Miriam Vogel: My name is Miriam Vogel. I am an Associate Justice in Division One. My name is spelled M-I-R-I-A-M as in "Mary," Vogel, "V" as in "Victor"-O-G-E-L.

Robert Feinerman: My name is Robert, R-O-B-E-R-T. Last name is spelled F-E-I-N-E-R-M-A-N. I am a retired former Presiding Justice of the Division Five of the Second District Court of Appeal and also served for a number of years as the Administrative Presiding Justice of the Second Appellate District.

David Knight: And then we're all ready to go.

Miriam Vogel: All right, then, I would like to begin by again identifying myself as Miriam Vogel, a justice of this court, and saying that we are filming today Justice Robert Feinerman as part of the appellate oral history project.

Justice Feinerman was a member of the Court of Appeal from 1982 to 1988, I believe, and I would like to begin by asking Justice Feinerman to sum up his professional career in a few sentences, just to give us an overview of where he started and what he's doing now. Please.

Robert Feinerman: All right. Well, I graduated from Boalt Hall at the old age of 22. I started at Boalt when I was 19; I graduated from UCLA just when I turned 19, and I fell into a very good position when I graduated from law school.

I had been a minor sport letterman at UCLA. The athletic director was someone named Bill Spaulding. His son-in-law owned the company called Budget Pack. And I attended a Lettermans Club meeting and his father-in-law, Bill Spaulding, said, "My son-in-law is looking for an attorney." They had a law firm on retainer called Stephens, Jones & LaFever, and they wanted to save money and hire their own attorney.

So I started off in January 1950, and a week or two after I was admitted to the bar I was general counsel for Budget Pack. I didn't have a law library; I had two or three codes. And the first job I had was to negotiate a contract with the Reconstruction Finance Corporation for the building of a new factory.

Budget Pack was the largest farinaceous food packer on the West Coast and—

Miriam Vogel: I'm sorry.

Robert Feinerman: Farinaceous: foods of beans, rice, that sort of thing. They were the first people to pack in cellophane, and they also had a macaroni pasta manufacturing company called Spaulding. The macaroni company was named after Bill Spaulding, who was Leonard Gordon's father-in-law; they manufactured candy and they had factories in San Leandro, Denver, and Portland.

And here I am—I look 16 and I was 22—as a general counsel. So my first job is to negotiate a contract for the RFC, Reconstruction Finance Corporation. And I don't know anything about Reconstruction Finance Corporation, but I knew an elderly attorney named Jacob J. Lieberman from my work in B'nai B'rith who had been the regional counsel, retired, at the RFC. So I called him up and he said, "Bobby, come over to my office; I'll go over the contract with you."

Well, I learned how to use the telephone at a very early age, because the next problem I had was a problem with the Federal Trade Commission. The pasta manufacturers can have a certain level of vermin in their pasta, and the level apparently was exceeded in inspection.

So what happened is I knew someone who was involved in Federal Trade Commission work and I called him up and said, "What do I do?" So gradually what happened was, just to give you an idea, after I was there about six months I was . . . there was a gentleman, they had a number of contracts with labor unions and they had 300 trucks that they operated throughout the West. And they had contracts with the Teamsters, Bakery & Confectionery Workers, and the Mechanics Union.

There was a man named Joseph Brodine, who had been the assistant secretary of labor under Frances Perkins in the Roosevelt Administration. Frances Perkins, as you know, was the first woman to be a cabinet officer in the United States.

He and Leonard Gordon got into a disagreement and he was terminated, so Leonard came to me and said, "Bob, you're now handling our labor relations."

Miriam Vogel: Wait, I'm trying to keep up with you. You're not yet 25 years old. You're doing—

Robert Feinerman: No, I was 23 years of age.

Miriam Vogel: *[Laughing]* And you're having experiences with this company where you're a general counsel and you're meeting all kinds of important people that most of your classmates are only dreaming about.

Robert Feinerman: That's right. I never went to work for a law firm in my life. So what happened was—this is all by way of background as to how I got into the field that I practiced in—I was representing management in labor relations.

(00:05:08)

When I was in law school I wanted to be on the labor side. My father was a—I'm trying to remember—he was a pharmacist who

worked for Thrifty Drug Store, and he was a charter member of Joe De Silva's retail courtesy in the pharmacist division.

I had an uncle who was the national director of the Workmen's Circle, and the family was very tied in with the labor movement. But what happened was, is that I fell into this position; and as I said, six months afterwards I was told I was now doing the labor relations work.

So my first negotiation with the Teamsters Union at Ninth and Union for our drivers . . . and I always remember that incident; I think I had turned 23 at that point. I met with three people from the Teamsters Union. One of them, Tommy Pitts, ultimately became the president of the AFL-CIO in the state of California. And I said, "I'm here to negotiate a contract for Budget Pack." And he looked at me and said, "Kid, if your boss doesn't sign this contract within two hours, there won't be a truck rolling." I said, "Sir, under the Wagner Act and under the Taft-Hartley Act, you must negotiate in good faith." And he looks at me and said, "After the Wagner Act and the Taft-Hartley Act, you want the trucks to roll?" And all of a sudden, it dawned on me: Gee, labor wasn't necessarily all that good and management wasn't necessarily that bad.

Anyway, to make a long story short, I was involved because I was a lawyer. I became the spokesman for the pasta manufacturers on the West Coast and a lot of the candy manufacturers. And in 1953 the president of the company said, "Bob, it's time for you to open up your own office." I said, "How am I going to open my own office?" He says, "I'll tell you what, I'll pay you your salary as a retainer, and I bet if you go around to the other macaroni manufacturers and the candy manufacturers, you can get retainers from them." Which I did.

