and
6 loving and open because of Kathy.

7 BF: That's right.

8 RW: You know, the dinners and things like that. So I think that Kathy really is the frosting on
9 the cake. I want to thank both of you for doing this.

10 TL: Thank you, Judge.

11 BF: Thank you, Judge.

12 RW: I didn't realize how wonderful the afternoon would be, so I wanted you both to know how
13 much I've enjoyed this, and hopefully we'll get a chance to look at it together. [3:44:07.8]

14 BF: Thank you, Judge, thank you so much.

15 TL: Thank you, Judge.

16 RW: Thank you.

17 [End of Interview]