

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

ORAL HISTORY PROGRAM

Hon. Robert Sherlock Smith



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: Hon. Robert Sherlock Smith
Court of Appeals 2004 to 2014
New York State**

An Interview Conducted by: Andrew Klein

Date of Interview: August 17, 2017

**Location of interview: Friedman Kaplan
7 Times Square, New York, NY**

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THE HISTORICAL SOCIETY OF THE NEW YORK COURTS

Oral History Project

INTERVIEWEE: Hon. Robert Sherlock Smith

INTERVIEWER: Andrew Klein

DATE: August 17, 2017

[Begin Audio File]

AK: Good morning. My name is Andy Klein and I will be, today, interviewing the Honorable Robert S. Smith, as part of the Oral History Project for the Historical Society of the Courts of the State of New York. Our videographer today is Daniel Sierra, and we want to thank you, Daniel, for your assistance.

Many of the interviews of former Court of Appeals judges were conducted either by an ex-clerk or two ex-clerks. In one instance, it was actually done by someone's daughter. All of these people are people who had very intimate experiences with the judge. I never was an elbow clerk for the judge and I'm certainly not his daughter, but Judge Smith and I shared 11 years together, working closely together at the Court. I was consultation clerk, and then chief clerk and legal counsel to the Court, and so we've had many opportunities to engage, both on a personal and a professional level, and I just want to say that I'm very honored to be able to do this interview today.

RSS: I'm very grateful that you agreed to do it.

AK: Thank you, thank you. You know, I've worked with a lot of judges on the Court. I worked with numerous Chief Judges, 29 Associate Judges, and I would just say that I believe that Judge Smith was one of the best of the group as a judge and one of the most liked judges that we had, by the staff at the Court, and so again, I'm just delighted to do this.

RSS: Well, that's great. You can fill up the whole hour saying stuff like that. I can listen to that all day, thank you.

AK: Now that I've buttered you up, now let's get to the tough stuff. Before we go, basically what we'll do is we'll take you from your childhood, through your schooling, through your private practice, to the Court, then after you left the Court, to your return to private practice and then anything else you want to talk about that we haven't covered.

[00:02:07]

The first thing I want to talk to you about is your middle initial, S., Sherlock. One would think that the Sherlock would come from Sherlock Holmes, especially since both of your parents were writers, but as I understand it, it is actually your grandmother's maiden name. Is that correct?

RSS: That's right. My father's mother, who I never knew. It's an interesting name but it's not a particularly interesting story. The Sherlocks were from County Roscommon in Ireland.

AK: And so neither of your parents had any particular association, any connection with Sherlock Holmes, any love of the stories?

RSS: No. As you know, of course, Al Rosenblatt, who was my colleague for a couple of years on the Court, and was on the Court before me, is a big Sherlock Holmes fan.

AK: Right.

RSS: I enjoy reading him but I never -- the name really doesn't connect me to Sherlock Holmes.

AK: On the website right now, there's a mini biography that was written by your daughter Rosemary, and some of the stuff that's in there is fascinating. I'd like to talk to you a little bit about that. Now, as I understand, your earliest years were spent in Lenox, Massachusetts.

RSS: Yes.

AK: But then in 1952, your parents were separated.

RSS: Yes.

AK: When they were separated, was there a custody and visitation provision in the separation?

RSS: Well, I didn't read the agreement, but my mother had custody and I saw my father, as I remember, it was alternate weekends, I would go up to Lenox. He would come pick me up, drive me up to Lenox. My mother and I lived in Westport, Connecticut.

AK: And so you saw your father every weekend and you were with your mother during the weekdays.

RSS: I think it was every other weekend but I'm not sure, it might have been every weekend. I don't know. I'm just thinking back. I can't imagine that I was out of

town every weekend -- how can you have friends? -- and so it must have been every other weekend.

[00:04:18]

AK: Right. In 1952, for parents to separate was fairly unusual.

RSS: Well, my father's parents were also separated. In fact, my wife and I are the outliers in my family. In her family, it's normal for people to remain married, but you go to my family gatherings and you see a kid you've never seen before and they say well she usually lives with her mother. You almost expect it.

AK: Yeah. So was there anything -- I mean today, so many children live with a single parent. Back then, were there any special feelings or anything that emanated from the fact that you were living with a single mom, going to school?

RSS: I remember once or twice. I remember a classmate asking me once if my father was dead, but I don't remember being greatly bothered particularly by that. It was a complicated situation. I was fortunately, in some ways, not the most alert of children to subtle signals, and that may have been just as well, but there were plenty of complications.

I think I mention in the biography, my mother had been, before my parents separated, my mother had been mentally ill, seriously mentally ill, she was institutionalized. My wife, to this day will say, "I can't believe your father let her have custody." She was, in many ways, a very unstable woman, but the fact is, she did a very good job. She was very, very devoted to me, and she managed to hold herself together enough to raise a young child and do it pretty well.

[00:06:24]

AK: Mental illness has a lot of different definitions, depending on who you talk to.

Can you expound at all, in terms of what your mother was like?

RSS: Well, I mean I think she was -- the words that were thrown around in those days, no doubt still are, things like schizophrenia and paranoia. She had delusions of people persecuting her and I think she never would have left the institution if the new medications hadn't come along in the 1950s, that could -- you know Miltown and whatever else, whatever medications of that sort existed. She was always a volatile woman and quite capable of getting very, very angry, of breaking, rupturing relations with people she'd been friends with for years, or becoming very angry and bitter at people. She was a very difficult woman with many, many faults, but she was a very good mother for a young child.

AK: The dichotomy is fascinating. Now, both of your parents were writers, right?

RSS: Yes. My father published, I guess half a dozen novels perhaps, but never really, and would have preferred to write nothing but fiction, but he couldn't make a living at that. He found that he could make a living writing nonfiction, especially about sports. He wrote a book about baseball, which was published in the late '40s, I think, just called *Baseball*, which was very well received, got a lot of favorable commentary and was reprinted, and a number of other books.

[00:08:40]

My son, Ben, was very close to my father and when Ben -- Ben was, for some reason, interviewed, I guess when he became, as he is now, editor-in-chief of BuzzFeed.com, and he talked about his grandfather and said, "I sort of

worshipped him growing up.” A guy read the interview and called up Ben and said, “So did I.” My father had an admirer out there.

AK: Is writing something that you ever thought about?

RSS: You mean becoming a writer as a career?

AK: Yes. Right.

RSS: No. I think I did not want to repeat my father’s experience of never knowing where your next meal was coming from, frankly. I remember in my late teens, seeing him very, very worried about just his financial situation. I think I later understood that it wasn’t so much that he couldn’t make money, it was that he always spent about 10 percent more than he made. Actually, that’s not quite fair, but he spent every dime he made. I think he quoted somebody, some baseball player, maybe “Dizzy” Dean or somebody said, “The worst way to waste a dollar is to save it.” But anyway, I really thought a writer’s life was too insecure.

AK: What type of things did your mother write?

RSS: Let’s see, when she was younger, before I was born and when I was little, she could make a living with magazine stories. There were magazines called *True Confessions* and things like that. You’ll be shocked to hear that *True Confessions* were not really true, they were made up. I remember once, she wrote a story she told me about, in which the plot was taken from *Of Human Bondage* by Somerset Maugham. She basically just changed... Then, later, she worked for some time, on a novel that was never published, which I think was about her. And I never read it, come to think of it. That’s just striking me now, I never read the book, and I wonder if the manuscript is anywhere in existence today. I don’t know. The

tentative title was *Cops and Doctors*, but it was a mystery based on her experience in a mental hospital.

[00:11:32]

AK: Wow.

RSS: She then became sort of a scholar historian of an eccentric sort. Anything she was, was of an eccentric sort. She got very interested in Mark Twain. She was writing a book about Mark Twain's literary audiences. It was her nature, that that more or less became a book about the world, you know everything had some connection with Mark Twain.

AK: Right.

RSS: The book kept expanding and growing, and of course she never finished. But by the time she was done, let's see it morphed into a book about the failings of modern literary criticism, and then it morphed into a book about the historiography of the Civil War. Don't ask me how you get from one to the other, but I do have a manuscript and one of these days, maybe after I really retire, I'm going to go back to and look it over, and see if anything can be made of it, under the tentative title *How the South Won the Civil War*. The story being, how -- and this is sort of topical in a way now, or in reverse now, but in the 1950s and '60s, when she was writing it, the historiography of the Civil War, it was very much from a southern point of view. The South was the romantic lost cause, Reconstruction was a horrible thing, the radical Republicans were the bad guys. She was trying to tell, from her very partisan point of view, which would be very politically correct today but was not so fashionable then, that the Confederacy

was evil, that Reconstruction was a good thing. She was trying to tell the story of how the bad guy historians had won that struggle.

[00:13:33]

AK: When I was young, I actually read a book that said if the South had won the Civil War.

RSS: Yeah.

AK: Now, also in your mini biography, your daughter talks about the fact that your father spent a lot of time up in a cabin in Maine, I believe. Is that right?

RSS: Yeah. Well, he loved going up to Maine. He worked, as a young man, in a logging camp and then at a hotel, a resort hotel in Maine, and he loved that part of the world. Not the coast, but the hunting and fishing area sort of around Rangeley. He had a camp up there from the time I was little. He also belonged to basically a fishing club. He loved to go up there, he would take me. He took me and my mother up there when I was quite little, he took me up there in my teens, when I hated it. I never thought I would go back to the place again, but of course then my son came along, who adored my father and maybe, for that reason or for some other reason, was absolutely crazy about fishing. The two of them -- you know, wanted to get in on it, so I started going. Well anyway, the end of the story is *I* was up there with my son and his three kids two weeks ago.

AK: Really?

RSS: Yeah.

AK: That's great. So did you hate it because of its reclusive nature and the fact that you weren't into fishing?

RSS: I hated it because I was a bad fisherman, and my father was constantly trying to make a better fisherman of me. Every cast was a bad cast and every cast, he would tell me what was wrong with it. I can't imagine a more miserable experience.

[00:15:27]

AK: So now, when you go back with your own --

RSS: By the way, I'm pretty good now. I'm not a great fisherman, but one thing I can do is I can cast. I keep out a short line, but I can handle it. I'm very proud of that achievement.

AK: And when you go up there now with Ben and his children, do you sort of see your father still there?

RSS: Well, I certainly think and talk about him a lot, and there are plenty of people there who remember him. You meet people in the dining room. I didn't actually meet this person though, I met her cousin just two weeks ago, and the person in question was when my father was quite an old man, was quite a young woman, and my father was very, very delighted to speak, to talk to her. He was a very charming guy, people liked him, and he made a lot of friendships. When he was in his 70s and 80s, plenty of the friendships were with women in the 20s and 30s. Just friendships but I'm sure he enjoyed it.

AK: Absolutely. Okay. When you were 12, you went, with your mom, to Cambridge, England.

RSS: Yes.

AK: Also, your daughter talks about the fact that on the day of the departure, you were given a book of criminal trials called *Defender's Triumph*, which you read on that boat and have kept to this day.

RSS: That's right.

AK: Was that the beginning of your interest in the law?

RSS: I don't know if it was the beginning, but it certainly did stimulate it. I remember watching *Perry Mason*, but I think that was a little later. I think *Perry Mason* may have come along in the late '50s, or something like that. But yeah, I remember *Defender's Triumph* by Edgar Lustgarten. He was a very good writer and described, I think it was four, famous British trials. I still love that sort of thing. When I'm in London, my idea of fun is to go to the Old Bailey and watch the trials.

[00:17:45]

AK: That's interesting. How was it traveling with your mother at that point? I mean the medication had...?

RSS: She was the same person traveling as she was at home. I was an adolescent by the time I went to England. All adolescents, I think, have difficulty dealing with their parents.

AK: Absolutely.

RSS: Of course, with me it was -- I remember once, sitting around with my wife and a few other married couples, talking as people do, about what it was like to be a teenager and how your parents were always embarrassing you, and I started to

join in the conversation and Dian said, “Your mother was embarrassing.” So, maybe in my case it was a little more complicated than most.

AK: Right, understood. But I agree with you, all adolescents feel embarrassment towards their parents, yes. All right, so I’m just going to ask you one more mega question about your childhood, and maybe you answered this in part earlier. Your daughter, in the mini biography, comments that your parents were socialists, again a term with many meanings, that they were atheists. Then you have the separation and the notion of mental illness on your mom’s part. Do you think all of this impacted upon you in any way, made you a type as a child growing up; introverted, extroverted, jock, intellectual? I mean, that’s a lot of things that are sort of out of the ordinary in the 1950s.

[00:19:45]

RSS: Yes. Some people have met my mother and said, “Oh, now I understand why Bob is compulsively calm.” I mean, I think it’s pretty obvious that this kind of somewhat unusual upbringing did produce a real liking for stability and security. I told you, I didn’t want to imitate my father’s adventures, and I often joke about how I hate change. I like things to go in a nice regular course and I think that’s partly because, really my mother had such a turbulent existence and my father to some degree also.

AK: Right, right, okay. Now, before you entered college, you went on another trip with your mother, this time to the Soviet Union, and up until that point, your daughter describes you as sharing in your parents’ socialist views and that that trip actually

had an impact on you and your view of socialism and the Soviet Union in general.

Do you want to describe that a little bit?

RSS: Yeah. Well, I guess I was sort of... I was going to say typical but my parents weren't really typical young liberals or middle aged liberals, or whatever they were. They weren't typical, they weren't Stevenson liberals, they were Kefauver liberals. People don't even remember who Estes Kefauver was any more.

AK: Have no idea.

RSS: He was sort of the populist counterpart to Stevenson in the Democratic Party. Stevenson was the intellectual, who was much beloved by many, many Democrats. Kefauver was a Senator from Tennessee who wore a coonskin cap and shook hands with people and said, "Hi, I'm Estes Kefauver." For some reason, that had more appeal to my parents. But I was definitely of the sort of left-wing, quasi-socialist persuasion that was, in my mind was typical of the intellectual elite, then and now, a kind of generalized feeling that the direction of history is moving left, that maybe the communists go too far but there's a lot to be... Actually, the left doesn't say this today, but they certainly did then. There was a sense, well you know, I don't really condone Stalin but at least they have equality in the Soviet Union, that sort of attitude, and kind of a romantic view of communism.

[00:22:43]

Going to the Soviet Union in 1961 did suck that out of me to a considerable degree. There's just something about the atmosphere, when you know you're in a country that's not free. I remember when I was there, we were sitting around

talking with people who came to the Soviet Union, I think English or something, people who came to the Soviet Union often, and one of them said, "Every time I come, when I leave, I get off the plane in Helsinki, and I take a deep breath and I say fresh air."

AK: Wow.

RSS: I had that feeling too. You know the difference when you're not in a free country, and that did have an impact on me, even though I remained -- I told you, I'm not big on change. It took me a quarter century after that, to actually become a Republican, but I think that did have an effect.

AK: Well, you still could have been a Democrat, even though you had that.

RSS: Oh yes, I managed for quite a while.

AK: Okay, so now you come back from the Soviet Union, and it's on to college, right?

RSS: Yeah.

AK: So you grew up in the East Coast, a New England background sort of, and you wind up going to Stanford. Why Stanford?

RSS: I'm not sure. I've often asked myself that question. I think my father wanted me to go to Harvard, he liked the idea of Harvard. My mother, God knows what she wanted. She wanted whatever seemed offbeat and unconventional, but not in the typical way. That makes it sound like she would have wanted me to go to Antioch. She would have killed me if I'd gone to Antioch. Maybe she and I shared a taste for doing something a little different. It was different, it was 3,000 miles from my parents, which isn't bad when you're 17 years old.

[00:24:50]

AK: Right.

RSS: I had the illusion, which I am convinced that almost kids choosing a college have, although they never admit it, my love life was going to be transformed. I was going to go to Stanford and beautiful women were going to throw themselves at me, which somehow had not happened in high school. I think, I'm sure those fantasies influenced a lot of people and of course I could not have been more wrong. All the guys in California are 6' 3" and blond athletes and I didn't have a chance.

AK: And you didn't find that the women were just so drawn to intellectuals?

RSS: Many of them were able to resist me, I was quite disappointed.

AK: Now, at Stanford, you went through Stanford in three years, not four, is that right?

RSS: I did.

AK: I mean personally, when I was at college, it was the best time of my life. I would have liked to have extended it out to eight years. You chose to abbreviate it, to make it three years. Why?

RSS: Well, I mean partly, I took a lot of advanced placement courses in high school and by the time I showed up in college, I had enough credits. So it wasn't so much abbreviated, as I would have had to deliberately slow it down to take four years and I'm not sure I ever really considered doing that. I wasn't mad about California. Well, as I've already sort of implied, I was a bit of a fish out of water. I was not a typical Californian, and I had literally never set foot in California until the day I arrived as a freshman. That said, I think I got a good education, I met a lot of nice people, I have a few who are still my friends today. I'm not really sorry

I went there, but I was not eager to stay on the West Coast, I was eager to get back.