So in 1953 I opened up a cooperative law suite in Beverly Hills with four others: Bob Shutan—who Chuck, your husband, knows; and Dick Hayden, who was a superior court judge; George Perkovich became a superior court judge; Julius Title became a superior court judge; and Oscar Tannenbaum, who was Julius' partner.

And we subleased four offices, and I was one of the few people in Beverly Hills at that time that represented management in labor relations, so I got a lot of referrals. And after a while I started negotiating contracts on the national level with the UAW with the steel workers and so forth.

And I was at that time also active in the Democratic Party, so I became friends with many people in the labor movement. And as part of what I was doing, I became sort of a purveyor of the sweetheart contract.

The Teamsters had organized a plant and given them my card and said if Bob Feinerman represents you, you wouldn't have any problems with us; so many of my referrals came from union people who I had a relationship with in either my work in the Democratic Party or because socially I knew them.

And I also was involved in the savings and loan business. What happened was, I had . . . during the Knight administration, one of my colleagues, Oscar Grossman, had represented Joe DeSilva, who had obtained a charter for Washington Savings & Loan, which opened up on Hollywood and Ivar Boulevards. And Oscar had been the general counsel for Helena Rubinstein Cosmetics for many years, but he hadn't really practiced law. He was a tall, stately gentleman of about 6'2" with a mane of white hair.

But he didn't know what to do. So he employed me on an hourly basis to do the application for the savings and loan charter for Washington Savings, and I did the insurance application. And when Pat Brown became elected Governor, I was an expert. I had done one, so that—

Miriam Vogel: *[Laughing]* One more than most.

Robert Feinerman: One more than most. So I started working with a lot of legislators and others on a referral basis. And eventually I decided, gee, it's a good deal I have with savings and loan charters. So I formed my own group and we opened up West Hill Savings on National and Sepulveda Boulevard in 1960. And I was the president, but I wasn't the operating officer, because I had a full-time law practice. And when I was appointed to the bench in February of 1963 to the municipal court, my brother Milton took over as president of West Hill and he also took over my law practice. He had been a partner—

Miriam Vogel: You were still very young in 1963.

Robert Feinerman: Yes, I was 36 when I went on this. I was, at that time Pat Brown appointed me, the youngest judge in the state of California. Now, Jerry appointed people quite a bit younger. Dick Schauer, when he was appointed, was 33, so I became the second youngest person on the bench; and then Phil Saeta was 32.

(00:10:06)

And then Jerry, when he became Governor—which was of course after Ronald Reagan—he appointed a woman who was 29 to the municipal court in San Diego. Now today, of course, since the merger of the municipal and the superior courts, you have to have 10 years of law practice. So there are very few people in their late 20s or early 30s who are appointed.

Miriam Vogel: There I think are still a few in their early 30s, but not as many. So you're on the municipal court then—

Robert Feinerman: For two years.

Miriam Vogel: Two years.

Robert Feinerman: And then in 1965 when Pat elevated me to the superior court and I started off in criminal and then went into juvenile, and then when Lloyd Hicks was the presiding judge in the court—

Miriam Vogel: Wait, wait. Before you get too far away, juvenile and criminal, this doesn't sound like what you were doing as a lawyer; it doesn't sound like—

Robert Feinerman: No, when I was a lawyer the only experience I had . . . my experience in the municipal court was entirely criminal; I never had a civil case. And it was quite an experience for me. I started off in Lincoln Heights in the drug court and we had no Judges College at that time. I came with my robe and the clerk didn't believe that I was a judge because he said, "You look like you're in high school."

And I showed him my documentation. Jim Tante had been in the drug court, which was Division 58, for about six months and he was in a big hurry to leave. So I said, "What do you do?" He said, "Well, Bob, you bring them out eight at a time and you have them hold their hands out. And if they're not shaking you look to see if they've been arrested within 30 days; and if they haven't been arrested within 30 days, you give them one or two days to sober up. If they have," he said, "if they got 30 days the last time, you give them 60; if they had 60, give them 90; if they had 90, give them 120. But you never give them more than 120 days. If so, they'll plead not guilty and flood Division 20 downtown."

So that was my experience. So Division 58, my successor was Dick Schauer. When Dick was appointed, that's when I met Dick Schauer; and he had just married Loretta, his wife, and I think they had their first child. They were expecting their first child.

But be what may, we had a representative of the AA in the courtroom who . . . when we occasionally had a businessman. And then what happened is I then went from 58 to 59, which is a vice court. Now, 58 and 59 were in the jail in Lincoln Heights. I didn't even know where Lincoln Heights was when I first was assigned there because anything east of downtown was foreign to me.

But Division 58 smelled like a bar; Division 59 consisted primarily of women who were prostitutes who were arrested. And I'm one of the few judges who could say I handled 200 to 300 prostitutes a day. Only a few men can say that. Be what may, it was quite an experience in that court; I learned a lot. I used to go home and tell my wife all the stories that I heard.

Miriam Vogel: Where, in this schedule of rushing through college and having this fantastic practice and onto the court, at what point did you marry?

Robert Feinerman: What time did I marry?

Miriam Vogel: What part of this schedule, where did we fit in the marriage?

Robert Feinerman: Sunny, my wife, and I met when we were 18. I'm eight months older than her, but I was a senior at UCLA and she was a sophomore; and I was a reader in poli sci. She was a pre-med student at the time, a bacteriology major. And a girlfriend of hers, they came to complain about her grade in the poli sci class. But my wife was much cuter than her girlfriend.

