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## **ORAL HISTORY PROGRAM**

**ROBERT S. DEAN, ESQ., and LYNN W.L. FAHEY, ESQ.**



*Found on exterior entrance to New York Court of Appeals*

DEAN AND FAHEY

**HISTORICAL SOCIETY OF THE NEW YORK COURTS**

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**ORAL HISTORY**

**Subject: Robert S. Dean & Lynn W.L. Fahey**

**An Interview Conducted by: David L. Goodwin**

**Date of Interview: July 31, 2024**

**Location of interview: Greenberg Traurig, LLP  
One Vanderbilt Ave  
New York, NY 10017**

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**HISTORICAL SOCIETY *of the* NEW YORK COURTS**

**Oral History Project**

**INTERVIEWEE:** Robert S. Dean and Lynn W.L. Fahey

**INTERVIEWER:** David L. Goodwin

**DATE:** July 31, 2024

DLG: Good morning, everyone. I'm David L. Goodwin, supervisory staff attorney at the United States Court of Appeals for the Second Circuit and Trustee of the Historical Society of the New York Courts.

It's July 31st, 2024, and we're recording at the lovely new offices of Greenberg Traurig at One Vanderbilt Ave. in Manhattan. Countless thanks to Judge Carmen Ciparick, Chair Emeritus of the Historical Society's board, for graciously hosting us today at her law firm.

And we're here for the Historical Society's oral history recording of Robert S. Dean and Lynn W.L. Fahey, a rare oral history twofer, but absolutely warranted for two titans of the indigent criminal defense bar.

It's been my privilege to know Lynn since around 2017, when she took a chance on me and hired me as a staff attorney at Appellate Advocates, which she founded. And Bob, I began meeting you off and on around that time as well, and was of course thrilled to learn that we all had Judge Rosenblatt in common. Of course, it was his idea to do this recording today.

So, with that, I'd love to start at the very beginning. Can you tell me where you guys are from—your origin story, as it were?

RD: Well, I was brought up in the suburbs of New York City. I live in New York City now, but I didn't move to New York City until 1974 when I started law school at

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NYU. And I didn't come from an upper middle-class background. I was the first person in my extended family to go to law school or even become a professional. So, my parents were very, very encouraging in terms of education, but did not push me into any particular profession. And we can talk about why I chose to go to law school later. I think that's a question down the line.

[2:10]

DLG: I must follow up and ask, which suburb of New York City?

RD: Originally Westbury, which was a definite middle-class suburb, and then my parents moved to Scarsdale because of the school system. So that's where I spent junior high and high school.

DLG: And Lynn?

LF: I grew up in New Jersey, suburban New Jersey, mostly a town called Glen Rock, which was a very lovely suburban town, commuter town. And I was the first in my family to go to law school. Definitely.

DLG: What made both of you think you wanted to be a lawyer? What pushed you in that direction? Was it something that happened in college? Was it something that happened before that?

LF: Well, for me, I think it was -- I took a political science course in college and the whole course was reading case law about different powers of Congress and the president and whatnot. But it was all, all case law. And I loved that. And I think that's what started me interested in the law. And also, it seemed like a good fit because it's so analytical. And as a kid, I was a math whiz. Now I can't add two and two, but I was wonderful at math. I always thought I would end up a math teacher. Of course, now our older son is a math teacher, but I never became a math teacher. But I really

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sort of fell in love with the idea of the law. And I thought it suited me well. And that was that.

DLG: Were there teachers in your family? Was that why you thought you were heading in that direction?

[3:58]

LF: No, no, my father was captain of a ship. My mother had been a private secretary to a bank vice president, one of the big New York City banks before she got married and had me and retired, sort of became a homemaker.

DLG: I'm sorry, that begs for follow up. Captain of a ship? Can you say a little bit more about that?

LF: Well, my father was Norwegian. He was lucky enough to be out at sea when Norway was invaded and he and the ship, the crew went to the nearest Allied port and volunteered to work for the Allies. And he sailed convoy duty back and forth across the Atlantic during the rest of the war and met my mother, who lived in New Jersey. And her grandmother was Norwegian, had come from Norway many years before. And she, the church ladies, the Lutheran Church ladies that she belonged to, knitted socks and gloves and whatnot for the Norwegian sailors. And my father got a pair of her socks, and he wrote to thank. And they ended up meeting and ended up getting married. And then my father became an American citizen. And then he sailed on American ships after that.

DLG: More people should be brought together by socks. It's a story you don't hear nearly often enough. And just to follow up quickly, college was where again?

LF: Vassar, which was wonderful. I mean, I had gone to a very nice, very good public high school. But being a girl who was smart and shy was not great. And Vassar, which was all women at the time, was my first experience of really being valued if

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you were female and smart. So that was just a breath of fresh air for me. And I loved Vassar. That was really a wonderful time for me.

[6:10]

DLG: Excellent, excellent. And Bob, where was college for you?

RD: It was Northwestern, which was, you know, very good academically and was a beautiful campus. I really enjoyed my time there. But when I went in, I was pre-med. I was pre-med for one semester until I got a C in inorganic chemistry; mostly people were defeated when it came to organic chemistry. I never even got that far. Then I became a history major, and I really didn't -- law school wasn't the first thing on my mind. And then I read in a magazine a profile of somebody who worked at the embassy in Paris who went to NYU Law School and then went to the Johns Hopkins School of Advanced International Studies in Bologna, Italy. And that sounded really good. So that's -- I thought maybe I'll do that.

DLG: Did you take time off before college and law school, or did you go right through?

RD: Well, after I graduated college, I did a year at the Johns Hopkins School of Advanced International Studies in Bologna, Italy. It was a two-year program. But, although I loved living in Italy and I enjoyed my time there and the studies were fine, but it wasn't -- I understood I wasn't cut out to be a diplomat. So, then I just decided to apply to law school. I completed my year in Italy. I got my *diplome* and then I went to NYU. I really wanted to live in New York City at that point, and NYU was a good school and I got in.

[8:07]

DLG: So, did you contemplate going back to Chicago at any point? Or was four years there enough?

RD: You mean Northwestern?

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DLG: Yeah. Well, the city of Chicago more broadly.

RD: Yeah. Actually, Northwestern's in Evanston, which is a beautiful suburb just north of Chicago. Actually, I only went to college for three years because in high school I took a lot of Advanced Placement courses, which is very common now. But in those days, it was not very common to take, you know, three such courses. And I did well on the exams. So, when I got to college and I met with my advisor, he says, "oh, you have one year's worth of college credits, so you're going to graduate in three years." It was news to me, but my father was very happy because they were paying for my education.

DLG: So, they saw one year of tuition payment fly out.

RD: Actually, the first semester was all my bar mitzvah money gone. After that, my parents paid for undergrad. They paid for graduate school, and they paid for law school. I had no debt.

DLG: Lynn, did you also have a time in between college and law school, or did you go straight to law school?

LF: No, I went straight to law school.

DLG: So, what animated that decision? Why did you decide, "let's go right through"?

LF: Well, I kind of thought that if I didn't, I wouldn't end up getting my act together and going to law school. So I was, you know, sort of in the groove of studying and being a student. And it seemed a good idea to just go straight on.

DLG: So, I think you both mentioned that you were the first in your families to go to law school. How did your families react? Were they supportive?

[10:06]

LF: Mine, not really. You know, this was the early '60s. My family was very traditional and I think my mother, you know, my father was out to sea all the time. So, it was



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really my mother making decisions. And my mother's thinking was, you know, I should maybe teach school for a couple of years and then I should get married and have children. And that was the daughter's purpose in life.

DLG: That was the plan.

LF: And in fairness to her, I loved being a student. I loved school. Every school I went, I just loved it. And I think she had a somewhat reasonable fear that I could be a perpetual student and never actually earn a living. So, I think that kind of figured in. So, you know, I mean, eventually she adjusted to the idea that I was a lawyer. Although whenever she came to my office, no matter where it was, she was very disappointed. It didn't have like, you know, wood paneled walls. And it wasn't what she pictured as a lawyer's office should look like. It was a public interest lawyer's office. And you know, that didn't fit the mold. But you know, they became supportive, and my father ended up being very supportive, especially when I started Appellate Advocates, because, you know, he was used to commanding people and being responsible for a whole bunch of people. And, you know, he understood all of that and the ambition that goes with it. And, you know, and so he was kind of my biggest -- aside from Bob -- my biggest supporter in that venture. But early on, it was not what my parents envisioned for me.

DLG: And steering a not-for-profit, not dissimilar to steering a ship, very similar skill set. So, we heard why NYU, why Cornell for you?

[12:00]

LF: Cornell was wonderful to me. I went there for free.

DLG: Very good reason.

LF: Right. And since my parents, or my mother anyway, didn't want me to go on to school after college, you know, their philosophy was always, they would pay for

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college wherever I wanted to go. But after that I was on my own, so I had to find a place where I could actually, you know, go. And Cornell was -- they were wonderful to me. I mean, I went there tuition free and they provided me with a job, they gave me room and board, and they were wonderful to me. I mean, and that made all the difference because I think, but for that, I don't know that I ever would have gone to law school. I mean, it was not in my family's DNA to go into debt for anything. And people didn't go into debt for school in those days like they do today. So, I owe Cornell a tremendous debt.

DLG: And I know we touched upon this earlier, but this is the '60s. You know, women are not a huge percentage of law schools at the time. What was that like being at Cornell? Was it a supportive environment? Was it kind of like -- the school itself was very supportive, you said, the atmosphere.

LF: Well, if I would say it was mixed in my class. My class was about 130-150 students. Three of them were women.

DLG: I think the statistic is 5%.

LF: There was one Black man. There was one Hispanic man. There were three women, and otherwise it was all white men. Many of whom -- this was the Vietnam era -- so many of the students had been in the Armed Services and were going to law school on the GI Bill.

In terms of my fellow students, by and large they were fine. They were welcoming, they were pleasant. They were -- It was absolutely fine, but there was something called the Law Wives Club, which is the wives of the male law students.

[14:03]

And although some wives of male law students became very good friends of mine while I was in law school, in general it was a really hostile group and I don't know

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what they were afraid of -- we would take their husbands' jobs; we would seduce their husbands -- I don't know what they were, but they really, really hated the three of us female law students. So that was tough.

The school was very supportive. The professors by and large were very supportive, although they kind of didn't know what to do with the three of us. There was one professor, probably my favorite professor, who taught torts and evidence. I don't think he ever asked one of the women a question in class. I think he was being like overly chivalrous, maybe. The professor who taught criminal law only called on the women when it was a rape case under discussion and really put them on the spot. That was really disheartening. And there was actually a man who taught family law, and he actually asked at some point in class for a show of hands of how many students thought that women should be allowed to be judges.

DLG: Do I want to know with the show of hands?

LF: Oh, I don't know. I don't remember. But the question was like, "oh, really?" So, it was a very mixed bag. But on the whole, I loved law school. I really enjoyed law school, and as I say, Cornell was wonderful to me.

