Cynthia Aaron: I'm Justice Cynthia Aaron. I am an Associate Justice on the Fourth Appellate District, Division One, in San Diego.

David Knight: Spell your last name, please.

Cynthia Aaron: A-A-R-O-N.

David Knight: All right, Justice Wiener.

Howard Wiener: Howard Wiener. W-I-E-N-E-R.

David Knight: Your title when you were on the bench?

Howard Wiener: Associate Justice of the Fourth Appellate District, Division One, San Diego.

David Knight: We're ready to start anytime.

Cynthia Aaron: We're here today to interview Justice Howard Wiener, a retired justice from our court, the Fourth Appellate District, Division One, in San Diego, for the Appellate Courts Legacy Project oral histories. I'm going to call you Howard, if that's okay?

Howard Wiener: That's okay. And again, let's deviate from probably the protocol that folks might want, because there are a couple of things I'd like to say before we start. I think the reason is—or I think I know the reason is—that I'm concerned that if we get too immersed I won't be able to express the appreciation and thanks to those who I think are entitled to it. So I made a few notes, because I really do appreciate this opportunity and really feel privileged by having the chance to be here and have you, Cindy, interview me.

I want to make sure I thank Chief Justice George for this opportunity, and no question he should be complimented for his leadership in reference to this California Appellate Courts Legacy Project. I'm comfortable in saying that an oral history of former justices of California's appellate courts I would hope would be of value to individual jurists in the future, as well as legal historians and the public; and I would like to think that in some direct and indirect ways it will improve the administration justice.

I also want to thank Justice Haller of this court, who I've known for a long time. She's a very hard worker, wonderfully conscientious, as the chair of the Legacy Project as well as all the others on the committee; and of course, my thanks to Justice Aaron, who has graciously agreed to interview me.

And I know in this process I leave out a lot of people, but the people in the Judicial Council or the judicial library sent me considerable material, cases, et cetera. So a lot of people have

worked very hard doing research, for which I really appreciate their efforts.

But I also want to make sure that I don't skip over other people who were so helpful to me when I was on the Court of Appeal. I didn't view my job here—and I say "here" because we're at the Court of Appeal in San Diego—as a solo performance. I had help, materially aided by wonderfully capable research attorneys: Bill Dato, now Judge Dato, for about 10 years, of the almost 17 years I was on the Court of Appeal; Buzz Kinnaird, for the first three years when I started here; Paula Hui, who is now at the Court of Appeal in the Third Appellate District; and Melanie Gold, who is here working with Justice Haller. And they were assisting me after we were assigned two research lawyers.

I did receive, obviously, valuable assistance from a number of other research lawyers who were with me for one or two years as well as a substantial number of externs; these are students from law schools whose insight and work and skills were really terrific. And I cannot ignore the research lawyers on central staff who worked on selected matters, including writs, and they were always available to brainstorm concerns that I had or research issues that I thought were important.

And I really would be remiss if I didn't thank the clerk's office—a lot of wonderful people who I won't try to identify, who from my perspective were always cooperative. I would feel guilty if I didn't highlight Steve Kelly's wonderful leadership. He's still here at the clerk's office; he was here either when I arrived in 1978 or shortly thereafter, and I . . . He's just a wonderful guy, a lot of fun to be with, wonderfully capable, and I think it's really quite remarkable that he's dealt with the egos of all the justices so well during the last 20 years.

So, sorry for the lengthy monologue, but I wanted to make sure I thanked all those people.

Cynthia Aaron: Oh, that was very gracious, as always, and I'm sure everyone will appreciate it. I'd like to start by asking you some questions about your background, your family. If you would, would you just please tell us a little bit about your family and where you grew up?

(00:04:58)

Howard Wiener: Well, I was born on February 1, 1931. My brother had been born four years earlier in Providence, Rhode Island. Well, the times were interesting, i.e., post-Depression. The checklist from the Judicial Council obviously made me reflect on issues that I might not have reflected on. And I think the reality is that my childhood was typical of kids at that time and place. And when I say time, i.e., the '30s, place . . . Providence is a small community, population, and it's about a quarter million;

the state at that time had a population maybe three-quarters of a million. My grandparents had emigrated from Russia, a product of the pogroms in Eastern Europe. They wanted to live the American dream. They were very sensitive to education, very much immersed in the Jewish community in Providence. It was a small community, looking back on it—less than one and a half percent of the population.

So we were a "typical" Jewish family growing up in a typical environment. My grandfather really did live the American dream. He was very successful in business, made a lot of money. And my dad, who was from Belfast, Ireland . . . Again, the notion of an Irishman speaking Yiddish with an Irish brogue was atypical, and to that extent we are a little bit unique. But he had a small store in Pawtucket, where he had a more or less unsuccessful venture in importing Irish linen. And he had wanted to be a singer. A terrible businessman, and so consequently we were, bluntly, the poor relations in a relatively wealthy setting in a community that frankly was compartmentalized. The Irish lived one place; the so-called colored, now African Americans, lived in another section of town. So we were really part of a Jewish community. And looking back it's interesting how narrow—at least in my mind now—the scope of our social life was.

I went to public school, played a lot of sports. I had a pleasant time.

Cynthia Aaron: What did you play?

Howard Wiener: Everything. In those days we didn't have organized teams like soccer moms we have now. You'd pick up a football game on the street, tag football; you'd go to the field and you'd play tackle football and baseball in the lot not too far away, and you'd walk from your house or you'd take your bike. You didn't have to worry about a lot of things that parents worry about now. And there'd always be a game; on Sundays there'd always be a game at the playground for softball with different ages. So you just got immersed with kids and had a good time.

Cynthia Aaron: Did you have any hobbies when you were child?

Howard Wiener: I think I had some unsuccessful hobbies trying to make model airplanes unsuccessfully, and others. But I think it was sort of sports and hanging out with the kids. Nothing . . . Our house wasn't particularly intellectual, social; no television to speak of. The radio: Sunday night you'd listen to Jack Benny or *The Shadow,* names that probably don't ring a bell with anybody except a few of my contemporaries. But it was a pleasant environment. My mother played the piano, my brother played the piano. My dad, as I say, trained to be a singer, so in comfortable times we would have some fun around the piano.

Cynthia Aaron: Are there any events from your childhood that stand out in your mind as having a particular impact on you?

Howard Wiener: It's a good question, and the answer is no. *[laughing]* It was a pleasant time, it's a time . . . In 1941, December 7th, I remember what I was doing when Pearl Harbor was bombed; you know, rushing home. I'm 10 years of age. And the environment changed dramatically. People rushed off to join the service. It was a scary and anxious time. I remember at school you'd have planning for what happened if there were bombings, and so there were drills—bomb drills and things of that sort.

So it was a nervous time for four or five years: rationing of food, rationing of gasoline. You'd see . . . I was a kid, and of course news was more carefully censored, shall I say; so you didn't see the horrors that you see today.

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But you'd see the blue stars in the windows of the homes where people were in the service and then you'd see the gold stars where young men and women were killed. So it was an anxious time. So I don't know if that fills in any of the blanks.

Cynthia Aaron: It does, it does. If we may skip to college at this point, where did you go to college?

Howard Wiener: Well, I went to the public schools in Providence—Hope High School. My mother had gone there. And it was a pleasant time, nothing dramatic. My memory of school was that they would have classes for some of us who planned to go to college and then different classes for those who wanted to go into a trade. So although there was no dialogue on it, people sort of knew where they were heading.

So I went to Brown. And I think as a product of the times, Depression, and product of our family, where money was unfortunately a dominant concern, and my father's lack of skill in business—for a whole series of reasons, I elected to become financially independent when I was about 15.

Cynthia Aaron: Oh, let's talk about that before we go to college, then; tell us about that.

Howard Wiener: If we stop there just for a moment, as a result of that . . . and I won't get into details, I'm sure. I'm sure there's some psychological baggage that I won't burden any of you with.

So I had a lot of jobs. I worked at a delicatessen store, I drove a truck, I worked in the post office during Christmas. My dad had a store with shades and Venetian blinds and curtains. So I hung up shades from probably age 11 or 12 in every state

building in the state of Rhode Island and homes, et cetera. So I realized that a) I didn't want to be poor, and b) that I didn't want to hang up shades. You know, you climb up some of the places which, to say the least, were dirty; you would dust off a lot of junk; and you're 15 feet off the floor without all the power tools you have now. You know, I did work, work, work, and then the shade wouldn't fit.

I knew that I wanted to do something other than to hang shades for the rest of my life. So I knew I had to get an education. But I was never very good then, or now, seeking advice, doing homework before planning; I didn't have a mentor, I didn't have a confidant. I'm sure there were facilities at school, vocational guidance kind of things that I didn't take advantage of. So if you don't have any money and you're from Providence, you're going to go to one school: either Brown University or dental college or Providence College. And I went to Brown.

So, again, it was a sort of happenstance, not an awful lot of thought; so I'm at college without any great deal of planning.

Cynthia Aaron: What did you major in?

Howard Wiener: I majored in philosophy, again without an awful lot of predetermination. It's an area that I thought would be interesting, I'd enjoy.

Cynthia Aaron: Was it?

Howard Wiener: I enjoyed it. It wasn't nearly as rigorous as other majors, I'm sure. For a while I thought maybe I should be a doctor, but all I'd see in the microscope were my eyelashes, and I didn't have the skills for science. I realized early on I didn't have the skills for spatial relations, so engineering was out. So I ended up in philosophy, and I did enjoy it; I thought it was great. I thought Brown was a great school; I had a great time. But again, I worked there, various jobs, building and grounds, and again, you don't know how it impacts your life.

But Brown alumni rave about President Wriston, the former president of Brown; his son, Walter Wriston, was a famous banker, et cetera. But my memory of the president is not only his lectures, when he took chapel, mandatory chapel one day a week; but I was moving furniture in his house, and I was about to hit a wall, and he came in and started yelling at me. And I didn't think he was particularly kind. So my image of the president then was different than others'.

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But I liked Brown. It was fun, it was good classes. I was active socially: went to all the football games; refereed, again, to earn money, all the sports—basketball, football, softball. I played intramural. It was a good time, fun.

Cynthia Aaron: Was it while you were in college that you decided to go to law school or to apply?