[00:27:01]

AK: And you graduated with highest honors from Stanford?

RSS: Yeah, let's see, they didn't have magna, summa, and cum laude at Stanford. They only had two categories; with distinction, with great distinction. I graduated with great distinction, thank you.

AK: As you've lived your whole life.

RSS: Thank you, thank you.

AK: I took AP courses in high school as well, and then took the AP tests. You know in calc, I got a five, so I could have placed out of freshman calc, but I decided, as opposed to you, in terms of using those AP courses and taking the credit and going ahead, I figured, "My God, I got a five in AP calc, I'm going to ace this thing." So I take it and wouldn't you know that the science and math courses at Stony Brook, which is where I went to undergraduate, were the dropout courses. So, I took calculus and the first class I got, the first test I took there, I got a 28, and that was a B-plus. So, it was an unbelievable curve that they were grading on, you know, but at the time, everybody who went to Stony Brook was going there as premed, which is where I started out.

RSS: Wow.

AK: I obviously went to a very different route. When you were at Stanford, was there a direction that -- what was your major, what was the direction you were looking for?

RSS: I majored in history, which is the nearest thing you could come to major in general studies basically.

AK: Right, right.

RSS: Which I enjoyed. I think I knew then, that I wanted to go to law school. I think I had made that decision before I went to college. Indeed, I think I had it in my head that I was going to go to Columbia Law School. I liked New York City. Why this doesn't translate into going to Columbia as an undergraduate, I have no idea.

AK: Right.

RSS: I had a fondness for New York City in my head, before I went to Stanford, and being in California certainly intensified it. So I think my sense is that from at least from the time I arrived at Stanford, if not sooner, I thought I was going to Columbia Law School.

[00:29:10]

AK: Interesting. I figured you went to California to sow your wild oats, right? I mean that's, you know...?

RSS: They sadly remained unsown.

AK: Another parallel. I also, after a year and a half of being premed, I decided I wasn't going to kill myself to go to medical school and I wasn't sure I'd get there, so I became a history major as well.

RSS: And look at us today.

AK: That's right, here we are.

RSS: That's what happens to you if you major in history.

AK: That's right. So you go to Columbia, and at Columbia, you graduate top of your class and editor-in-chief of the *Columbia Law Review*, right?

RSS: Yes. Nice of you to mention it, thank you.

AK: So at this point you realize, you did Stanford in three years, you nailed Columbia, you must realize at this point, you're absolutely brilliant and that your law aptitude is ahead of most of the other people.

RSS: Well thank you, yeah. Well, I try not to get my ego too inflated but it does get inflated sometimes.

AK: Right, right. So what was law school like for you?

RSS: I loved it, I really loved law school. I thought there was an intellectual rigor about law that I hadn't -- I mean, I enjoyed my classes as an undergraduate too and I liked learning history, but in law school, I just thought I was dealing with more precise questions with real answers, and with somewhat less tolerance for bullshit.

AK: Exactly. You didn't find that the law -- you talked about precision. I've always found the law to be such a large, amorphous gray area. You didn't find that?

[00:31:15]

RSS: Well it is in a way of course. It's true, that there weren't -- and I think a lot of first year students find frustrating, is that you don't have a lot of questions with clear answers. So maybe I didn't put it right a minute ago. The answers might not be clear, but you really knew what the questions were and you could argue about the answers and you could construct a really rigorous argument one way or the other. That's what I've always liked about the law. If you want to sit around arguing about whether you know, whether Robespierre or Danton better embodied the

spirit of the French Revolution, I have trouble getting my teeth into a question like that.

AK: Right.

RSS: I mean it all depends on how you're defining the terms and what you like and what you don't like. But if you're trying to decide whether the rule -- and this, I'm remembering from first year of law school now -- whether the rule of some coerced confession case should be made retroactive, you can think about that just in a more rigorous and more analytic way that I found more satisfying.

AK: Absolutely. Had the *Paper Chase* come out yet as a movie?

RSS: I don't think so. Indeed, I think the character in that book, the professor, he was legendary. He was a Harvard professor, but he was legendary even at Columbia in my day.

AK: Is that right?

RSS: Yes. Shall I use his name? The name was Casner, and if the censor wants to take it out, he can take it out. He was famous for tormenting students at Harvard, and people would tell stories about it. Even at Columbia, they would talk about how he would humiliate a student and offer him his train fare back to Pennsylvania or whatever for getting a question wrong.

[00:33:30]

AK: The movie came out before I went to law school and in the very first day of my torts class, our normal professor wasn't there and there was a substitute professor, and he called on me to talk about a case and I felt like I was in the movie. For 20

minutes, he had me on my feet, you know and of course, being the egotist that I am, I thought I did pretty well.

RSS: Well, he didn't keep you there for 20 minutes because you were wasting everybody's time.

AK: I guess, I guess, but at the end people would come up to me and go "Oh, you poor boy." You know, it's like...

RSS: I loved the Socratic method in law school. I thought it was fun to try to match wits with the teacher.

AK: I felt the same way, I agree. Were there any professors that had a special influence on you, that you really enjoyed?

RSS: I was very lucky in my first-year teachers. The ones I remember best, well I remember them all, but Allan Farnsworth, who is now dead, well I guess maybe they're almost all dead by now. Allan Farnsworth was the contracts professor. A lot of people didn't like him, I thought he was wonderful. He was a very conscientious, very well prepared, extremely smart guy. He knew exactly where he was going with every class and knew what he was talking about.

There was a guy named Al Hill, who was a little flamboyant but very, very smart and a very nice man. He would lead the class through some very confusing subject for a minute and then he would ask how the case would end, would ask should the plaintiff win this case, "How many say yes?" You know, you have a show of hands. "How many say no?" "How many say yes?" He would do it twice and the votes would shift a little, then it was "Any questions about this case?" And then he would go on to the next case. So you sort of got the idea that you

weren't going to get precise answers, you were going to be made to think about the questions.

AK: That's great, that's great.

[00:35:35]

RSS: I should mention Marvin Frankel too. He was later a federal judge. I guess he must have passed away by now too, I'm pretty sure he did, but he was later a federal judge and a very distinguished lawyer. He was the first professor I had in law school and a very nice, very able teacher.

AK: When you went to law school, was your view that you were going to come out and practice?

RSS: I had the fantasy that my life would be in politics, which is possibly one of the most idiotic ideas I could really have had. I've always been fascinated by politics as a spectator, and I think maybe probably what was going on, was that I thought I was Franklin Roosevelt. My parents, like approximately 20 million American parents who grew up in the Roosevelt era, wanted their son to be Franklin Roosevelt. I was going to go to Columbia Law School and go into politics, just like he did, and become President of the United States, just like he did. That was an absolutely mad idea. Very few personalities could be less suited than mine for politics, but that was in my mind and I did, when I was in law school, I did join the local political club and become fairly active.

AK: And now, there's some -- I don't remember where I read it, but somewhere I read that part of the reason you moved away from politics was the influence of your not-yet-but-soon-to-be wife, Dian.

RSS: Well, she certainly was horrified at -- when I took her to the local political club, she took one look and almost went screaming out the door. They were not her type of people, you might say. There was a lot of petty backbiting that she just couldn't stomach. That wasn't so much the -- that was the occasion for my basically getting out of the local political club scene. It did become clear to me that Dian couldn't stand it, if I was really going to be spending a lot of my life... I think at the time I became involved with Dian, I was running for president of the FDR-Woodrow Wilson Democrats of the 67th AD North, and Jerry Nadler, now a Congressman, was at that time a very young insurgent who was opposing my faction. I didn't run against him. I think I ran against his handpicked candidate. Anyway, I basically dropped out of that race. I took no part in it and was perfectly happy to lose, and that really was because my relationship with my girlfriend wouldn't have survived if I hadn't. On the other hand, it was also, as I've said, even if, God forbid, I had never met Dian, I was not suited for a life in politics. The idea that I could have ever been a politician is ridiculous.

[00:39:05]

AK: So, did you meet Dian while you were in law school?

RSS: Yeah, we were fixed up by a friend. She was at Barnard and a classmate of mine at Columbia fixed us up. Dian, in characteristic fashion, returned the favor by fixing Bob Loeffler up with the woman to whom he is now married. We saw them last month.

AK: That's great. Now, in Judge Rosenblatt's oral biography, he says that you have the most incredible memory of anybody he's ever met, and one of the reasons he says

that is because, as I understand it, you had memorized all 154 Shakespearean sonnets. Is that correct?

RSS: Yes, and I congratulate you on knowing the right number. Yes.

AK: Thank you. And did you use those to woo Dian?

RSS: No, no, no, that's actually, that's one of my late life accomplishments, although I did -- well, as young people that age do, I think we both tried to impress each other with how cultured and intellectual we were, and there was a certain amount of bullshit on both sides.

AK: So when did you decide to memorize these sonnets, and why did you do this?

RSS: For the fun of it. I love poetry and I, at some point in my life discovered that I couldn't really enjoy or love a poem until I'd memorized it, that I didn't -- I guess I now think you haven't really read a poem unless you've memorized it. So I got in the habit of reading, memorizing the poems I liked best. So when I picked up Helen Vendler's book about the sonnets and read it, I would try to memorize each sonnet as I went along. I didn't think at first, that I would be able to retain them all, but then I realized if I was insane enough to devote enough of my life to doing that, I could. I'm embarrassed to tell you, it's not just that I have a good memory. I do have a good memory, but I also have a ritual of going through every god-damn sonnet every week, while I exercise. That's the only way you can retain them, is to keep them fresh.

[00:41:47]

AK: Right, sure.

RSS: My tastes were not always quite that high level. When I was a kid, I don't know, living in Westport, I memorized "Horatius at the Bridge," which is a long and wonderful children's poem, most of which has stuck with me for a long time, until today, and I recited what I remembered of it to my grandson two weeks ago, and he said, "You should learn the rest of it." So, being a slave to my grandchildren, I immediately got it out and relearned the parts I'd forgotten, and if you happen to have a half an hour with nothing to do, I'll happily recite "Horatius at the Bridge" for you.

AK: When I get that half hour, I'll give you a call.

RSS: Okay, yeah, that's what my grandson says too.

AK: Why do you think that you can't enjoy a poem unless you memorize it?

RSS: Well, the idea of a poem is that every word really, really matters, the point of a poem is that it's a choice of the perfect words to say something, and if you don't know what the words are, how can you really relate to the poem? I mean obviously, I'm overstating the case, of course you can enjoy a poem without memorizing it, but it really makes a difference, to have the poem by heart.

AK: I don't know that I agree with that, but that's just one of many things that we don't necessarily agree upon.

RSS: Yeah, not the first time we've come to different conclusions.

AK: Right. Okay, so you're graduating law school, you've now moved outside the realm of politics, you realize that's not right for you. You graduate Stanford with highest honors, you graduate Columbia with essentially highest honors, with what

your resume showed. If what you chose to do was private practice, you must have had every big firm drooling over you at that point.

[00:43:56]

RSS: I still remember one that failed to drool. There was a firm from which I did not get an offer. What I think happened was, they interviewed me and didn't like me, which was good for me.

AK: Right.

RSS: But I didn't have a problem finding a job, and I was pretty strongly attracted to Paul Weiss right from the start.

AK: Why?

RSS: Well, once again, I guess I still thought of myself as political to some degree and Paul Weiss, they had -- they were tied into politics. Arthur Goldberg had just become a major partner there, although actually, that didn't happen until after I had gone there as a summer associate. There were a lot of rather significant Democratic politicians who had some connection with Paul Weiss, but what also attracted me, the more I knew about, was it was just a very good firm with a lot of very smart lawyers who worked hard practicing law. And I guess, although it may have been the political glamor that originally attracted me, the reason I came to like the place and stayed there and had a good time there for many years, was just the quality of the law practice, a lot of great lawyers and a lot of nice people. Sometimes, not always the easiest people in the world but a lot of nice people.

AK: When you first went there, -- I didn't know you did a summer associateship there too. So you did your summer associateship, at the conclusion they made you an offer to come back as an associate the following year?

RSS: Yes.

AK: When you first came back there, they put you in the corporate section, right?

RSS: Yes, yes. In the old days, before the inmates ran the asylum at law firms, they didn't ask you what you wanted to do. If you volunteered, they might listen to you. So I showed up and found myself in the corporate department and I thought I wanted to be a litigator, and I was wise enough or bold enough to say that on the first day that I wasn't insulting anyone. Then, after a couple of months, I reiterated the point, saying I've been having fun, and for once in my life I did it the right way, I did it tactfully. I didn't always do those things, but I remember writing memos saying I've really enjoyed the work in the corporate department but I think I would like litigation even more, and they consented to it. At that time, I think there was really much more demand for corporate lawyers, hard to believe in light of what's happened since, at least at Paul Weiss and many other firms, the real money, and people said the partnership opportunities were in the corporate department in 1968. That did not remain true for very long.

[00:47:06]

AK: Did they tell you why they put you in corporate originally, as opposed to litigation?

RSS: No, but I speculate that's the reason, they just needed more bodies in the corporate department.

AK: Now, at Paul Weiss, as a litigator, there were some incredible people there; Arthur Liman, I think. Who were the people who became your mentors or people you looked to for guidance and for training?

RSS: Judge Rifkind, he was the dominant figure in the firm when I came and he was everyone's mentor or role model, at least in the litigation department. He was a wonderful lawyer and a wonderful man, a very nice man. There was an aloofness about him. He wasn't always warm and cuddly, but he was a nice man and a fine lawyer who set a great example for everybody. I think in common with many other people, I took him for a model, and I now, the now ex-judge in private practice, we're not that much alike and the firm I'm at isn't Paul Weiss, but I do think of him often, I do. I've adopted, tried to adopt, tried to get people to call me judge as my first name, since at Paul Weiss, everyone was called by his first name except Rifkind. I remember somebody said, "Yeah, Mr. and Mrs. Rifkind named their little boy Judge."

AK: After you left the Court, and I think I was still at the Court and I called you, and I spoke to your secretary and I said, "Hi, I'd like to speak to Robert Smith," and she said, "You mean Judge Smith?"

RSS: Oh, good for her. She's well trained.

AK: So you know, it set in, yeah.

[00:49:06]

RSS: Yeah.

AK: Anything in particular that Judge Rifkind or Arthur Liman or anybody else, taught you as a litigator, that you found useful as you moved along the line? Cross examination, anything about trials?

RSS: Well let's see, I could probably spend all day answering that question.

AK: Okay, Marilyn would shoot us if you did that.

RSS: I don't know, the things I remember learning from Rifkind are loyalty and devotion to your client, real caring about your client's cause, being passionate about your client's cause, treating people respectfully, staying calm, always having time for whatever the problem of the moment or the person of the moment was. There are some things about Rifkind that nobody could possibly imitate, and he's probably the last lawyer who could practice the way he did. He could stand in a courtroom and say things like, "And the planet appeared where the astronomer had prophesied." Can you imagine someone saying that in an oral argument? But he could do it and it worked, and I think he's the last lawyer I ever saw who could do that.

Arthur Liman was also an incredibly brilliant lawyer, a very different type of personality from Rifkind. With Rifkind, you always had the sense that he had nothing to do except talk to you. You sat down in a meeting, he was -- Arthur, you always had the sense, which was correct, that he was juggling four million things. But he managed to do them all and do them extremely well. He was a very intense, very passionate, an absolutely brilliant lawyer, an incredible cross examiner. I remember once, he was cross examining a witness while there was a

thunderstorm outside, and I was sure that he was arranging those thunderclaps just to go...

I remember in 1975, I was a senior associate, but I had not worked much with Arthur until then, and we had a fairly long trial together. I was not really secure as a -- there were a lot of things I knew I could do. I think I knew I could write briefs pretty well, I knew I could take depositions, and I could do a prepared direct of a witness, but cross examination intimidated me a little bit, I wasn't sure I knew how to do that. I remember, I think I was going to cross examine some very minor witness at this trial and I remember Arthur saying to me at a break, "What I try to do is I figure out what the guy has to give me, and I make all my questions really tight." That's it, that's cross examination.

[00:52:30]

AK: Right.