And so it took me a little while, but about six months later I asked her out for a date; and then we were engaged for almost four years. We got married when I finished law school and she finished her graduate training as a clinical technician at the county general hospital. We were married in November '49, and I took the bar in October and I got the bar results the first week of January.

Miriam Vogel: So you were a family man by the time you were appointed to the—

Robert Feinerman: Yes, I was all of 23 and my wife was 22.

Miriam Vogel: And then coming back to where we were a moment ago, we have you on the municipal court handling a whole different field of cases.

Robert Feinerman: It was completely foreign to me. The only experience I had in criminal was I had been active in the Junior Barristers; and at that time there was no federal court public defender, so the Junior Barristers used to contribute, used to volunteer.

So I put in one week each year as a volunteer in the federal court, but basically all we did was plead people guilty. I think I had one or two trials; that was my only experience in criminal.

(00:15:00)

Miriam Vogel: So then you were elevated to the superior court.

Robert Feinerman: Well, before that, I went to Division 20 of the master calendar of the muni court, and then I had a trial court for six months.

And then when I was elevated to the superior court, they assigned me to criminal to the Brunswick Building. And my first case, I'll always remember, was a case about a gentleman who had been convicted of first-degree murder and was sentenced to death, and he had to reverse it before the California Supreme Court.

He was a brilliant man. He was a genius; his IQ was over 180. He only had one problem: he was a serial murderer. He had murdered a number of women and he had been convicted several times, and each time he had reversed it.

So no one wanted the case and they assigned it to me. Thank god I at least had had some experience in muni court. And he taught me a lot of law and he taught me a lot of evidence. He knew every case and every page number of every case. He was convicted but he fell within that area of time when the California death penalty was rendered unconstitutional; that was after *Furman v. Georgia* and *People v. Anderson*. It was a California seminal case in that area. So I sentenced him to death, but I presume he has probably died by now, because he was a lot older than I was.

Miriam Vogel: And that would have been in the mid-'60s.

Robert Feinerman: That was 1965, right. So I stayed in criminal. And then I wanted to work in the juvenile court because I had been on the board of the Jewish Big Brothers and then worked my way through law school in the summers with Judge Harry Pregerson on the Ninth Circuit; we were camp counselors in a nonsectarian camp that was sponsored by the Jewish Big Brothers.

We had a lot of kids who were Hispanic, African American, and so forth. And I enjoyed working there. I was able to get the position because when I graduated from UCLA in February of 1946 law school didn't start until September. So I got an emergency credential and taught the fourth grade initially for a week on the east side, and then I went to Lanchashire Elementary School.

So I enjoyed working with the kids. And in the summer . . . you had to have either been a schoolteacher or a psychiatric social worker, with Harry Pregerson as an exception; he had been a war hero and he knew the director of the Jewish Big Brothers.

So I worked with Harry and a number of other people, and I had a group of 10 every two weeks. We had five periods each summer. I worked with kids who were referred by psychiatric institutions. These were kids who were very disturbed—some of them manic, some of them bipolar—and I lived with them for two weeks. And it was an interesting experience.

Miriam Vogel: By the time you got to juvenile as a superior court judge in the '60s, was there then the division there is now between the criminal cases and dependency or—

Robert Feinerman: Yes, there was. When I went to juvenile court, in the entire county there were three judges assigned to juvenile, period. And we used to rotate around McLaren, which was the 600 and 601 cases; one of us would go one day a week. And I had the arraignment calendar initially, and there were no district attorneys

at all. We had a public defender who was there and a probation officer who we'd put on the case.

And essentially we sat. We didn't wear a robe. And it was theoretically a civil proceeding, even the 602 cases. We didn't sit on an elevated bench; we were on the same level as the kids. And it was quite an experience.

Miriam Vogel: I'll bet. How long were you in juvenile?

Robert Feinerman: For nine months. And then I got the call to go back to criminal. So I went to criminal, and at that time I had a court in the old criminal courts building. And then what happened was, that was the end of the '60s, end of '65 and '66; and then in '67, I became the supervising judge at the criminal courts of L.A. County, Department 100.

Floyd Hicks was the PJ, and then Donald Wright was the assistant PJ. So that was quite an experience, because all the arraignments at that time were in Department 100, and we handled 300 to 400 people each day.

You had to have a court reporter who had iron pants, because we never took a recess. And the bailiff would bring up three or four people at a time. And we had a DA who had been there for many years and was like a tobacco auctioneer. He'd call the case—"101, 102, 103," and that sort of thing. And the public defender would waive a reading. And then there were the poor guys who would want to say, "Judge, can I say something?" as the bailiffs were pushing them out; and I had to ordinarily stop them. It was an assembly-line procedure.

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Miriam Vogel: So you really were running the whole criminal court, then, for what—two years?

Robert Feinerman: Right. No; just for a year. Well, actually 14 months, and then I was succeeded by Dick Schauer. What happened is, it was a tradition—those of us who were in Department 100 were sort of a little fraternity. I followed Art Alarcon; he followed Evelle Younger, who followed Dave Williams; Dave Williams went into the federal court. And then Dick Schauer followed me and Bill Keene followed Dick Schauer and then George Dell followed Bill Keene and then Malcolm Lucas followed George Dell.

Miriam Vogel: And this continued all the way through?