DLG: So, you're both in law school. Did you know right from the start that you were going to go into indigent criminal defense, or did that notion coalesce and take hold during your time in law school?

LF: I did not picture criminal defense particularly, but I knew I wanted to deal with people.

[16:06]

So criminal law, family law, torts, something that dealt with individuals rather than corporations or businesses, although I did love tax law. That was my math

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background, but I knew I wanted to do that. But criminal law in particular, not necessarily.

DLG: Similar experience for you?

RD: Yeah, I had no plans of becoming a criminal lawyer at all. I still had that idea of, you know, becoming an international lawyer. That was gone pretty quickly. I'd say the first year of law school was pretty grueling. But, you know, the first year of law school was really the only crucial year of law school. The second year was sort of a repetition. And the third year is basically a waste of time, I thought anyway. But at the beginning of my second year, I saw a notice up on the job board that the Prisoners' Rights Project of The Legal Aid Society wanted a law student intern to deal with their clients who were prisoners, and that sounded interesting to me. I was a do-gooder, and I interviewed with one of the attorneys there, Ellen Winner, who's still a friend of mine. And so, they hired me. The job was, it was explained to me, that the Prisoners' Rights Project had about nine lawyers, and they were all very expert, you know, courtroom litigators, and they just did class actions for prisoners. They didn't represent individual prisoners in lawsuits or anything like that. It was all 1983 actions, but the prisoners were their clients.

[18:03]

They needed their cooperation. They needed them as witnesses. They needed them to be, you know, the class, and the prisoners all had problems, you know, in prison -- medical problems or problems with, you know, being in punitive segregation too long, somebody losing their watch while they were being detained, all sorts of stuff. And they would write in, and the lawyers, you know, the federal litigators, they couldn't handle that. So that's what I did.

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I was in an office about 1/3 of the size of this room. And I had somebody working with me, Mike Ciaffa, who later on became a judge in Nassau County. But, the office had the coffee machine, so all the lawyers would come in once in a while, and they'd drink coffee and they'd talk. And the Prisoners' Rights Project was actually a project within the Criminal Appeals Bureau of The Legal Aid Society. So, I was surrounded by lawyers from the Criminal Appeals Bureau that I interacted with all the time because a lot of the people who wrote in were their clients and they'd probably be complaining about that lawyer. They would write to me, you know, in Spanish, which I knew. And I -- they weren't assigned an attorney yet specifically. So, I'd go see the Managing Attorney who was Myra Wallach, and I'd say, you know, "he's been writing you in Spanish and you know, he's receiving no answer." "He should learn English...." Anyway, so I spoke to the attorneys there a lot. So, I got the idea I really wanted to work for The Legal Aid Society, so that took root very quickly.

[20:06]

But I wanted to be a trial lawyer. Didn't have anything against appeals, but I really wanted to be a trial lawyer. So, for the third year, I got into the Criminal Law Clinic at NYU, and it was basically my entire third -- it was half the credits -- but really I spent almost all my time doing, you know, working in the Clinic. I represented clients who were offshoots of The Legal Aid Society. That was our intake. And you know, I interacted with a lot of the Legal Aid trial lawyers, and I was surrounded by them all the time. And I really liked the trial work.

It was common knowledge that The Legal Aid Society, Criminal Defense Division, would hire all of the lawyers from the Criminal Law Clinic, you know, when they graduated. So, when the time came, I applied to the Criminal Defense Division. I also applied to the Criminal Appeals Bureau because they had a separate hiring process.

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But that particular year, my clinical professors were feuding with The Legal Aid Society, Criminal Defense Division management because there was a question of -- there was going to be a strike by the attorneys and would we continue to, you know, appear in court if the Legal Aid attorneys went on strike. And of course, you know, the do-gooders that we were, we all agreed collectively, all 40 of us that we would not. We would honor the picket line. Of course, there was no strike in the end, but they told our professors that they weren't going to hire anybody to be with the Criminal Defense Division.

[22:07]

So, I did not get hired by the Criminal Defense Division, but the Criminal Appeals Bureau knew me because I was around them all the time. And in fact, I not only worked Prisoners' Rights the second year of law school, but the third year I continued on. And then in the third year, they paid me. So, I earned like \$40 a week, which -- heaven! So, they hired me, so, that's how I ended up in the Appeals Bureau. And my goal was always, I do three years in Appeals -- that was my commitment -- and then I transfer to Trials. I understood it was easier to transfer from Appeals to Trials than the other way around. But Appeals was really a good fit for me, so I stayed there 20 years.

DLG: And Lynn, so you're up in Cornell. I imagine the ease with which you work for The Legal Aid Society, it's a little bit more difficult. What was your path to joining The Legal Aid Society?

LF: Well, after law school -- I had worked in the Legal Aid Clinic in law school, and in fact did that in the summer, which involved -- there had been recent reforms. This is like 1968-69. There had been recent reforms to the divorce law. So, we had all these poor women who had been like -- husbands were long gone for 20 years, but they

were still technically married and whatever. And I spent the summer mostly going into court with these divorce clients trying to get these women divorces, which was actually great fun. And I got to know the judges in Ithaca who were just lovely to me. And it was, that was really nice.

The woman who oversaw the Legal Aid Clinic was Betty Friedlander, who had a private practice in Waverly, NY, this little bitty town on the Southern Tier.

[24:08]

And so, after law school, she hired me. So, I went to work for her. It was just the two of us in that practice. Lots of criminal law, lots of negligence and lots of family law -- obviously, two women in practice. And it was a wonderful experience. She was fabulous. She had a feeling for the law that's just like a gut feeling of like what's wrong with something that was very impressive. So where we were, Waverly -- the Southern Tier is like the northern end of Appalachia. So, our clients were by and large poor. They ranged from, you know, solid working-class people, salt of the earth sort of people to really desperately poor. And, you know, I liked them, and the clients I liked best by far were the criminal clients. They were appreciative of anything you did for them. Whereas, you know, the family law clients were, you know, they wanted to get the spouse and you know, and nothing was good enough to satisfy them. So, I really, I really loved the criminal clients, and some of them were absolutely the most wonderful people.

When I was up there, there was a terrible flood in that hit particularly Elmira and Corning, where we did a lot of work. And we had a client who was like the local hero. He tied a rope around himself and around a tree, and he swam out into these raging waters and rescued people. It's phenomenal. We had other people, clients, who

worked on flood relief afterward for weeks, day after day, all day, I mean, devoted themselves to that. I mean, these were just -- they were criminals.

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They were guilty of breaking the law in some way, but they were really wonderful people. So, I really liked the criminal clients.

But you know, it was lonely living up in upstate New York. My family were all down in New Jersey. So, I really decided I wanted to move back. My parents were getting older, and my relatives were all down here. And Betty Friedlander, who I worked for, said to me, "you should talk to Will Hellerstein. You would love working for Will Hellerstein." She said, "He'll flirt with you, don't let that put you -- " He never flirted with me, but she said, "you like to write, you're a great writer." I was not a great writer at that point. I was clear, but I was not -- she just didn't like to write, so she thought I was a great writer. And she said, "and you really like the criminal stuff, and you'll be happy there."

So, I talked to Will. I went down, I got -- was interviewed. He hired me, and that was it. And then I was at the Criminal Appeals Bureau for 21 1/2 years, I think, after that.

DLG: And so you have you been doing -- I think you and I talked in the preparation for this that you had done a few appeals already in your prior office --

LF: Right.

DLG: -- a natural transition. And do you remember anything, by the way, about practicing in appellate work that stands out from back before you jumped to New York City?

LF: No, not particularly. I mean, I argued a case in the Appellate Division, Third Department. I remember it was a very pleasant experience. And it was a beautiful new courtroom at that point with windows that looked like portholes. That's my most vivid recollection. And I worked on some other cases.



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There was one case that was very dear to my heart. I second-seated the trial, and then I did the Appellate Division brief. At that point I left and went to Legal Aid, and the case ended up going to the Court of Appeals and won.

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And that was a case in which -- it stands for the proposition that in a self-defense case, if the defendant knows, and personally knows and has witnessed the violent acts of the deceased, that that can come in on their defense to show the reasonableness of their fear. So that was a big case. And it was what -- I mean, I got to know the defendant's family very well. His mother cooked me spaghetti all the time. I mean, it was really a heart wrenching thing because he was convicted and, you know, but eventually won on appeal. So that I remembered, and I did some other stuff. I did basically all the writing that the office did, whether it was, you know, some interrogatories in some negligence suit or whatever it was. I mean, I did the writing because Betty really didn't like to write, and she thought I was good at it. Not that I really was.

DLG: I think that is a wonderful segue to, you know, the Criminal Appeals Bureau writ large.

And Lynn, I know you arrived there earlier; what are your memories of your first years of practice there? Notable cases... how things are... what practicing law was like in the in the '70s?

LF: Well, I don't think it wasn't that much different from what it is now, although there are some things that have definitely changed. Now, we routinely get pre-sentence reports. In those days, you had to go to the county and get the pre-sentence report, and you were monitored as you sat there and made notes from it.

RD: You weren't allowed to get a copy.

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LF: You couldn't copy it, whatever. So that that changed, that was a big change because that was really a pain in the neck.

[30:01]

In those days, a lot of cases were affirmed without opinion -- ANOs -- and that was not a good thing. I mean, very hard to explain to a client, you know, they didn't even care enough about your case to say why they were affirming, you know. And that practice has gone by the wayside in the New York City courts, in any event.

And of course, in those days, the benches were all male. It was a while before there were women judges, and I'm not sure what difference that made in terms of decisions or whatever. It's not like women were more liberal or more conservative or more interested or disinterested. But psychologically, it was really great to see women judges. And so those, those are all changes for the better as time went by.

One change that was really a bad change I think was that waivers of the right to appeal became prevalent. So now in virtually every plea case, in the New York City counties anyway, there's a waiver of the right to appeal, which means that the Appellate Division, if it's a valid waiver, can't look at a search and seizure issue, can't look at an excessive sentence issue. And having the appellate courts review those things serves a really important purpose to make the law more equitable. So, I think that's a real negative that's happened over time.

So, you know, some things are much better now, some things are worse, but the experience of arguing, I don't think that's really changed much.

[32:00]

DLG: And were you practicing when you first started in both the First and Second Departments?

LF: Yes, yes.

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DLG: And you mentioned earlier when there were no women on the bench, obviously, and I think yesterday when Justice Renwick spoke to us, the Second Circuit, she mentioned the First Department's first female justice. It was I think in 1984, so 100 years after the First Department became an entity. Was the Criminal Appeals Bureau at that point mostly male or was there some gender parity there?

LF: No, I'd say it was roughly half and half. And the same was true of the DA's offices that we dealt with. Why these areas attracted women in higher percentages than other areas of the law, I'm not sure. But I suspect part of it is the same reason it attracted me, which was I wanted to deal with people and real-life situations and know that someone had a real stake in what I was doing rather than a big nameless, faceless corporation. So, I suspect that's what draws a lot of other women into criminal appellate work.