Howard Wiener: Well, if I haven't made this clear, I don't think I'm Columbo, the actor on television in terms of stumbling about; but with all due respect to me, I think my mind might fit that picture. I didn't know what I wanted to do. I wanted to be independent. I wanted to have some kind of autonomy. I didn't want to be poor. I wanted to do something that was important without getting my arms around that and without having any great skills. I think I was relatively shy. I think I was very sensitive to people, and I had gone to court a few times, because of interest in the law. I really liked the courtroom. I thought it was exciting; I thought it would be a great adventure. I was intrigued with the skills; I was intrigued with the drama. So I thought I'd try law school, because I didn't know what else to do. I didn't want to get job.

Cynthia Aaron: Do you remember what took you to a courtroom before you were a law student?

Howard Wiener: What did I want to do when I grew up kind of thing? A search that is never-ending . . . And I was on a . . . They had a court system at Brown, and I ended up participating in that as sort of a judge and also an advocate for certain issues, and so I wanted to see what courts were like. So I went down to the courts in Rhode Island, a handsome courthouse in Providence, and sort of hung out for a few hours at a time.

Cynthia Aaron: Well, once you made the decision that you wanted to go to law school, did you apply to a number of law schools? Or how did you sort that out?

Howard Wiener: Again, it's interesting. In terms of themes, I suspect one theme comes through, is sort of stumbling, is I didn't ask anybody again, didn't have any guidance, didn't examine my own personality, which I should have done. And so I applied to two law schools: I applied to Harvard, I applied to Yale. I wrote a letter to each of them saying I'd go to their law school if they could pay me some money, which again didn't realize again that I was invoking the chutzpah principle. And much to my surprise I got a letter back. I don't know if it was a surprise or not; I don't know what I expected. I got a very nice letter from Yale; I was accepted at Yale. And it said, 'We don't give scholarships to first-year students. We'll loan you some money." And I wasn't sophisticated enough to appreciate what a loan meant.

And Harvard said yes, we did have a scholarship for those persons who had graduated from a Providence public high school. A chap by the name of Charles Smith had given a fund of money in trust, half of which went to maintain the Providence public parks; the other half went to any student who had graduated from a Providence public high school. And since I fit that category, before I started Harvard, I had a full scholarship for tuition. And before any viewer gets excited about that, tuition for the first two years was $600 a year and for the last year $800. So my $2,000 for three years was paid for. Interestingly, before finals in my first year, I received a letter from Harvard saying I had qualified for the scholarship for the second year, which of course was a mystery that I certainly enjoyed.

Cynthia Aaron: I'd like to talk a little bit about your law school experience. Did you like law school?

Howard Wiener: Absolutely not. *[laughing]*

Cynthia Aaron: Why not?

Howard Wiener: What happens, as you move down the timeline I think you appreciate who you are and your characteristics and the strengths of your personality. And I was anxious at law school, because I found it a very elitist environment. I found it a very competitive environment; I thought the attitude was overly competitive. I have since read and seen, read the book *One L.* I have seen the book *One L* and other literature about Harvard first year. That was my experience; I found it very uncomfortable. I was nervous in class being called upon. I didn't feel comfortable being ridiculed.

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I was startled at the priorities of the environment. It was an environment geared to Wall Street. Any lawyer who had the gall to be sensible and want to think about criminal law, they were out of the mainstream. Anybody who hadn't graduated Phi Beta Kappa, summa cum laude, was really looked upon negatively. I thought it was an arrogant, insensitive, overly competitive environment; and the professors delighted in it, with some exceptions. Professor Casner in real property, I never saw an ounce of humility in him, although he knew all the rules of incorporeal hereditaments. I thought that somebody like Warren Abner Seavey, in agency, was older—i.e., older, he was going to be 65. He showed a marvelous sensitivity, marvelous warmth. I thought he was an exception.

Cynthia Aaron: So you do have some positive memories from law school?

Howard Wiener: Oh, yeah. I mean, again, one can't minimize the education; one can't minimize the skills of a professor Freund or Archibald Cox,

and some of the professors were really wonderful. So I appreciated the good education. I think I appreciated the benefits of the education. I thought it was unnecessarily competitive, and unnecessarily narrow. It was not a liberal environment—"liberal" in the sense of a tolerant environment. Mine was the Harvard that "graciously," two years earlier—I put graciously in quotes—allowed women in for the first time. That's outrageous, to think it takes a couple of hundred years to think maybe women should get a legal education. So there were, I think, 10 or 12 in our class. I have problems recalling any African American; I have problems recalling any Hispanic. It was a white male bastion.

And again, digressing from your question, I'll get back. Since Dean Kagan frankly has dealt with all of the issues that concern me, it's a much more user-friendly environment—much more sensitive to the students, much greater scope of curriculum, much greater scope of caring, both in terms of facilities, in terms of classes. It's just a much better place now than when I was back there a few years ago for my reunion. And I did go to my 50th reunion—not many in between. As one of my classmates said, in a rather critical manner, "She's no Dean Griswold." My reaction was "Thank god." I'm not minimizing Dean Griswold, a great dean in many ways, former Solicitor General of the United States, certainly a very capable person. But he didn't in my mind bring the human qualities to law school. So I don't mean to spew it on the record, so to speak.

But I spent a lot of time, again, playing basketball there. Derek Bok, who later became the president, was always on the basketball court; I didn't know how he was going to get through, but he managed to do well. Today he is the president again of Harvard University.

Cynthia Aaron: Well, did you find that having gone to Harvard Law School opened doors for you in your legal career?

Howard Wiener: Again, in my stumbling about, I'm sure there may have been facilities at Harvard that I was unaware of to help me in terms of planning. I didn't take advantage of any of them, either because I didn't know they were there or because I didn't have those skills. I was married in the end of my second year at Harvard. So I just decided to drive to California. My wife was from California and I thought I'd try it here.

It wasn't a totally voluntary choice; Rhode Island at the time required a six-month clerkship without pay. And I had an uncle who was a lawyer and I talked to some people who were lawyers in Rhode Island, and the notion that I needed a job with pay, they were offended to think I had the gall to ask them. And so consequently I didn't have any money. So without any money I got in the car with my wife and son Daniel, who was crawling around the back seat; we just drove to

California and I looked for a job. So in that sense, Harvard may have opened doors, may have had the ability to open doors. I just wasn't able to find them; for some reason I just didn't see them.

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And again, the process either was so different then or I was so unaware of . . . Yeah, I had to take a bar exam; I figured I'd go someplace and take the bar exam. I knew nothing about the process. And Dana Latham, who was the chair of, the founder of, Latham & Watkins, a famous law firm now, was in charge of Harvard's vocational placement at the time. And I wanted to see him right away, but I couldn't get in to see him for three or four weeks. So I signed up for a bar exam and knocked on doors; and William Mathews, who was a U.S. district judge at the time in Los Angeles, had agreed to interview people from Harvard who were looking for a job. So I met him—a very stern guy, but he was very old. As a result of preparing for this, I looked him up, he was born . . . So he couldn't have been more than 57 or so when I met him. I thought he was ancient; now that I'm 76, 57 doesn't sound very old. *[laughing]* He was very nice, very stern, very Harvardian, very . . . Had a talk about jurisdiction and the precious jurisdiction of the U.S. district courts. And I remember his scoffing about diversity jurisdiction; I didn't know what he was talking about, but—

Cynthia Aaron: Just smile and nod.

Howard Wiener: Yeah, nodding. And so he said, "Well, I'm going to hire you; I'll either hire you or Ben will hire you." "So that's great," I said. I don't know who Ben is, and it turned out that Ben was Benjamin Harrison, a U.S. district judge who had been appointed in 1940. And again, I'd looked him up recently; he was born in 1988 (*sic*).

So again, I thought he was so old, but it turns out that he wasn't. And again a total digression, but in terms of the times, two items I find so interesting. He was nominated on June 11, 1940. He was confirmed on June 23 or 24, 1940, and was sitting as a U.S. district judge before July 1, 1940. So we didn't have a lot of *futzah futzah* with the United States Senate in those days. And what was so fascinating about Judge Harrison is he had never gone to law school and never gone to college; he had studied independently in Needles, California, and ultimately become the U.S. attorney and then from there to the U.S. District Court.

So I had gone from Harvard Law School in this intellectual environment in which credentials were so crucial. I didn't conceive coming out of Harvard you could be a judge without having gone to college or law school, and I'm working for a very nice man who had never gone to college or law school.

Cynthia Aaron: How long did you work for him?

Howard Wiener: About a year as a law clerk.

Cynthia Aaron: This is a district court, so what was the workload?

Howard Wiener: Memos on cases that were appearing in front of him. It was a different world. He had some civil, some criminal. Judge Harrison reminded me of Gary Cooper, who some of the viewers, some of you may know was an actor who didn't say very much. He would walk in in the morning and say "Good morning, Howard." And my chambers . . . I mean, I'm as close to him as I am to you and the camera here—very close, in another room, so I could hear everything that went on: civil cases, jurisdictional issues, motions to dismiss, and all. I mean, I had taken a year of federal courts in law school and a semester of federal courts, or another year of federal courts. Federal procedure the first year, federal courts the second, after (*sic*) my third year, so I knew something about federal procedure—at least I thought I did. I was far more intellectual than he had any interest in being; he was not an academic guy.

So in the morning he would say "Good morning, Howard," and at night he would say "Good night, Howard." But it was a different world in that it was less formal; and he was not a bureaucrat, a very realistic guy. In those days criminal cases were not voguish. And there was a lawyer whose name was Morrie Levine who came, who did criminal work, which was not what "good" lawyers did. The criminal lawyers were either Italian or Hispanic or Jewish. They weren't "silk-stocking" firms.

I remember Morrie Levine coming in one day and saying to him . . . He said, "Morning, Ben," and I said, "Morning, Morrie, how are you?" "Fine." He said, "Ben, I see I'm going to have a case in front of you."

He says, "Like hell you are."

He said, "I just filed it, Ben; it has your initials on it."

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Then he says, "That's true." He said, "But I sent it down to Bill."

He said, "Well, why did you do that, Ben?"

He said—and you know, I could hear this; this is a judge talking—he says, "Well, the last case you had in front of me, Morrie, you appealed."

He says, "Ben, I needed the fee."

And he says, "Needing the fee is one thing, but reversing me is another." So he just kicks the case out.