Robert Feinerman: Right, and we sort of passed the baton to each other. And also one of the things we did was we oriented newly appointed judges in how to handle a criminal court. For example, I had in my group of people Malcolm Lucas, John Cole; these were all people who had a two-hour luncheon program and they all had come from

civil practice. Now, how to handle a criminal case as a trial judge? A little bit on search and seizure; how to handle 1538.5 and 995 motions; some basic rules of evidence.

Now, at the same time I was in superior court, I also taught evidence at SC Law School. Dorothy Nelson was an old friend of mine, and when I was on the court, she asked me if I would fill in. Well, I started in the night program, and SC had a night program. And then when Vaughn Ball, who was teaching evidence, had a two-year sabbatical—he went to the University of Virginia Law School—Dorothy asked me to take over his course, which I taught from four to six in the fall each year.

And when I was finally transferred to Santa Monica, I couldn't go downtown, as it was a problem getting there—because I taught in the late '60s at SC, and it was during the period of the Vietnamese war protests. The women all burned their bras and the guys all had hair down to the middle of their backs. And they objected to seat assignments, so Dorothy eliminated seat assignments and the people sat where they wanted to. And I would come in and I was generally rushing from downtown to get there and invariably I would get in at five after four and they would boo me as I walked in. *[laughing]*

Miriam Vogel: *[Laughing]* Not a lot of encouragement.

Robert Feinerman: But it was interesting. And I had a lot of very outstanding lawyers and judges as alumni in my evidence class. Then in the evening, I used to teach a course in psychiatry and law with Dr. Seymour Pollack.

Miriam Vogel: At the same time?

Robert Feinerman: At the same time. We taught that every year, and as part of my training for that, I attended two years of psychiatric training in the medical school. So I didn't have to take the test, but Seymour arranged for me to in effect take the same training as residents in psychiatry did.

Miriam Vogel: So you're sitting at a superior court downtown, teaching two classes different nights—one day, one night—at SC. What were you doing in your spare time?

Robert Feinerman: Well, in my spare time I tried to work out, because one of the things I've done all my life is I had started working out with weights when I was quite young. So I still try to work out three times a week for an hour and a half. And my routine is I stretch for 20 minutes, ride an exercise bike for 20 minutes, and then work out with weights. I still at my ripe old age of 80 can bench-press 200 pounds, which not many people who are 20 or 30 years younger can.

At one time I used to work out with Governor Schwarzenegger. That's when he was . . . yeah, the sports connection. He was lifting less weights than I was because he was trimming down.

Miriam Vogel: That had to be fun; the time working out would pass quickly, I would think.

Robert Feinerman: Yes. Well, I work out with people who are essentially 30, 40 years younger than I am.

Miriam Vogel: All right, let's get back just to finish this overall view so—

Robert Feinerman: Well, what happened is after I was in criminal, I was very comfortable. Don Wright was the PJ. He said, "I think it's time for you to go to civil." And I said, "But I love it. Give me a trial court," because I just finished as a supervising judge.

He said he would assign me to the discovery department, Department 63. And I didn't even know what discovery was, because when I practiced law, we didn't have discovery in California. We only had it in the federal courts, plus the only thing you could do in California at that time was take a deposition.

The scope of interrogation was relevancy of the issues, not relevancy of the subject matter. We didn't have interrogatory or requests for admissions and so forth. So I—

Miriam Vogel: That must be one of the biggest changes that you've seen in the course of your professional life.

(00:24:58)

Robert Feinerman: My predecessor in the department was Bob Thompson. And Robert Thompson gave me his quick note . . . he had a notebook that he had developed with various forms. And he was very, very, very warm to me and very comfortable, and he showed me, gave me the ropes. And I had as a commissioner Jim Natoli and then I hired as my research attorney Pat Phillips. She had just graduated from Loyola Law School and she had taken the bar; and she had remarried Dr. Phillips and she had just given birth to her fifth child.

In fact, she told me that to make sure she could take the bar exam . . . She was a pilot; she went up in the airplane and kept diving to accelerate her pregnancy. Whether it worked or not, she didn't know. She was able to deliver her fifth child just before the bar exam.

So Pat didn't know anything about discovery and I was an expert. I had a few hours of training from . . . so I ran the discovery department in 1968. I handled half the calendar and Jim Natoli had half the calendar.

Miriam Vogel: Did you have any premonition then that the concept of civil discovery would expand to the extent that it would seem to keep four judges busy, full time, just in the L.A. Superior Court, hearing 30 cases a day each?

Robert Feinerman: Well, I used to have a calendar sometimes of 50, 60 cases; and the first three months I was there were the hardest three months of my entire judicial career. I stayed up until 1:00 or 2:00 in the morning.

First I had to learn discovery. Bob had been there for a little less than a year, and before that the first person who was there was named Filbert McCoy and he used to write these opinions and publish them in the *Metropolitan News,* and he would cite his own trial court opinions. And he was reversed a number of times by the—

Miriam Vogel: What, they'd just publish them informally, for the benefit of the bar?

Robert Feinerman: Yes. He used to write opinions and they used to be cited by the attorneys coming in. Bob Thompson eliminated that practice because he felt there is no citability in trial court opinion, except of course the appellate department of the superior court.

So what happened is that Bob got appointed to the Court of Appeal and he got appointed to Division One. Parker Wood was the PJ and Mildred Lillie was there and a judge from Orange County; I'm trying to remember his name.

Writs were then being handled by each division for three months. And then what happened is that all of the writs that came into . . . there were five divisions in the Court of Appeal and each division rotated around every three months.

Well, it got to be their load was too high so they decided when Division Five had it, they brought up Art Alarcon to handle the writs. Then it was Division One's turn because it went One, Two, Three, Four, Five.