DLG: Are there specific judges or cases from the first years of practice that really stand out in your mind? People you really enjoy practicing in front of or really notable cases like the one you mentioned earlier, Lynn, that all these years later still stand out as a really great early experiences?

LF: Well, I represented a wonderful, wonderful man, Joseph Gruttola, who was the man who made Bruce Wright famous. So, you know, "Cut 'Em Loose Bruce," because he gave him very low bail on Christmas Eve. I am absolutely convinced that he was not the culprit and that the police framed him -- absolutely convinced, and I remain convinced, but I could not manage to get him anywhere.

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Although the Appellate Division, First Department, issued this decision that said, you know, everything was fine, but in case there had been a miscarriage of justice, the parole board should consider releasing him right away, which then they did. So, they

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basically reduced his sentence in a sense, but let the conviction stand and that was a killer, that case.

It's always hard to represent someone that you think is innocent. It's wonderful if you can get them relief -- that's like the highlight of your career -- but if you can't, that's really a killer. So that's probably what most stands out for me from the early years.

DLG: That always struck me as being very true as well. People loved asking public defenders, "what's it like to represent guilty people? Isn't it tough?" That is never the toughest thing.

LF: No, no, no.

DLG: Bob, were there people you enjoy particularly practicing in front of, or notable early cases from early on in your career?

RD: Well, arguing in the Appellate Division -- I did both the First and the Second Department -- they were pretty rough. My first argument in the Second Department was of a case that I had been handed because every attorney who handled it in the Criminal Appeals Bureau left before they briefed it, because it was such a -- it was really a dog of a case. And it was given to me because I'd run through my original cases very expeditiously. So, "yeah, give this to Bob." And I briefed it right away, of course. And as I was arguing it, one of the judges says to me, "Mr. Dean, why did it take so long for this case to get up on appeal?"

[36:01]

And I said, "I don't know. They gave me the case, and I briefed it." So, the judge leaned over to the PJ, and said, "he's with The Legal Aid Society," "OK." They were tremendously backlogged back in those days.

And in the First Department, my argument -- my first argument -- so these days, of course, you always introduce yourself to the Court, "my name is so-and-so,"

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whatever. But I didn't do that -- I just went right into it. And that's because during orientation, Carol Berkman, who was the Assistant Attorney in Charge, later became a judge -- she says, "you don't have to introduce yourself. Your name is on the brief, so why do you have to introduce yourself?" So Judge Lupiano -- he was the PJ -- said, "would you like to introduce yourself?" And I was really confused, and I said, "oh, it's on the upper right-hand corner of my brief, Robert Dean." Then I tack into my argument again. And Lupiano says, "that doesn't mean you can't tell us, Counsellor." The courtroom broke up. And then -- so I continued my argument, and then Judge Lupiano got up and he left, and I thought, "well, this is good." Later I learned that he did that often because he had a weak bladder. But it was a really great introduction to the Appellate Division, First Department.

So those were my first two arguments, which obviously I remember.

LF: I should tell you about my first time I went to the Court of Appeals. It was a case that I had no chance. This was -- I was working for Betty Friedlander still, and so I went to the Court of Appeals and I didn't think I was overly nervous, but I went to the ladies room and I sat down.

[38:04]

I got up and my knee locked so, and I couldn't walk -- I couldn't straighten my leg. I hobbled into the courtroom, and as soon as the argument was over, I could walk just fine. So that was my first Court of Appeals argument.

DLG: And that was before you even came back -- you came down to New York City. That must have been just very few years into your career.

LF: Oh, yeah, yeah, yeah, it was early on.

DLG: But did you have any cases from your first few years at The Legal Aid Society that went up to the Court of Appeals that you recall?

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LF: Oh, I had a lot. I don't remember them offhand, but yeah, I had a lot of cases. They granted leave fairly liberally in those days, and they would have leave conferences in person -- leave conferences. And so that was really fun -- leave conferences -- that was one of my favorite parts of the job, and I went to the Court of Appeals, I'd say at least a couple times a year for the first several years with the -- you know, one case or another, you know, some successful, some not. It was fun to argue there. It was nice. It was a very pleasant court to argue in front of.

DLG: Do you have any particular recollections of, much as Bob did with that wonderful introduction, the First Department? Any interesting personalities?

LF: No, you know, I basically liked the vast majority of the judges I've appeared in front of. I have favorites. Early on, Judge Breitel was my favorite, Judge Titone, I loved Judge Rosenblatt. I love -- notice that Titone and Rosenblatt both went from the Second Department to the Court of Appeals -- it's a long time since someone's been taken from the Second Department to the Court of Appeals now, I don't know what gives with that, but that's a shame because I think the Second Department has a real good gut sense of fairness and giving you your day in court and whatever.

[40:05]

So, I would like to see more people go from the Second Department up. I loved Judge Mangano. He was very good too. I really enjoyed arguing in front of him. There was a lot of like, you know, give and take, that had an edge to it, but it was it was really fun. And of course, once there were women judges, Judge Ciparick, Judge Kaye, Judge Rivera today -- I mean, they're wonderful judges and a pleasure to appear in front of. I can't say I remember anyone and think, "oh, they're terrible." Although there were two judges in the Second Department who used to -- if they were both on the case

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together, it's difficult, I'm not going to get anywhere with this case. But, you know, in general, I like the judges I appeared in front of.

DLG: And Lynn, I know you mentioned this *Willie Miller* case. Does that fall correctly in here in terms of chronology?

LF: Well, that's the one I talked about with the self-defense claim. Yeah, that was that.

DLG: Did you notice a change as the '70s became the '80s and the kind of atmosphere around criminal practice altered a bit with the war on drugs and the crack epidemic and anything else? Was practicing law in New York City different at that point or did it really not change very much?

LF: I don't think it changed very much. It was a sad time. It was a very busy time. But what we did I don't think was very different. I mean, you know, the courts go in trends. So, you have, you know, sort of a more liberal time and the more conservative time and then more liberal time. So, you know, there's something of a pendulum, but I don't like -- I can't say things were very different in that era from what we do in other areas.

[42:00]

DLG: Well, speaking of the 1980s, Bob, less than a decade into your career, you achieve the -- what I still think is just the frankly mind-boggling -- feat of arguing in front of the U.S. Supreme Court as a Legal Aid Society attorney in *Cruz v. New York*. Can you talk a little bit about that experience?

RD: OK, so sure. I got a *cert* because there was actually a split in the circuits, although the split was hidden. I was very much aware of it because I argued that case in the Appellate Division and I lost, and I argued the case in the Court of Appeals and I lost, although Judge Kaye dissented. And when I actually won in the Supreme Court, I heard she was very happy -- "I had dissented." But it concerned the *Bruton* rule and

an application of it called the interlocking confessions exception to the *Bruton* rule, which no longer exists because of my case.

DLG: So what -- what is that?

RD: OK, so the *Bruton* rule is where if you're on trial with your codefendant. -- So, let's call the defendant, "my guy" and the codefendant, the "codefendant." -- So, the *Bruton* rule is, you know, if the codefendant doesn't take the stand, but the codefendant's confession comes in and implicates the defendant -- "my guy" -- then what would happen would be the judge would say, "OK, the codefendant confessed but, you know, 'my guy' is the real perpetrator. But that's not admissible against the defendant, only against the codefendant." And in *Bruton*, they said "no, you know, that violates the Confrontation Clause" because no jury is going to be able to obey that instruction. So usually there was either a severance or the codefendant's confession would be redacted so not make any mention of the defendant at all.

[44:00]

So, the interlocking confessions exception to the *Bruton* rule was where both defendants confessed, and they basically confessed to the same set of circumstances, although usually they named the other person as the prime actor and the prosecutors love to try those defendants together for obvious reasons. And in this case, *Parker v. Randolph*, that was the Supreme Court case which started this law. Justice Powell was -- I think he was sick at that time. So, there were only eight judges, and it was a case where both defendants confessed and named each other. And the question was, did this violate the *Bruton* rule because the confessions factually interlocked? I mean, they were pointing at each other, but otherwise they were interlocked. And four judges -- we called them the plurality -- they decided that because the confessions interlocked, there really was no Confrontation Clause violation because we all knew,



you know, they were both agreed on what happened. Maybe as to who the real perpetrator was, they disagreed, but as to the underlying events, pretty much the same. So they interlocked, so no Confrontation Clause violation.

And three judges said, “that’s crazy, no way. This is a Confrontation Clause violation, not harmless error, nothing. You know, we would vote to reverse.” And Justice Blackmun, he voted -- he concurred with the four judges who were, you know, in the plurality. And he says, you know, “this does violate the Confrontation Clause, but I’m going to vote with those guys because it was really harmless under the circumstances of this case. I mean, they both confessed to the same thing.”

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“So, it was harmless.” So, what happened after that is in all these cases in the circuits and in the states too, all the convictions were affirmed based upon the interlocking confessions exception. But it was never clear whether this was Justice Blackmun’s view, which is, you know, it violates the Confrontation Clause, but in most cases, it’s going to be harmless and it was harmless here, or the plurality decision, which didn’t violate the Confrontation Clause at all, don’t have to get to harmless error, right. So, there were actually -- although there was this interlocking confessions exception to the *Bruton* rule, there were only four Supreme Court judges who bought into that. But the circuits and the states, like I said, they all affirm the convictions. But some said it was the Blackmun reasoning and some said it was the plurality reasoning, but they always affirm.

So, in my case what happened was my guy, his confession was made months after the fact orally and very briefly to a sort of a suspicious witness, but that was it -- that was my guy’s confession, a fairly brief oral statement to a fairly dicey witness. Whereas the codefendant confessed on videotape to the police and, you know, it was like an

hour long and my guy's confession was like five seconds. And so qualitatively, they were different, you know, in terms of interlocking. So, I had two arguments, you know, and New York had its own interlocking.

[48:03]

They adopted this *Parker v. Randolph* thing and adopted the plurality decision. But I argued first of all that Justice Blackmun was right, and this is really a harmless error situation. And how could it be harmless? I mean, it was an hour-long videotaped confession. But secondarily -- and I know that argument was going to go nowhere because the New York law was against me on that, but I argued they didn't interlock. Confessions, if they might factually interlock, but if they don't interlock in terms of like reliability, then they don't really interlock. And so that was my argument in the state court. When I lost in the state court, I said, "OK, let's go back to this split." What's the law -- Justice Blackmun's concurrence, which is, you know, violates the Confrontation Clause, but it's going to be harmless error most of the time, or it doesn't violate the Confrontation Clause at all -- no problem, so that was the split, and that's why I got *cert*.

So, when I argued the case -- and Lynn was there, as were my mother and father and my mother's cousin Florence, and all of my office also came down to watch the argument -- I knew there were three judges who were in my favor because they had dissented in *Parker v. Randolph*. So, there were three judges and four judges were definitely against me because they had they were in the plurality in *Parker v. Randolph*.