So it was a little different world. And they didn't have bailiffs; they had pals of the U.S. district judge who served as bailiffs. And so Judge Harrison had Jack, who would drive his car and sit in the courtroom, et cetera—no guns, and not an awful lot of formality. Well, Jack got sick, and so I was a bailiff for three or four or five or six weeks. And I saw some marvelous trials, some absolutely marvelous trials.

I saw a trial of Rita Hayworth—again, an actress of some note years ago—versus Columbia Pictures. And there's a law firm now, Mitchell Silberberg & Knupp; and Mr. Knupp was in the courtroom, and he was assisted by Macklin Fleming, who later became a Court of Appeal justice, on the state's side. He had graduated from Yale. And I forget who represented Rita Hayworth. So I was a bailiff.

So before the case started, Judge Harrison came to me and said, "Howard, Guy Knupp is a great lawyer."

"Yes sir." So I'd go out. And Mr. Knupp, I recall, was tall, and he had cowboy boots on. And when Judge Harrison would take the bench, everyone would stand and then sit down. And Judge and Guy Knupp would sit there during this very exciting trial, morning and afternoon, and then before Judge Harrison left, he'd say, "Howard, that Guy Knupp is a great lawyer." He didn't do a thing; just sat there day after day after . . . That went on for two weeks. Every day, "Guy Knupp is a great lawyer."

"Yes, sir."

And at the beginning of the third week, Mr. Knupp stood up and said, "Judge, I think we should see you in chambers."

"Certainly."

So they adjourned, and they're all in chambers, all the lawyers—parties not there—and Mr. Knupp says to Judge, "Ben, I think we should settle this case."

"Whatever you say, Guy." *[laughing]*

So the case got settled. Judge Harrison comes in; he says, "That Guy Knupp is a great lawyer."

So I'm learning about the law biz from the inside. It's a little different than I expected, and when I left . . . Judge Harrison liked me and I really liked him; although not an awful lot of schmoozing, he gave me advice. He wanted me to work for the U.S. attorney, and I didn't go down that path. And the advice he gave me—we're looking out the window and told me where

his aunt had lived, et cetera, near the U.S. district courthouse in L.A.—and he said, "Now remember, Howard, always tell the truth, and never take a mining claim instead of a fee."

At the time, I was so taken by the brevity of this wisdom . . . but over the years I've just been so impressed with how profound it is. And when I taught a class in professional responsibility I talked about that; it probably says everything. So, as you gather, I liked the experience. It was very interesting. I met a lot of people and I enjoyed it.

Cynthia Aaron: What did you do after you clerked for him?

Howard Wiener: Well, again, in my stumbling mode—and I don't mean to stress that—again, I didn't go down traditional paths for Harvard lawyers. In my initial quest I admit . . . As I say, I'd met and interviewed with Dana Latham. And I didn't realize at that time there was discrimination among law firms and that Jewish lawyers would have problems being hired. I thought discrimination was only on the East Coast and not on the West Coast. And I'd had an interview with a lawyer with the Nossaman firm before I was to meet Mr. Latham. He asked me where I was going to go, and I said, "Well, I'm going to go to O'Melveny & Myers and Gibson, Dunn & Crutcher. And he scoffed at that. He said, "That's ridiculous."

I said, "Excuse me, sir, I'm all of 24 years of age." And I said, "I don't know why you're laughing."

He says, "You're doing this wrong." He said, "You have to go see Isaac Pacht at Ross, Warne, Bernhard & Pacht, because he is Jewish; you have to go to Loeb & Loeb, you have to go to Mitchell Silberberg & Knupp." He says, "Don't go to those firms. It's a waste of time."

And so I remember that so vividly for a couple of reasons. One is, he was so outspoken, smoking a little cigar all the time and using the "F" word, which I didn't know people with white hair would use the "F" word.

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So here it is; he had bluntly told me I'm wasting my time because these firms discriminated against Jewish lawyers. So I had seen Mr. Latham in looking; he was very nice to me, very pleasant. And consistent with my naiveté at the time, while we were talking about opportunities in Los Angeles and where he could help, I asked him—and again, looking back on it, it's so naive, it's shocking—but I did turn to Mr. Latham and I said, "Excuse me, sir; I understand from Mr. So and So, Mr. Brady"—my memory of this then—"Mr. Brady told me that your firm will not hire Jewish lawyers." And I remember a long pause and Mr.

Latham saying quite graciously, and he said, "You're going to be a great lawyer. You ask some very good questions."

So I wasn't hired, and made a judgment call that maybe I had to change paths in terms of my job search, and Harvard wasn't going to help me. So I knocked on some doors and met a lot of lawyers and met a chap named Paul Egly. People from Los Angeles would know that name, because he later became a judge, and he was the busing judge in Crawford *v. Board of Education*; but he was a lawyer in Covina. And we talked about what we saw for the law practice. One of my contemporaries had gone to Lawler, Felix and Hall; they represented Standard Oil. Another chap from law school had gone to Gibson, Dunn & Crutcher, another to Musick, Peeler & Garrett; they're all major law firms in Los Angeles. So I ended up in Covina with Paul Egly in the general practice in a very famous firm called Egly & Wiener. So I was out on my own.

Cynthia Aaron: Was it just the two of you?

Howard Wiener: At that time.

Cynthia Aaron: And what kind of work did you do?

Howard Wiener: *[Laughing]* Covina was a small community at that time; and to give you the setting, and you're not going to believe this, because I have a problem believing it. We had a very small office. It was like you'd open up the front door and there was a hallway down with three little rooms. His was the front room, a middle room, and I was in the back office, very small, on 151 East Badillo Street in Covina. And we did "everything." Paul was a veteran, 10 years older than I am. He had very well-educated, wonderfully smart, wonderfully creative . . . had gone to Covina schools, had received a field commission in the service; very charismatic, a lot of fun. So we had a selective clientele; we took anything that walked in the door.

But to give you the picture when I first started, we had a library in that middle room that consisted of the Witkin books. I think there were two, a green one and a blue one. Maybe it was a green one and a red one. One was procedure and the other was substance. That was our library. And Paul's wife Marion had been from Germany; she was back in Europe at the time. And Paul's task, when I first went with him, was to take care of their parakeet Manny. So there were the two Witkin books and Manny in a cage in the library, and so that was our physical setting. We had a Royal manual typewriter.

And I had a business deal with Paul. I was always a superb negotiator, and I negotiated a business deal with Paul that he would guarantee me $200 a month. So I'm married, have a kid, and I'd left working for Judge Harrison at $72 net weekly for $200 a month net that he was to pay me if I didn't get paid

from any other source. The first day I was there a woman walked in who wanted a divorce. So I asked our secretary, Dora, I said, "Do we handle divorces?" She said, "We do, Howard." And I said, "Are there papers?" She said, "Yes." I said, "What do we charge?" And she said, "$275." So I said to this person, "It's $275," and she gave me $275. So Paul never had to pay me, and we were off running.

I suspect Harvard lawyers start differently now and maybe started differently then.

(00:40:03)

Well, one of my contemporaries from law school I remember meeting in the first two or three or four years was going into court for his 11th accounting of the Harvey Mudd estate. I think I was in downtown L.A. on one of my bigger, more significant misdemeanor trials. So I tried a lot of stuff, a lot of misdemeanor trials and felony trials, just everything. And then as we grew in the practice, the firm grew. We became respectable; we developed a clientele. We had a very good law practice. So I practiced there for 19 years.

Cynthia Aaron: I was just going to ask you that. While you were there, were you active in the local bar?

Howard Wiener: Yeah, I used the . . . I was very comfortable with lawyers. It was a different world then. The Citrus Municipal Court had just started in Covina, and it was in a building, not a courthouse.

And there was a judge there—as a total digression—by the name of Al Miller, and he had been a successful lawyer in Cincinnati. So now I'm maybe 28, 29 years of age, routinely going on the Citrus court to handle misdemeanor, petty thefts, drunk driving, et cetera—one of the great trial lawyers of Covina. And I didn't understand it, but Judge Miller, when he would take pleas—and all the cases were negotiated in those days without an awful lot of formality—he would impanel a jury to take pleas. And I never understood why there'd be a jury in the box. And we would end up entering a plea and a fine of $150 or something to a drunk-driving case.

And ultimately the truth came out is, he wanted—Judge Miller wanted—to have more judges and a huge courthouse, and so he would send the data in to the Judicial Council that these pleas were jury trials.

So in a given day one judge is handling more jury trials than occurred in the history of man. So when the Judicial Council was getting this data and then it goes to the Legislature for more judges, he was able to say, we need two, three, four, five judges. And so, again, I was so naive, I didn't understand

what's happening. Well, somebody was jiggling the figures, so to speak, for no other reason than to augment the courthouse.

So again, in terms of bar activity, I was very active; we had the Citrus Knife and Fork Club where we got together. The lawyers were of a wide variety. There was no one else from Harvard, but there were a lot of lawyers of very well-trained background, of varying ages, all very social; one's word was one's bond. Then that bar became a more formal bar, then the Pomona Valley Bar Association, and I became the president of both. And then I later was on the Board of Trustees of the L.A. County Bar Association, then ultimately elected to the State Bar Board of Governors. So the bar really—

Cynthia Aaron: When was that?

Howard Wiener: 1972. So the bar really was my constituency. And so I was elected in 1972. At that time, by legislation the L.A. district required one person who had an office outside of Los Angeles. And again, they had a so-called breakfast club of the establishment bar, and the establishment bar would nominate somebody at the breakfast club, and that person would routinely get elected. That was the first time, however, that they had a contested election between lawyers from the plaintiff's trial bar who were uncomfortable with the breakfast club controlling things. So I had a chap run against me, and so I was the establishment lawyer. People who knew me thought it was ludicrous and humorous and ironic, but it was the first time there had been a contest for the bar. So I was elected. George Hillsinger, a trial lawyer, does defense work, still alive, was elected by the trial lawyers; Joe Cotchett, now a famous lawyer, was elected in Northern California. And so that started a three-year term, which took a lot of time and very, very interesting.

Cynthia Aaron: And worthwhile?

Howard B Weiner: Oh, very worthwhile, and that district attorney of San Diego County, Bonnie Dumanis, was on the board. That was very worthwhile for a whole host of reasons.