RSS: The rest is practice. I remember Arthur as certainly my model as a trial lawyer. I worked a lot with a much less famous man named Jay Greenfield, who was not that much older than I and is therefore still around today. A very smart, very intense guy, not always -- I don't think he'll be angry to hear me say it -- not always the easiest guy to work for, especially when I was an insecure young associate and he was an insecure senior associate on the verge of partnership. But he was an excellent lawyer and I guess what he -- I learned from a lot of people at Paul Weiss but maybe especially from him, that you really can't get away with bullshit. I said there was less of that at law school than as an undergraduate, but in the practice of law, you really can't do what you did at school, which is say

something that sounds good and go on to the next bit, and you get a grade because you wrote it well. Really, what I learned from Jay but from many others but maybe especially from Jay, is you have to struggle to do the impossible, which is to answer every question fairly and accurately and in a way that's favorable to your client. Now of course you can't do that because your client is going to be wrong about some things.

AK: Right.

RSS: But you can come as – it's amazing how close you can come sometimes and that's, after I got into it, what I really loved about the practice of law, is that constant challenge of trying to do the impossible, of trying to make a fair, honest defensible picture of the world in which your client is totally right.

AK: What about the situations where you actually felt in your heart that -- I mean, you didn't get to choose all your clients, Paul Weiss was choosing. What about those situations where you actually felt your client was wrong and you still had to present your client's best case and make yourself believe your client was right?

[00:54:42]

RSS: Well, your heart is pretty malleable. You'd be surprised how... Look, the fact is that almost all clients are partly right and partly wrong, and you get into the partly right part of it, that's your job as a lawyer, is to see their point of view. I find I was almost always able to do that. Have I occasionally found myself making arguments that I really didn't in my heart believe in? Sure, yeah. You do the best you can. I think it even happens that judges wind up writing opinions that they

don't -- which doesn't always reflect in most impulses of their heart, for one reason or another.

AK: Right, absolutely, absolutely. Now when you went to Paul Weiss, which was a monster firm in New York at the time, you started out as an associate. Were you sometimes low man on a totem pole of five attorneys?

RSS: It wasn't usually five then. Three was a big team then, and if it was a really huge case, you might get a fourth lawyer. Well, let's see, of course Judge Rifkind was the senior partner on most cases, and there would be a tendency not to count him. He would come in only for the very special occasions. Typically, it would be Rifkind, a litigation partner, one litigation associate, if the case is big, two litigation associates. If it was really big, you might get a third associate.

AK: And so your associations with people like Rifkind and the other noted attorneys at the firm, that developed as you grew in the firm.

RSS: Well it wasn't really, it wasn't that hierarchical. Four or five lawyers is not that big a group. They get together and talk about the case all the time.

AK: That's true. Interesting. At Paul Weiss, were you doing both trial work and appellate work, or just trial work?

[00:56:54]

RSS: There was no distinction. We didn't have separate trial and appellate practices.

AK: So if you started a case, you took it from square one, all the way through the appeal process?

RSS: Basically, that's right, subject to what the client wanted or what you were hired to do, but yes.

AK: And there's many phases to a case. I mean, you know from the very beginning, going through depositions, often having so many cases settle, having settlement negotiations, the trial itself, then the appellate process. What did you find that you liked best in working a case?

RSS: Trials.

AK: Doing the trials?

RSS: Yeah, although -- yeah, trials are the most fun, yes. A quotation from Jay Greenfield, who I mentioned before, "Cross examination is more fun than sex." I remember a young bachelor partner who quoted that saying and said, "You know, I think I would have to do more research." And I don't actually endorse that proposition, but cross examination is quite enjoyable when it's successful.

AK: What do you think your strongest feature as a litigator was?

RSS: Well, first of all don't say was, I'm still a litigator.

AK: See, I look at you and still see you now as a judge. What was it then and is it still your strongest feature as a litigator?

RSS: Like all litigators, I'm an egomaniac who thinks he can do everything perfectly.

AK: Right.

RSS: I think it's probably true that my greatest strength is probably in writing briefs. Writing briefs and arguing, brief writing and oral argument. I would probably admit, if you put a gun to my head, that I'm probably a better appellate lawyer than a trial lawyer, but I still think I'm a pretty good trial lawyer and I love trying cases.

[00:59:05]

AK: So your best attribute is not your most fun.

RSS: I guess that's true, but I'm pretty good at both of them.

AK: You're so good across the board it doesn't matter.

RSS: And they're both a lot of fun.

AK: Right, right, that's good.

RSS: People used to say, or at least I heard it said, that Rifkind was the stronger appellate lawyer, Liman the greater trial lawyer, and I think that's probably true, and maybe I have a little more of Rifkind than Liman in me. Of course, I flatter myself by comparing myself to neither, but you get the idea.

AK: I do, yeah. Just flattery, but yes. Now, you're known for your hypotheticals, so I'm going to pose this in a hypothetical capacity. If you were an attorney who had a weakest feature as an attorney, and of course we know you have no weaknesses, but if there was a hypothetical that there was somebody just like you who had their weakest feature, what would you think that would be?

RSS: Well, I don't want any potential clients reading this interview.

AK: Okay, should we just strike this question?

RSS: Let's see.

AK: Don't forget, this is a hypothetical character, so this isn't you.

RSS: My personality is what it is. Other people can probably assess it better than I can. I tend to be calm, not to get -- most people don't believe I'm a litigator, because I am not hyper-aggressive and I don't get all excited. I think that's sometimes a strength and sometimes it's not. I think there are certainly times when clients want

somebody who will bite the adversary in the leg, and that's not really my style.

Yeah, I think that has sometimes been an issue.

[01:01:10]

AK: Do you think that there would have been times, when you were before a jury, where if you had a more dramatic, over the top personality, that it would have been more advantageous to you?

RSS: You can't change who you are. That's really saying there are cases where the client would have been better off with another lawyer. That's really -- no, because that really is what -- and I'm sure there are, although not so much with a jury. I think the lowkey style works well with a jury. I think there may be some judges where you're better off where the guy is better at shouting.

AK: Interesting. So when you were at Paul Weiss, were there any cases that stick out in your mind that you would want to talk about right now?

RSS: All of them. I've got all day.

AK: Okay, well there's one that I read about that I didn't take the time to research or learn anything about it, but just the heading of it seems fascinating to me. I guess you represented the Airline Pilots Association.

RSS: Yeah.

AK: And as a representative of the Association, you were trying to take over United Airlines? Is that a fair way to describe it?

RSS: Yes, yes. Beginning in the '80s, there was a long running effort, which I think finally succeeded in the '90s, of the unions, including the Pilots Union and at one point only the Pilots Union, to buy the company. This is a case where the

employees wanted to buy the company. That matter sort of came to me. This is tips on how to get business in as a practitioner. I was on vacation at the Jersey Shore and a call came in, in August, to a partner at Paul Weiss who couldn't, or didn't feel that he could handle the matter, and he started calling other litigation partners, and I was about fourth on the list and I said I'll do it. Hard to believe that happened, with that big and desirable a matter, but it did.

AK: Right.

[01:03:42]

RSS: Actually, it wasn't -- the matter that he called me about was not huge. It was not insignificant but it was not huge, and it was at least as much corporate as litigation. I now remember that I worked with a corporate partner who just died a month or two ago, Peter Haje, on that. And then, when they decided they wanted to take over the airline, they called Peter and Peter got me involved as a litigator, and that was a very major part of my life for a few years and a lot of fun. It was at least as much a corporate matter as a litigation matter, so that Peter and other corporate partners were very involved.

AK: Did this start sort of like as a tender offer?

RSS: It was -- what was it? It wasn't a tender offer, it was an LBO. That was the age, if I'm not screwing up, my memory isn't what it should be, but it was the age of the leveraged buyout, where all you really needed was a lot of chutzpah and a computer and you could buy anything. You could buy United Airlines or General Motors, or any company you wanted. You did a computer run that showed that over X years, the earnings of the company would cover whatever you were

planning to pay for the company, and then you went to a bank and said give me the money and they said sure, here it is. That was the world of the late '80s. Not everyone had quite enough nerve to do that but if you did...

Anyway, so the pilots -- who remembers all these details -- made an offer to buy the company. The company, maybe there would have been a tender offer in the picture at some time, because how else would we have gotten the public shares? But I don't think of it as a tender offer case. I think it was a poison pill case.

Maybe a poison pill was a way of preventing tender offers.

The company had put in a poison pill. A poison pill was the word that was used in the '80s, maybe still is, to describe a provision of the corporate charter or bylaws or something, that would make it very difficult to take the company over. They put in a labor contract poison pill, because at that point the machinists, who were the other major union at United, were opposed to a takeover. They later became allied with the pilots but at that point, the pilots were trying to do it all by themselves, with the machinists opposing them. The company entered into a labor agreement with the machinists, which basically said if anybody takes over the company, machinist wages get tripled, or something. It was subtler than that, but it was to have consequences that would make it uneconomic, and we sued to invalidate that provision.

It was tried in the District Court in Chicago, before a very good judge, who ruled partly in our favor, partly against us. I think what we lost on, I believe, was that he held that the labor, the Federal Labor Laws preempted our claim. We took an appeal and I argued that one in the Seventh Circuit, before a panel on which Judge

Posner was sitting, and we won that one. I remember that particularly because I had an analogy that I put into the brief and then took out. It was in a draft with the brief, I said the other side was arguing that state law could not supersede a labor contract. I said well, and I wanted to put in the brief, "What about the laws against murder? Can a contract provide that the strikebreakers should all be shot?" And then I said, "No, that's too fancy for an analogy, that's too law professor-y, they'll never get it." Then I see Judge Posner is on the panel and I said, "Well I can use it in oral argument," and I did, and he loved it, he loved it. Also, I said, "Can a contract call for payment in cocaine?" And so he tried that one on the other side, on my adversary, said, "So you're saying the labor law preempts a contract, so what if the contract says payment in cocaine?" And the lawyer said, "Well, what if -- well that would not require interpretation. What he's saying is that you can't - the state courts, you can't..." I forget what his theory was, it's something to do with, if it didn't require interpretation that's one thing. And so Posner says, "Well what if it says a major export product of the Republic of Colombia?"

[01:09:08]

Anyway, we won that appeal and Posner used the analogy in his opinion, but he improved it, because he said suppose the contract provides that strikebreakers be poisoned, thereby picking up the poison pill. That, yeah, we won the case, the deal was all done, everything was a great success. Indeed, one of the points we made at trial was that we had what was known as a highly confident letter from investment bankers, saying they were highly confident they could raise the funds for this takeover. We had an expert witness who testified correctly, that it had

never happened, that a reputable investment banker had signed such a letter and the financing had not come through. Guess which case was the first?

The deal cratered on October 13, I believe, of 1989, ushering in a significant recession and the end, the end of that era, when you could buy any company you wanted.

AK: Wow.

RSS: Then the company went into bankruptcy and then the machinists and the pilots did take it over.

AK: Right, right. That's fascinating.

RSS: I don't know if it went into bankruptcy, but the stock sure went down.

AK: And that allowed them to jump in. Okay, another case I'd like you to talk about, because this is one that I remember, because I was at the Court.

RSS: (inaudible).

AK: I did not know that you were the attorney on it until just recently, but the case was *SHAD Alliance v. Smith Haven Mall*. As I understood it then, it is essentially whether Article 1, Section 8 of the New York State Constitution precluded the owner of a private shopping mall from enforcing a blanket no hand-billing policy. It was Smith Haven Mall out in Long Island, which I actually had very good knowledge of, having gone to Stony Brook. So I could picture the mall and I could picture exactly what was going on, and the whole essence of the case, as I understood it, was whether there was state action involved.

[01:11:21]

RSS: Yeah, whether the free speech provision of the Constitution protected your right to leaflet in a privately-owned shopping center.

AK: Right.

RSS: At that point, I think there was sort of a vogue for the idea that well, we're going to eliminate the state action doctrine and apply constitutional freedoms to everybody. That went out of vogue when I think they -- I'm cynical, but I think the reason it went out of vogue was when college professors suddenly realized they would have to let Republicans speak on private campuses; you can't have that sort of thing. Not just Republicans, but really ugly conservatives with bad opinions.

AK: Right.

RSS: Free speech for good opinions is fine, but free speech for bad opinions doesn't go well, as you may have noticed recently.

AK: I was just going to say that, yeah, yeah.

RSS: Although in fairness, we aren't just talking about speech there.

AK: Right, right.

RSS: But as I say, it was quite a popular idea and frankly, we expected to lose the case. I forget what happened at the trial level, I think we lost at the trial level. It's dim, because we did not argue, it was submitted to a judge in Suffolk County and I forget which way he decided. The Appellate Division decided against us 3-2. I think I remember that we argued before a panel of four. The panel was equally split. They vouched in a fifth judge, who I think was Dick Brown, and he voted

against us. At that point... maybe I should have mentioned which side we were on.

We were on the side of the mall owner, the bad guy's side.

AK: Right.

RSS: The people who wanted to stop the leafletting. And the issue was whether the state counterpart of the First Amendment prevented them from doing that. Ed Korman, I guess now a Senior Judge in the Eastern District, was Chief Judge in the Eastern District for some time, who had been a friend of mine at Paul Weiss and then had become Assistant U.S. Attorney and then U.S. Attorney, in the Eastern District, was at that point, briefly in private practice. It was the interval between his leaving the U.S. Attorney's Office and going on the bench. He was hired as an amicus on our side of the case and he called me up and said, "Don't take the appeal, you can't -- I can't count to four judges on that court, you're not going to get four votes." I said, "I see your point," and the client eventually said, "Look, I own this property in a fiduciary capacity, I can't abandon an appeal I think is meritorious; if we lose it, we lose it, go ahead and take it."

[01:14:25]

So we argued it before, I believe a bench of six, and I don't remember anything about that argument, but what I do remember is that to our surprise, we got a notice to come back and argue it again, that a new judge was being vouched in. I think it was Sybil Hart Kooper, that is the six had obviously divided equally and they had to vouch in an Appellate Division judge. I'm not sure why it was a bench of six. What year was the argument, do you know?

AK: It was 1985.

RSS: '85. I don't know what the vacancy would have been or what judge. It may be that Judge Meyer was disqualified, because he might have had some connection.

AK: That would make some sense.

RSS: Anyway, so we argued again, before a bench of seven, and we won 5-2, which I thought at the time, I thought of course it was all my genius, that I had persuaded somebody who voted the other way. I now suspect that it was because they didn't want an Appellate Division Justice making the law. They did not want the vouched in judge to be the deciding vote, so I suspect somebody switched. I later heard that the Chief Judge, who I think wrote the dissent in that case, was certainly in the dissent, Judge Wachtler, was quite put out by that result. He had planned to write a history making opinion, upholding the sacred rights of people to protest in shopping centers and he was annoyed when he didn't get the votes. Judith Kaye told me that that she found it a really hard case but eventually went my way.

[01:16:46]

AK: Yeah, it was -- I don't think I'm giving up any significant secrets by saying that it was a very hard-fought case within the conference. Then-Chief Judge Wachtler, did write the dissent, but his point, as I understood it, was that the Smith Haven Mall was such a large part of the community, that there were so many activities that went on there, that they were almost like a municipality within the context of this locale and so that he felt that their actions, that the mall's actions, were tantamount to state action. That's where he was going with it and that was the novel, large idea, that I thought that he wanted to bring to the fore.

RSS: Thirty years later, I still find that totally unconvincing. People don't sleep at Smith Haven Mall, I mean nobody lives in Smith Haven Mall. It's a large private enterprise. But I guess I don't really have to argue that right now.

AK: No, you won that one, so we can leave it there, right. But I was very impressed with his reasoning at the time, but what did I know? I was just a young guy. Anyway, one of the things that to me is the most fascinating about your time in private practice with Paul Weiss, were the pro bono cases you took before the Supreme Court. One of them you lost and in that one, as I understand it, your client insisted on his innocence right up until the end. I can't imagine a greater responsibility than arguing a case before the Supreme Court, where the person that I'm representing is telling me that they are innocent and that the result of my not succeeding would be his death.

[01:19:06]

RSS: A lot of people just can't do death penalty work, I think. For better or worse, I'm the sort of guy who can. I remember one of the legendary figures at Paul Weiss was, I think it was Louis Weiss, and I think this is the Weiss of Paul Weiss is Louis Weiss, who was dead long before I came there but was still quoted as saying, "Remember, your client had problems before he came to you." So, I never really -- I mean, I remember once, when I was trying a death penalty case, I was working with a then young woman, Judy Lieb, a very able lawyer who later became a Criminal Court Judge and may still be a Criminal Court Judge. She sort of wanted to do the closing argument and I told her I wanted to do it. I said, there are a number of reasons but one of them is that I can do it and I can screw it up,

and get the client executed. I can still live with myself because that's my temperament, and I don't think you can do that. I wouldn't have been happy about it but you know, I'm not the type to really totally eat myself up over that.