Bob Thompson suggested to Parker Wood that he knew a young judge in the superior court who would be very good for writs; he recommended me. So I came up in 1969 to handle the writs for Division Five, and that's why you saw some of my opinions in the notebook that you're holding in your hand. They were cases that I wrote in 1969. And what happened is that we would hear the cases three months, grant alternative writs, and then we would write the opinions after the three months.

So I worked two divisions. I worked with Division Three; the presiding judge was John Ford, who then had been district attorney of L.A. County many years before that. And I worked for Division One, so we rotated around.

I spent about a year and a half there, and then what happened is Joe Wapner . . . I lived in the Palisades and I wanted to be in Santa Monica and an opening came there. It was a very prized assignment at that time, and Joe Wapner held it for me for six months. He said, "If you don't come to work, I'm going to assign it to somebody else."

So what happened is I went to Santa Monica, and I was there for '70 and '71. And around 1971, *People v. Anderson* came down, which invalidated the death penalty in California; and all the death penalty cases were sent back to the Court of Appeal.

At which point an emergency call went out from a number of the justices of the court I had worked with and said, "Would you come back and handle the death penalty cases?"—which I proceeded to do.

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But the *Manson* case briefs were late in being filed, and at that time whoever was the PJ said, "If you don't come back to Santa Monica, you're going to lose it." So I recommended someone named Charles Vogel to be my successor and he went up to the Court of Appeal to handle the *Manson* case. Now, the case, as I recall, he met someone named Miriam Tigerman in Division One. I remember the story. *[laughing]*

Miriam Vogel: Yes. That's absolutely right. That would have been 1975.

Robert Feinerman: Right.

Miriam Vogel: So at which time I was clerking for Bob Thompson. And I started in the fall of '75, and Chuck's pro tem assignment started then and lasted . . . I left about 14 months later and he was gone by then.

Robert Feinerman: Anyway, I was in Santa Monica until '82, and I think I had one more assignment as a pro tem in the Court of Appeal but—

Miriam Vogel: But overall you were on the trial court keeping—

Robert Feinerman: Nineteen years; two years as a muni judge and 17 years in superior court.

Miriam Vogel: So you were a year short of possible retirement at that time you came to the Court of Appeal.

Robert Feinerman: Yes. But I was too young. I was 55 when I went to the Court of Appeal. So what happened is that I succeeded Otto Kaus as PJ of Division Five and—

Miriam Vogel: So when you got there, it was you and—

Robert Feinerman: It was Clarke Stephens, Jim Hastings, and Herb Ashby. And I found them to be wonderful colleagues, and they accepted me right away. And what I attempted to do, because I think Clarke Stephens was disappointed when he wasn't appointed the PJ . . . But whatever reasons there were, he wasn't, and they all had seniority over me. So what I tried to do, before I made any decisions as PJ, I would consult with them all and would arrive at a majority basis. I sort of tread very lightly for the first year there.

And part of the problem when I got there was that they each had two research attorneys. I only had one, because the way the budget worked, Rose Bird was very tight with the monies for research attorneys. So I handled more of a load as far as handling my cases from scratch than the others, and I got a second research attorney about a year later.

So I was fortunate in having as my research attorney Barbara Perry, who had handled writs and who was an outstanding lawyer. And she had been with Otto from the time she graduated in Loyola as number one in her class.

And so what happened is, is I gave her all the opinions I had written when I was a pro tem. And frankly, the cases she wrote I thought I had written, because she followed my style. I had a meticulous format. I didn't believe in long opinions; I hated those cases I had read when I was in law school, when I was a lawyer, when people started in the middle of the forest and then worked their way out.

So basically the format I had for her and for my other research attorneys was one, first paragraph, what is this case about; second, what are the facts; three, what are the issues; four, what are the contentions of the party; five, what is the applicable law. Apply the law to the facts in a dispositive conclusion. That was the format that I wanted followed.

Miriam Vogel: So logical and so often ignored, that process.

Robert Feinerman: So that was the format I had. And when I eventually got a second attorney, what happened is I divided the work into three parts. I did one-third of all of it from scratch myself, primarily criminal, because the cases I had written when I was in the Court of Appeal were primarily writ cases that were criminal law and I was very familiar with it. Although I tried civil cases in Santa Monica, I enjoyed criminal a great deal, and I enjoyed the criminal court bar. But I also had a number of civil cases of my own. And then I read the briefs on the other cases they had, but I rarely went to the record except if I felt there was something that had to be corrected. But I corrected all of my . . . I went over the case.

I was sort of a stickler for grammar and syntax and punctuation. When I taught in law school, I used to grade the subjective exams

with a red pencil and a black pencil. The black pencil were the corrections of law; the red were punctuations, syntax, and grammar. And I did the same thing—in fact, it became sort of a joke around Division Five: How many red-pencil marks did Justice Feinerman put on your draft? Because I had my own style; in other words, I was trained where you have "however" and "nevertheless," you put a comma after it. You use semicolons in certain places.

Miriam Vogel: Just an old-fashioned—

Robert Feinerman: Old-fashioned way of doing things. I know that today people do it, but I hated run-on sentences and long paragraphs.

(00:34:58)

Miriam Vogel: Where was the court at as far as computers go at that stage? Now, geographically, I know the court was at 3580 Wilshire, but I meant with computers. If I remember correctly about that time, they were still using Wang word processing.

Robert Feinerman: What happened is that initially when I came into the court there were I think Wang word processors that the secretaries had, but we didn't have anything as research attorneys.