[50:02]

Justice Blackmun was still there, so he was like a fourth vote for me, right. So four, four. So, the question was could I get a fifth vote? And that fifth judge -- the new

judge -- was Scalia, who was at that -- he had been on the bench only very briefly, but was known to be pretty much pro-prosecution. So, I don't know where the fifth vote was going to come from. Maybe one of the other judges would be, you know, convinced by my "they don't interlock." That was really my main argument. And then they asked me, you know, like, "well what's the rule?" And I said, "well, it's Justice Blackmun's rule." And Justice Blackmun was looking at me like I was his son -- I mean, he didn't say anything, but I could tell. I mean, that's the thing about, you know, orally arguing in person, you got to read. And the three judges who had voted for me and *Parker v. Randolph*, who were still there, they hardly ever said anything in arguments that was there, but I could tell they were with me just from body language. The person who was giving me the hard time was Judge Scalia. And he kept on saying, "well, why don't they interlock?" And I said, "oh, you know, one's an hour long..." "Yeah, but you know, really, they do interlock." And I'm saying, "no, they don't really interlock." And this went on and on and on. It was mostly the main argument. And so, as I was walking out of the courtroom, everybody was saying it to me, "well, sorry, Bob, you lost -- you're losing." And I said, "I only need a fifth vote. I got four judges." So, I hadn't given up hope, and then some months later, they decided the case, and it was five to four, with Judge Scalia writing the majority decision.

[52:00]

As it turns out, he's pro-prosecution but very big on the Confrontation Clause.

DLG: Very much so.

RD: Confrontation was you're confronting -- doesn't matter how reliable the others -- the thing was that you couldn't confront, you're supposed to confront it. And it didn't matter that the confessions interlocked, in fact, the more they interlocked, the worse it

was for the defendant, right? Because they were both saying the same thing -- maybe they were pointing the finger at the other guy, but they're both describing the same set of facts that made it worse for the defendant because the defendant is trying to avoid their confession. So interlocking made it even worse. Then the oral argument made sense.

DLG: How did you find out you had won?

RD: I got a phone call saying well -- all I got was a phone call from the clerk saying that the conviction -- not the conviction was reversed, but they ruled in my favor. They had to send it back down to the Court of Appeals for decision -- decision and conformity here with which isn't -- I'll relate that story also. But that was it; I just knew I won. I had no idea why I won, but I was very happy. And then, you know, the next day there was an article in the *Law Journal*, you know, interlocking confessions, exceptions down. I had that framed; I still have that picture frame. And that was all I knew until I read the decision. Then I got it. Then the oral argument made sense. "Oh, OK, this is what he's getting at." I thought he was against me, but he wasn't. So, it got sent down to the Court of Appeals again to consider it. And at that point, you know, harmless error, really? I mean, the only evidence against my guy was his five-second confession.

[54:01]

And so, was this overwhelming proof of guilt? And could the jury possibly have looked to the hour-long, you know, I mean, so the DA had basically given up on that, and he was now arguing that it didn't matter because the codefendant's confession, although it wasn't admitted against my guy -- the jury was told, you know, not admissible against my guy -- they argued it was admissible because it was a declaration of against penal interest by the codefendant. This was so wacky! I mean,

the DA didn't argue that below, that wasn't the reason. Because of the previous case I argued in the Court of Appeals *People v. Angel Nieves*, you had to have DA preservation. The DA argued something was admissible on theory A. If it wasn't admissible on theory A, it wasn't admissible on theory B that they didn't argue. So that was going down. So basically, I was up there, and the prosecutor was commiserating with the judges, "Oh, you all voted for me before. You know, why should we give this guy anything now?" And Judge Wachtler and Bellacosa just looked, and they just shook their head no.

LF: Can I tell you my recollection of *Cruz*? Because I went down. Bob went -- that morning of the argument -- Bob went down to the hotel restaurant, and he had breakfast and I thought, "wow, he's having breakfast" because I never was able to eat before an oral argument -- even Court of Appeals, which started at 2 o'clock, I never ate before the argument. So, he goes down, he has breakfast and I'm thinking, "boy, he is so cool and collected." And then later he tells me, "I left a \$20 tip for breakfast."

RD: That's all I had. You know, it was a free breakfast included, but you typically tipped it.

[56:01]

RD: All I had was the \$20. But see, I was nervous before the argument, but I wasn't that nervous. And the reason was that a week before, I went down to observe the arguments on that day, just to see what things were like, you know, where you stood. And I saw these guys argue and I thought, "I can do this." I mean, arguing in the Second Department was much rougher. I mean, Lynn likes Mangano, but he could make you cry. He made, you know, experienced litigators actually cry during the arguments. And, you know, I argued many times by then at the Court of Appeals, Second Department, First Department, I knew how to orally argue a case. And I

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thought, "I can do this." So, I mean, I was nervous before the argument, but you know, I wasn't, you know, completely shell-shocked or anything.

DLG: Speaking of I can do this, was there ever any doubt when *cert* got granted that you were going to do the case? Because nowadays, you know, you get *cert* granted and everyone sort of parachutes in and says, "Let O'Melveny do this one."

LF: Yeah, yeah, yeah

RD: Yeah, that's right. No, there was no doubt --

LF: At Legal Aid, if you got *cert*, it was your case.

RD: Yeah. So, I think Phil Weinstein was the head of the office at that time. I just went down to Phil, said, "I got *cert*," and he said, "well, good luck."

LF: Yeah, no, never stole the case from anyone. And in our offices too, never -- if somebody got leave to the Court of Appeals, it was their case. They went to the Court of Appeals. We never took a case away from anyone and said, "oh, well, you know, let a supervisor do it" or "let the head of the office do it" or never. That just wasn't the work ethic.

[58:00]

DLG: And I feel like we, through that story, skipped over a very important thing that I would like to double back to. How did you two meet?

LF: At Legal Aid!

DLG: That's what I figured.

LF: I'm 6 1/2 years older than Bob. I had been there since the beginning of 1974. He came in 1977. I was a supervisor. He was a staff attorney. Today you would say, "oh, that's not a thing that should happen." But in those days, you know, Will Hellerstein married a staff attorney who then became the head of the Juvenile Rights Appeals Division. And Will would say -- when you had an incoming class, say "look around

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everyone, you know, see, there are opportunities here,” really. And there were a lot of Legal Aid romances in those days. So, it was -- I had a little fear and trepidation in the beginning because I thought, you know, “if this doesn't work out, you know, are we both going to be able to still work here?” And, you know, but fortunately, it worked out.

RD: It worked out.

LF: Today is our anniversary.

DLG: Happy anniversary!

LF: 41 years!

RD: Yeah, Lynn did the right thing. And she went to Will, the head of the office, and said, you know, “I’m dating a staff attorney.” And he says, “that’s all right, just don’t supervise his work. Don’t tell me who it is.” Everybody thought it was Dan Ross or Paul McAloon or --

LF: Paul was married; Paul was married. No, I had buddies that I would have lunch with, you know, so anyone I would have lunch with, “oh, that’s who it is.” So, they, they didn’t know -- they didn’t know who.

DLG: So, I guess fast forwarding a little bit to the 1990s. At some point, both of you decide to go off on your own.

[1:00:01]

DLG: And I know that this is a whole saga, so feel free to share whatever it is you are comfortable sharing, but I’d love to hear about how Appellate Advocates and Center for Appellate Litigation came into being.

RD: Two different stories --

LF: I’ll start because Appellate Advocates, you’re ahead of CAL. I loved The Legal Aid Society. I would have been happy staying there forever, I think. But in 1995-ish, I

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guess, the union went on strike. It was the Giuliani era. It was a horrible, horrible mess. The City --

DLG: You were a -- ?

LF: I was the Assistant Attorney in Charge -- one of the Assistant Attorneys in Charge. And so, the union went on strike. The City cancelled Legal Aid's contract. The State funding went away. It was a complete disaster. The board of directors -- I think what happened was that they decided they needed labor peace at all costs. So, the managers were just hung out to dry. So, the secretaries who couldn't really type were safe, those who were excellent at their jobs and had risen to managerial positions and the other secretaries, they were at risk. Same thing for attorneys. The supervisors were at risk. and the staff attorneys were all safe. It was a horrible, horrible time. The tension was unbelievable. At some point, I got to the point where I had had a headache non-stop for days and days and days. And I remember we were walking home from the subway together, and I turned to Bob and I said, "I'm afraid I'm going to have a stroke. If I resign, can you hang in there?"

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LF: So, we have a paycheck coming in, you know, and support the family. And he said, "yes, go ahead." So, I resigned. And then the City decided that they were going to, you know, contract with other entities or whatever. So, I put together a proposal along with my two wonderful partners, Barry Stendig and Winston McIntosh. And the three of us, you know, we investigated real estate and benefits and all the sort of stuff that was, you know, new to us. We put together a proposal that the City accepted, and that's how we how we ended starting up. The day that our furniture -- we bought all this used office furniture -- the day our furniture was being delivered, we learned that The Legal Aid Society was suing the City to void our contract. Our contract and



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Brooklyn Defender Services and Queens Law Associates were the three of us who were starting at that time.

DLG: You were the first three -- ?

LF: The first three, they were suing to void our contracts. So, we ended up in litigation that went on for several years defending our right to exist and not knowing, you know, if we were going to continue existing or not. Fortunately for us, The Legal Aid Society blew the statute of limitations, which was a great boon to us, as it turned out. And then the suit continued on some other grounds for a while and eventually settled and went away. But there were several years when it was, you know, we didn't know, "are we going to be in existence or are we going to be out of existence?" So that was, that was really rough. But that's how my office came about. And then a year later, Bob left Legal Aid and put in a proposal along with a couple of his partners.

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RD: And the question is, why did I do that? And the answer was because I was really miserable. I was left behind -- I mean, my job was safe because 2/3 of the supervisors had either been demoted, fired, or left, you know, in a huff. So, there were very few supervisors left, so they wanted to hold on to them now. But you know, the atmosphere was not good, and the place is kind of falling apart without all of its leadership that left. And I was sort of happy in a way in the sense that -- about at this time, Holly Maguigan, who was a clinical professor at NYU, approached me because I had worked with her on a case earlier, just out of the goodness of my heart, basically. And she said, "well, you know, a lot of clinical people applied for clinical positions, and they didn't get them, so they're all pissed. So how would you like to take on a clinic at NYU, become an adjunct clinical professor?" I said, "sure." So, for two years I actually ran this clinic, you know, out of my office. I did the seminar, you

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know, the academic portion, and I coordinated matching 18 students up with attorneys in the office. And I coordinated, you know, the oral arguments, you know -- I coordinated everything. And I really liked that. I did that two years. But otherwise, the office, I thought, was falling apart and it was just -- Appeals, I thought, was really important. You know, Appeals was a separate division. You know, there's a Criminal Defense Division -- it was a division -- and then there was a Criminal Appeals Bureau.

[1:06:02]

RD: It was a division. We were independent.

DLG: Right.