In the particular case you're describing, *O'Dell*, yes it's certainly a very heavy responsibility, to have a human life on your hands. He did insist on his innocence right to the end. The evidence against him was strong. I did my best for him on that issue, but the actual innocence issue was always a very tough one in that case. The State of Virginia, I thought, foolishly resisted the idea of doing more DNA testing, which would have, which could at least, have proved it one way or the other. We were not all that -- our eagerness to do DNA testing was ambivalent. We wanted to do it when there was nothing else to do, let's take a shot, but I was never optimistic about the way the DNA was going to come out.

[01:21:39]

AK: So you actually, you had significant questions about his innocence?

RSS: Very significant questions about his innocence.

AK: Okay, so let's talk about the case you won, because it's always more fun to talk about cases you win, right?

RSS: Yeah.

AK: That was what, *People v. Penry*?

RSS: Yeah. That's a famous case in the death penalty world.

AK: This is the mental retardation issue.

RSS: Yes. This case went on for -- well, the case existed, literally, I think for 30 years.

AK: Wow.

RSS: I came into it in 1990. I don't know if -- the crime was committed in 1979. I came into it in 1990, with a Texas lawyer, John Wright, who had been with it right from day one, did the second trial, got to the Supreme Court in 2001. Things don't move all that quickly in the death penalty world. It was reversed and sent back for a third trial, in which I participated in, in 2002. He got a third death sentence, that's where I got off the boat. I think it was before I became a judge, shortly before I became a judge, I withdrew from the case. Obviously, I would have to withdraw anyway. John Wright stayed with it and eventually got it reversed in the state court, sent back for a fourth trial, and eventually worked out a plea of life without parole.

AK: And the issue was that they didn't take mental retardation into a case, in mitigation?

[01:23:34]

RSS: Yeah. In the first case, which was tried in -- the first trial was in 1980 and it got to the Supreme Court, I believe, in '89. Once again, this endless process of appeals before you get to the Supreme Court. The argument was there made, that because Penry was mentally retarded, he could not be executed, that you can't execute mentally retarded people. The Court rejected that argument but nevertheless, reversed Penry's death sentence because they said that the instruction given to the jury had not sufficiently allowed them to consider Penry's mental retardation. It went back for a second trial, that's the first one I participated in. It was in Huntsville, Texas, in 1990. Of course, the trial was, you know, I could talk all day about that trial, it was a fascinating experience. Death penalty cases are

fascinating, of course, because they raise these very, very basic questions about what is the nature of good and evil, and when you can blame people and when you can't. It's very interesting stuff.

So, we did the second trial, got a second death sentence, to no one's surprise.

What he did was not -- both these guys, *O'Dell* and *Penry* were rather vicious rape/murder cases. At the second trial, the trial judge believed that he was compelled by state law, to give essentially, the same instruction that had already been held bad, and that wasn't really -- well, not really instruction. The state law required that certain questions be asked of the jury, and it was those questions that had been held in the first *Penry* case, to be insufficiently broad to encompass mental retardation. Well they didn't change the statute, so the judge decided he had to ask the same three questions, and then he said, effectively, but even if you think for any reason, that this guy doesn't deserve death, mental retardation or any other reason, then just pick one of those questions and say no, even if the answer is yes. Bizarre. And that was really our argument, just too bizarre, just too weird. At that point, my daughter Rosie was, well let's see, by the time we got to the Supreme Court, she was about 16, maybe 16, going on 17. When they were briefing it, 15 or 16. I'm telling her how the judge essentially told the jury they had to give a false answer to the question and she said, "Aren't jurors supposed to take an oath?" I said, "You know, let's find the oath," and sure enough, they take an oath to give true answers to the questions, which we did make an issue of.

[01:26:54]

What happened was we lost all the way up and we preserved the point, even though it was rejected in *Penry-1*, we had, I think preserved for the record, the idea that maybe *Penry-1* should be overruled and they should change the law and mentally retarded people should not be executed. There had been absolutely no sign that the Court was prepared to move on that issue and we made the decision, when we petitioned for cert in, I guess some time in, I guess late 2000, we made the decision not to make the overrule *Penry-1* argument, just to go on the narrower point that they'd misapplied *Penry-1*, because the conventional wisdom, which the sages of death penalty world told us, is don't go in with 20 points, go in with your two or three best points, and overrule *Penry-1* was an obvious loser and we dropped it. Weeks after we filed our petition, the Court granted cert in a case in which the issue was whether they would overrule *Penry-1*.

AK: Wow.

RSS: To everyone's shock and obviously, somewhat our consternation, because it was theoretically possible that *Penry-1* could be overruled and Penry could get executed, because he hadn't raised the point the second time. Fortunately, I think that was also too bizarre for the Court. I'm telling the story out of order. The case, as I remember... yeah. As I remember, cert was not granted in *Atkins* before it was -- no, of course it wasn't. Our cert petition came up before *Atkins*, so we're now back in the world when *Penry-1* is clearly the law, when we filed what we think is a meritorious petition but you know, in my heart, I didn't think they were going to grant cert.

It got to the day of the execution and the associate and I working on the case were down in Texas, discussing things like who should be the last person to see Johnny, his lawyers or the priest, and I basically said, "The priest practices in a higher court than I do, he should have priority." We're driving, as I remember... And obviously, of course, the cert petition is before the Supreme Court and we've applied for a stay. We're driving to, I guess it's the death house... I'm not sure whether the actual execution chamber was in a different building or not, but we're driving to the place where he's confined, to see him, undoubtedly for the last time, and Kathy, the associate, has sort of an old style, clunky portable phone and it rings, and she picks it up and she says, "We got the stay," and she drops the phone on the ground. Of course, I didn't know, for all I knew that was the Supreme Court on the other end. So I grabbed the phone, I said, "Excuse me, Ms. Puzone became distracted for a moment."

It was just our colleague at Paul Weiss in New York, telling us. So we got the stay and then, a month later or something, they grant cert on *Atkins* and looking at it retroactively, it looks as though they recognized, as we did, that it would have been just too bizarre to overrule *Penry*-1 and execute Penry.

[01:30:48]

AK: Right.

RSS: So they granted cert in our case and accepted our argument, and then later, in *Atkins*, I guess it was in *Atkins*, or maybe some other case, held that execution of the mentally retarded is unconstitutional under all circumstances. That didn't end the *Penry* case, because the prosecution, which had conceded at the first trial that

Penry was retarded -- and he was retarded, for God sakes, he went to the state school for the mentally retarded, and he was not the valedictorian at the school. He was clearly retarded. But when it became, when retardation became sort of a defense, I think not only at the third trial but even at the second trial, the state just said, "Well he's not really retarded and we've got experts to show that he's not retarded, and we've got definitions of retardation." That was -- I keep using the word bullshit. That was bullshit, although there was some on our side too. I've always been a little bothered by this whole issue of whether you can execute the mentally retarded. The people who were on our side and thought that the mentally retarded should be protected from execution, would show public opinion polls which showed that people generally agreed that the mentally retarded should not be executed. Those same people, when you tried to tell them that someone like Penry was not retarded, would say, "Oh no, you don't understand what retarded is, very few people understand what retardation means." Well they were correct about that, which to me undermines the validity of that poll, because most people will say the mentally retarded shouldn't be executed, and then they'll look at the mentally retarded guy and say, "Wait a minute, this is a guy just like you and me only he's not as bright, and he committed a perfectly vicious murder and he knew what he was doing." And that's what the jury did in the third trial in Penry's case, so he got his third death sentence, and that's where I stepped out of the picture but as I said, it had eventually, the happy ending, I guess, that he got life without parole.

[01:33:00]

AK: When you were doing all of these pro se cases, these death penalty cases, this was still when you were with Paul Weiss?

RSS: Yes.

AK: What was the firm's attitude about you doing it?

RSS: They loved it, they loved it.

AK: Is that right?

RSS: Yeah. They believed in the cause and it was also, you know, it was great for recruiting, it was great for the image. The firm was big enough to absorb the costs, they loved it, and I got nothing but support. Well, I can't say nothing but support. I told you, these guys were rapists/murderers.

AK: Right.

RSS: Defending murderers is fine. Defending rapists is not always politically correct.

AK: Right.

RSS: I did get some pushback from my more vigorous feminist partners, that they really did not like the case.

AK: Because of the rape element.

RSS: Mm-hmm.

AK: So, you've been with Paul Weiss for many years and all of a sudden you decide you're not so sure you want to stay there anymore.

RSS: I would say -- it wasn't all of a sudden.

AK: Okay, over time.

RSS: Over time, yeah.

AK: None of these things happen all of a sudden but over time, your interest in staying with that firm started waning.

RSS: Yeah. What I often say, when I'm telling people, when they go to big firms, I say, "Yeah, but no more than 20 years, 20 years and out." I was very happy at Paul Weiss the first 20 years. I was much less happy the remaining 14 years I was there. It was really a matter of how well my practice was doing. I think I told you, the pilots' case, the deal cratered in October of 1989. My law practice sort of cratered at that same moment. There was a major recession in the legal industry that began then. Paul Weiss was not -- I mean, they weren't starving, but they weren't doing -- they were worried they weren't doing well, and that was true for a lot of other firms, and my practice never really came back, never as much as I wanted it to. I did interesting things, I had good cases, I'd had fun, but I was not busy enough. I was not bringing a lot of money into the firm. I got the feeling that the only thing that mattered was how much money you brought into the firm, or at least that that mattered a lot, which it did, look it always did. There's never been a law firm where people don't care a lot about how much money they make. I had the feeling that after the experience of the recession in the late '80s and early '90s, it came from being something very important to almost an obsession with a lot of my partners, and since I was not one of the big producers, I began to feel like a stepchild.

[01:36:00]

The real story of what happened is that I got the idea in my head that the solution was to become a federal judge. Another advice for any young lawyer who might

be -- or a not so young lawyer, who might be reading or listening to this, do not ever... If you're unhappy in a job, you leave the job, you don't apply for a judgeship and figure that will solve your problems, because that's the road to misery. When the Republicans got in, after the 2000 election, and believe me, I cared a lot about the 2000 election, which as you may remember was rather a cliffhanger.

AK: Right, right.

RSS: I was really eaten up about it, because I thought my future depended on it, or at least I thought there was considerable -- I didn't think any Democrat was going to appoint me to the federal bench. So, I was thrilled when Bush won, and I immediately began applying for federal judgeships. To make a long story short, there were cycles of optimism and pessimism and two interviews at the White House, and two vacancies and I was runner up both times. I just got completely fed up with the process and said, "Ah, I never wanted to be a judge anyway, the hell with this. I'm going to do what I really want to do, I'm going to leave Paul Weiss and set up my own practice," and I did. I was an individual practitioner with an of -- not of counsel, but a special counsel relationship and sharing space with a very, very high-quality small firm, the Kornstein Veisz firm. I was having the time of my life, and I was generating business that I would have been thrilled to get at Paul Weiss.

AK: Why do you think that happened, that you couldn't generate it at Paul Weiss and now you could generate it on your own?

[01:38:00]

RSS: A combination of luck and morale. When you're happy in what you're doing, you make a better impression on people.

AK: Absolutely.

RSS: I actually don't think I ever would have -- well, who knows? I think the improvement in my morale had something to do with my eventually getting the judgeship I did get. One of the pieces of business I got was essentially from Governor Pataki, from his counsel and under the guidance of his then former counsel, Jim McGuire, who was quite close to the Governor. There was a huge bond litigation that they hired me for, and so in an ironic way of course, all those efforts to become a federal judge had borne fruit, because it was in effort to become a federal judge, that I had cultivated the Pataki people, who I thought undoubtedly would have been influential and who indeed did recommend me to the President. So that federal judgeship didn't work out, but I established a relationship and I guess made a favorable impression on the people in the Governor's office, who brought me this huge case. To me, this huge case was not an opportunity to become a judge, it was just a huge case for a very important client.

AK: Right.

RSS: I had given up on the idea -- I had applied several times for the Court of Appeals, thinking what the hell, why not apply, and had diminishing success. I'd been interviewed... the last time I applied, I wasn't even interviewed by the panel. I had been interviewed twice before. But I worked hard on the case and made a favorable impression on the client, who was the Governor's counsel.

AK: Right.

[01:40:00]

RSS: I knew that there was a vacancy on the Court of Appeals, and I also knew, or thought I knew, I didn't know, that the Governor wanted to appoint Jim McGuire to that vacancy.

AK: Right.

RSS: I don't know if I had even decided, it didn't even occur to me to apply for the vacancy. The deadline for putting in applications was some date in September. I think it was on a Tuesday and on the previous Thursday or Friday, I got an email from the Governor's counsel, my client, saying, "Jim says you applied to the Court of Appeals some time earlier, why don't you apply this time too." At this point, I'm bitter and cynical about the whole judgeship process and I know perfectly well, McGuire is going to get the appointment. But also, this is my major client. If he had told me to put on a red hat and walk three times around the block, I would have done it without the slightest hesitation. So I said, "Sure, I'll put in the application." I said, "Can you get rid of that guy McGuire and then I might have a chance," and Richard Platkin, the counsel replied, quite appropriately, "Well, Jim is a candidate but it's good for the Governor to have other options."

So, I go in on the weekend, I fill out the application, which is no small task, and I put it in, and I'm delighted to find that I'm going to be interviewed, which is already a step up from the last time, and then I'm super delighted when I get a call

saying I'm going to be on the short list. So this is great, I can put this on my website, I'm one of seven people on the list.

AK: Right.

RSS: That night, I get a call from the *Law Journal* and I say, "Who else is on the list?" And he tells me the list, and the name McGuire is not there. Well, you know, I still didn't really think my chances were all that great, especially when I read in the *Law Journal* the next morning that hey, big surprise, McGuire is not on the list and since McGuire is not on the list it's obviously going to be Pigott. So that, I didn't get all excited about it, but I'm going through the process, I figure there is some hope.

[01:42:20]

Meanwhile, I'm working on this case, which is now in the Third Department, and there's an argument scheduled for, I think it was November 17th. The short list came out in mid-October. At the end of October, I get a call from Richard Platkin saying, "Just hypothetically, if the Governor should pick you, who would argue the case?" Well, I didn't drop the phone, but I felt like dropping the phone. I answered him, said, "Well, you know, we'll work something out," or I gave three suggestions and he said, "Oh, that sounds okay." But I began to think hey, maybe they're actually thinking about doing this.

AK: Right.

RSS: Then, I was interviewed by the Governor and that was -- when I said that I thought my morale had an effect, he asked me if I really wanted the job and I was able to answer him honestly, "Yes, it's almost the only job I can think of, that I

would like better than the job I have now.” Somehow, I think to be interviewed in that frame of mind was better, and I don’t have to say yes, I desperately want the... (phone rings) I’m sorry, I should have turned this off. Where was I?

AK: You were talking about how he had asked you -- the morale was better.

RSS: Oh, yeah, that’s better than being able to say yes, I desperately want the job because I’ve got to get out of the job I have now. So it was a better answer.

AK: Right.

RSS: At that point, by then I was quite optimistic, but I still was obviously, keeping my fingers crossed. Then I got a phone call the next, I guess it was Monday, saying, “Get up here on Tuesday.”

AK: And that’s when you dropped the phone, right?

RSS: Yeah. I was in the middle of a deposition and I was called out to take the call from Richard Platkin. The woman who was working with me on the case, this was actually at Paul Weiss, because it was a case I had continued with Paul Weiss, after I left Paul Weiss. There was a then-associate, now-partner at Paul Weiss, who had been working me on the case and she knew that I was going through this process. I got called out to a phone call, I remember she had a big grin on her face as I walked out. She guessed what it was, and she was right. I interrupted the deposition for an unconscionably long time. I still feel bad about all those guys sitting there, waiting for me to come back to the deposition.

[01:45:11]

AK: Did you actually continue the deposition?

RSS: Oh yeah, yeah, but it took a while.

AK: I can imagine. Okay, so now you're appointed and confirmed, and you're the first appointed judge since Judith Kaye with no judicial experience. Were you scared, anxious, apprehensive, excited, all of the above?

RSS: I was sure excited, I was very excited. It was a wonderful, wonderful thing, it was a dream come true. I wasn't tortured by self-doubt. I thought I knew how to do that job, I mean I've been before all these other clowns all of my life, I figured if they could do it, I could do it. But yeah, I was basically very, very thrilled, and of course nervous, a little bit nervous, until I heard the confirmation vote, but I began to think it was going my way some time before that.

AK: You had opposed Judge Kaye when you were both in private practice, I think.

RSS: No, I don't remember being -- we were on the same side. You're thinking of when I was on the Court.

AK: Okay. I thought that...

RSS: No. We represented codefendants in a large trial. I guess I had known her slightly before then.

AK: Okay.