Let me go back a giant step. When I first worked as a pro tem, we were in the old state building downtown on First Street; and it's now an empty lot, I think.

Miriam Vogel: It is.

Robert Feinerman: Right. And there was an earthquake and it was damaged. But there were five divisions there, and that's where I was in '69; when I came back in the '70s to handle the death penalty cases was also in the state building.

When I was appointed to be PJ of Division Five it was at 3580. And I never worked in the Ronald Reagan Building, but I had an electric typewriter that I used initially. Eventually, what happened was is that—

Miriam Vogel: Bob Thompson had a manual typewriter, so look how far advanced you were by then.

Robert Feinerman: Right, and what happened was is that unfortunately, the State signed a contract with Wang Computers as well as . . . Originally they had Wang word processors. Wang word processors were okay as word processors, but the Wang computers are pretty crummy. Eventually the state got into a lawsuit with Wang about this.

But the computers came in my last six months when I was on the court. I retired in February, although I stayed an extra month by

assignment to finish some cases. I would say that '87 is when the computers first came in, the Wang computers, and they just didn't work out. But I learned how to use a computer.

Miriam Vogel: Do you use one now?

Robert Feinerman: Yes, I am in fact on my third computer. I have a Dell. I use Microsoft and I'm fairly proficient because I typed all of my own opinions and stuff.

Miriam Vogel: How do you think that has affected appellate judging, the concept? When you started on the Court of Appeal, although there were word processors, most of the judges wrote their own opinions, I think. They wrote them out by hand or, worse yet, dictated them. Changes were hard to make. Length meant more work to everybody involved, particularly the secretaries.

It's a very significant difference from today, where everybody at the court has a computer and everything is easily changed and modified and everything is easily included. What is your sense of the good, bad differences between then and now?

Robert Feinerman: Well, let me put it this way. When LexisNexis and Westlaw came in, I was resistant to it because I was used to doing research by Shepard's. In fact, I used to sometimes play a game on research attorneys. I'd have them use Westlaw and Nexis and I would Shepardize; and I think I would get the cases faster than they did.

When I was going to Boalt, I just missed World War II by a year, so I didn't have any money. And they gave me a job in the law library at Boalt Hall for $61 a month. Of course my board and room at the co-op was $37.50 a month, so I actually saved money. *[laughing]* Believe it or not when I went to law school at Boalt the tuition was $25 a semester. And it's changed; Boalt now for California residents is $23,000.

But be what may, one of the things I did was quick research, because occasionally at night I manned the desk and people would call and ask legal questions, and I answered them from a one-volume *Summary of American Law* which was on the desk. So I had learned to do quick research.

But in answering your question, I think that perhaps we spent a little more time, at least in my experience, between the first time I worked on the Court of Appeal as a pro tem and afterwards; the volume was far less, and you had more time, I think, to think about things.

When I came back the volume was greater, and I also as a PJ had some administrative responsibilities. When I became an APJ, of course I had additional administrative responsibilities. We, as you recall, had problems in the 3580 building with air conditioning and so forth.

So what happened is that if a justice didn't like their air conditioning they would call me and complain. I had to call the building manager or call the people in London who then contacted the Saudi Arabian owners of 3580; and if a research attorney felt that a fellow research attorney was leering or making a pass at them, they would call me.

So that was part of the reason I retired when I did, because when I was APJ in the last year I would say 60 to 70 percent of my time was spent doing APJ work rather than work as a justice in legal research.

We were planning the Ronald Reagan Building and Thax Hanson was chairman of the committee, and I think Vaino Spencer and Joan Klein were working on furnishings; and if they had a question they would call me and so forth.

And then I was the one who, when I was APJ, convinced the Judicial Council to raise the central staff senior attorneys from the class 3 to class 4; and in addition we also computerized the court. It was one of the things that I feel I accomplished when I was APJ—the computerization of the court, which we didn't have before.

Miriam Vogel: It certainly made a big difference; absolutely something to be proud of. What do you think was the most significant case you worked on during the years when you returned as APJ?

Robert Feinerman: I think the most significant case I worked on was the dissent I wrote in *People v. Phillips*. The Senate went up on the Supreme Court. I sat with the Supreme Court on the murder case. The majority opinion was written by Cruz Reynoso, and it was a trifurcated murder case.

The death penalty was affirmed, the special circumstances was affirmed, but they reversed the death penalty. And the case is . . . I don't know if you had the chance to look at this in the notebook, my dissenting opinion, but Stanley Mosk joined me in my conclusion—not in my rhetoric, because he had to live with the other people.

When the case eventually came up for a petition for rehearing, at that point there were two new justices on the Supreme Court—Panelli and Malcolm Lucas—and they joined with Mosk in voting to grant the hearing petition that the Attorney General had requested.

In a nutshell, the case . . . philosophically maybe when I was a law student and I was a lawyer I was opposed to the death penalty, but it's the law of the State of California. If ever there was a case for the death penalty to be imposed it was this guy. To make a long story short, the objections to the death penalty are

it's enforced against minorities much more than against majorities, against men more than against women, and against poor people vis-a-vis rich people; you're familiar with all the philosophical arguments.

This guy was a contractor who came from Orange County. He was a member of the Balboa Bay Club, etc. He had a sideline: he was a drug dealer. He had two partners. He lures them up to a rural county up in the northern part of California, shoots them both, thinks he's killed them both, sets their car on fire.

One of them, he's with a girlfriend, and one man lives and fingers him, so he's on the lam. He stops at his mother's house to get a change of clothing. He's caught, I think it's in the state of Idaho, and while he's in the jail cell, he tries to put a contract out to kill his mother and kill his girlfriend.