RD: And after the strike and Danny Greenberg came in, we were demoted from a division to just another adjunct portion of the criminal defense practice, they called it. So, we were no longer -- we no longer had any independence, and we were being stripped and sold for parts. The new management thought too many resources were going into this, you know, Criminal Appeals Bureau. The trial attorneys were running around, you know, because they were shorthanded, so all the, the resources went to the trial division. And I just -- it's a matter of principle. I just did not like that.

LF: Well, there was also a problem with Danny Greenberg once he came in because he did not like the criminal clients. He would talk about the worthy poor, meaning the civil clients as opposed to the criminal clients. So that was --

DLG: And he was the Attorney in Charge?

LF: Of The Legal Aid Society, yeah.

RD: Right, so it was not -- it was not pleasant. So when, you know, in the first round, when Lynn's office got the award -- they also, you know, offered contracts in the Appellate Division, First Department; in New York County, Bronx, and Staten Island.

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Nobody got those contracts. And the Office of the Appellate Defender, you know, they were an office -- an alternate appellate office in the First Department -- they already existed. They'd existed for like 10 years. They put in for the contract. They didn't get it. So, the following year, they redid the First Department contract, the one with New York County, Bronx, and Staten Island.

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RD: We were -- and so I rounded up some, you know, senior people at the Criminal Appeals Bureau and said, "you want to get out of here?" And they were, "oh, yeah." So we put in a proposal, and we were not the only ones to put in a proposal, but, you know, we got it. And then of course, The Legal Aid Society was suing us, but most of the suit was thrown out because the nominal defendants, us, our group, were not served within the statute of limitations. So, this was federal court, almost all of the suit was thrown out. And then when the next RFP was issued, six years after the first one, Legal Aid was now entitled to propose, because before they were looking for alternate providers, which was not The Legal Aid Society, now Legal Aid could propose. And so, there's no more reason to do the lawsuit, so it was just withdrawn.

DLG: So, what were your visions for -- well, I'm first curious, where did the names come from with this? You're sort of scrawling things down in a napkin and figuring out what works, like where did the names for Appellate Advocates and CAL come from?

LF: You know, I think Appellate Advocates -- I think the name came from Hillard Wiese, who had actually thought about putting together a group and going after a contract for the First Department, I think. And then they had decided not to do it, but I think they had come up with that name or something similar to that. I think he suggested it, and that just sort of made sense.

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RD: It was the napkin for my work. But see, the thing that was different about our groups was my office, Lynn's office, and also the Office of the Appellate Defender.

[1:10:08]

RD: We were the only independent appellate shops in the State. Every other appellate shop, including The Legal Aid Society's Criminal Appeal Bureau, was just an adjunct to the larger public defender office. So, the chief defender -- let's say in Buffalo or Rochester -- chief defender was the head of the trial office. The Appeals Bureau was just sort of like an internal shop that was secondary. And so, appeals didn't get much attention there. There was sort of a second-class unit within the office and the resources -- they all went to the trial office first because they were the public. You know, if there's no trial lawyer in the courtroom, that was a problem when the case was called. Appeals, you didn't file a brief for, you know, five years. You know, the client was pissed; the court was pissed, but you know, it wouldn't appear on television. And that's true today.

So, you know, one of the things that I did, you know, talking about volunteer work or whatever, I did a lot of CLEs for the trial offices because -- and mostly it was CLEs for the trial lawyers to get them to, like, preserve issues and to get them to, like, not only file the notice of appeal, but ask that counsel be assigned, which was a big problem. And you know, think about the next issue -- the issue that if you preserve the issue, if you think ahead of them, you preserve the issue, then we can litigate it and change the law.

[1:12:07]

RD: I did a lot of CLEs, but these -- when I did the CLEs to the appellate groups, it was just a small group of lawyers, and they were always sort of like second class citizens. And later on, Lynn and I were founding members of the Chief Defenders Association

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of New York because, you know, there was no organization that represented us. You know, there was NYSDA -- New York State Defenders Association -- whose big thing was we should all go out of business, and there should be a centralized public defender office. And we were saying, "well, but wait a minute," you know, so we were founding members and, you know, we were the only chief defenders in the room. And they'd be talking about the chief defenders -- they'd be talking, and I would have to raise my hand. I'd say, "wait a minute, guys, what about the appeal?" "Oh, yeah, the appeals, sure." But I had to really stick up for, you know, when we're talking about legislative priorities and CLE programs -- I said, "wait a minute." And they said, "OK, Bob, OK." So that was a really big thing to be an independent appellate shop. We just did it the way we wanted to do it, and we didn't have to worry about the trial people.

LF: Well, we also didn't have the conflict of interest problem that The Legal Aid Society had, because at Legal Aid, every time you had a client who'd been represented by Legal Aid at the trial level and was complaining about his attorney, you had a conflict of interest. You'd have to get off and some 18-b attorney would have to take over the case. Or if Legal Aid -- if there were children involved and the family law branch of Legal Aid -- the Juvenile Rights Division -- represented someone in that context, that would be a conflict of interest you'd have to get off.

[1:14:09]

LF: So, there were a lot of cases that Legal Aid in fact couldn't keep on appeal, whereas for us it didn't matter. I mean, we had good working relationships with, you know, Brooklyn Defender Services or whatever, but we weren't the same organization. We had no compunction about saying, hey, these are --

RD: We could call anybody ineffective; everybody's fair game.

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LF: Yeah, everyone's fair game, but that's what serves the clients. So, you know, so it was important that we could do that in a way that Legal Aid couldn't.

RD: Legal Aid was assigned and then got relieved -- that delayed the appeal for a year.

LF: Yeah.

DLG: So, you've struck out on your own; you're running an independent shop. What was that adjustment like in terms of being the head of your own organization?

LF: You know, the law was fine. The law was easy. Being a lawyer was easy. And in a sense, I enjoyed being the person who made the final decision. I mean, I had, you know, Barry and Winston and to confer with, but the decisions were mine. And that was good because I didn't always agree with the decisions that I was a part of at Legal Aid. But we -- it was running a business as well as running a law office. And the business part of it was tough. I mean, someone would talk to us about, you know, long term and short term disability, but my eyes would glaze over. I mean, it was just -- and when we started out, we were very small. We had 12 attorneys and a few support staff. I was the HR person. I was the benefits person. I was the person who negotiated with the City. I was the one who kept the financial, you know, spreadsheets and all of that. I calculated people's vacation days.

[1:16:00]

LF: I mean, I do all this stuff in addition to doing cases and supervising people and running the CLEs and all of that. And it was a lot; it was a lot of hours a day, and it was a lot of the -- the business stuff -- I sort of, you know, "do I really know what I'm doing here?" Whereas at Legal Aid, you concentrated on the law, and there's the 22nd floor who did all of that other stuff, and you didn't have to worry about it. So that was the big adjustment, I think.

DLG: Did you have a similar experience, Bob?

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RD: Well, I didn't have to do the HR because one of the people I took with me from Legal Aid was their Managing Attorney, so she handled the HR business. But other than that, running, being responsible for the livelihoods and you know -- I was the attorney of record on all these cases. If there was a problem, the judges would call me. And you know, I was the one who dealt with the City, managed the contracts, did all the negotiations, did the hiring, did a couple of firings that people didn't realize that I'd actually fired those people -- it went so smoothly. So as far as the staff knew, I never fired any anybody -- but it was tremendous responsibility. And I never really got a true vacation because I always had to be in contact with the office. So, I was constantly, you know, on vacation, checking my e-mail, hopefully there was Wi-Fi, you know, just to -- a decision had to be made, I had to make it, you know, it didn't matter if it was 2:00 in the morning where I was, you know, so it was constant, just constant feeling of responsibility.

[1:18:02]

RD: And it was fine for 25 years or so, but when I hit age 70... let somebody else take over.

LF: Yeah.

DLG: Did you feel like you were sort of in it together, like you could speak to each other about the challenges you were facing?

RD: Oh, yeah, sure. Absolutely.

LF: Yeah, sure. Although, I mean, we had differences of philosophy, we had different ways of doing things. And you know, Bob would sometimes think I was a little crazy, and I think he was a little crazy, but, you know, but we could talk things out. It was good to have a sounding board at home.

RD: Right.

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DLG: And was the geographical division of the focus of the office always the plan that CAL was going to be First Department and Appellate Advocates was going to be Second?

LF: Well, initially we weren't sure when the City was going to issue a request for proposals. We weren't sure what form they were going to take. So, we thought that they would issue one for an appellate office, but we thought it would be both departments. And I actually went and spoke with the clerk of the First Department. But then when the RFP came out, it was department by department, which was wonderful for me because I knew everyone in the Second Department. I had wonderful working relationships with them because I had been the Criminal Appeals Bureau's liaison to the Second Department. So, the clerk, who at that point was Marty Brownstein, was a wonderful clerk, and Judge Mangano was the PJ, I got along very well with him. So I had established relationships. I knew all the procedures and protocols and all of that. So that was just the natural fit for me and very, very, you know, very, very easy. And they were happy to get me and my group, and I was just thrilled to be there. I love that court. I still love that court.

RD: They're really two different courts. I mean, obviously they're both intermediate appellate courts, but the way they did things was completely different in the First Department.

[1:20:06]

RD: Every case, you did a brief in the Second Department. If it was a plea case, it was a motion. First Department, you could argue anything. You know, you decided whether to argue in the Second Department. They didn't hear arguments in the plea cases; they were by motion. First Department had this thing called the dismissal calendar. Second Department had just 180, 360-day letters -- I don't know what it was. The First's



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dismissal calendar, that was a lot of work. That was something I had to deal with all the time.

DLG: Is that, "This has been pending too long. If you don't do something ...."

RD: Yeah. And you know, we were pretty up-to-date. We weren't backlogged, but there were still cases that were delayed for usually good reasons. We had to do affidavits in those cases, account to the court and you know -- just the calendaring was different. In the Second Department, you knew who the judges were going to be ahead of time. The First Department you did not. It's just -- and, you know, they just decided cases differently. The First Department would lower sentences, they would reduce sentences even in plea cases. Second Department, I don't think so -- very rarely. First Department did it a lot. That was the one good thing about the First Department is they reduced sentences.

LF: On the other hand, the Second Department would reverse cases.

RD: Yeah, the First Department wouldn't reverse cases, but they would lower sentences.

LF: Yeah.

DLG: And over time, did the kind of scope for the -- or the idea for the offices change? Because I know both expanded in terms of both practice areas and of course personnel.

LF: Yeah. Well, that happened sort of naturally.

[1:22:01]

LF: I mean, a lot of things grew out of the appeals. I mean, 440 motions we always did if they were a natural part of the appeal. So, things like the act that gives relief to domestic violence defendants -- these things sort of naturally grow out of your appellate caseload. And SORA came into being. And then so there were SORA appeals, and then we gradually took over doing a lot of SORA hearings because we

could actually preserve the issues. And so, a lot of things just grew out of the appellate practice. But then there were also these big waves of re-sentencings, DLRA re-sentencings and the post release supervision. The people imposed it; they didn't impose it -- they went back and forth, and you had hundreds upon hundreds of New York City defendants who were affected by these re-sentencings.