(00:45:05)

You learn about . . . you see law in a different context, you see how people practice. Seth Hufstedler was on the board; you know, Shirley Hufstedler was then on the Ninth Circuit. Leonard Janofsky was president, and later became president of the American Bar Association; Paul Hastings, Janofsky, and Walker. So it was interesting to meet the Chief Justice, dine with the Supreme Court; it was just an eye opener.

Cynthia Aaron: You said you were with your firm for 19 years. Was the next step a judgeship, and how did that come about?

Howard Wiener: Yes. In the process of fortuities and not planning . . . Because there are some people who look at you and they label you "Can you help me or not" and put you in another category. I've never looked at people that way; I never had a grand plan. I've always assumed if you're pleasant enough and conscientious enough, somehow the luck gods and the fortune gods will smile on you, and there is a role for merit. And so I developed a pretty good reputation practicing law; I tried a lot of different cases, had a lot of different experiences. I had small businesses, starting by Frank DeSalvo, who was driving a dump truck when he starts, ends up selling that business to Union Oil. We represented a lot of people in the rock and gravel industry.

So we had a very good law practice ranging from a lot of doctors and a lot of lawyers, construction people; eight or nine lawyers; I had a couple of secretaries. So I'm pretty successful as a lawyer doing a general practice still. And interestingly, when I called up one of my former partners to talk about today—Jane Egly practiced law and she happened to marry Paul—but she said, "Well, what you have to stress is that you and your firm were so different." We hired Jane in 1972, and she said at that time we were one of the few law firms, even then, hiring women. And she explained to me in my phone call with her recently, it was the single best job she ever had, because at no time did she face any hostility or discrimination. And I didn't realize that's on the vanguard.

And it was in a firm in which Art Baldonado was one of my partners; he later became a judge. He was a Hispanic chap from Los Angeles. I didn't know you're not supposed to hire Hispanics in those days. I thought Mexican Americans are here first; I didn't realize the discrimination against Mexicans. So our firm was diverse, without trying to do the politically correct thing. We were just nice people who were good lawyers.

And so a fellow by the name of Bill McVittie was running for the Assembly in San Bernardino County. And Bill was a lawyer, and this is in 1973 or so, and he was alleged to have done some improper things in the election process, violating highly technical provisions of the Elections Code. And in any event, so the district attorney of San Bernardino County filed a complaint against him, and he wanted a lawyer who he thought would do a good job.

So he hired me, and to make a long story short, we resolved the matter in a satisfactory way; and lo and behold, Bill gets elected to the Assembly, much to everybody's surprise, including mine. But he is a very good campaigner, a very nice guy; and I wanted to be a judge at that time. So as a result of that experience, people in the Legislature thought I knew something about elections law and code. So I was called by a few people in the Legislature to represent them. Again a digression, one of the tenants from the space we leased in West

Covina was Chuck Wiggins, who became a Ninth Circuit judge. And before then he was in the Congress, and he was a key player in the Watergate hearings. And he was viewed as a brilliant constitutional lawyer, and he had been a lawyer in El Monte with a very modest practice.

(00:50:04)

So I was having lunch with him while he was on that committee where the hearings, Watergate hearings, are going on. I said to him, I said, "Chuck, I don't understand this; you were a lawyer in El Monte; I mean, you had maybe a modest divorce once in a while." I said, "Now you're being billed in the *L.A. Times* as a brilliant constitutional lawyer."

He said, "Howard, you have to understand one thing in life." He said, "It's not who you are, it's what the *New York Times* says you are."

And I think that happened to me, because people in the Legislature thought I knew something, so I met some. . . . McVittie's in the Legislature; he called and said, "You want to be a judge, your name is in, why don't you apply to San Bernardino County?" I said, "I don't live in San Bernardino." He said, "Well, that would be poetic justice, wouldn't it?" I lived in Claremont, down near the border.

So I got appointed. I met Tony Kline, who was Governor Brown's appointment secretary, and so I got appointed. And I wasn't particularly well received, because the presiding justice was angry that a Los Angeles lawyer, a perceived liberal Democrat, would be appointed as a judge in San Bernardino.

Cynthia Aaron: So you were appointed to the superior court by Governor Jerry Brown?

Howard Wiener: That's correct.

Cynthia Aaron: How long were you on that court?

Howard Wiener: Two and a half years.

Cynthia Aaron: Go ahead.

Howard Wiener: Well, you know, in all candor, it was not a welcoming experience; the presiding justice was angry about it, and he handled it in an interesting manner.

Cynthia Aaron: How was that?

Howard Wiener: He made clear that I had a welcoming ceremony in which I could only invite limited guests; instead of the usual celebratory event, it was a very . . . I could only have "X" number of people,

et cetera; all of which was unnecessary, and he was simply wrong. And he assigned cases to me to make sure to embarrass me. The first case I had was a criminal case, a modest criminal case; the third case was a death penalty case. And so, although I knew something about misdemeanors and knew something about mechanic's liens, I knew as much about a death penalty case as the videographer—who, although a guru on computers, I'm sure could not handle a death penalty trial.

And so, but much to his surprise . . . very good lawyers. I did my homework, we had a trial. So the bar was very appreciative of my being there; they viewed me as a breath of fresh air. They realized I was being discriminated against, in being thrown a tough weight. The lawyers were marvelous; three-quarters of the bench were very gracious. So it was sort of divisive, but it was a great experience. I loved San Bernardino; I really enjoyed being a trial court judge. The fourth case I had was the . . . Whitey Kolazak was a hit man for the Mafia, transporting 2,000 pounds of marijuana.

And then I was appointed as presiding judge of the family law calendar, which the presiding judge thought I was entitled to; but again, I thought it was marvelous. That was a great experience. I went upstairs—I remember to the sixth floor—explained to the clerk that I was newly appointed and I was in charge of family law. And she started to cry and I asked her, "Is there a reason that you're crying?" And she says she had been there for umpteen years, 15, 16 years, she had never had a judge go from the third floor to the sixth floor to introduce himself; and she was so excited about the opportunity of working with somebody who was going to help her deal with the calendar, because what the presiding judge had done to embarrass Governor Brown was he had put a moratorium on civil cases and had elected not to hear any more civil cases, so the backlog was building up. So she and I drafted a program where we just put all the cases on the calendar, told everybody there's going to be a trial date coming up; and of course 80 percent panicked and settled the cases. So we ended up being current in about four or five or six months. It was a great experience. The bar was great; the cases were interesting. I had a great time.

Cynthia Aaron: Let's now turn to the Court of Appeal; I assume you applied at some point to the Court of Appeal. And what led to that decision?

Howard Wiener: Yeah, I liked the trial court, but it seemed to me that I figured out somewhere along the way I could handle the Court of Appeal issues.

(00:55:08)

I was nervous initially—would I have the capability? And I ultimately concluded I did have the skill. I thought I could do something of greater public impact. I thought the cases would be more challenging; I thought it would be intellectually stimulating. I just thought it was the impact on both the law and society would be greater. I thought I could do the job, and it was just time to try something different.

Cynthia Aaron: Was that Governor Brown?

Howard Wiener: Yes. And the timing was right; the people who then-Governor Brown appointed to San Bernardino were very conscientious. We literally cleaned up the calendar; we were current by the time I left. And San Bernardino is in the Fourth Appellate District, and even though I hadn't been a resident of the county, I'd been reelected. So I was well regarded. And an event occurred in San Diego; I was told that there was disagreement as to who to appoint. So it was suggested I apply and I did; and much to my surprise I was appointed to the Court of Appeal.

Cynthia Aaron: Who was on the court, the Court of Appeal, at the time you joined it?

Howard Wiener: Well, I need a drink of water. I didn't know I could talk this much about the past, so this is interesting.

You picture the scene: I'm in San Bernardino, and again life at the superior court is different than I anticipated, for a whole series of reasons. I was so excited Governor Brown had called me, told me I was appointed. I left my chambers, and I bumped into a colleague who I had known for a long time and said, "I've just been appointed to the Court of Appeal." And he said—he looked at me, making eye contact—and said, "Who's going to handle the calendar here?" which puzzled me then.

So judges are interesting. I have to say that there are a lot of special judges, but I have always found it . . . I've always been more comfortable being with lawyers than I have been with judges. I find lawyers somewhat more energized and, frankly, maybe even more healthy psychologically, bold and overstated as that comment may be.

So I arrived. Justice Brown, Gerald Brown, was the presiding justice at that time; he was in his early 60s. I knew nothing about the Courts of Appeal, except Chief Justice Bird had assigned me as a trial court judge to both the San Bernardino Court of Appeal and the L.A. Court of Appeal. So I spent five months during a two-and-a-half-year period on assignment to the Court of Appeal, which was an interesting learning experience.

So Justice Brown wanted me to meet with him and the other justices before the confirmation process, and I was puzzled about that because it seemed to me that I shouldn't be talking to anybody until I was confirmed. And I don't recall whether I deviated from his request and held off, but I don't think I did. So I think I met with him and Justice Robert Staniforth and Justice Cologne, before I was confirmed or at least . . . yeah, before I was confirmed. And I remember driving down from Claremont where I lived on the highway; and I had directions, because I had rarely been in San Diego and it seemed like a long distance from Claremont. And I remember I had to take off on Front Street off the freeway, and I had to find the state building, and I went into the state building to the sixth floor.

And it was a very awkward setting. Justice Brown, who I got to know very well, was different. He was—

Cynthia Aaron: You want to elaborate?

Howard Wiener: He was awkward socially, and people who are watching this who know Justice Brown know exactly what I'm saying.

(01:00:03)

But he marched to a different drummer: he liked music, he liked literature, he had an impeccable memory, the most remarkable memory imaginable; and so if you were having a conversation with him at 5:00 on a Friday afternoon and he was telling you about the automobile ride he took with his older brother to Anapolis in the '30s and that conversation was broken up, at Monday morning he would meet you in your chambers and continue the sentence from where he left off. It's just different, which required some adjustment in terms of schmoozing, not a regular guy in so many ways.

I remember the awkward setting. I sat on a chair similar to this and the three of them sat across from me in order: i.e., Brown, Cologne, Staniforth. Staniforth also was somewhat awkward socially, and we had an awkward conversation where I met them, and I then got in my car and drove home. And then we had the confirmation proceeding, et cetera, and I end up then in San Diego. It was a relatively formal environment, and some events stick out so clearly. I didn't really know much about the job. I was essentially given a research lawyer; Buzz Kinnaird was my research lawyer. He had worked for Justice Staniforth and Justice Cologne, and so he knew the ropes better than I did.