During the trial he admits that he had killed someone in Mexico. He admitted to selling cocaine. He didn't put on any factors in litigation. No evidence on litigation was put on; the People put on a laundry list of factors in aggravation.

Unfortunately the trial judge did not instruct the jury that they had to find beyond a reasonable doubt to a moral certainty each of the factors in aggravation to be true. But there were a number of things that were . . . he admitted to a number of the factors in aggravation: the murder of the guy in Mexico and the cocaine trafficking.

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There was zero in mitigation. So I felt that was a travesty of justice. And Stanley Mosk, who was certainly a liberal guy on the court, joined with me. So I wrote a rather biting dissenting opinion, which you will find in there and that I think wasn't very long; but I put a lot of time in and—

Miriam Vogel: It takes more time to write something short and make the point that you're trying to communicate, so that is clearly significant. Was there a significant civil case that you handled?

Robert Feinerman: Yeah, I had a number of interesting civil cases I sat on. For example, the right-to-die case; I think it was the first one in California. This was a case involving Glendale Adventist Hospital. Bill Ginsburg, you probably know him from as representing the young woman who was involved with President Clinton—

Miriam Vogel: Monica.

Robert Feinerman: Yes. Was representing the Glendale Adventist Hospital.

What happened is a man was dying and he was in great pain and he had given instructions to his family that he was not to be . . .

in effect, pull the cord if this happened. And the family asked Glendale Adventist Hospital to do so and they refused to do so.

They asked that he be transferred to another facility; they refused to do so. He died the day before the hearing. We decided the case was not moot, and we held that there was a right on his part and the part of the family to have, in effect to have, his life terminated.

Miriam Vogel: A portent of things to come with Terri Schiavo.

Robert Feinerman: Right. But there were a number of interesting cases. I have one that I worked on which had to do with in essence whether a computer constituted personal property or real property for assessment purposes. In those days they were—

Miriam Vogel: Real property? What was the theory?

Robert Feinerman: Well, the theory of the county was that it was so big and was planted in the ground that it added to the value. And I disagreed, and so I wrote an interesting opinion.

Miriam Vogel: Was this ENIAC or one of those kinds of computers?

Robert Feinerman: This had to do with assessment by the county.

Miriam Vogel: But you said the property was a computer. So are we talking an old-fashioned—

Robert Feinerman: Well, it was a giant computer that filled up . . . it was larger than this room. Today it would be a little microcomputer. And I think the security bank was, the case was, one of those in there. It's a published opinion in which the trial court I think went along with the county assessor and said it added to the value of the real property because it was so big and so heavy it couldn't be moved. And I took the position "No, you're wrong, it was personal property."

And one of the cases I wrote was *Morrow v. Superior Court*, which I wrote actually when I was with Bob Thompson with Division One. Morrow was a deputy public defender and one of his assignments was to Chuck Older's court, Judge Charles Older. And he had a number of courts. Chuck Older who had been in the military; he flew with the Flying Tigers before World War II.

He fought, he was an officer, in the Air Force in World War II and he fought in the Korean War. And he was a tough guy and he got upset with Morrow one day and he ordered him to be in this courtroom every morning at 9:00 and not to leave before he was permitted to leave. This was a deputy public defender with various assignments. One day he arrived late and he had some other assignments, and Older found him in contempt and put him in jail.

Miriam Vogel: Trial—

Robert Feinerman: So what happened was the chief public defender of the county contacted me at night or something for a writ, and I released him. And I wrote in the opinion *Morrow v. Superior Court,* in which I traced the history of the county public defender's office, and I wound up concluding that a deputy public defender had the same rights as any attorney—and that Judge Older nor any other judge could order him to stay in his courtroom and be in his courtroom and not leave to handle his other assignments. That was interesting, a fun case.

Miriam Vogel: How about talking for a few minutes about how you've "retired," I think they called it?

Robert Feinerman: Well, I actually re-treaded. What happened is I stayed for 25 years. I could have retired at the end of 20 years, but for some peculiar reason I wanted a 25-year certificate from the California Judges Association; also, I enjoyed being on the court. But it got to the point where I felt for economic reasons that, yeah, you put in 25 years.

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The last five years you're working for 17 cents on the dollar. And I had gone on the bench. . . . I had a very good law practice and I cut my income dramatically when I went on the bench; and I felt well, you know, I didn't have the years of earning money that other people do. When I went on the bench, you know, the salary was $19,900 a year.

Miriam Vogel: I made that much as a law clerk in 1975 when I started here.

Robert Feinerman: Well, that was 1963; that was the salary for a municipal court judge. When I went to superior court, we got $22,000 a year. When I retired from the Court of Appeal in 1988 the salary was $78,500, I think.

Miriam Vogel: Really? Is that all? It's doubled; it's more than doubled.

Robert Feinerman: Yes, it has. So what happened is, is that my last five, six years in Santa Monica, I was working almost full time in settlements, although occasionally I'd get tired and I'd ask for a jury trial. But Judge Clinko and I had a reputation, Mario Clinko, for not letting cases go out to trial. We were sort of the good detective and the bad detective. He would yell and scream at people. If he didn't settle the case he would send it to me, and vice versa. So we settled everything, so I was known to most of the major firms as a good settlement judge. And I decided that mediation would be the area that I would probably get involved with, although I didn't exclude doing arbitrations.

So what happened was that I retired on Friday, and Monday I already had a full calendar because I was asked to associate with one of the providers. I mean, some of the people in JAMS had talked to me, but I decided I'd go out on my own. I prefer to be independent because I felt comfortable. And I kept busy and I've kept busy for 19 years.