RSS: There was a big case, which Arthur Liman was counsel for one defendant and Jack O'Donnell, of the old Olwine Connelly firm, was lead counsel for the other, and Judith and I were the two senior associates. I think she was a partner already, I was not. She was a junior partner and I was a senior associate, but we were sort of counterparts on the case. We worked together, got to know each other and liked each other, and didn't really -- you know after that, for the next 17, 18 years, we didn't see each other that much. It was longer than that, wasn't it? It was more

like 28 years, we didn't see each other that much, but we remained on friendly terms. I was opposed to Steve Kaye, who was a somewhat different personality from Judith and a tough adversary, a good guy but a tough adversary, but I was on friendly terms with him despite our little disagreements now and then.

[01:48:04]

AK: Well, needless to say, when the list came out, when you were appointed, everybody in the Court was like...?

RSS: Who the hell is that?

AK: Who is this guy, right. Chief Judge Kaye, who we all loved, she actually -- I was talking to her in her chambers, after you were appointed but before you came on, and she said to me, "You know, I really like Bob Smith, but let me tell you something about him, because you're going to be dealing with him a lot," and she said, "The most popular word in Bob Smith's vocabulary is wrong. You are wrong." And I said okay, and then of course, in all the time that we dealt, I never heard you say that. We argued but you never specifically...

RSS: I may not have used the word, but I think I may occasionally have said something to express the view that I did not agree with what you and Judith were saying.

AK: Yeah, yeah, no question about that. Why don't you talk a little bit about your first day on the Court? As you're going down into the robing room and you're about to get onto the bench, what's going through your mind and how are you feeling?

RSS: Well let's see, I remember, I was obviously very excited. I think that I asked -- well, my daughter Rosie had been sort of my advisor and confidant all through the years, where I've been suffering over if ever I'm going to be a judge, I'm not

going to be a judge. I remember the first time I put the robe on, I think I asked Rosie to help me on with it, because I thought -- just as sort of a symbol. I go on the bench and I'm pretty well prepared. I was very, very, very well prepared actually, because my appointment was announced in early November, and I was sworn in, in mid-January. I figured, when I was appointed, I figured, "Oh good, I've got some time now, to wind down my practice." Winding down the practice took about half a day. You wind down your practice, you call up the clients. Some are upset, some are delighted, some don't care, but they're gone, and so I had three months with essentially nothing to do but read the cases for the second week of January. So I was very well prepared, although I had no law clerks, but I made up for it. I eventually had law clerks, but I didn't have them when I started in that process.

[01:50:57]

AK: Right.

RSS: I remember, I think actually the first time I think I actually made notes to myself, of questions I wanted to ask, and I think it's the last time I ever did that, I realized that the questions would sort of spring, unbidden to my lips, without any of that.

AK: Oh did they ever, right.

RSS: Yeah. I remember, sort of deliberately not being in a hurry to ask. I thought it would not be seemly, for the new judge to be shooting questions right out of the box. I don't remember exactly what the -- well, I remember almost what the first question was, yeah, I do sort of remember, but in general, I remember that it was a softball question. It was a question addressed to the side that I thought was right,

sort of prompting him to make an argument. He was having trouble with someone else's question, it was one of those, isn't the answer to that judge... so, yeah. I think, more specifically, if you want to know what the first question was, and you didn't ask but I'll tell you anyway.

AK: Okay.

RSS: I think it was, "Are you saying that it was an abuse of discretion, or are you arguing that it was an error of law?" He thought a minute and said, "Error of law."

AK: Of course, you know, I would say, I always thought an abuse of discretion was an error of law, but that's another issue.

RSS: Yes, yes, well you're right, as a matter of fact.

AK: Yes, yes.

RSS: But I think there are cases that say that the standard for an Article 78 is abuse of discretion or error of law.

AK: Correct. So now it's your first year on the bench and you probably face one of your toughest cases, *People v. LaValle* comes onto the Court. The Court had been dealing with the death penalty for quite some time and yet avoiding the constitutional issues through other means, finding other errors, and now you've got *People v. LaValle*.

RSS: I think for me, the story starts with *Mateo*, because *Mateo* was argued the second day I was on the Court.

AK: Oh, is that right?

RSS: Yeah, yeah.

AK: I didn't remember that.

RSS: So during that interval, when I was preparing myself, a lot of what I was doing was reading *Mateo*. One of my first law clerks, Dee Rajan, who was a very able criminal lawyer from Legal Aid. When she came on-board, she was working on it too, and so between us, we knew a lot about *Mateo*.

[01:53:37]

AK: Right.

RSS: And so that was sort of the occasion for me to learn New York death penalty law, and I learned about a case called -- tell me what the case is, you know the one. It was an Article 78, in which we invalidated half the death penalty or something.

AK: I don't remember the name.

RSS: It was before my time, when we severed -- we, I'm using the we that includes Cardozo, which we always love to do. We severed part of the death penalty statute and upheld the rest of it. I've forgotten the name of the case. It was Barr? Barr against a judge? I don't know.

AK: I don't remember the case.

RSS: Maybe not Barr. I don't remember. I know Judge Wesley was on the Court then. Anyway, I remember having great trouble with that case and thinking it didn't make any sense, and having the naïve view that if it didn't make any sense, maybe we didn't totally have to follow it. I got over that. Well, you don't think I ever really got over it, but in my earlier days, I was more rambunctious then. That was a case in which I had -- it was pretty clear that under that case, we had to set aside the death sentence and we did, even though I resisted that a little bit. Although in that case, I actually remember, I would not have upheld the death

sentence, because I thought that -- and this was something that resonated with my history. In *Mateo*, the judge had kept out of evidence his history of child abuse. Child abuse was a big issue in the *Penry* case. For me, it was a better issue than retardation, although it never caught on in the popular imagination or in the courts, but the real, best reason for not giving Penry a death sentence was the horrible child abuse he had suffered. I remember focusing very much on that in *Mateo*, but then that got lost because the death sentence got set aside anyway.

[01:55:55]

Anyway, so by the time *LaValle* comes around, I am sort of immersed in the peculiarities of the New York death penalty. My memory of *LaValle* is that I was more or less stunned by what happened. I don't think the defendant seriously argued the point that the Court decided on. I do remember, I think it was Susan Sommer, who was arguing for, was at that point employed, I guess, by the capital defenders.

AK: Salomon? Susan Salomon?

RSS: Was it Salomon, Susan Salomon? Could be, could be.

AK: Yeah.

RSS: Yes. I remember someone asking her a question during the argument about, well couldn't we just say the whole death penalty is invalid for this reason and she said, "Oh yes you could, and I'll happily give up my job." But I didn't think she was taking the question seriously, I didn't think she thought the Court would do it, and I didn't even conceive that the Court would do it. Anyway, but they did, they fastened on what I still think is a very -- okay, it's coming back to me. There was

a serious problem with the deadlock instruction in *LaValle*. The problem, I was prepared to get over, but I was not at all surprised that the majority of the Court was not prepared to get over it. I had assumed that the Court would reverse on the deadlock instruction, send it back for a new trial with no deadlock instruction. It seemed like the almost obvious thing in the world. I was amazed and indeed, I used the word astounded in my dissent, twice as a matter of fact, or astonished I think, that the majority said not only is this deadlock instruction unconstitutional, you are constitutionally required to have a deadlock instruction. But we are such apostles of judicial restraint, that we would not write a deadlock instruction for the Legislature; that would interfere with the Legislature's prerogative. So until the Legislature gets around to writing one, which everyone knew god-damn well was never going to happen, there's no death penalty in New York. I was annoyed by that, as you can perhaps tell, from my description of it. I was not pleased with that decision and my dissent said so.

[01:58:39]

AK: And your dissent was that it just should have been severed, right?

RSS: Yeah, well my dissent, I actually thought the deadlock instruction could be upheld, but I did not dissent nearly as vigorously on that point, as in saying that if you're not going to uphold it, just sever it, take it out of the statute, it's the easiest thing in the world. Unlike the ridiculous severance that they did in that other case, which drove me nuts, the one I can't remember the name of. But you know, it wasn't going anywhere, so I fussed and fumed and wrote a dissent, which I think Ron Tabak wrote an article in which he used some very harsh adjective about my

dissent, I've forgotten what it was. It wasn't apoplectic, it was something like that. Do you want to go right away to *Taylor*?

AK: I do, but before I do, I want to ask you one question, because as I understand it, you've publicly never expressed a personal feeling as to whether the death penalty should exist or not, and so this is your opportunity to expose to the world, your views as to that.

RSS: Okay. It's a complicated answer. You're right, that I don't think I ever publicly expressed any view while I was -- of course, I didn't exist publicly until I was nominated as a judge, and I certainly didn't express any view during the confirmation process and I never expressed a personal view while I was a judge. What I did say was I wasn't sure. I remember saying to the Senate committee, I don't believe that a judge should be influenced by his personal preferences and in the case of the death penalty for me that's easy, because I'm not sure what my personal preference is, so I can't be influenced by it.

AK: Right.

[02:00:44]

RSS: I started out as a hardcore opponent. When I started doing death penalty cases, I simply took the simple, you know, thou shalt not kill view of the death penalty, and even as my politics were becoming more conservative, I sort of adhered to that for quite a while. Strangely, it was working on death penalty cases that got me off of that. I began to look very hard at these cases and you think, you begin to imagine other cases that would be a little different and say what are you supposed to do? There are some cases where just nothing else seems just, nothing else

seems to work. I guess what I come out thinking is if I could establish an ideal republic where I make all the laws, there ideally wouldn't be any murder in it, but there would be a death penalty reserved for a very, very few, very extreme cases, available to induce plea bargains in somewhat less extreme cases. Sometimes I say what we want, I just want, -- so it's like international affairs. We want the credible threat of force, and we never want to use force. We want the credible threat of the death penalty and of course, if you never use it, it's not credible.

AK: You don't want to use it though.

RSS: Anyway, I guess I would, in principle, be in favor of a very, very limited death penalty. I'm bothered by it, I really am bothered by it, and maybe, maybe there shouldn't be any death penalty at all. I remember especially vividly, a conversation I had with a guy, a psychologist who was working with the defense at the first *Penry* trial, a little guy, I can't remember his name. I called him Doc, we called him Doc, I've forgotten what his first name was. Maybe it wasn't Doc. We gave him a nickname that was a short form of his last name. A nice little guy, knew everything in the world about the *Penry* case, but we did not use him as a witness because he had this unfortunate habit of saying what he really thought. But he knew everything in the world about *Penry* and he was telling me *Penry's* life story one night over a beer, which was the -- and of course it was the most sordid, depressing life story you could possibly imagine, from infancy on. The sort of life story that makes a guy tell you that the happiest years of his life had been the years spent on death row.

AK: Oh my gosh.

[02:03:22]

RSS: And so at some point, I say to him, “Doc, why are you and I sitting here trying to save this pathetic life?” And he said, “Well, Johnny may be a failed experiment, but if he is a failed experiment, it is for the experimenter to make that decision, not the other rats.” That point still gets to me.

AK: Yeah, yeah.

RSS: So anyway, that’s a long answer to a short question.

AK: Good answer. Okay, so let’s take it and now move right to *Taylor*.

RSS: *Taylor*. You know, but the audience for this show may not know, that *LaValle* was a 4-3 decision, essentially invalidating the death penalty, on what I thought were totally spurious grounds.

AK: Correct. Not necessarily that they’re spurious, but that you thought they were spurious.

RSS: Yes, yes.

AK: Anyway, go ahead.

RSS: Yes. You’re allowed to express your opinions now too, you’re a free man. Then there were two more appointments to the Court, one a Republican and one a Democrat, not that politics ever has any influence on how the cases come out but it does.

AK: So we're talking about Judges Pigott and Jones, right?

RSS: Yes, who replaced -- actually, Republican, Democrat is too simple, because Judge Rosenblatt had voted with the majority in *LaValle*.

AK: Correct.

RSS: Even though he was a Republican. But Pigott, who replaced him was, I think everybody thought, probably quite a likely vote for the death penalty. Jones was less obvious than we might have speculated.

[02:05:38]

The reason *Taylor* was a difficult case was that the prosecutor Donna Aldea, a very able lawyer who argued for the Queens DA, was able to distinguish *LaValle* and say the problem you had in *LaValle* was that the deadlock instruction, or the absence of a deadlock instruction, according to the Court's theory, was coercive, because they might fear that the defendant would be paroled. But in *Taylor*, which *Taylor* was tried before *LaValle* was decided and therefore, it was the defense that was asking for ways to neutralize the coerciveness of the instruction. Of course, after *LaValle*, the defense loves coercive instructions because it's a guaranteed reversal, but before *LaValle*, the defense complained to Judge Fisher, Steve Fisher, who tried the case, an excellent judge, that the instruction was coercive. Fisher said, "Well, I've got to give the instruction because it's in the statute, but I'll tell you what I'm going to do." The coercion problem is that the jury might fear that if they deadlock, the defendant is eligible for parole, because that's what the deadlock instruction said and that was the law, that if the jury deadlocks, the defendant must be eligible for parole. "So I'll tell the jury well, if you deadlock, he's eligible for parole, but don't feel too bad about that because this guy killed five people and I'm planning to give him five 25-year consecutive sentences, so he won't be paroled until he's 173, and that should cure the problem."

[02:07:38]

Donna Aldea's argument is it did cure the problem and therefore, you should distinguish *LaValle* and uphold this death sentence. I remember having one very pro-death penalty law clerk and I said to him, "Okay, give me a good rationale for taking this approach to *LaValle*, for carving this piece out of *LaValle*." He basically didn't persuade me I could do it, and he worked on *Taylor* of course, for a long time, over the summer. I got a new law clerk, Reed Smith, also another excellent law clerk, who wrote me a memo on why we should not -- why we should reverse the death sentence, why we should not cut back on *LaValle*. He did really, a very fine job of presenting that case. I remember his memo began, "It depends on exactly how wrong you think *LaValle* was, and what was wrong with it," and he analyzed it in some detail. I eventually came out thinking that while *LaValle* was just as bad as I said it was, the idea of distinguishing it on the basis of whether it was realistic for the guy to be paroled or not, was just a bad idea. That is that *Taylor*, of course, wouldn't have got out until he was 173. Well, suppose he would have got out when he was 101, or well, make it 91, make it 81, make it 79, where are you going to draw that line, and isn't it a stupid line to draw? When you're talking about things of life and death, is it really an offensive line to be drawn, saying well I can execute this guy because he's only 38, but the guy in the next cell is 41, so he can live. It just doesn't -- it's the other way around actually but it doesn't matter.

[02:09:57]

AK: Right.

RSS: It just isn't right. It isn't the statute the Legislature wrote, it isn't a reasonable, sensible statute, done that way, and I just wouldn't go along with it, and I wrote an opinion saying that. I did not join either of the other two opinions in *Taylor*, I wrote my own opinion. I said first, when I see a lot of people interpret *Taylor* as my adherence to stare decisis, which is right in a way, that I was respectful of precedent, but nobody on the Court said we should overrule *LaValle*. Donna Aldea did not seriously argue for overruling on *LaValle*. That actually might have had more appeal to me, if they had, and I did consider an amicus argument for overruling, and I would consider whether I'm going to overrule, and I said no and I explained why. The issue of overruling was just ignored in the other judges' opinions.

The harder question of distinguishing *LaValle* and making it an "as applied" case, was tougher. I actually remember that during the deliberations on *LaValle*, a Judge said, "I think the majority is going to have to retreat to an as-applied approach to *LaValle*, because there are some cases where *LaValle* just shouldn't be applied." And I understood the argument and I think that Judge wanted me to put something in the dissent that would suggest that limitation, and I said, "I don't think it's a good idea. I think if you're going to do this, do it across the board, don't try to do it as applied, where the rule of *LaValle* applies to some cases and not others." And indeed, in *Taylor*, Susan Read did come out for the as applied result and wrote a very able opinion, an extremely good opinion defending it, and I went the other way.

AK: Yeah. Well, I'll give you a choice right now. There are some other cases at the Court that you wrote, or wrote a dissent to, that are worth talking about, or we could take a break from that for a second and maybe you just want to take a few minutes and tell us how you operated your chambers, how you chose your clerks, how you worked a case. Would you rather continue going with the cases first or take a break?

RSS: No, I love talking about all these things and can talk for -- I hope you've got a lot of tape. We're just getting warmed up here.

[02:12:40]

AK: Let's take a break from the cases and let's talk about the fact that a number of judges on the Court decided to go to full-time clerks, permanent clerks. They found clerks that they really loved, it made it easier for them to keep those three clerks on full-time, and once they got the system down, it made their life easier. Or for whatever reason they chose. You continued the traditional method of hiring clerks for either one or two-year terms, throughout your 11 years on the Court. Any reason you decided to choose to go that route rather than go with the permanent clerk route?