RD: Thousands.

LF: Thousands, yeah. And so, the City decided that they wanted to be sure everyone got covered. So rather than deal with trial level where you had all these individual 18-b attorneys and who knows, you know, you didn't have sort of control about what was happening, they decided that the appellate providers should handle those. So, we did a tremendous number of those and they were just sort of divvied up, you know, between us and Legal Aid, you know, we sort of divvied up -- you take this bunch and you take that bunch and so forth. And we did all of those to make sure that nobody got, you know, slipped between the cracks and didn't get represented on these. So that was a big expansion of our caseload during those years.

And then, you know, things have just changed. I mean, there's a more holistic approach today to representing defendants on appeal. We do a lot of re-entry work.

[1:24:02]

LF: We have got these wonderful re-entry guys who are just phenomenal. And we just do a lot of things that we used to not do because the practice is just sort of expanded in a very natural way. And there were more cases. I mean, in the Second Department, there are a lot more cases now because for a long time there were hardly any plea cases appealed in the Second Department because the DAs insisted on waivers of the right to appeal with every plea. But of course, it turned out that a lot of judges couldn't take a valid waiver, so a lot of the waivers were faulty and should not have

prevented a defendant from appealing. So this is where, I mean -- Bob was really instrumental in this, getting these trial groups to, you know -- I mean, I lectured them also, but Bob was really the instrumental one -- getting them done, filing notice of appeal. Even if you think the guy got a great deal, you know, the law changes. So, you know, suddenly if you're YO eligible, there has to be a YO decision. Well, if you have an appeal pending, you get a remand, and you get that opportunity. If you didn't file a notice of appeal, you're out of luck. Same thing with immigration. You got an immigration problem that's discovered later. There's a chance that someone can get you some relief. If you didn't file a notice of appeal, no appeals lawyer was appointed, you're out of luck. I mean, all sorts of things. If you're under 21, you can get a waiver of your fees and surcharges. I mean, that sounds like small potatoes, but to our clients, a few hundred dollars is a lot of money. So, if you filed a notice of appeal, on appeal, you have a good chance of getting that money waived.

[1:26:01]

LF: If you didn't file a notice of appeal, you're out of luck. I mean, so there were all sorts of reasons to file a notice of appeal and follow up and get counsel assigned. And that now happens more routinely. And it used to happen hardly ever in the Second Department. So, there were very few plea cases. In fact, the first few years of Appellate Advocates, I did all the plea cases -- personally -- because there weren't that many of them, and nobody liked to do plea cases, and I found them really interesting a lot of the time. But now there are lots and lots of plea cases. So, the universe of cases has expanded. So, more cases, more attorneys.

DLG: Was the Appellate Term originally in both of these --

LF: No.

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RD: No, it became a part of it later. The City didn't know it from the Appellate Term when they issued the RFPs. But, you know, one of the things that Lynn and I did was we got the City to put more stuff into our contracts in terms of the kind of cases we did. And, you know, this SORA appeals were always -- after with certain -- in the early 2000s as people started to get released from prison and now they had to have SORA hearings before they went out into the community. You know, those SORA hearings were given to the trial attorneys, if they were still around, often they were not. So, I arranged -- I got together with the other First Department providers, and we all agreed on the formula for what to do -- how to apportion the SORA trials -- the trial level SORAs, because we were already doing the appeal. And so, then we went to the administrative judge in New York County and the Bronx, and we said, "this is what we've agreed to. All you have to do when a case comes up for a SORA hearing is e-mail me. I'm the guy. I consult with the -- my colleagues, Office of the Appellate Defender, Legal Aid."

[1:28:06]

RD: "We have a formula." We would do our own clients; we would do New York County Defender Service clients, you know, and they would do, you know, the Legal Aid clients. We had a formula, and so it made it really easy for the clerks. The same thing happened with respect to the Domestic Violence Survivor Justice Act and the PRS re-sentencings-- and there's a story there too -- and the sex trafficking survivor 440 motions. All these appellate providers got together, we decided on a formula, and then the clerks were told to e-mail me. And after I retired -- I didn't make any big announcement or anything like that to the outside world -- but after I retired, I got this very nice card that was signed by all the clerks in the New York County Supreme Court Correspondence Unit that I had dealt with over the years who

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loved this system because all they had to do was e-mail me and I tell them who was to be assigned -- that made my day. I mean, that was really wonderful. And, you know, we had the same deal in the Bronx. It didn't work out quite so well, but it was the appellate providers that the City wanted to handle these post-conviction motions. Because the trial attorney is very good at doing trials and taking pleas, but when it came to these extra proceedings, most of which ended up being appealed, that was our cup of tea.

LF: Well, especially if there was writing involved.

RD: Writing, yes, writing. You had to write.

LF: Right, trial attorneys don't like to write. By and large, they think they're no good at it, although some of them are fine.

[1:30:00]

LF: And judges always liked getting papers from us because they were well written. They were clear. They made the point they --

RD: We showed up.

LF: Yeah, people showed up, right.

RD: And so, it was our case for that day, not 100 cases --

LF: But it made life easier for the judges because they had some written materials that were comprehensible, and they understood what the issues were, and it made life easier for them. So, the judges really like the appellate groups handling these things.

RD: So, the PRS re-sentencings, of which there ended up being like 30,000 in the State of New York and ended, you know, a lot of litigation. What came out of this Court of Appeals case, *People v. Sparber* -- and there were five cases. *Sparber* was just the first one. I had one of those cases, and our office had three of those cases that day. And that concerned post-release supervision because when George Pataki became the

governor, and everybody was, you know, so against people being paroled, you know, “we’d get a 30-year sentence. He’d be out in parole in two years.” So, they did a law where, for violent crimes with parole, there’s a flat sentence. You got eight years, you did eight years. Of course there’s time off for good behavior and then you would be out on parole anyway, except, you know, they did away with parole. But you know, when they done -- their got their time off for good behavior, they still had to serve the rest of their sentence on parole. But you know, then it became like untenable in the late 1990s that people were being released into the community without any supervision at all. “This is terrible.” So, in 1998, the legislature said with respect to these violent crimes -- ultimately more crimes than just violent crimes -- that there would be a period of post-release supervision after the flat sentence was done.

[1:32:10]

RD: But of course, the judge didn’t have to actually pronounce it. It was just automatic. You know, it was Immaculate Conception, but the defendants of course didn’t know about it. They thought they were getting out when they got out of prison. They thought, “I’m leaving.” And then they were told on that last day, “oh, by the way, this five years of post-release supervision you still have to do and here’s your parole officer that you’re going to be -- ” And now they were pissed.

LF: And they were -- not only wasn’t it pronounced at sentencing, but they were taking guilty pleas from people, and they were telling a guy, “OK, you’re getting a sentence of three years.” They weren’t telling them, “you’re getting a sentence of three years plus five years of post-release supervision.” So how is that a knowing and intelligent guilty plea when they’re being misled as to what their sentence is? So, there were lots of problems with that.

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RD: *People v. Sparber* involved cases where the judge -- there were three cases. The judge didn't pronounce the post-release supervision. So, our argument to the Court of Appeals was, "well, if the judge didn't pronounce it, they don't have to do it, and it's too late -- it's done." And so, the Court of Appeals came back, and it was very clear in the argument which way this was going -- "no, no, no, no. Just because it wasn't pronounced doesn't mean they can't be sent back to court now, and it be imposed." And we are taking the train back; we go, "oh, we lost. You know, they're going to impose the post-release supervision." But of course, that meant that everybody had to be returned to court to be re-sentenced so they could impose the post-release supervision.

[1:34:00]

LF: Thousands and thousands of guys.

RD: And what if they hadn't been told about it at the time of the plea, which was like most of these cases, could they get their plea back? You know, because it wasn't knowing and voluntary. So, the legislature passed the law that said, you know, if the guy wanted his plea back, all the DA had to do was say forget about post-release supervision. And then he couldn't get his -- but anyway, all sorts of litigation. And it was our office that -- our offices, the appellate offices, did all these re-sentences.

DLG: And people being brought in from prisons around the State --

RD: Right, absolutely. People who, you know, they're -- these are violent crimes, so these were doing long sentences. So, if they had an 18-b attorney originally, that attorney was probably retired or had moved their office, and the clerks couldn't find them. So that's why the clerks were so glad they just had these point people. They could give these cases to the appellate providers, and the Drug Law Reform Act, I think the first one was in 2005. That was just for the Class A-1 felons who were doing like 15 to

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life. So, when those came into being, the City decided the appellate providers should do those. So, we divvied them up again. And the courts, once again, were very happy because, you know, they knew who to call.

LF: And then there was DLRA 2 and then the DLRA 3 --

RD: And then the DLRA 3, that was now for the Class B drug felons --

LF: Which was a tremendous number of people.

RD: What happened was the statute said that if you were in the custody of the State Department of Correctional Services, then you were eligible to get resentenced. But that meant if you were on parole, you were no longer within the Department of Correctional Services, so you're not eligible.

[1:36:03]

RD: But then they changed the statute, not having anything to do with the DLRA, to combine the parole department and the Department of Correctional Services into one entity, the New York State Department of Correctional Services and Parole, or you know, just one entity. So everywhere in the statutes where it said Department of Correctional Services, it now had this new title, which included parole. So, this quadrupled the number of defendants who are now eligible for DLRA 3 re-sentencing. So originally, we thought we were going to do like 100 cases, we ended up doing 300 cases. We were awash in all these post-conviction proceedings, and every time they came up with a new law that made people eligible for resentencing to doing 440s, we were the ones.

DLG: Right.

RD: So originally, our contracts were for 200 Appellate Division cases. And I mean, the last I looked it was 800 cases that we were doing. Probably even more for your office.

LF: I don't even remember.



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RD: But so our practice really expanded and, you know, we were not just doing these straight appeals anymore. So, it changed things.

DLG: But it sounds like everyone was very appreciative, which certainly helped.

LF: Oh, yeah.

RD: Oh, yeah. They didn't rule in our favor necessarily, but they were very appreciative.

DLG: So, are there -- maybe just one each -- particular cases that stand out from your years of Appellate Advocates and Center for Appellate Litigation that you're particularly proud of?

LF: Well, I had the first case in New York where a client was found -- granted a 440 on the ground that he was actually innocent.

[1:38:00]

DLG: Wow, OK.

LF: It was Judge McKay, who was wonderful. He was -- he gave us lots of time to reinvestigate, and we had a two-week long hearing, and he was just the most patient judge in the world and eventually ruled that our client -- we'd proven him to be actually innocent, as well as there was a very strong ineffective assistance of counsel claim which the People had conceded on at that point, but the actual innocence claim they had opposed.

DLG: How had that case come to Appellate Advocates, was it a direct appeal or -- ?