I found the job very difficult; what was interesting to me was again structure. I had a bundle of cases. They gave me a bundle of cases—six, seven, eight cases were mine, given randomly. The lead justice system that you have here . . . and we can get into that more in a moment. But the first oral argument I believe was in June, and so Justice Brown said

we're to take the bench on a certain day, and I said, "Okay, but there are four of us." He said, "That's right." I said, "But there are only, I think, Gerald, normally three on the panel." He said, "Well, that's true, but it's inefficient if we change." So there are four justices. I said, "Well, do you tell the lawyers who they should be arguing to?" "No."

So I recall sitting there, not on the panel; but I'm sitting there and some lawyer's arguing in front of me, and I want to say, "Hey, now you, please don't look at me." I remember feeling so guilty, I started taking notes. I felt obliged because the poor chap is arguing.

Cynthia Aaron: Did that system persist for—

Howard Wiener: No, no, no, at the end of the first day apparently other people said, "Come on, this is silly," and so we changed it. Well, another thing happened was I notified the clerk's office, I said I would like the briefs in all the cases. And I don't know if it was Steve or somebody else—and I'm referring to Steve Kelly—but whoever it was, I was in the clerk's office physically to pick them up, and they're laughing. I said, "What are you laughing at?"

"Do you know you are the only justice who has ever asked for the briefs in all the cases?"

I said, "Well, what does that mean?"

They laughed. He said, "You know what it means." I couldn't get over that; I couldn't get over it from just a management perspective, because why would you want research lawyers for justices to know that they're not being examined or scrutinized or cases analyzed from a perspective of the briefs? Because what happened is Justice Brown was proud that we were "a hot court closed group."

Cynthia Aaron: Which means what?

Howard Wiener: Wednesday before oral argument we'd have a notebook in which the memoranda would be prepared for oral argument. Memoranda, bluntly, is a draft opinion; draft opinion is *the* opinion, and we would not have an oral argument conference—unlike my experience in Los Angeles, and unlike my experience in San Bernardino and on the Court of Appeal. So you take the bench with several days' preparation, but it would be a hard work week from Wednesday to the oral argument, and so you would be reading the briefs before that time.

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And so I didn't understand how that fit. But what was interesting: a) after I arrived and after the first setting we went

to changing seats at the Court of Appeal to three. And then each of the justices then said, "Oh, get me the briefs edit," because there are plenty of briefs around, et cetera.

But we were assigned six or seven or eight cases, plus there were by-the-court opinions done primarily by Justice Brown. And it was an interesting world in the sense, with one research lawyer, I'd take half the cases; Buzz would take half the cases; and you'd do your own writing of cases. And Justice Brown had been a Rhodes scholar. He had gone to Yale Law School with Whizzer White. His reputation was committed to Strunk & White: no "that"s, no legalese, et cetera; a very good opinion writer, very much to the point. Justice Staniforth was relatively new. Justice Cologne, as you probably know, had been on the Legislature, had been appointed by former Governor Reagan.

Very little dialogue, a very efficient court—until I arrived, I guess, because I found the job very difficult in that there were bodies of law I didn't know. I was not a fast writer. I could not sit down in those days with either a typewriter or early on computer and knock out something easily. And I assumed that the lawyers who were making arguments were serious about the arguments, and if I didn't understand the arguments, I would want to figure them out. Some of the arguments required more work than others, and since my law practice had been essentially to a great extent a people practice, how to resolve problems for people rather than complex corporate acquisitions in dotting i's or crossing t's in tax matters.

I was a solution-seeking person, but I didn't have access to those sources anymore. And I thought we had to do the job that the Constitution required, and the Constitution says that at the Court of Appeal, you have to give your reasons in writing, with reasons stated. And since I was sensitive to the practicing bar, I wanted to turn out a product they could understand and I wanted to understand it. And since although I didn't think I suffered from the impostor syndrome, I didn't have any illusions; and I wanted to make sure that I could do a job that I could be proud of and that was consistent with the opportunity that had been given to me.

So I found it a hard job with very few people to get insight from, because, as I say, Justice Brown was in a hyper-decisional mode, and he was interested in production. And in the entire time I served with Justice Brown as presiding judge, we never resubmitted a case; we had always decided . . . probably the median time from time of oral argument to time of filing an opinion was probably 20 days.

Cynthia Aaron: As you said, there was a draft opinion at oral argument.

Howard Wiener: That's right, and so signing off . . . I mean, there was an article written that I had been familiar with called "The One-Judge and

the No-Judge Opinion," written by Justice Thompson. Robert Thompson had been involved in that, Judge Hufstedler had been involved in that. There was concern with the power of staff, and essentially it was a staff-driven product with only one person, i.e., either the lead judge who is responsible for the draft opinion to be put in a notebook or a staff of the lead opinion. And that was all there was and everyone would sign off.

I thought the job entailed more; I thought it was a three-judge panel. And so I did homework. And early on we had a case called *People v. Pierce* that had been returned by the Supreme Court to the Court of Appeal in light of *People v. Honeycutt,* which interestingly, I remember certain aspects of it dealing with jury misconduct; it was a murder case. And I recall going to oral argument, I recall an affirmance.

(01:10:04)

Again, a draft opinion affirming by Justice Brown, signed off by Justice Cologne. And I was bothered by it, and I remember Justice Brown . . . I'm looking at your cases here, Cindy, sitting on a shelf in back of you, and I would put *People v. Pierce* on a shelf. I remember Justice Brown coming by and saying, "Howard, we have to get it out." This was about a day after oral argument, and I remember saying, "Gerald, I want to do a little more homework on that." I remember his tapping his watch and saying, "Well, we have to get it out." And I said, "Yes, that's true." And Rick Benish, who was on the Court of Appeal at that time as an attorney, a central staff lawyer here in San Diego in practice, and a very nice chap, and he knew my concern of what was happening . . . and so I drafted a dissent in that case. Rick was a sounding board. And I looked it up before today and that opinion, my dissent and the majority, was filed by the end of June. Again, within a 20-, 25-day period, the Supreme Court granted review, and 7-0 agreed with the dissent; they reversed with instructions to send it back.

Cynthia Aaron: That's nice.

Howard Wiener: And it was a marvelous learning experience for me and very exciting in the sense I probably received about six or seven letters from judges on that court in San Diego saying, "We don't know you, we never met you, but thank god you're here," words to that effect; it's a breath of fresh air, we haven't seen a dissent in years and years. Whether we agree with you is irrelevant, but at least now we have somebody who's going to be paying attention. The staff was sensitized to it, for better or for worse.

I never had any dialogue by either Justices Cologne or Brown on the outcome of that case, and so part of my learning experience was that as insular as the world is in the Court of Appeal . . . And as I think many people know, there is a so-

called Chicago experience where they put people in a room, they put a person in a room with 11 or 15 or 20 or 30 other people and somebody writes "X" on the board and they write a "O"; a lot of X's and an "O." And they go around the room and everyone is told to say there are only X's up there. And if you're alone in that room, over 90 percent of the people are swayed by their peers and they say there are only X's up there when they see the "O." And in a lot of social, scientific, psychological data that way . . .

And so early on, I became nervous about the insular world in which appellate justices live in, because in effect you're grading your own papers. There is a test out there and you're grading it yourself and nobody ever criticizes you—not like the Supreme Court, where there are commentators and dialogue. It's almost an invisible environment, and research lawyers or other judges are going to go up to you and say you're out to lunch. Your colleagues by and large, for a whole series of reasons, are respectful. The law reviews don't take up your cases; and so what you need, it occurred to me, is to be cautious about being sucked into an environment which may be comfortable but isn't a real world.

So you needed courage; you needed a courageous staff, you needed independence. And I was saddened by the fact that nobody schmoozed about that, didn't talk about it. It may have been the personalities; other courts may be different. But I learned a great deal from it, about the importance of relying on intuition. And I guess the theme of many of my comments is, I have very good intuition, and rely upon your instincts. And you have to be courageous, you have to do the right thing. And I guess . . . I know I'm getting emotional, but it's a tough job.

Cynthia Aaron: I couldn't agree with you more.

Howard Wiener: I'm surprised that I did get emotional, but it's such a privilege, it really is.

Cynthia Aaron: I feel the same way, I really do. Can we talk just for a few minutes about your approach to deciding a case? That's interesting, I think.

(01:15:03)

Howard Wiener: But for that lapse . . . and it's interesting; I didn't anticipate it. But again, it's really a great opportunity in terms of deciding cases. Again, I thought it was a hard job; and after I decided it was a hard job I asked myself, how do I want to do it? Because you're only on the bench one day a month, and it's very easy to be gracious for a day, with people arguing for 30 minutes. If you're well dressed and smile occasionally, people don't know what's up there, if anything. And you're wearing a black robe,

and culturally people are wonderfully respectful; whether you're entitled to it or not is a separate question.

But I felt that when I went to cocktail parties and saw lawyers I would want to be able to talk about the cases and know them; they were my cases in that sense. And so early on, I'd look at the briefs; and I never had problems making a decision and never had problems changing my mind. So that I . . . Buzz and I—then later Bill, and then we had a second research lawyer—you know, we'd go through the cases and I would say, "Look, I'm . . ." We'd look at the briefs together or separately. "I think we should do so and so on this case, let me know what your thinking is."

And so by the nature of the job and my skills . . . because in the process I wanted to teach myself to write, and I took that aspect of the job very seriously. So I'm on a learning curve learning how to write, and I'm on a learning curve how to manage efficiency, because we have to get cases out. And I did not want to resubmit cases at the trial court level; I never resubmitted a case. As a lawyer in the private sector, I realized that what a judge does is decide, and that's important. That's your job and you have to do it the best you can. No one bargained for perfection; you do the best you can. So what one does is I would want the cases to get out; so with Bill Dato, who came on after the first . . . after Buzz left for a year, and then Rich Fridell came on and then Bill came back.