RSS: Well, I'm not sure. I was used to the idea, I guess. The model in my mind, of law clerks, was the federal. I didn't clerk on the federal courts but a lot of my friends did, and those are all generally kids out of law school. Then they were right out of law school, now I think the federal judges want them to have a year or two of seasoning, but they're for short terms. I guess I thought, and maybe I was right, that there are a lot of very bright young people who want to clerk for a year or

two, who don't want to make it a career, and that you may be able to hire abler people if you're looking for short-term rather than long-term. In fact, the tension I had was that I did want people for two years. I felt that one year was unfortunate, because people really just started getting good at it when they left. But a lot of candidates had a hard time and sometimes there was a bargaining. I would say, "You can do it if you'll take two years," and they'd say, "No, I'll only take one," and sometimes I'd say, "Okay, no thanks," and sometimes I'd say, "Okay, for you. You know, I'd rather have one year of you than two years with the next guy." Yeah, I think that's basically the answer. My last law clerk, Matt Bova, did stay more than two years, a little more. I did once ask -- well, you know, I shouldn't tell that story. I'll keep that one. I'll tell you later off the record.

[02:15:25]

AK: Okay, that's fair, we'll leave that one, let that one go. Why don't you tell us a little bit about the way, at the Court, the Chief Judge would approve a calendar, and it would tell you all the cases that were going to be on the upcoming session. So, why don't you take us a little bit, step through step, once you got the calendar and once you got the briefs and records from the people who worked at the Court, who were in charge of that, how you worked a case. How you divided it up among your clerks, how you then worked with your clerks in preparing it, right up until the point of the argument, and then once you drew the case, after argument, how you prepared for your report at conference and then ultimately, the writing of the opinion.

RSS: Okay. Well, at the initial stages, I was very, very hands off. I let the clerks divide up the cases themselves, completely and basically any way they wanted to. I mean, there was usually one clerk who was sort of the criminal specialist and who would get a lot of the criminal cases, but from the outset, I think the first one was Dee, and I said, "I don't want Dee getting all the criminal cases and I don't want her getting only criminal cases." I worried a little. What I worried was that the clerk with the strongest personality would get all the best cases. The one point when I thought that might be happening, I spoke to the other two clerks, and they swore up and down it was not a problem, so maybe not, and I guess it probably wasn't. Otherwise, I thought it worked fine. The fact is that people tend to want the cases they're good at, so when people divided up the work themselves, it came out about as well as you could. I know a lot of judges would get a case and say this case is not for Freddy, this one is for Sally, because Freddy ain't going to be able to handle it. Look, were some of my law clerks stronger in many ways than others? Of course, that's going to be true everywhere, but I never thought that the -- I don't ever remember saying, "Oh God, I wish I'd had the other law clerk do this case."

[02:17:50]

AK: Right.

RSS: I mean, except for the ones -- there are some clerks, I wanted them to do all my cases. Theoretically, there might have been some, although I would never admit it, where I would have wished they did fewer cases, but I don't really remember being bothered by the division.

I'm going to make an admission, which I have made a million times; I'm embarrassed every time I make it. I didn't read the briefs. I let the law clerks read the briefs. If you had told me, when I was in private practice, that I was going to be before a judge who wouldn't read my brief, who would give it to a law clerk to read, I would have gone berserk. I would say my tax dollars are paying for that stupid piece of horsemeat to hand my brief to his law clerk? I spent hours writing this brief and the son of a bitch won't even read it? One of my former partners, when I told him I wasn't reading the briefs, I think he almost retired from the practice of law. He was very upset.

What I've found was that I liked to get very deep into the case myself. I liked to spend as -- time is finite and I spent as much time as I possibly could and I worked pretty hard, reading as much of the record as I could and as much of the law as I could, as much of the cases as I could, and I just decided my time was better spent doing that, than reading what a couple of guys are going to tell me about what the record and the cases say, and that I could rely on my law clerks to give me a not too condensed version of what the lawyers were saying. Often, the law clerks would say it better than the lawyers. Now, you didn't usually say it worse, I mean you know, if all you have to do is parrot the brief, people can do that. They would also sometimes go beyond what the lawyers did. Matt, Matt Bova, I mentioned before, was incredible, because he knew every criminal case ever decided.

[02:19:53]

AK: Right.

RSS: And he would say wait a minute, this is a *United States v. (inaudible)* case, you know. I remember once, he pulled out a Supreme Court case that was absolutely identical to the case that was before us and nobody had cited it. It was so on point it was ridiculous. The only difference was the spelling of the name. Anyway, so I would rely -- so, when a case came in, I would basically do nothing until I got a memo from the law clerk.

AK: Okay. Let me break you here for a second because this sends me on another tangent that I have to bring up at this point in time. People have different views as to preservation and yours was one end of the spectrum as far as I was concerned. In fact, there's one case, let me see if I can find it in my notes quickly, a case called *Misicki v. Caradonna*, which was decided in 2009, and in that case, you wanted to decide the case on an issue that was not even raised by the parties in the Court of Appeals. I don't know if you remember this.

RSS: I remember.

AK: It was a personal injury action based on alleged regulatory violations and you said that the safety regulation that was the basis of the suit was inapplicable and the defendant himself did not make that argument. Now, in not reading the briefs and doing your own research, or having an encyclopedic Matt Bova on your staff, where you can come up with arguments and rationales that are not the ones that are being argued by the parties, do you not feel, in that context, that the Court supplants the representatives?

[02:21:58]

RSS: I recognize that, it's a fair point, and indeed, I think I said, in *Caradonna*, in *Misicki vs. Caradonna*, if I could persuade the majority to do what I want to do, I would not want to it before I gave the parties a chance to address this issue. I would write a letter. And obviously, you don't do that every day.

AK: Right.

RSS: Usually, of course, you stick to the case, but to me, *Misicki v. Caradonna* was a case where you had two lawyers arguing which breed of dog, whether this was a Labrador Retriever or a Cocker Spaniel, and I look at the god damned thing and it's a cat, anyone can see it's a cat, and it seemed to me ridiculous for us to be sitting there debating whether this cat is more like a Labrador Retriever or more like a Cocker Spaniel, I mean it's a silly thing for a court to do. It does not clarify the law in any way, to write a learned opinion on whether a cat is a Cocker Spaniel.

AK: At the same time, it puts the court's thumb on one side of the scale of justice, doesn't it?

RSS: No. It puts a thumb on the side of justice, I mean just decision is that it's a cat. I mean if it is a cat, it's better for the court to decide it's a cat. It is a problem and it's a problem that I think bit us, bit me in a case called *Catu*, which came out later. It is a problem to go reaching for things that the parties haven't argued, because every now and then you just miss something that they would have pointed out to you. I'm not saying that the approach I urged in *Misicki v. Caradonna* can come up every day, but I do think when it looks perfectly clear

but the parties just missed an obvious controlling thing, I think there's a real danger of getting the law very screwed up by following the parties in that error.

AK: So you think it's important for the court to step in when the manner in which the parties argued the case could lead to the law going down a path that it shouldn't be going down.

[02:24:01]

RSS: Well yes, or I would put it a little differently. I'm saying that if the court refuses ever to step in, there is a danger that the law will go down some wrong paths.

AK: Okay. All right, so now let's go back to your chambers.

RSS: All right. I'm a last-minute person anyway and unfortunately, a lot of my clerks were like me, so I would sometimes get a lot of stuff at the last minute, but I didn't touch a case really, until I got, from the law clerk, quite a detailed memo. They ranged, they were you know, they were single spaced memos ranging from five pages in the simplest case, to forty and sometimes longer. Matt could write very long memos because he would get carried away sometimes. Then I would, after a few different experiments, the practice I followed was, and it became quite ritualistic. I've told you, I'm sort of a rigid person, I like to do the same thing every time.

AK: Right.

RSS: Recite all the sonnets through every week.

AK: Right.

RSS: The first thing I would do is read the decisions below. The second thing I do is read the law clerk's memo. A third thing is I take out the memo again and I start

going through it, and what I want them to do is to cite to everything in the record and everything, every case or other statute or other authority they think is worth looking at and to give me copies. And I go through the memo and if it says plaintiff is a Delaware corporation, A-26, I open up A-26 and look at the certificate of incorporation. In a case with a transcript, what I liked to do and if I had time I would do it, is when they cited something in the transcript, I didn't just read the little passage, I would read the testimony of that witness. That meant by the time I was on page two, I had spent about four hours on the case. On the other hand, the rest of the memo went a little faster, because I had read quite a lot by then. So I would do that and I would read and think about it and ponder and every now and then send an email to the law clerk, and then a half an hour later, send another email saying, "Ignore previous email. I just noted on page 17, you've dealt with this."

[02:26:37]

Then, I invariably, when I was done, I would take the law clerk's memo and turn it over and write on the back of it, and the first line was always my tentative view of the case. How I would affirm, I would modify, I would reverse, and a little outline of my reasoning. So maybe theoretically, it would be a rough outline of the opinion I would write, except in a more shorthand form, that I could understand. That, I might write in my totally illegible handwriting, I might write half a page, I might write three pages on each case. That's what I did. I would then talk to the law clerk about it and argue about it, and I might change my mind later, but that's how I did that. Then, I walked out on the bench pretty well

prepared, I think. I usually knew what I was talking about when I was asking questions.

AK: And you certainly asked your share of questions.

RSS: I did ask my share of questions.

AK: No doubt about it.

RSS: And several other people's share too.

AK: Yes, yes. I always took great enjoyment in seeing the delight in your questioning, you know?

RSS: I told you that cross examination was more fun than sex. Well, that's a form of cross examination, you know.

AK: You were like a kid in a candy store, no question about it.

RSS: Yes, yes, absolutely.

AK: And so then argument is over and I think by now, it's well known that the judges would then go into the red room and they would then draw the case from that day, that they have.

RSS: In the good old days, yes.

AK: Yes.

RSS: Since our day, things have gone downhill.

AK: We won't talk about the present. And so you draw the case and you go upstairs and I assume you tell whichever clerk wrote that case that we drew it. Then what happens at that point?

RSS: Then... Once again, I'm quite ritualistic about these things. Usually, the next thing that would happen would be the Court would go out to dinner, or it might be

before dinner, it might be afternoon, it might start before dinner, but the clerk and I would sit across from each other. I would take out a pad and I would start to write, on a pad, the report I was going to make to the conference the next morning. The law clerk's function, as I told them, "Your function is to sit there and say that's genius, that's wonderful, you're absolutely right." Most of the law clerks, fortunately, had a way of, every now and then, saying some more, some less tactfully, "That's the stupidest thing I ever heard, you're not really going to say that." That process would result in a fairly detailed report, which I would then -- I wouldn't literally read it, but I would present it orally, based on my notes, the next morning.

[02:29:43]

AK: Right. And for those who don't see the tape, they won't know that I'm using a yellow pad to ask you these questions, much like the yellow pads you would come into conference with.

RSS: Yes, yes.

AK: I would watch you turn pages.

RSS: Yes, yes, you have the same archaic habits that I had.

AK: Right. Neither one of us is a technocrat, you know?

RSS: Yeah. Although, I've got to tell you, I prepared for an oral argument in court yesterday and I typed it on my phone and printed it before I went to court.

AK: Oh my gosh.

RSS: Yeah, yeah, that's very new. After about 40, 50 years, I began to think you know, maybe it's not so good to be standing in court with a set of notes you can't read.

AK: Right, right. The typewriter helps. Typewriter? The computer helps. So, you present your report in conference and let's make this easy, let's not have any dissents. Everybody agrees with you, so now you've been assigned to write the opinion. Do you draft it, does your clerk draft it?

RSS: I draft it.

AK: Do you draft together?

RSS: I draft it. I did all the first drafts.

AK: And then do you have your clerk review it for feedback?

RSS: Oh yes, yes. Once again, often they say this is the greatest thing I'd ever read, which is what they're supposed to say, and they got bonus points for that, and sometimes they said, "Hey, this doesn't work."

AK: Right, right. And so it's mainly your work, but it's with their input.

RSS: Oh, yes.

AK: And then when you're both satisfied with it or essentially, when you're satisfied with it...

RSS: When I'm satisfied with it.

AK: Whether they still have reservations or not, you send it out to your colleagues.

RSS: Right, right. And of course, we also spent a good deal of energy in my chambers working on other people's cases.

AK: Right, yeah.

RSS: I think I was a fairly big commenter on other people's opinions.

AK: I'd say you had your share of dissents, yes.

[02:31:44]

RSS: No, I don't mean that. I mean on the opinions that other people circulated, that I would say, "Hey wait a minute, the paragraph on page 14 really doesn't make sense," that sort of thing.

AK: So you'd be offering a lot of constructive comments on positions that you agreed with.

RSS: Yes. Yes, I hope they were constructive, yes.

AK: And when you were doing that, would you do that with the clerk who was assigned to the case or were you doing that individually?

RSS: It was with the clerk. Typically, I would read the opinion. I might discuss it with the clerk. The clerk might come rushing in and say, "You won't believe what they did."

AK: Right.

RSS: Normally, I would read the opinion, the sort of opinion I was planning to draw. I would draft an email to the author. Once in a while, my email said nothing, it said, "This is great," but not so often. Judge Graffeo got those every once in a while. Often, even when they were great, and sometimes they were, but often I would have suggestions even on very strong opinions. Sometimes, frankly, it also happened that I thought the opinion wasn't that strong. I did not view myself as a copy editor or even as a style -- to try to improve the style. I deviated from that now and then but if the problem, if I said the opinion says all the right things and it doesn't say them all that well, okay that's not my problem.

AK: Right.

RSS: But if it didn't say the right things or if I thought there was a point that could be made sharper or made in some more effective way, I would comment. As I said, I'd draft an email to the judge who had written the opinion. I would then send the draft email to the clerk who's working on the case and the clerk would comment on that draft and eventually, there would be a final email that would go out to the author of the opinion.

[02:33:54]

AK: If you felt really strongly about it and the judge did not accept your suggestion to add something or to change it in some way, would you raise it at conference with the colleagues or would you just let it die there?

RSS: I don't ever remember raising an issue at conference, about whether oh, this paragraph can't be in there. I might occasionally, sometimes, when I thought there was something that was just conceptually wrong and I couldn't persuade the colleague who wrote it to change it, I would write a separate concurrence. I would agree with the result, but I can't buy it on this ground. I remember doing that once with Judge Kaye, where I tried to persuade her to take out a whole section of her opinion she didn't want to take out, so I wrote a concurrence saying I can agree with everything except that.

I remember one opinion Judge Rivera wrote, that to reverse a criminal -- I forget. I forget the details but I remember saying the result is right but the problem is a hearsay problem, it's not a something else problem. I forget what the something else was.

AK: Okay, let's go back to a few other cases. There's one case which I think you're fairly well known for, and that's *Hernandez v. Robles*, which involved the right to gay marriage in New York. You actually wrote that for a three-judge majority. I think Graffeo concurred.

RSS: Yes, but did not join the opinion.

AK: Right. So, it was actually a plurality decision. From what I've understood from you, and I'd like you to talk a little bit about your writing, but I also understand, you've had a lot of negative feedback on that as well.

[02:36:09]

RSS: Oh yeah, oh yes.

AK: Even from friends.

RSS: Oh yes, yes, friends and family. That was, as you know, that was a decision that said gay marriage is not a constitutional right. I have no difficulty with the idea.

AK: And you used the rational basis test.

RSS: Yes. To me, I have no difficulty with the idea that, whether it's a constitutional right, is a different question from whether it's a good idea, and a very, very different question from whether gay people should be treated equally to straight people, the latter of which I don't have any doubt about at all. A lot of people have more trouble than I do with those distinctions and certainly, some -- I certainly did have friends who were very upset by the opinion, who viewed it as a declaration of war, as an insult to gay people. There's a guy I considered a friend, a member of -- well, I guess I won't give an identifying detail. A friend who essentially stopped speaking to me and except for once, when we were in a

situation where we almost had to say hello, he hasn't spoken to me to this day. And I got a couple of bitter letters from old friends about that case. Also, more cheerfully, my Stanford roommate, who has a daughter who is a lesbian, wrote me a long, long letter. He didn't have my email so he wrote me like a five-page typed letter on everything he thought was wrong with the opinion, but it was a civilized letter and I wrote back to him saying here's what I think. We went back and forth for a long time and to me, I thought it strengthened the friendship. I thought you know, I thought that was fine. And I was also very touched by -- there's a gay man who I had worked with at my church. I taught Sunday school at the church and he was the principal, so he was sort of my boss at the Sunday school, and he wrote me. The decision came down, we saw each other fairly often. It came down, we saw each other a few more times. It didn't come up, it's a perfectly normal relationship, and then he wrote me a letter essentially saying that he thanked God that we could think differently, so differently on such an important subject and still remain close to each other. This had something to do with what Jesus meant about loving your neighbor. I was very touched by that.