LF: It was originally a direct appeal years before, and it had some issues, but there were two witnesses -- supposed eyewitnesses -- who both went to the police apparently independently of each other right after the shooting and said my client did it. And although the family insisted that he was with them, he was not -- I didn't see any way to get around these two apparently independent people. And I had issues I raised, but I was not successful with. But I was always bothered by the case. I always wondered if

he really hadn't done it, wasn't the guy -- Jonathan Wheeler was his name. And so, several years go by, and I get a call from Judge McKay's law clerk who says, "do you folks ever represent someone on a 440 motion if you had them on appeal?" And I said, "well, usually if we had thought there was a valid 440 motion, we would have brought it at the time." But I said, "but who is it? Who's the client?" And he said, "it's Jonathan Wheeler." And I said, "Oh my God, you know, he's the one case that has haunted me for all these years that I really, you know, I didn't know what else I could do for him."

[1:40:05]

LF: "But I really thought he wasn't the guy." So, he said, "well, he has filed a 440 motion *pro se*. Would you take on representing him?" So, I said, "well, let me write to him. If it's OK with him, absolutely." And so, he was very happy, and we did an investigation, De Nice Powell and I -- she was wonderful. And so, it turned out -- one of the witnesses had recanted, and the other witness had died. But as we researched the case and investigated, we discovered that the witness who had died -- she was a sort of this flaky woman, but she had lied in her testimony in two very distinct ways. She had said that she saw the guy being shot and he fell and he cried, "help me, help me." And then she went across the street and called 911. So, the medical examiner testified for us eventually that there's no way he could have spoken after being shot in the head. Of course, initially, I asked the wrong question. I asked, you know, "would he have died instantly?" And he said, "well, we can't -- couldn't say whether he died instantly." So I said, "well, he's supposed to have said -- " "Well, but he couldn't have spoken." So that was a lie, and we found there was only one female caller to 911, and it wasn't her. We found the woman who made the call, and she came in and testified. She came down from -- she was living in Troy at that point. She came down and

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testified and identified the tape with her voice on it and that she was that call. So, we established that that woman had just lied about what she saw and what she did. I mean, two very basic facts. And then we had the witness who recanted. The witness who recanted, he and his cousin were supposedly in the building that night and came down the stairs and saw the shooting.

[1:42:13]

LF: I always suspected they were the really the shooters, maybe. But he recanted. The cousin had died by that time. He recanted, and he testified that he had refused to testify and then the DA threatened to pin it on his cousin and so he flipped. So the People then brought in as a rebuttal witness -- they brought in the DA, and the DA, who was now in Nassau, he said, you know, "I remember this -- this was years ago -- but I remember this case so vividly because the strangest thing happened when I said to him -- when he refused to testify, and I pretended to call the cops and tell them to go pick up the cousin. And as soon as I did that, he flipped like that." And he agreed to testify against my client. And so of course, he meant to suggest that they were going to pick up the cousin to come testify, but he interpreted it as they're going to pick up the cousin to blame for the crime. And I suspect it's the cousin who committed the crime all along, in any event.

And then we had these family members who, you know, at the time of the trial, these were like teenagers. And, I mean, they were perfectly respectable people, but they were family members who had an alibi. But the alibi put him very close to where this happened. The shooting happened in an elevator on the 1st floor. They were in the other elevator travelling up to their apartment on the 4th floor or whatever it was.

[1:44:00]

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LF: And as they were exiting up there, they heard the shot. So, it put them very, very close to the crime scene. And they were young teenagers at the time. They went to the defense attorney who interviewed them, but then never called them. But these years later, they were grown-ups, and very respectable grown-ups. One of them, a cousin was actually like a supervising corrections officer on Rikers Island and a very, you know, like military straight-laced woman, who was extraordinarily impressive. And they all came in and talked about the elevator, you know, on the 4th floor and hearing the shot and all of that while he was with them. So, they gave him a very strong alibi, probably much stronger than it would have been 12 years earlier. But so there were lots of things that fell together. But, you know, it was a tough case -- a huge deal. He was doing 20. He was 16 at the time of the crime, and he was doing 25 to life. I mean, the thing I most have cared about over the years are the innocent clients, and some of them I have, you know, a fair number of them I have managed to get relief for in one way or another. Maybe getting the DA's office to drop charges, maybe getting a weight of the evidence win from the Appellate Division. I just got one last week. Someone else argued the case, because I was gone by then, but you know, I mean, that is really heartwarming. It's the most nerve-wracking part of the job, but it is by far the most rewarding.

There's one other thing I'd mentioned -- this is this is actually from Legal Aid. I think I had a client who had some good issues, and I really liked the client, and I worked very hard for him.

[1:46:05]

LF: I was, in the end, unsuccessful. But after that he wrote me the most touching letter. He said he was Black, and he said he had always thought of white people as like different -- or even the enemy or whatever. I don't remember what wording he used,

but that dealing with me over the years of his case had changed his mind, and he no longer looked at white people as this monolithic sort of us versus them group anymore. Yeah, yeah, it was lovely... Can you follow that?

RD: Well, in my career, I only had two clients who I really thought were innocent. Both cases went to the Court of Appeals, and one of them I lost and I still think about that today. But the other one I won, and that was *People v. Reed*, and there were three codefendants -- my guy was one. And in the Appellate Division, one of the codefendants got relief on some challenge issue, which either my client or the other codefendant were ineligible for. So, they were affirmed. And then got leave to the Court of Appeals. I don't know how, but we did. And you know, we had an argument about the juror, but that was going nowhere. My main argument was that it was reasonable doubt as a matter of law. Ordinarily, the Court of Appeals doesn't get involved in reasonable doubt or weight of the evidence.

[1:48:05]

RD: Very rarely they would be so disturbed by a case that they would sort of do weight of the evidence, but pretend it wasn't weight of the evidence. It was reasonable doubt as a matter of law. And the classic case was this other *People v. Reed. People v. Mary Reed*, where she was a barmaid, and the evidence strongly suggested that she killed the victim but did it in self-defense. I mean, that was the narrative that the DA presented. And then on summation, the DA said, "well, believe the evidence that she killed him, but don't believe the same evidence from the same source that it was in self-defense." And the Court of Appeals said, "no, you know, under those circumstances where the only evidence of guilt is also evidence of innocence, you know, that's reasonable doubt as a matter of law." So, in my case, the People's witnesses -- one of the People's witnesses said definitely my guy did it along with

these other two people and all the other witnesses gave exculpatory testimony saying either “I saw it, and he wasn’t there” or gave him an alibi. I mean, they testified against the other two defendants, but as to my guy, they either gave an alibi or they said he wasn’t there. And the one witness who placed my guy there, he was a drug addict. He was on narcotics. I think even at the time of the trial, he was, you know, just impeached all over the place. His testimony was all over the place. But Gregory Reed was there, and he was convicted. I did this, you know, “reasonable doubt as a matter of law argument” basically off of this case --

[1:50:04]

RD: I think it was a Court of Appeals case, *People v. Jackson* where the Court of Appeals said, “well, if the evidence is in equipoise, then that’s reasonable doubt as a matter of law.” So, I said the evidence is in equipoise because of the People’s case. They have him both being there and not being there, and that’s in equipoise.” So that was the theme of my argument in the Court of Appeals. And of course I’d spoken to the client’s mother, you know, many times throughout, you know, that “we’re going to try; we’re going to try.” And the argument went so badly because they weren’t buying this equipoise argument. I was so discouraged when I got back to the office. I spoke to the mother; I said, “we’re going down. I’m sorry. You know, I tried my best,” and then they reversed and dismissed on reasonable doubt grounds as a matter of law with -- I think Judge Kaye wrote the decision and you know, they did just that. They said, you know, “where the only witness against the defendants is, you know, somebody who you can’t believe -- ” you know, because he’s a narcotics addict, and they went through all the discrepancies in his testimony. It was sort of like a weight of the evidence thing -- “underneath these circumstances where this is the only witness,

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that's reasonable doubt as a matter of law." That was just -- I couldn't believe that. I had to call his mother again.

DLG: A much happier --

RD: A much happier conversation. And then he sued the State under the Unjust Conviction Act and won a bunch of money. Anyway, I won't talk about the one where I lost.

DLG: Nothing wrong with focusing on the happy memories. I had two other final topics I wanted to hit before we will bring this to a close. Although of course, if there's anything you folks think should have been talked about that wasn't, we can focus on that as well.

[1:52:03]

DLG: I'd love to hear -- obviously your entire careers were *pro bono* in a sense of, you know, working for indigent clients and working for the communities, but what kind of non-legal work or volunteer work or mentorship work did you do over the course of your career that really stands out?

LF: I didn't really do anything outside of work. By the mid-'80s at Legal Aid, I was doing the hiring of attorneys. I was the liaison to the Second Department, and I was running a complex of 40 plus attorneys, and I had two little kids at home. So that was it. My plate was full. Then I got involved in writing a book. I was one of the principal authors of the West book on New York Criminal Law, which I understand is like the 4th edition now, I'm still doing the pocket parts every year. I was representing the three original groups in the Legal Aid lawsuit when we started our office and doing all sorts of other things.

RD: I was representing the groups that followed.

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LF: The second groups, right. And life was just very full and very busy. And I did -- I mean, I was on a couple of bar committees. I did a couple of reports, you know, but nothing big.

In terms of mentorship, running an office like mine is one gigantic mentorship opportunity. I mean, there are hundreds, probably, of attorneys over the years that I have worked with, taught things, and mentored along the way. And that's by far one of the most rewarding aspects of the job: to see people thrive and grow. A lot of our sort of our former children -- our legal children -- are judges now, which is heartwarming.

[1:54:06]

LF: I mean, it's been -- that's been a wonderful part of the work.

DLG: Did you ever think about trying to direct yourself at the bench?

LF: No, not really. I really like being an advocate. I also -- I don't think I'm emotionally suited to being a judge. I get weepy easily. I mean, I could say -- you don't want a jury seeing the judge weep when the mother is talking about identifying the son's body at the morgue or, you know, you can't have that. And I have a hard time keeping a poker face not betraying emotion. And I tend to feel for my clients, and I tend to feel for the victims. And you know, I can read the cold transcript of a case, and you know, someone will come into my office, and they'll see me weeping because what you're reading is really sad and moving. And so, I thought that really disqualified me from being a judge.

DLG: Bob, similar thoughts?

RD: I did a lot. I mean, put aside the fact that I was also the co-author of a West book, along along with Larry Marks, recently the Chief Administrative Judge, and put aside that I ran a clinic at NYU for two years and taught as an adjunct at Brooklyn Law



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School for about seven years after that, teaching appellate advocacy and post-conviction remedies, put that aside. I actually did put in papers to become a Criminal Court judge in the early '90s, and I was a finalist three times -- I saw Mayor Dinkins three times, and I didn't get any of the -- I was a finalist, but I didn't get it.