Bill would get the tougher cases, because by then they were being graded. Again, interesting, essentially the same number of cases, so I would give him the big cases. It could take a month or two or three on cases; they just couldn't be done in a week or two. *People v. Hedgecock*, other cases, we'd take a long time on it. I would divide up the other cases between the research lawyer and I; so I would be writing two or three cases, the research lawyer would be writing two or three, and Bill would have the heavy one. And then we'd be mucking around with the dissents or concurrences and I would ask one or the other to brainstorm those.

So it's an ongoing assembly line. And so I remember in one of my first cases, it was a true finding. Someone had pled, admitted a true allegation—a juvenile case. I said . . . I'm sorry, it was an enhancement. I said, "Well, they admitted it." I said, "Doesn't seem like a big deal to me; you know, we have to affirm." And then the research lawyer said, "Well, you have to read *People v. Bunnell* and certain other cases, talking about waiver on the record, et cetera." So I'd have no problem deciding, both on the base of intuition, instinct, experience. And then one would have to confront the cases and where the cases took us. So it was an ongoing process; nothing was ever in cement. You'd hear oral argument, think the case should be changed. So we'd decide, and again it was an ongoing process;

until I signed the opinion it was never a done deal. It was just, I could change.

Cynthia Aaron: And with your colleagues, was there agreement reached pretty easily in most cases?

Howard Wiener: Yeah, I had some ground rules. I mean, the colleagues were different. Justice Brown, as I've intimated, was here for 20-plus years; to the best of my knowledge he did not write a dissent in those years. Justice Staniforth marched to a drummer in which he had strong views in cases and criminal cases in which there was violence. He was much more liberal in cases in which there was no violence. He was very sensitive to claims of plaintiffs in personal injury cases.

(01:20:05)

Probably not a bundle of tact in some of those statements, but, you know, the colleagues . . . we didn't have challenges in reaching decisions; it was always a cordial process. I never lobbied one judge without another judge being present. I thought that was inappropriate. And since my oral communication sometimes can't be as clear as thinking things through, reading the cases, brainstorming it with one or more research lawyers, thinking about it, I would generally write memos and share them with the other justices on the panel, express my concerns. Or even before oral argument, I would alert somebody. Others I said I'm concerned about this case. But it was never an uncomfortable process. I think I would describe the process—I would use the word, by and large with most of the colleagues here—as "cordial," comparing it with "collegial." "Cordial" is pleasant; "collegial" contemplates intellectual dialogue, meaningful discussion.

Cynthia Aaron: There was less, then, than you would have liked?

Howard Wiener: It was a more—with certain colleagues more—on the cordial side than collegial side; and I was disappointed in that, but that's the way the decisional process works. Some people are not comfortable coming to grips, talking objectively about issues. The difference among justices is not Democratic, Republican; in my mind the differences between justices is frequently—I'm overstating this—is between background. Justices—again overstating it—justices who come from the public sector sometimes see issues differently than those who come from the private sector, because of their life's experiences.

For example, Justice Froehlich—appointed by a different governor, a very conservative justice—he and I would have commonality, because we both came from the private sector. We knew the importance of getting out a case quickly, because of the financial aspects of it. We thought if we could resolve it

at the Court of Appeal without a retrial, let's do it rather than sending it back, because we were sensitive to the costs associated with it, and we were comfortable with our skills.

So even though he might start from one side and end up at the middle and I'd be on another side and end up at the middle, it was based on those common experiences we would hash out differences, so we disagreed relatively infrequently. Justices . . . I probably disagreed with Justice Staniforth, who in one sense I should have been agreeing with more, because same governor, a Democrat, et cetera. But his predetermined views on certain aspects of cases was uncomfortable with me. So they were certainly cordial, but not collegial in a sense of brainstorming.

Cynthia Aaron: You mentioned your one dissent; did you dissent often?

Howard Wiener: Much to the surprise of many folks, I didn't, because I think they viewed me as more "liberal" than I think I really am. In the material—which I again thank people for, again here—they have a number of dissents, probably as many as 35 in that material. I thought there were 13 published dissents, i.e., less than one a year for the years I was on the court. And when I parsed the material here, it was interesting to me—more than half of my dissents either resulted in a nonpublication, decertification, or granted review. So I'm left with very few dissents in the cases that I've seen.

So I didn't dissent that often, because I feel very strongly about dissents—not an ego trip—is there a way of working out the problem, is there another solution to the problem? I feel very strongly that dissents are . . . unless you feel very strongly, they shouldn't be there, because the party should think there is a unanimous decision by a court; it ends up splintering; it ends up triggering dialogue. So I was very cautious in writing dissents and very cautious in writing published dissents.

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I happen to feel . . . when I looked at the material here, I saw a person in history; I didn't realize it's the same person that I am sitting here now. So I had to go back in history looking at some of those dissents; and you know, I was emotional a few minutes ago, but when I read them again, some of them again, I am re-convinced at the correctness of it and—

Cynthia Aaron: Well, that's nice, that's a nice feeling.

Howard Wiener: Again, I'm going to deviate probably from what's allowed of me, but there are a couple . . . there's one . . . there are a couple I ran across that I could find if I was that organized. I think they are so correct, egotistical as it sounds. And again, it's history. I mean, a long time ago, the case called *McLaughlin v. Sikorsky* with the helicopter crash, people in the military were killed and

Justice Cologne, I believe, wrote the opinion. And the issue was the military, the governmental immunity doctrine; and the panel says yes, it applies, put it back on trial, and it applies. I happened to think . . . I disagreed with that very strongly then, very strongly now; and again, what I said, I just . . . Again, this is immodest, perhaps. It—

Cynthia Aaron: Go ahead.

Howard Wiener: I said, "The majority's rejection of state law in adopting a certain holding which allows the governmental immunity doctrine represents in my view a skewed cost-benefit analysis, where the costs are borne by the injured claimants and benefits in the form of increased profits accrue to a private manufacturer, excluding those times of declared war or states of emergency, which inject special considerations. I conclude the interest of both the federal and state governments are served when our military personnel are provided with sound and reliable equipment designed and manufactured without defects."

We know the timing of this video, at least in my mind, it couldn't be more apropos. I also dissented in a case called *Decker v. Imperial Beach.* And in that case the issue was gross negligence and the majority hold—. If I can find it again, the majority explained that no, there are no factual issues; and without getting overly emotional again, assuming I can find it, I tried to explain in that case where . . .

I'm lost and I'm still on tape here and having a nervous breakdown. I have more papers here than I should have, which only shows why I don't practice law, I could never handle papers.

Party had said, it's . . . The majority in *Decker v. Imperial Beach* explained why there were no factual issues, in a summary judgment; and I explained in a page, which I won't read entirely, that I didn't think understanding what gross negligence was requires a scholarly insight into an arcane subject. I thought that we should focus on the human factors of the case. And I ultimately said, "Picture a young man caught in some lobster traps in the ocean; he had gone surfing, and he is caught there. And some people are on the beach and there have been helicopters going above and there is a fire chief on the beach with a bullhorn and they're trying to figure out what to do. People are gathered there, but the fire chief won't send anybody out there for a whole series of respectfully bureaucratic concerns.

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And the majority explains why there are no factual questions. Here there is no, there can't be any, gross negligence. They

have done everything you can do. So I end up saying here, "The summary judgment remedy characterizes a drastic remedy to be used with caution as to replace a trial on the merits. Although the appellate record is purportedly culled, I cannot leave this case without admitting that I will remain haunted by the specter of this young man's lengthy, unsuccessful struggle against the power of the sea, fighting to stay afloat, emotionally assisted by what can only be described as a callous call from the beach that 'Help was on the way.' In no way can this case be described [*sic*] to the drowning described in another case, where lifeguards came," et cetera.

"All those participating in the rescue efforts were certified emergency technicians," et cetera, et cetera, et cetera. "The case here should be decided on the evidence presented in trial and not on the documents before us." And again, much to my surprise, going back in history, I felt the same way reading this now as I did then. It's a sad case: somebody who is deprived of a trial. And I thought that's what courts are about, to make sure that people did have a trial on the merits.

Cynthia Aaron: Did you ever have one of your opinions reversed by the Supreme Court?

Howard Wiener:: *[Laughing]* Sure, I can . . . It's funny, I didn't look at those issues. But sure, I had grants of review in cases that I had published and then decertified.

Cynthia Aaron: Did they have any particular impact on you?

Howard Wiener: Of course. Impact in a number of ways is . . . again on deciding what your job is. You develop some kind of relationship with the Supreme Court, and I was comfortable concluding . . . And I think my colleagues were, at least most of them were. The Supreme Court is assigned a defined task; I'm assigned a defined task. I will do my job; it will do its job. So I ended up being very comfortable with what it's doing and what I was doing. I think a case . . . So I remember I wrote an opinion in a case, an employment case, which I worked very hard on, the panel worked very hard on, and the Supreme Court decertified. and Jerry Uelmen wrote it up as one of the 10 best decertified opinions in some magazine. And he was right.

I guess the case in which I was saddened about was *George v. Krishna,* in which there was a very substantial verdict against the Krishnas, in a fascinating case. Mil Silverman, a civil lawyer here in San Diego, tried it. He had a $40-some-odd million verdict, including punitive damages, which was reversed. And it went . . . and so we talked about false imprisonment. We talked about the rights of parents to control the lives of their children. We talked about false imprisonment. We talked about brainwashing.

It was a case we worked on for months and months and months. Now Judge Dato, Bill Dato, worked on it. It was a marvelous case. And it was a case in which we said a lot about a lot of issues. It went from our court to the California Supreme Court that denied review and decertified; went to the U.S Supreme Court to be held pending some discussions on punitive damages. It was sent back to the California Supreme Court in light of its decision. It was before *Campbell,* so it came back; they sent it back to us, the Supreme Court sent it back to us for rewriting. We rewrote it. Now, if one thinks about it, it's the only time a court will have an opportunity to discuss the earlier decertification in that case. You don't have that opportunity very often. So I added provisions, a section at the end, as to why I thought the Supreme Court had decertified it and why I thought it should remain published. And Justices Kremer and Work would not sign off on that opinion, because they thought it was—

(01:35:06)

Cynthia Aaron: Because of that?

Howard Wiener: Because of that. They thought it was disrespectful. I thought it would have added a body to a literature talking about publications; if the Supreme Court granted a review, would they respond to it, et cetera. So that's a bit of a digression.