[02:39:13]

AK: That's a beautiful thing. It sort of surprises me, with respect to other friends of yours who where it created a breach in the friendship, only in the sense of, I think one of the things that you were known for is as a judge who would not let their personal feelings enter into their legal process, legal thinking. I mean, and that's what *Hernandez* was to you, that was the correct legal result and indicated nothing other than that's how you viewed it in a legal fashion.

RSS: I think that's right, that's right. Gay marriage is on the list with capital punishment, of things I never expressed a public view about.

AK: Right.

RSS: Whether I was for or against it. But yeah, it certainly -- I mean it says right in the opinion, of course the Legislature can establish gay marriage if it wants to, it says we understand there are perfectly good arguments on the other side, but as we read the Constitution, we're required to just say that if the statute isn't totally insane, you uphold it. I did not think, still don't, that the restriction of marriage to opposite sex couples is totally insane.

AK: Another case of yours that was a very significant case and might also have been a plurality, I'm not sure, was *Pataki v. New York Assembly*.

RSS: Yes.

AK: That involved the budget and appropriations, which at one point was primarily in the hands of the Legislature, and then got changed later by statute and was put more in the hands of the Governor.

RSS: By constitutional amendment actually.

AK: Okay. And here you had several ways that the Governor and Legislature sort of went at each other with respect to this. Do you want to talk about that at all?

[02:41:23]

RSS: Well, that was a complicated case and the details might get tedious, but I did think it was important. New York adopted something called executive budgeting, I guess during the Al Smith administration back in the '20s, which gave the Governor an enormous amount of control over the budget, and this was a lawsuit

basically testing what the Legislature could do to get around that. It was a complicated thing—analyzing the various pieces of the constitutional revisions and worrying about how they fit together, but to me it was important to preserve the purpose of the whole amendment, was to give the Governor the upper hand and the responsibility of deciding how it works. I remember a Judge saying, “You know what the Legislature is, it’s a money spending machine,” and that sort of echoed with things you found in the legislative history of these amendments, saying I think it was some famous person, like maybe Stimson, one of those famous lawyers from the early 20th century, who played a big part in public life, he was the guy who devised this scheme of executive budgeting and he said, “You will never get economy in government unless some one man” -- it was a man then – “some one man has to lie awake nights worrying about it.” Which makes a certain amount of sense and that is what the Legislature adopted, and we were trying to preserve that. It raises a lot of very tricky questions. It’s not, by no means, the easiest thing in the world.

[02:43:58]

AK: I’ll raise one other case with you, that was decided when you were on the bench, which I think in some ways you wrote in an out of character way, because it was one of the few cases where you actually showed a little less calm, and that’s *Bordeleau v. the State of New York*.

RSS: Yes, I went berserk or maybe it showed more. I often went berserk, but this time I let myself go, maybe because Pigott wrote an orthodox normal dissent in that case, so I could write a raving dissent.

AK: Right, right. You concluded by saying -- let's see, you expressed a need to vent frustration and concluded by saying that you have defended the right of the Legislature to commit folly, but not folly that our Court was meant to prevent. And then in quotes, "I think I am entitled to be annoyed," was your signoff.

RSS: Yeah. That's not an insulting thing to say, is it?

AK: That was part of the nicer part of it, but yeah, yeah. You just felt that they are the -
-

RSS: It drives me nuts, I mean it still does. You have a Constitution that says do not do this and the defense -- one of my sons summarized the argument of the State for why they did exactly, absolutely exactly what the Constitution prohibited, in so many words.

AK: Right.

RSS: And the answer, "it can't be unconstitutional, we do it all the time," which I think in my view, that's the argument that ultimately prevailed.

AK: Understood, understood. Many of the people who have worked at the Court have described the Court as a family. It's not a large group of people and all who work at the Court are really tight-knit and function to do one thing and that's create the law of the State of New York. Yet, you've got seven people who battle on a daily basis, and they all have clerks who are battling with their judges. Did you look at the Court as a family during the time you were there?

[02:46:34]

RSS: Family might be a little strong, but I certainly did look on it as a group of friends. Of course, if you mean -- the seven judges, when I say a group of friends, the

seven of us, I thought we were always friends, even when we were quarreling. I liked the people, I looked forward to having dinner with them every night. In fact, there's nothing I miss more about the Court than the collegiality, even though I have plenty of friends here. You know, just sitting around gossiping with them over a meal or wine or drinks was a great pleasure.

The Court, as a larger institution, that is meaning basically everybody who worked in the building, yeah there was certainly a great sense, I thought, of institutional loyalty. I remember Sascha Michaels, one of my law clerks, once pointed out to me, everybody who works in that building, including the people who empty the wastebaskets, feel very strongly that they're part of something important and they really care about their jobs, and they're right. That to me was a very important part of being on the Court.

AK: I think that Sascha's point couldn't be more strongly made. I mean you know, oftentimes I've said that everybody at the Court gives a hundred percent, a hundred percent of the time, and I think that's true. Any of your colleagues -- well, let me first say this. Recently, we lost a wonderful judge, George Bundy Smith, and I think Judge Rosenblatt recently remarked, said, "He was the perfect blend of gentleness and courage." Any of the colleagues that you served with that you would want to mention any of their significant attributes, or not single anybody out. However you want to handle it.

[02:48:43]

RSS: If anything else, I could talk as long as you want for most any of them. You can't not speak about Judith Kaye. She was a great, great Chief Judge, a very

charismatic, sort of inspiring person. She inspired a lot of -- I think, even though I'm not a big fan of identity politics, even I have to admit that the role she played for young women lawyers in the State, and I've seen it again and again, she was a real inspiration to them and really meant a lot to a lot of people. She was also a very, very decent, warm hearted person. I say this as someone who fought with her all the time, I sometimes found her a little bit on the stubborn side, not that she would ever have said that about me.

AK: Right.

RSS: She was a really warmhearted, really kind person who cared about everyone she came into contact with every day, whether they were bigshots or not bigshots.

Vicky Graffeo, I think at the time that Judith retired, I remember Vicky saying, somewhere, in some context, "Her real legacy is not in the *New York Reports*, her legacy is in all the kids in this State who have parents, who wouldn't have parents if Judith Kaye hadn't fought as she did for adoption in this State." So I guess the one thing she should be remembered for more than anything else is her personal compassion and warmth of heart.

Now that I've mentioned Vicky, I think I've made it clear that I thought she was a superb judge. She's one of the great untold secrets of the Court, is what an extraordinary judge Vicky was, really. I think it was a great loss when the Governor didn't reappoint her. She reminded me, in some funny ways, of Judge Rifkind, even though the personality is very different. I remember somebody once said, "Rifkind told me once to research 'goo-gi-ga-ga-goo-goo,' and I laughed it off, and then I'm reading a case and there it says, 'goo-gi-ga-ga-goo-goo.'" I

remember once, I called up Vicky about this opinion that I thought just didn't make sense at all, and usually I emailed her but for some reason I was talking to her on the phone about this and I said, "Vicky..." I'll put it this way, I said, "Vicky, you're quacking like a duck, this doesn't make any sense," and she said, "Well I was just trying to follow the rule in the such and such case." I looked it up and sure enough, "Quack, quack, quack, quack."

[02:51:51]

Susan Read was also a friend and a big sister and a mentor to me. She's a very nice person, Susan, a very smart, able judge and a tough customer but a very nice, warmhearted person, excellent judge who taught me quite a few things about being a judge, of which the one I remember best is her telling me not to write opinions that say in substance, "We're really wonderful people, the law made us do this." I never quite got over the tendency to do it, but I did cut back on it. I guess she's right, that whining about the law is not supposed to be a judge's function.

Al Rosenblatt was a friend and colleague and companion, a lovely guy, a very able judge, a great pleasure to be with. George, it's all been said. George was an amazing guy. Judith once said, "George is our deepest conscience."

AK: Yes.

RSS: George really believed in doing the right thing, knew what the right thing was, and when he said it, you listened. If the question of what was the right way to handle it and the vote was 6-1 and the one was George, George won. Let's see have I skipped anybody? Gene Pigott, I can't -- Pigott and I are sort of such pals,

that time doesn't permit, and he and I and Ted Jones were drinking buddies for years. I would sit and listen to them talking about Vietnam, where they had both served. I, like most upper middle class kids, I never got near Vietnam and I didn't know anybody who did.

AK: Right.

[02:53:54]

RSS: In fact, one of the weird things about being a man my age with my background is you know, there's a wall in Washington with the names of all the people who died in Vietnam, thousands upon thousands and thousands. I'm exactly the age of all the men at that wall, and I don't know one of them. So I guess my life broadened a little when I got to know Ted and Gene, both Vietnam veterans. Gene told me that Ted was a real war hero, although he would never brag about it, that he knew, from what he knew, that Ted had given extraordinary service. I suspect that might be true of Gene too, but you'd never find that out from Gene. Among Gene's many endearing qualities is that he absolutely hates to be made a fuss over. I remember when he was sworn in and the whole point of the judge's swearing in is to make a big fuss over him, he managed, at the very end, to turn it to say this is the last moment you're going to see Governor Pataki and Judith Kaye in this position, and I want you to stand up for a moment and honor history as it's passing. It was a nice thing to do, but what it also did was it eliminated the ovation that Gene was supposed to get at the end, and I think he did that on purpose. Anyway, I'm very fond of Gene.

When Jonathan Lippman became Chief, I think like a lot of us, I suspect a lot of us were on edge. I, of course, wanted Ted to become chief because he was my friend, and I didn't really know Jonathan. There was some feeling of wait a minute, who is this outsider, why couldn't the Governor have picked one of us? I thought Jonathan did a wonderful job and we became good friends and I became very, very fond of him and I still consider him a friend. I thought he was a great Chief and very politically effective. Getting a pay commission through the Legislature was just a miracle, I mean Judith killed herself trying to do something like that and was incredibly frustrated that it never got done. By the time Jonathan came along, when he would say, "Okay, here's the bill that's about to be passed," well I'd now heard this 16 times before, and then all of a sudden I wake up the next morning and they passed it.

[02:56:34]

AK: Right, right.

RSS: I mean it was just incredible. He even got the constitutional amendment to extend the retirement age past the Legislature. Unfortunately, he couldn't work his magic on the voters. But really, very effective and really, a very good guy, just a complete pleasure to work with.

Judith, who I was very, very fond of, as you know we butted heads quite a lot, because maybe because we're both stubborn as mules and slightly contrary.

Jonathan and I, even though I think we probably have more different outlooks than Judith and I, it went much smoother. Jonathan is much more ready to -- I mean, I remember a case where the Court had divided 3-2-2, and another Judge

and I were voting to affirm. Jonathan Lippman and another Judge were to reverse; and the other three were to affirm on the grounds of lack of preservation. Jonathan called me up and said, “Look, it’s 3-2-2, it’s ridiculous, either I’ll get the Judge aligned with me to come over to you or you get the Judge aligned with you to come over to me, but we ought to get together.” I thought about it and it was obvious that the right thing to do in this case to join Jonathan and make it a reversal and make the law clearer. In the same situation, I have to say, I think Judith would have called me and said, “You really have got to come over with me,” and I would have gotten my back up and I wouldn’t have done it. So I think in that situation, Jonathan’s approach was more effective.

[02:59:15]

AK: Before you talk about a few other of your colleagues, I thought generally, the approach for Chief Judge Kaye, for the Court, was that it act more as a collegial unified body, whereas Chief Judge Lippman had more of a tolerance for, and actually appreciated, dissenting votes.

RSS: That’s very true, and it’s also true that I am on Jonathan’s side of that argument.

AK: Right.

RSS: Certainly, I love dissents, it’s no secret, but in all fairness, Judith had a point. I thought she overdid it, but there are times when it’s very important for a court to be unanimous, and even I would, once in a while, swallow my pride and say, “Look, we should speak with one voice on this one.”

I remember one where we reversed a conviction for child abuse. The guy probably really had abused a lot of children, and it was a nasty case. I remember

another one of my very talented law clerks, Scott Danner, doing a memo saying you know, there are a lot of ways to affirm here, what bothers me about it is that you're saying "bad people get bad trials." Anyway, there was a majority to reverse. I was inclined to affirm and maybe one or two others were too. I think we all thought that was a good one to be unanimous on. If you're going to do something that's really unpopular, do it 7-0.

Anyway, they really are both very respectable points of view, Judith, who thought that dissents were basically a crime against nature, except when she dissented, and Jonathan, who thought dissents were fine, but I did lean towards Jonathan's side of that difference.

[03:01:25]

The other colleague I do want to talk about, Carmen Ciparick, who of course I sat with forever. Obviously, the nicest human being in the world. She makes all the rest of us look like really obnoxious pigs.

AK: Agreed, agreed.

RSS: I've heard her talk about... I think once in my life, I won't mention who it is, is a rather prominent person, that she admitted she didn't like. I said, "Oh my God." But then come to think of it, I've never heard anyone say they liked that guy. I remember the first time I met Carmen. I had been appointed but not confirmed, and in my mind, I was still a nobody lawyer, going over to see this judge. I said, "Hello, Judge," and she laughed at me and said, "Oh, call me Carmen. I can call you Judge if you're going to call me Judge." She did it -- I can't reproduce the

way she did it. She had a way of making people completely comfortable, instantaneously.

AK: Absolutely.

RSS: Yeah, she's just the kindest person in the world. And then I didn't serve that long with either Jenny Rivera or Sheila Abdus-Salaam, but I did get to know and like them. Jenny was another one where I think everyone, when she came on the Court, there was some feeling of resistance, that is that was a slot that everyone expected to go to Rolando Acosta. We all liked Rolando and were looking forward to seeing him and then, this person called Jenny Rivera, who no one has ever heard of, gets picked out of nowhere. I certainly found her a very pleasant surprise. She's a really smart woman. She and I have different politics of course. If that were a problem, my life would have been utter hell anyway. I may have sort of been expecting to find, sort of a very rigid, left-wing agenda type of person but she's not really. She's thoughtful, she's intellectual, you get a fair shake. She's not going to reflexively go for the little guy in every case. Certainly, she's undoubtedly going to be very sympathetic in cases where there's an immigration issue and I think she's now on -- I don't know about the latest additions, but for a while she was very much alone on the Court, as being sort of a defense leaning judge in criminal cases. But I always found that she was a fine judge and a very good companion.

[03:04:50]

Sheila's loss, I guess is a year ago now, but we're still in shock from it. A lovely person. I knew her years and years and years ago, because when she first applied

to be a judge, I was on the City Bar Committee, in charge of interviewing her for that position. The startling thing was the resume didn't fit at all. As far as I know, she'd never been in a courtroom. She had been working in the Attorney General's office, reviewing co-op filings, but she was very, very impressive and very impressive in the interview, and when you checked her out, the people who worked with her all said she was absolutely first rate. So it really came as no surprise to me that she had the wonderful career she did, although her dissents could be acerbic. I remember her dissent in the case we talked about before, I thought was perhaps a little strong, but as a human being, she was always very gentle and kind and friendly. She was just a lovely person and a fine judge and it's just a terrible loss.

[03:06:30]

AK: Absolutely, absolutely. One thing that you said a number of times when you were at the Court, was that one of your biggest surprises of the Court was the Court's central staff.

RSS: Yes. Yes.

AK: And for those who don't know, the Court's central staff is 12 attorneys, hired either out of law school or practice, who are managed by two people, two attorneys who head the staff, and they're responsible for the reports dealing with attorneys who are seeking leave to appeal to the Court on the civil side. Why did you find them such a surprise and such a pleasant surprise?

RSS: Well, apparently, I guess because I share the cynicism that a lot of litigators have, about what happens when you submit something to the Court that clearly is not

going to get a lot of intense attention from the judges, like a motion for permission to appeal. They get at least 500 a year and my theory was, you know, I'm knocking myself out writing this motion for leave to appeal and they're going to give it to some gnome who can't read and write and is going to spend five minutes on it and end up wasting my time. I was really -- maybe I shouldn't have been, but I was very pleasantly surprised when that ain't what happens. First of all, these gnomes, they're intelligent, hardworking people who really care about their jobs. As I said, everyone at that court is really very committed to doing a good job. They're very well supervised and the hiring process, I think must be pretty good. You're not getting the Harvard and Yale for those jobs, you're getting people from Albany and Syracuse and they do a damn good job and every case is taken seriously, perhaps in a way that you know, maybe some of the Harvard and Yale snotnoses wouldn't take it so seriously. I didn't always think they got it right, I was not hesitant, but with very rare exceptions, I always thought they produced a very good product, a careful product, and sort of respectful of the litigants.