[1:56:02]

RD: They send three names to the mayor for every slot, and one of them has an invisible asterisk next to the name. And I was like a good finalist because you know, my credentials at that point were pretty good, but I didn't get it. But at that point, people told me, you know, if you want to become a judge, you should get involved in bar associations. So, I joined the City Bar, and over the course of the years, I was on every criminal committee there was, and also the Judiciary Committee of the City Bar, which is like a part time job. And then I chaired the Criminal Courts Committee for three years, and that was the committee -- that was a lot of work because we had to -- we were also involved in evaluating judges. And then I was chair of the Criminal Justice Operations Committee for three years. And you know, we did a lot of work. And then I was also a member of NYCLA, and I chaired the Appellate Courts Committee for three years. And, you know, we did a lot of work there, but mostly we had judges come in to talk, you know, Appellate Division judges, Court of Appeal judges. And then I joined the State Bar, and I was on the Executive Committee of the Criminal Justice Section for a long time. And then I was invited on to the Mandated Representation Committee, which I was on for a long time. And then I chaired that for three years, most recently. And you know, that was that was a very good committee.

[1:58:02]

RD: A lot of times when I became the chair, it was to sort of to resuscitate a committee that wasn't doing so well. That was my specialty, but Mandated Representation was

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always well-run, so I took over a well-run committee, and that was very rewarding. And I put all my fellow chief public defenders on the committee and, you know, plus some other people. So that was very -- I did a lot. I, you know, did a lot on legislation -- sometimes successful, sometimes not successful, a lot of lobbying, so forth and so on. So, I was very active in the bar associations, and in terms of, you know, mentoring, obviously, you know, inside of an organization, I was mentoring people. But you know, Joe Zayas, you know, he worked at the Criminal Appeals Bureau while I was one of the supervisors. But when he was a law student there -- while he was still in law school -- I worked with him, and Justine Olderman, who later become the head of the Bronx Defenders, she was my clinic student. And David Loftis, who's currently the head of the Legal Aid Criminal Defense Division, he was my first supervisee at the Criminal Appeals Bureau. So this, you know, just a few people. Oh, and Claudia Trupp, who was in my office, I worked with, you know, since the early '90s. She's now head of the Appellate Resource Centre at the Office of Indigent Legal Services. So, you know, yeah, I always tried to get people, you know, ahead. I don't know why I was so good about that, but I really did like to help people out.

LF: Joe Zayas has told me that when he was a fairly young attorney in the office, you took him out to lunch and told him he could be a judge someday.

[2:00:08]

LF: He ought to set his sights on that.

RD: I don't remember that particular conversation.

LF: Well, he remembered that. He told me about that.

RD: I do remember when he became the administrative judge in Queens. He called me because, you know, I talked to him over the years, and he asked me did I know anybody who would be a good clerk. And one of my supervisors was saying that they

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wanted to leave the office and become a clerk. So, I said -- so instead of saying, "Joe, I don't know anybody like that," I hooked them up, and she got the job on my recommendation, and then she left it like a few months later and that was the last time Joe called me for anything.

DLG: Well, you can't get them all right.

RD: So, you know, Larry Marks, the previous administrative judge, he was a friend of mine and the co-author on the book. And anytime there were some initiatives that involved, you know, statewide practice, I would be -- as far as being on a committee, I would volunteer to e-mail Larry Marks, you know, and say we'd like to do this. So "Dear Justice Marks..." And then we'd get a meeting, sometimes with him, sometimes with his chief counsel, and we'd get stuff done. It was really useful,

LF: Early on when Larry was at Legal Aid, he wanted to take a leave of absence because he wanted to go to the London School of Economics, and the powers-that-be did not want to let him do it. And I went to bat for him, and I said, "you got to be kidding me. He is terrific. Why do you want to drive him out of here? Let him take the year or whatever was off and go do that."

[2:02:01]

LF: "That's what he really wants to do, and he'll come back." And they gave in, and he went and did it. But yeah, you had to. But there are lots of people who worked for us over the years who become judges.

RD: You know, people would -- Michael Obus, who is the Chief Administrative Judge in New York County for a long time. His clerk was Dan Rosen, who was a fellow supervisor at Legal Aid. And Michael Obus and I were friendly. And whenever there was a problem, you know, I needed to set up some way for us to get assigned, you know, that was very useful. I just asked for a meeting with Michael Obus. I knew all

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the heads of the other public defender offices in New York State, so I could always call in a favor if I wanted them to write something in favor of some legislation. All I had to do was, you know, call them and say, "would you do this?" And they did it.

And, you know, that's all gone now. But yeah, no, I did a lot.

LF: He was a glutton for punishment. I used to tell him that every time he told me, oh, he was going to head a bar committee. You know, he's such a glutton for punishment.

RD: You mentioned the award I got from the Criminal Justice Section of State Bar in 2003, the Outstanding Appellate Practitioner. Of course, Lynn got it before me.

LF: I got the first one, the first time they awarded it.

RD: So, I got that. And then as I was retiring, I got another award from the Appellate Courts Committee of the State Bar, and they had a dinner where I made a speech -- I wasn't the only one being recognized. And then the Mandated Representation Committee gave me their Denison Ray Award for outstanding Public Defense Practitioner.

[2:04:03]

RD: So, yeah, they recognized me --

LF: All in boxes in the basement --

RD: All in boxes in the basement.

LF: Yeah, it was very nice that they did an appellate practitioner award because it was the first time anybody had actually recognized appellate practitioners in their own right. And that was a very nice thing.

DLG: Harkening back to the idea of not just being a subset of the trial --

LF: Right, exactly to being -- yeah, to having some value.

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RD: One of the things I did was, I did this Court of Appeals update memo, which, you know, tracked all the Court of Appeals cases pending from leave grant to decision. And this was a very popular item, and I distributed to all my fellow public defenders --

LF: A vast list of people.

RD: A vast list of people, everybody got it. That was very popular, especially with the trial offices. And we also sent out every two months an "issues to preserve at trial." This was for the trial people, so they can actually preserve stuff, you know, this hot issue was coming up. These were very much appreciated by the bar in New York State. So that's probably why I got some of the awards.

DLG: Great job, well done. So, on that note, looking back now that you've both stepped back. Lynn, I know you're still doing some work for Appellate Advocates --

LF: Well, I just went last week. I just went back one day a week as a volunteer to help out and because being retired is really boring. So, it gives me something interesting and stimulating to do.

DLG: Is there anything you would do differently, knowing what you know now, that you would have changed?

[2:06:04]

LF: No, I don't think so. I have had a wonderfully rewarding professional life for which I am very grateful. I mean, I think I found the spot in the world that is right for me. I love being an advocate. I love mentoring younger attorneys. I love representing the clients, most of whom I have really very much liked over the years and sympathized with. I think, you know, there but for the grace of God go many of us who have had what we consider to be just the normal advantages of life, you know, a supportive family, a safe neighborhood to walk around in, a decent education, you know, things

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that our clients just don't have shots at all a lot of the time. And to represent those people in their darkest times, it's really been a privilege, which I very much appreciate. So, I don't think I would do anything differently.

RD: I wouldn't do anything differently except I'd skip the COVID pandemic. Running an office during that pandemic was just brutal, brutal. But you know, I would say that I never really considered myself a particularly good person. I really enjoyed my practice, and a lot of it was because I was anti-authoritarian. And just in terms of my cases -- the ones I, you know -- forget the ones where I was the attorney of record from my office, I helped a lot of people. Being in prison is a pretty miserable existence.

[2:08:04]

RD: I saved people a lot of years in prison, a lot. I relieved a lot of misery. So, I feel good about that. Basically, I feel very good about that.

DLG: I think that's what so many people think they're going to do when they go to law school. And so many people come in with the best of intentions to be public interest lawyers and to help poor and the needy and less fortunate, and it is such a culmination of an ideal for two people to have done that and to have done it well. And as you just mentioned, to change so many lives in the process. I mean, there's so few areas of law, I think, where the impact of whatever it is you're doing is so immediately viscerally felt, then someone is being exonerated or someone is getting out of prison or, you know, circumstances just unequivocally change for the better. I mean, you can win someone \$200,000, but then you're going to have to spend years trying to collect that judgement. It's a good thing, but it's not quite the same.

LF: Well, and even when you're unsuccessful, which on appeal, let's face it, are most of our cases, you know, there's something to be said for the sort of oversight that you are

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part of providing, you know, that you're holding people to account and you're -- would trial judges behave differently if they didn't know an appeals lawyer was going to read that transcript and look over their shoulder later? Would DAs act differently? Would defense attorneys act differently? I mean, knowing that there's someone there who's going to give everything a second look and hold people to account if they have done something improper or erroneous or whatever.

[2:09:58]

LF: I think you just have a tremendous role in making the system more fair, even when you're not successful in the individual case.

DLG: Very true. Before we bring this to a close, is there anything you think we should have talked about that we didn't? Any topic we should have explored? I always make sure I ask that, you never know what's lurking out there.

RD: I think we covered a lot.

LF: Yeah, I think we covered a lot.

RD: I think the one thing I didn't get to say is that I went to the Court of Appeals almost 40 times -- maybe 40 times. The only person who went more often than I did is sitting next to me.

LF: So, in very good company.

RD: Yeah.

LF: Yeah. Court of Appeals was fun. It's a nice court to argue in front of.

RD: The Court of Appeals, unlike the Appellate Division, was very nice court to argue in front of. Like very fond memories of Judge Ciparick, but also Judge Rosenblatt and another Pataki appointee, Judge Smith, he was really great to argue in front of.

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LF: I very much like Judge Read, and she was another Pataki appointee and not vastly popular among the criminal defense community, but I always found her to be very concerned and very -- I just really liked her. I thought she was an excellent judge.

RD: And Judge Pigott, he was a lot of fun.

LF: Pigott was good. Yeah, a lot of them were really, you know, very, very good. And I must say, my court -- the Second Department -- I think the Second Department judges over the years have by and large been absolutely wonderful. I mean they have a gut feel for what's right and what's fair. And if there's a real question of guilt or innocence, you know, if you have a good issue, you've got a real shot with them.

[2:12:06]

LF: They're going to pay attention. They're going to treat you well. I mean, I love the court. I think it's a wonderful court to appear in front of, and that's been true over the years. Now I haven't argued a case for -- since I think pre-COVID. But, you know, that's been my experience with them for a long, long time, is that they're really great to deal with, and the clerks are wonderful to deal with, which is very pleasant.

DLG: I mean, that is my experience as well. Wonderful place to be. Yeah, not as nice of a courtroom as the First Department, but --

LF: But, you know --

RD: It is a nice courtroom.

DLG: Thank you so much, both of you, for going through this process with us.

LF: Sure. It's fun.

DLG: We've been mostly focusing on the bench, but the bar, of course, is also so important. And I think in especially in indigent criminal defense, I can't think of anyone whose story I would want to hear more than both of yours. You know, you've helped so many people and just at such a pivotal time in New York State legal history. So, thank



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you so much for all the good work you've done, and, Lynn, especially to you for giving me a chance. It was it was the right place for me to be and I'm glad you could see it.

LF: It was the right decision. Yes, no question.

DLG: Thank you so much, really a pleasure.

LF: Thank you.

RD: Thank you.