Because, for example, in *People v. Hedgecock* we—the court here—confronted 27 issues, involving the then-mayor in San Diego who had been convicted of felonies in a highly publicized case. And the lawyering in that case was very good, both in the public and private sides—very interesting issues. And there were 27 issues; the Supreme Court granted review in 2. So I was thrilled that the Supreme Court granted a review because of issues we couldn't decide; we said so in the opinion. They were governed by precedent.

And that's how the system should work, where you have a chance to say things on issues. The Supreme Court agrees with those issues and then, for institutional reasons, takes one or two. So the system works together.

And again, Laura Halgren is a superior court judge now, she was an extern for me, a marvelous extern. And when she . . . Before she became a judge, the last case she argued was a case dealing with lesser-included, lesser-related, instructions for the California Supreme Court. She explained to me that she had argued my dissent in that case that the Supreme Court should adopt it. And it didn't adopt my decision, but at least my dissent ultimately became the law in California. So the process works in a way where there is an obligation for a judge in his or her role to do that job and not worry about other roles. They

will take care of themselves, because the system does mesh and work together.

Cynthia Aaron: Well, you talked about a couple of your memorable dissents. Do you have any other memorable majority opinions?

Howard Wiener: They're all memorable. *[laughing]*

Cynthia Aaron: Anything that had any particular impact either locally or statewide or on the development of the law?

Howard Wiener: *Hurtado v. Statewide Home Loan* was a case that had a lot of publicity. I think it's an important case. That was a case in which we spent a lot of time talking about discretion. What do we mean by judicial discretion? It's a phrase that's bandied about; nobody really thinks about it. So that triggered a lot of dialogue and triggered a lot of energy. When I look back at what I did . . . And how I see the job is, there's a sorting-out process that's ongoing. And what justices I think have to be concerned with is they become a person on an assembly line—that sort of a boilerplate kind of a world rather than what's really going on here. So I'd heard discretion bandied about so much. What do they really mean?

So *Hurtado v. Statewide Home Loan* was important; *People v. Patrick,* in which we talked about could somebody commit a crime when they were asked to go rescue somebody from a cult and brainwash him. The *Del Mar v. the City of San Diego* and the whole development of North City West was, I thought, a very important case. The Civil Service Commission case dealing with conflicts of lawyers and who does the county represent. A case, *People v. Hyde*, was a case in San Diego in which they never found the body of the person who was murdered, and it was a first-degree murder conviction. The case involving the recusal of a judge in Imperial County dealing with judicial recusal, and what do they mean by and how do you go about that challenge of disqualification of a judge.

Are there others? But there are a handful. I mentioned *Patrick*, I mentioned *Hyde*, *Hedgecock* unquestionably, *Krishna* unquestionably. *A & M v. FMC*, it was the first decision on the unconscionability of provisions, of certain provisions, of the Uniform Commercial Code.

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So we laid the groundwork for procedural unconscionability and substantive unconscionability, which ended up, I think, being very significant in later literature; it spawned a ton of articles on unconscionability.

But again, in terms of process, although the question isn't asked, I had a chap who was an extern from UCLA, an

absolutely marvelous chap, Steve Morgan, who happened to be an orthodox Jewish man from . . . who had a brilliant sense of humor. And he had a simple case dealing with a machine that didn't work very well, grating tomatoes out in Imperial County. Were they entitled . . . There were certain pleading questions, et cetera. So it came to us and he delved into it. He spent an entire semester, as if it were some marvelous Talmudic challenge. And he came to us—I say us, it was me: "Well, I got to leave, Judge." And he wheeled in the stuff; it was several feet high. And Bill Dato and I went through it and we said, do we want to finish this, or should we forget about it? Because Courts of Appeal don't have the time to write an opinion like that. But we didn't want to disappoint Steve, so we worked on it and generated this opinion, which became a very big deal, and justifiably; it's a very important case and it was very interesting.

Cynthia Aaron: Well, that's interesting. I want to talk about, a little about, judicial philosophy. And really the first question I have is, would you say that you had a philosophy that guided your judicial decision making?

Howard Wiener: Oh, the answer is . . . If by philosophy was there a way I went about the job, the answer is yes. If it was liberal, conservative, right or left, I think the answer is clearly no. I think I was very unpredictable. Again, the case *Opsal v. USAA* is a case in which we reversed a bad-faith judgment, saying there was no bad faith as a matter of law, because what the insurance company did was reasonable. I also authored *Delos v. Farmers*, which is, immodestly, I think a landmark insurance bad-faith case.

I think I did have a philosophy. I had to understand the issues; I had to sort out the issues. I had to figure out who we were writing for. We were writing for the lawyers in a given case; we were writing for the parties in a given case; we were writing for the Supreme Court. Is it the family law bar, is it the trial judge? And then it had to be said in a way that I could understand it and anybody else could understand it, and it had to be said in a way that wasn't overarching or overreaching, because I wasn't smart enough to anticipate all the things that could happen.

So I wanted to be as narrow as possible, and I also wanted it to be consistent with California law, because I knew my job was to decide it consistent with law if that were possible. So I was concerned with just doing the job in an environment in which it's very easy to "cheat," because people don't know if you're doing the job. I think frequently in life, the perks are a lot greater and more pleasurable than the job itself. In the Court of Appeal, the judging job at every level is very hard, and I think a special person . . . I think it's a lot harder than people think. So consequently I just try to do the job.

Cynthia Aaron: You mentioned being . . . you didn't use the word, but you were constrained, you say, by Supreme Court precedent. I did want to ask about resolving conflicts between, we might say, law and conscience. What's come up personally for me sometimes is that I might have decided a case differently, but either there is precedent that says I have to go a certain way or more commonly the standard of review is abuse of discretion.

(01:45:06)

So while I might not have done what the trial court did, was what they did really an abuse of discretion? Was that an issue for you at all?

Howard Wiener: No, just . . . no, I never had that problem. The only time conscience was a factor is I never wanted a research lawyer to write an opinion, even as a first draft, in which he or she disagreed. And so the rules were with me is, if you didn't agree, you didn't have to do it; or if you didn't agree, write it your way, I would write it my way, I would circulate both. I didn't want anybody to do anything in my environment which was contrary to intellectual conscience.

Cynthia Aaron: But would you have discussions where you tried to persuade them to see it your way?

Howard Wiener: I mean, I can think of only . . . I have really no memory of ever having a meaningful disagreement. And I don't know if it was courtesy or deference or seniority or belief; I think—I like to think—it was the latter. We didn't disagree. I remember one case with Bill Dato, dealing with criminalizing closing the doors at peep shows. He thought criminalizing it was unconstitutional; I didn't. So we circulated his. We said on it, "I'm sharing this with you. Bill thinks it should go this way; I think it should go this way. Sign whatever draft you are comfortable with. If somebody disagrees with me, I would like to see their draft." So that's what we did. He didn't get any votes. *[laughing]*

Cynthia Aaron: *[Laughing]* Well, there you go. Okay, when did you turn to . . . The judiciary today, some things that are going on . . . We hear a lot of references in the media to judicial activism. Do you have any thoughts about that?

Howard Wiener: I think it's an overused word; I think it's done on the political side. I think if there is any activism . . . And it's arguably at the high court level, the U.S. Supreme Court, the California Supreme Court; I don't see it at the trial courts, at the intermediate Courts of Appeal . . . frankly less so. Judges are very sensitive to political and social constraints now, more so than they were 20 years ago.

Cynthia Aaron: Can you think of . . . Have you thought at all about any major challenges that you think might be facing the judicial system today?

Howard Wiener: I do. I think there are a number of challenges. I've been in the private sector as of January 1, 1994, doing private dispute resolution, and I've now seen over 2,200 cases. And I think a significant challenge for the courts is how and/or in what way courts on the civil side should confront and/or address a perceived market for the private judicial system. And I think that states are confronting it differently. In the state of Florida, for example, court-approved private dispute resolution is essentially mandated with a certification process, et cetera.

In California the Chief Justice . . . And again, I indicated earlier my compliments for this project, and on a personal level a high degree of affection and respect for him. I disagree strongly with his view that the private dispute resolution and the public justice system should be kept totally separate with a bright line—which, notwithstanding a statute and frankly the Constitution, which would allow me and others to sit. There is a bright line that prevents me from sitting on assignment, because somehow the public system gets tainted and/or is potentially tainted. And I'm told—I don't know if this is accurate or not—if I'm in the private sector for two years, I'm irrevocably tainted. So as a result of that, the Chief Justice and the Judicial Council . . . In his role as the Chair of the Judicial Council and as the administrator of the courts of California, he essentially has barred all persons who are interested in the public sector from being involved in the public sector, essentially stripping away our role as a judge.

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So he has de-franchised us, and I think that has an enormous psychic effect. I think it deprives the public system of learning a great deal, because in my world the private sector should be diminished and shrunk considerably. There's no reason that cases shouldn't go to the public sector; but why do they go to the private sector? I think that should be studied.

Cynthia Aaron: Well, I was just going to ask you, why do you think there is such a demand for alternative dispute resolution?

Howard Wiener: Because it's perceived as if the private sector can do a better job. It's perceived as if they are more willing to take the time and energy and effort. I think all of these skills are available in the public sector. But for reasons that are not clear to me, that effort has not been made. To the best of my knowledge there has never been a study made in which entities such as private companies, insurance companies, people in industry, why . . . they haven't been asked why do they go to the private sector

rather than the public sector. And they haven't. I think this information would be very valuable. I think the courts should have doors open for resolution for people who have disputes, so we don't end up with what is coming to be a dual system of justice, where the rewards of the private side are greater than the rewards of the public side, and the impact may be more significant.

So I think it's a real issue that is being held in abeyance by this bright line—which I think is a tragedy, for a whole series of reasons. And other aspects facing the courts is I think diminished respect; getting involved in areas in which they may not have the ability to handle; or getting involved in social issues. I mean, for example, we have drug courts now, where the courts are the best place to handle it. I don't know the answers to that, but I can see cases coming out of the courts, civil cases, into the private side and social issues going into the courts. I'm concerned about that.

Cynthia Aaron: Changing topic a little bit, getting back to your experiences on the court. How did the court change during your tenure here? You said there were three other judges when you started. *[Off-camera discussion]* Oh, I was asking how the composition of the court changed.