[03:09:08]

I remember first of all, and I guess I credit the supervisors with this, the tone never got snide, and there are times when it's easy to be snide about some of these cases. You have somebody who thinks that the world -- that he's suing the world for failing to recognize that he's the second incarnation of Thomas Edison and it's easy to laugh. They never laugh. This is not a time for laughing, this is a time for taking people seriously. Every now and then, I remember one where some

prisoner, some pro se prisoner was petitioning, because they had taken a gold chain away from him in prison, and he actually might have had a decent case and the courts below it sloughed it off. I remember reading a very careful, detailed memo by a central staff law clerk saying oh yeah, there is some authority here; on the other hand, there are reasons not to take this, there are problems with the case, and he wound up recommending that we deny leave, which we did. I said, "You know, that guy will never know, but he really got a fair shot."

AK: Absolutely.

RSS: That's something that really impressed me about that court.

AK: I would just address two things that you just said in that context. One, you said they didn't always get it right, but then again you felt your colleagues didn't always get it right either, so.

RSS: I know and what annoys me is even after I explained it to them, they sometimes didn't seem to get it.

AK: I know, and you didn't have the same opportunity with central staff. Who knows what you could have achieved?

RSS: Well actually, central staff had a very delightful habit of when I explained it to them, they would say, "You're right, Judge."

AK: That's right.

RSS: On the other hand, Andy Klein, every now and then...

AK: He wasn't as bright as the rest of them, you know?

RSS: I don't know whether this is a place to say it or not, but I do want to say that when Judith introduced you as the eighth judge, when I first came on she wasn't

kidding. I always thought of you as a colleague and sparring partner and a great friend.

AK: Thank you.

[03:11:25]

RSS: It was an absolute delight to serve all those years. I guess it was you and I and Susan and Vicky, were the only ones that stuck it out that whole time.

AK: That's true. Thank you by the way, very much, that's very kind. The other thing I just want to say is with respect to the central staff resumes, while they didn't come from the Ivy League schools typically, but rather from Albany, Syracuse or wherever they came from, they typically were in the top ten of their class, and they were all editors of their *Law Review*. So not Ivy, but still stellar.

RSS: Yes, no, no, it was a very strong group.

AK: Okay, let's see what else I have to ask here. Sometimes, while you were on the Court, we started taking little road trips. We went to Syracuse, we went to Long Island, we went to Brooklyn, we went to Manhattan. You weren't there for all of them, some of them preceded you.

RSS: The Bronx.

AK: Bronx, right. How did you feel about those?

RSS: I was in favor of them. I remember the first one in my tenure was, I think to Buffalo. I think so, because Matt Jasen was there. Yeah, it was just before Jasen died. I remember when Judith proposed it, I think she was anticipating, or she was at least ambivalent about whether to do it, and I was one of those who said if we can do it without unreasonable inconvenience, let's do it. Of course, it does turn

out to be unreasonable inconvenience, at least for the staff, but that's the... Andy Klein can handle it, don't worry.

AK: Right.

[03:13:35]

RSS: I realize, it was a major pain in the neck, but it was a good thing to do and of course, we got a wonderful reception. I remember once saying to Judith, she liked it when I said, "It's so wonderful to visit our loyal subjects in the provinces."

AK: Judge Pigott used to say, "I love these, we're treated like rock stars." You mentioned earlier former Chief Judge Lippman's ability to move legislation and so I wanted to give you an opportunity right now to address one aspect of that. Judge Lippman was able to push through the idea of having a constitutional amendment to change the retirement age of Court of Appeals Judges from 70 to 80, and do away with this notion of constitutional senility, but it went down pretty brutally before the voters. I personally think it's a shame. You know, so many of our judges who leave the bench at 70 go into private practice and do all sorts of amazing things. Do you want to say anything about it?

RSS: I mean look, I would have stayed if they let me.

AK: Right.

RSS: I guess I have both a policy point of view and a personal point of view on it. From a policy point of view, I do think 70 is too young. On the other hand, I don't think we should follow the road of the federal courts. I don't think people should be allowed to sit forever. Well, there's also an argument, better too young than too old. That is, maybe -- one of my favorite lines is the distinguishing factor of a

perfect vacation is that it's much too short. If someone is leaving the bench at the top of his form, do you want him to be leaving when he's past the top of his form? Do you want him to be sitting on the bench when he's no longer as good as he was? That applies on the personal side too. I would have stayed if I could. You're going to leave everything you do, you're going to leave either too early or too late, and too early is better.

[03:16:00]

AK: Yeah.

RSS: I'm having a lot of fun practicing law and I hope I manage to leave that too early also, so I'm working on that. I certainly would have stayed if the amendment had passed, but I don't feel any personal bitterness about it. I can understand the point, that people shouldn't sit forever.

AK: This is a somewhat trite question, but I'm going to still ask it. When you look back at your 11 years on the Court, if people were to describe you, how would you like to be remembered?

RSS: Well, I mean the honest truth of course, I would like to be remembered with wonderful hagiography. Let's try to be more sane. I'd like to be remembered as a good judge who tried hard, who worked hard and did his best. I think that's what we all want.

AK: Would you say that the time that you served on the Court was your best time as a lawyer? And I mean the most fun, the most challenging.

RSS: Yes. It was undoubtedly the high spot of my career. I've had a great career, I loved everything I've done, I still love what I'm doing. If I'd never been a judge, I

would have had a very satisfying career. Judith Kaye was right when she said it's lawyer heaven. It had, for all, whatever the disadvantages are and there are some, it's an experience I was just incredibly, incredibly lucky in having. I would advise everyone to be equally lucky, it's a very good idea.

[03:18:10]

AK: Chief Judge Kaye aptly described it as lawyer heaven, and I'm going to quote to you from something another former judge said and ask if you agree with that too. He said, on several occasions, that he thought the greatest and most challenging litigation forum he had ever encountered was the conference room. Would you agree with that?

RSS: Oh, I don't know. No, I did not think of the conference room as a litigation forum. I actually, astonishingly, I thought of the conference room as a conference. I thought that most of the time, we were actually trying to work together, and we were not in combat. Oh look, sometimes we were of course, but to me the best part of being in the conference room with our colleagues is once in a while, we would take a really difficult problem, bat it back and forth for a long time and come to a solution that made sense. I think everybody wanted to do that and most people tried to do that.

AK: Okay, so now you know your time at the Court is coming to a close, because the referendum has been knocked down, the amendment is knocked down, and you've got to decide what you're going to do. Clearly return to private practice?

[03:20:18]

RSS: Yes. I guess I always thought that I would go back to private practice. I did think about, never really all that seriously, but I admire what Gene Pigott is doing and in a way I'm jealous of him, that he went back to the trial bench, and I know that's been done. I don't know if I would have been eligible. I've been told both things and I never bothered to look it up. That is some people who should know have assured me that I could have done that if I wanted to, and people equally knowledgeable have said, "No, that's only for people who were Supreme Court justices before they went to the Court of Appeals." I don't know, maybe you know the answer.

AK: I don't.

RSS: I never looked it up because I decided that even if I was eligible, I wouldn't do it. Not because I wasn't tempted but because I decided that when you're 70 years old, it's not a good time to learn a new trade and maybe do something you've already got good at. Having never served as a trial judge in my life, I thought by the time... And being a trial judge in a way, is different from being an appellate judge. An appellate judge, it helps to have some experience, but basically that's a job a smart lawyer can do. A trial judge, like being a trial lawyer, I suspect you've got to have done it for a while to be really good at it, and I felt by the time I was good at it, I really would be over the hill.

AK: So, why Friedman Kaplan Seiler & Adelman as your new home?

RSS: Well, you know, as I've told you about my experience before the bench, where I was at a big firm, where I was very happy for a time and then not so happy for a considerable period of time, I was at a very small firm, really an individual

practitioner with a connection with a small firm, at which I was deliriously happy. Going off the bench, I had sort of ambivalence and feelings and fantasies. I would periodically fantasize that I was going to go to a big firm, which was going to stuff me with more money than I had ever seen in my life, that I was going to have an extremely successful, busy practice, and I was going to have lots of free time; all sorts of totally contradictory thoughts. When I went looking, and I did look at a number of big firms, first of all I found that they were more able to resist me than I might have thought, sort of like those girls at Stanford, partly because, and I think this was a significant problem, almost all big firms have mandatory retirement policies. One thing I had that was quite clear, was I wanted actually to practice law. I didn't want to be stuffed by the taxidermist and put in the front window. I think if I had made it clear that I basically just wanted to sit around and be an eminence and inspire the young, I think I might have attracted more interest, but quite a number of big firms either were not interested or were at best ambivalent. There were one or two big firms that were seriously interested. I went to an interview with one of them; that was a firm where the litigation department was very enthusiastic. Then they went to their managing committee, and this is an experience I had at more than one firm, and they said, "Eh, what's the business plan, is this guy really going to bring in this much money?" And at that point, I was very excited about the firm and I went in trying to persuade them that I really was going to be a great big firm asset and was going to bring in all sorts of large business. I had the meeting and I walked out of the meeting and I said, "I don't

know if I convinced them, but I did not convince myself. This is not the right thing for me, I do not fit this role.”

[03:24:45]

AK: Right.

RSS: It was at that point that I had lunch with my old friend Bruce Kaplan, a long, scheduled lunch, and I believe it's pure coincidence that I happened to see him at that time. I wouldn't put it past him to have done a little calculating, but you know, it was a perfectly normal social lunch and he said, “How is the job search going?” I said, “Well, I've got to tell you, I'm having an identity crisis,” and I just told him the story more or less I just told you. “Does that mean that maybe you'd be interested in us?” I said, “Yeah.”

AK: And here you are. You are the head of their appellate litigation department?

RSS: Well, yeah, I mean don't let the clients know. It's not that big a department, it doesn't have that many meetings, but we're not that big a firm. I'm delighted to work on any appeals that come in, and there are some other very able appellate lawyers.

AK: And you're not doing any trial work now?

RSS: Oh, no, I'll do anything.

AK: You are as well.

RSS: No, will work for food. I've tried two cases, and we're not discussing how they came out. I argued a sanctions motion yesterday in New York County Supreme. Also, I found that quite a lot of my practice is doing expert reports, I'm working on one today, an expert testimony. There are many cases, not many but there are

some, where in foreign jurisdictions, they need experts in New York law, and sometimes there are domestic cases where they want someone who has some credentials as a New York lawyer.

AK: So you've been traveling out of the country?

RSS: I've done some, yeah. I testified in Australia and in Canada.

AK: Was there one where the opposing expert was Judge Levine?

RSS: Yes, that was one in Australia, yes, yes. We did what they called hot tub testimony, which means that we were both in the witness stand at the same time.

AK: Really?

RSS: Yeah. They do that in the commonwealth.

[03:26:50]

AK: I've never heard of that. And how does that work, they ask the question and then you both respond?

RSS: They ask the question and both can respond, one can comment on the other's response. If the people are civilized, which Levine and I were, it works fine.

AK: Right.

RSS: If you get a hyper aggressive animal, I'm not quite sure how it would work.

AK: Right, right. The two of you both have fairly calm dispositions for a situation like that.

RSS: Yeah, yeah, although neither one is a shrinking violet, but we're both fairly calm.

AK: That's right.

RSS: Just to fully describe my practice, in case the audience is looking for lawyers, I've done a certain amount of mediation and a little arbitration type work, so I do everything.

AK: Good, good. Okay, so let's talk a little bit about something apart from the law. Let's talk about the best part of you; your children and your wife. One of your children, your daughter, is a lawyer.

RSS: Right.

AK: Ben is the editor-in-chief of BuzzFeed and your other son is a professor of classics?

RSS: Well, he's not at the moment, because he's been a visiting assistant professor of classics at a series of places. It's a very rough business. As he knew perfectly well when he got into it, it isn't the high road to fame and fortune. I think he has decided that he's had enough, at least for now, of being in a different city every year, being in whatever city made him a job offer. I think there were some possible opportunities in, I forget if it was Nebraska or Oregon, and Ohio, and God knows where, and he decided he's going to move back to Philadelphia and reconsider. So, I'll let you know what his next job opportunity is.

[03:29:03]

AK: And do you think Ben's choice to go into writing, journalism, stems from at all, from his relationship with his grandfather, (inaudible)?

RSS: It looks like it might, yeah, certainly I'm sure. They were very close. I remember my father once said to me, "Ben is my bid for immortality."

AK: Just passed right over you, huh?

RSS: Yeah, yeah.

AK: And was Rosemary always interested in the law?

RSS: Yes.

AK: Did you want all of them to be lawyers?

RSS: No, no, I'm perfectly happy with them. Emlen was always -- Emlen is wonderful, very bright, but also a wonderful teacher and I imagine that he'll wind up teaching somebody somewhere, even if he does not decide he's going to make a career of being a university level classics professor, which may just not be a possible avenue. He's very, very good with kids, and he's very good at teaching people and communicating.

AK: And your wife is still working now, right?

RSS: Yes. Funny, she and I changed careers about the same time. Well, I guess that's not quite right. She worked as a freelance writer from the time our first kid was born, for about 20 years and had some success, sold some pieces. Obviously, it was part-time, she was taking care of the kids. She got frustrated, I guess, one too many ideas got rejected or a book she thought she was going to publish didn't get published and she decided to go to Ed school, when she was I guess in her late forties, and got a degree in teaching reading. It worked, she's been very happy doing that. She taught at a couple of schools for a few years. She taught at the Chapin School. What did happen simultaneously was when I set up my own practice, she set up her own practice. So she now tutors kids who are having reading problems, in our home. So, I get up in the morning, and I trip over a kid sometimes.

[03:31:48]

AK: I'm sure that's very rewarding.

RSS: No, I think she loves it.

AK: That's great, that's great. One other thing, on a personal note, that I just wanted to ask you about. Rosemary talked about the fact that both of your parents were atheists and in fact, she quoted you as saying that your mother had -- and this isn't necessarily being atheist, but that your mother had "as little religion as anyone I have ever seen." You sort of moved completely away from that.

RSS: Yes.

AK: Actually now, are you still -- are you teaching?

RSS: I'm not teaching Sunday school because the Sunday school closed, to my frustration, but I still attend church. I consider myself a normal Protestant Christian. I guess you've got to believe in something and my parents believed, I think they basically believed in the cause of the worker or something, which was something you could believe in then. I've found myself comfortable as a believing Christian and oddly, my younger sister is an episcopal priest.

AK: Huh.

RSS: Yeah. Our father, who we think is in heaven, although he didn't believe it existed, but we think he's up in heaven trying to figure this out.

AK: One other thing that I had skipped over earlier, I'm just curious. You also, both I think you took a leave from Paul Weiss for a year and you, at other times taught a course. You taught at Columbia and then you taught where? At Cardozo?

RSS: Mm-hmm.

AK: You're not teaching any more though.

[03:34:00]

RSS: No. Once again, I'd do it if they let me. The class I was co-teaching at Cardozo just isn't offered any more. But I did, I taught full-time for a year at Columbia. I then taught part-time for another nine years, just as an adjunct, teaching one class. It was a lot of work, but it was fun. I just like teaching. I like being with younger people. People sit and listen to you, that's almost like being a judge, it's great, they treat you with respect. For a few years, I taught, really taught, the state constitutional law course at Cardozo. The first year I did it, it almost killed me, because teaching something you never taught before is a really hard job, and to combine that job with the job of also being a judge on the Court of Appeals, that was a difficult semester. It was also very rewarding and then the next few years, I did it again and it was still hard work, but it's not as hard as the first time.

AK: Right.

RSS: I eventually sort of got burnt out of that and said, "Well, what if I become a co-teacher?" which is the easiest gig in the world, you know somebody else does the work and you show up. That was fun and I'd happily do that again if somebody wants me to.

AK: Okay. I think that's pretty much all I have to say, except for first of all, I want to say you were way too kind in talking about me. I'm so delighted that I had this opportunity. I have rarely met anyone in my life who I thought had as quick and brilliant a mind as you do who, despite their public acclaim, has kept their

humility and who has an unbelievable degree of sensitivity and a wonderful sense of humor, often based in self-deprecation. I just think the world of you, Judge.

RSS: Well, thank you.

[03:36:23]

AK: And again, I'm so delighted that you asked me to do this.

RSS: I'm delighted that you were -- obviously, I love hearing you say nice things about me, but I really appreciate you taking all this time to do this and I've enjoyed it. To say it again, it was a great joy to work with you all those years. You were the heart and soul of that court.

AK: Thank you, the joy was mutual.

RSS: Yeah, it was a lot of fun.

AK: Is there anything you'd like to say that we haven't touched on or anything else that you want to ramble on endlessly about?

RSS: As you see, I can ramble endlessly on anything you want. It's been a great career, I'm ready to do it again.

AK: Good. Anything else?

RSS: No, that's it.

AK: Okay.

RSS: Okay, thanks.

AK: Great, thank you.

[End of Audio File]