Howard Wiener: Oh, it went from four justices to ultimately eight justices. We went from the state building to this building, Symphony Towers. We went from Justice Brown and the way he had done things to Justice Kremer, the way he then did things. So we increased in size—a little more organized/bureaucratic. Computers came in. We went from one research lawyer to two research lawyers. The history of that again was interesting. When Chief Justice Bird early on was concerned with the fact cases were staff-driven, so she wanted "elbow clerks" to help so that it would not become a judge-driven opinion, with an elbow clerk limited to one year. Well, that morphed itself into two permanent research lawyers. So instead of an . . . if it wasn't staff-driven before . . . And I'm not saying it was or if it's good or bad; I'll put that aside. It's now clearly, it's become more administrative because you have two research lawyers. So that changed the job, because . . .

And with computers, it's changed the job, because it becomes a greater administrative burden; and reviewing cases from two research lawyers, along with more frequency of writs—I mean writs are routine. Everything becomes bulkier because of word processors. You know, when we first were there, we had carbon paper—not that long ago. But again in terms of change, it's so interesting. I remember calling Ralph Gampell: "Well, we're going to have computers." Ralph Gampell was the administrative director of the courts under Rose Bird. I'd happened to have a client in the computer world, a guy named Dick Pick. He had the first meaningful operating system, Pick

operating system; it still exists, before Microsoft. And I called Ralph and I said, "You know, I know somebody who's capable in software and you're going to buy computers for the appellate courts in California." He said, "We don't need that, Howard, thanks very much. We're going to go out and buy Wang computers."

Okay, Wang computers came. We all had computers here. And I remember a memo going out from Ralph, I guess it came from, asking could any secretary assist with the word-processing system that we had with Wang, because it couldn't do footnotes.

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And again, the notion that in this bureaucratic world you write out a check for . . . Everybody gets a computer, and they ask for a secretary. It happened to be a secretary at this court that came up with help for the software to write notes, footnotes. I started to develop an anxiety for thoughtfulness in the bureaucratic world, and it wasn't long after they threw away all the Wangs and we ended up with different computers, et cetera. So the world changed. We ended up with a computer operator; we ended up with an assistant computer operator. And so I became concerned that people would get so focused on screens, they would stop reading books and stop thinking. But there were changes.

Cynthia Aaron: Did you want to comment at all about the PJ and APJ system?

Howard Wiener: To this extent: I would opt for a system in which the legislation would be changed. Instead of having a seat in which someone becomes the presiding justice upon appointment, I think that person should become an associate justice. And I think the persons there should then have the opportunity to vote and some kind of term, because it's conceptually possible for the person to be appointed to a presiding justice seat to be a wonderfully skilled justice, but just not either have the interest or skills to be a presiding justice. I think the administrative presiding justice format is fine, but I—

Cynthia Aaron: Term limits.

Howard Wiener: I would think that . . . I would prefer an election by colleagues and maybe a term and a turnover in some way.

Cynthia Aaron: One of the topics that's suggested is historical perspectives, and one thing I just want to ask you about is whether you've perceived changes in society's attitude toward the law over the years.

Howard Wiener: Yeah, I think it's far less respectful. I think it's become cynical. They view law and judges as part of the political process. I

think there is less respect for government now for a whole series of reason, and I think judges are in that setting. And what guidance do they get? They watch television, so they can see Judge Judy, who recently had the case Anna Nicole Smith, where's her body going to be buried. So we had some chap in Florida who gives incompetence new meaning. That's the public image.

And I think there may be less stars out there at the trial and appellate courts, because I think it's tougher and tougher to be a great judge. And I think the qualities of independence and courage become subordinated to anxieties over acceptance. I think the private dispute arena has impacted the quality of the judiciary, in that I think judges are frightened now to be as outspoken, because they don't want to impact their career after becoming a judge. One of the great things about being a lawyer is that judicial outrage was so healthy, because people could be criticized properly in settings. That's disappearing, because people don't want to damage their image when they go in the private sector. It's becoming a . . . You want to have a brand, and your brand wants to be a silicon, sugarcoated, slick brand, where you're acceptable to everybody so you can get big fees and cases.

Cynthia Aaron: Do you think that's true of appellate judges and trial judges?

Howard Wiener: In my mind I would quickly say trial judges from my . . . and again, I don't mean to . . . I have a high regard for the trial bench, and I overstated it to make a point, perhaps; I think less so with the appellate court. But the rewards of being independent and courageous are . . . Who gives the courageous, independent judge a hug?

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Colleagues aren't, because you've made them irritated. You're not going along. The parties who prevail think it's great; parties who lose don't like you. The bar doesn't function in a way in which there are appropriate kudos, because of fear of getting too close to the bench. The legal journals aren't writing about you. It's just that private satisfaction of doing the right job, and that kind of reward is tough. So I think it's . . . You need an environment; certain courts have an environment in which that's possible, and other courts don't have it.

Cynthia Aaron: I want to ask you some questions—and you've touched on this, of course, during our conversation already, but some of the . . . What it has meant to you, I should say on a personal level, to be a judge in terms of the rewards from your career as a judge?

Howard Wiener: Well, I think today, much to my surprise—again, I've been surprised at how emotional I've been and I can get, because

I'm not an emotional guy—and lo and behold, certain things grab me. It's just the privilege of having the job. I just can't thank everybody enough for that. It really was a privilege. And although parts of it were uncomfortable, because starting out was a tough job and because later on people saw it differently than I did . . . By differently, they saw it as an assigned task and essentially a governmental employee; and I didn't think that's the case. I don't think it's the case. It really is a temple of justice, where you're allowed to do great things.

So it was a great thrill to be here, here in this building, and to be an appellate justice. There are a lot of other justices who felt the same way; colleagues in this court who felt the same way; and others, Supreme Court justices and others; as well as lawyers. So my personal satisfaction I can't say enough about.

Cynthia Aaron: So while it was hard, you loved it.

Howard Wiener: Yeah, it really was a great job. It was a good time for me to leave. It was time for me to do something else—certain repetition of the cases. I'm not confrontational. And I think the system, by the way—if I could impose upon the Chief Justice—I think the system should allow rewards for seniority. There are some economic rewards now. But appointments to committees or commissions, et cetera, should consider that as a factor rather than solely personality or friendship, et cetera. But it meant a great deal. It was a great job and a great time in my life. So I've even forgotten the question now.

Cynthia Aaron: Yeah. What I wanted to ask next was whether your being a judge had any particular impact on your family life and/or social activities?

Howard Wiener: I think it limits social activities; again, it's role-playing in life. You don't go to a bar and drink too much. When you're in public gatherings, you like to think you're dressed appropriately. It changes. If you're going to hang out someplace and relax, you're going to do it at home or in another environment or the city, et cetera. It's role-play. And you're constrained in communication, and socially it limits, I think, your outlets; or the canons of judicial ethics interfere with things you can say or do. But I didn't find them limiting; it didn't bother me. They were not that . . . didn't impact our lives considerably.

Cynthia Aaron: Do you have any advice that you would give to new judges?

Howard Wiener: I think the person who gets appointed should be comfortable in his or her own skin. So before you get appointed, figure out who you are. It may be the job looks good, but you're not going to like it, you're not going to be very good at it. Assuming you're comfortable with the job, just do the job; don't get overly cerebral and figure out the brand of judge you want to be and then earmark yourself for that person. Just do the job,

see the issues and decide them, and simply work hard. And don't be embarrassed to say you don't understand and try to mask it, so that you're not doing the job.

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And bite your tongue. Be pleasant, pleasant, pleasant; and when you find you can't be pleasant, confront it with a pal or a clerk or the lawyer or the party and simply say, "I'm uncomfortable with certain things you're doing; either one of us has to straighten up here." So keep your cool. Take a lot of recesses. The first 30 days on the job are going to establish your reputation. So whatever you do, do a great job in the first 30 days, because that's who you're going to be. And don't be afraid to quit if you don't like the job. So have a sense of humor, be compassionate, and just do the job.

Cynthia Aaron: That's all such good advice, such good advice. Looking back, and you've have touched on this also, but looking back on your judicial career, are there any—other than your cases—any other achievements that you're most proud of?

Howard Wiener: Well, I did, because of this questionnaire and the work people did, I obviously reflected on it; otherwise I wouldn't have talked so much, I wouldn't have remembered so much. But I did contact a couple of colleagues. I said, "Now tell me who I am." And the responses that came back, obviously they are favorable. As I said, I was a very careful legal craftsman, the best that they had encountered. I always cared about the little guy. I was a wonderful mentor. I really was respectful and went out of my way for new judges. And on occasion I could be very funny. And I'm very happy with that.

Cynthia Aaron: As well you should be. I don't know if you want to discuss this, but you alluded to it a minute ago. Did you want to discuss at all the reasons you left the bench?

Howard Wiener: Yeah, time to go. *[laughing]* It was time to go; I thought it was time. And there was a delay in processing cases here that I was becoming increasingly uncomfortable with, but it was simply time to go. I didn't realize all the factors that were at play. One of the factors at play, interestingly, I had to give a talk. I gave a talk to a criminal prosecution law enforcement group in San Diego—a very large, diversified group—and they asked me that question. And I had not thought about it, but a factor was, I was uncomfortable dealing with the violence and the tension between doing a great job as a judge and the terrible people who do terrible things. When you have a case, as I had, where a couple of guys that say "Let's go out and behead somebody tonight" and you see an appeal in a first-degree murder case, in which the prosecution of that county, not San Diego County . . . So it had to do nothing other than to set out the facts, regardless of what the law might be; all kinds of potential

error. So the tension between doing a great job as a judge and the constitutional rights that a defendant, even defendants who have done bad things, are entitled to . . . And the violence became stressful. I didn't appreciate the violence we see in the cases, the impact on the trial in the appellate courts. It takes a toll on you. I didn't want to see that violence anymore; I wanted to hide. So I don't read the criminal cases anymore. The civil cases, yes; but violence is a factor. So, time to go—a pause on the interview and elsewhere.

Cynthia Aaron: I was going to say, is there anything else that you want to say? I think I've covered everything I wanted to ask you.

Howard Wiener: I'm sure when I look at this, I'll make sure to thank the videographer, can't thank you enough. My god, you're awesome. I'm a little bit embarrassed about the emotion. I just hope people look at it and realize it's a great job; and I think, hope, people will care about the justice system.

Cynthia Aaron: Thank you so much. This is wonderful.

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