Miriam Vogel: Managing your own calendar?

Robert Feinerman: Yeah, well I have a full-time administrator who works for me; it happens to be my daughter Carol. But I started employing her about three, four years after I got retired because she was doing stuff for me when I was on vacation. And my wife leaned on me and so Carol went to work for me.

But she does her work. Primarily she comes to the house two days a week, handles my books; but the rest of the time she answers and returns all my calls on the answering machine and she contacts my computer and gets my e-mail through her computer and so forth.

Miriam Vogel: That's a very efficient way to do it and to handle it. So what do you find yourself doing now, what, almost 10 years into it?

Robert Feinerman: Now it's 19 years since I retired.

Miriam Vogel: I skipped a whole decade there, didn't I?

Robert Feinerman: What happened is, when I first started out, I pretty much was working with the same people I worked with when I was in Santa Monica. Primarily PI, although some business work. And then gradually—

Miriam Vogel: Is it mediation the way you thought or arbitration?

Robert Feinerman: Mediation and arbitration. And the law firms, the defense lawyers, know me, the plaintiff's attorneys knew me. And then I started doing, slowly, a lot of general civil stuff. I started doing work with O'Melveny & Myers and Gibson Dunn & Crutcher and Latham & Watkins on those things.

And Warren Christopher was very helpful. He and I were at Hollywood High at the same time. He was a year ahead of me. He was my mentor in debating; he was the captain of the debating team when I was in 11th grade and I was captain of the debating team in the 12th grade. And he facilitated my getting work from O'Melveny & Myers; and then Gibson Dunn & Crutcher, I knew a number of people there and so forth. And so I started doing a lot of work for major firms in litigation.

And then, for example, I closed the Howard Hughes estate a year or two after I retired. I was appointed as a temporary judge to determine the attorney's fees for Kindel & Anderson, which had

acted as the attorneys for the heirs of the estate; and they had put in work for 16 years on the cuff, and they were asking for many millions of dollars.

They tried, for example, the *Melvin Dummar*—you know the case.

Miriam Vogel: The fellow on the roadway.

Robert Feinerman: Right. In Las Vegas for a year and a half, and then they had coordinated the domicile. The case that went up to the U.S. Supreme Court . . . where was Howard Hughes's domicile? A retired Court of Appeal justice from the Washington, DC, circuit was appointed to hear it, and California, Nevada, and Texas all were convening. They brought in Latham and Gibson in some sub-specialties, and they did all kinds of things.

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And unfortunately the people who did the work, by the time I heard the case one of them was dying of cancer. And the fellow was head of the probate department. The head of the litigation who tried the case had also retired. And candidly, the firm dissolved after my award of attorneys.

There were a lot of other reasons. Kindel & Anderson, John Anderson, became very wealthy with Topa. He gave $15 million to UCLA for the Anderson Graduate School of Management and so forth.

But shortly after I made the award the law firm dissolved, and I gave them essentially what they asked for, maybe cut it by 10 or 15 percent. But that was interesting.

What happened is we tried it for six weeks at the . . . it's now called the Luxe Hotel at Sunset and Sepulveda. And the law firms that were involved set up suites and they had computers and they had 16 years' worth of records to go over. That was an interesting case.

I've had a lot of others. I've also done a lot of entertainment work; in the time that I've retired, I've handled cases with Madonna, Sean Penn, Cher, Morgan Freeman, Valerie Harper, the guy from Guns N' Roses who's the head of the band, etc.

Miriam Vogel: You've got a remarkable memory for the dates and the names and all these things you've done.

Robert Feinerman: Yeah, but I can't remember where I put my glasses 10 minutes ago.

Miriam Vogel: Who does?

Robert Feinerman: My problem is if you asked me who I debated in Mark Keppel High School and when I was in the 11th grade at Hollywood High I can tell you who they were; but where I put my glasses, or where I left a book, short-term memory, sometimes I forget.

Miriam Vogel: But that's what you have your wife and daughter around to help with, right? It's to find your glasses for you.

Robert Feinerman: Yeah.

Miriam Vogel: Let me ask you—you had just an extraordinary career starting so young and moving so quickly through the system, is there anything you would have done differently? If someone said, "Hey Bob, you get a second chance," what do you want to do?

Robert Feinerman: Well, to tell you the truth, when I went to UCLA I had never thought of going to law school. My interest really was in radio and in journalism. I did sports when I was 16 years old at the *Daily Bruin.* And then I was on the debate team at UCLA and when I was a freshman I was teamed with a 23-year-old senior and we took second in the competition in the state of California.

And then I took second . . . I was a perennial second-place winner. In high school my partner and I took second in the state in debating and I took second in the regional oratory. But I became interested in radio, and when I started during the war there was a shortage of men, so I was on a program called *Citizens' Forum of the Air* with the captain of the debating team from USC named Tom McDonald. And the fellow who was a moderator was Wallace Sterling, who was then a professor at Caltech and then became president of Stanford University—a distinguished scientist.

And I had this phony, deep voice at the age of 17, and people at CBS asked me if I would do some part-time announcing, and I did. And then I was involved somewhat with dramatics at UCLA, and a group of people, we got a program on Fridays, a half hour for a drama program on KFWB. There was an intern named Sidney Tannen who I'd known who got us this. And I was the narrator and I would introduce, "It was a cold and stormy night, and a little child was in the wilderness," some sort of thing like that. I remember doing a thing about Churchill; it started off, if I remember the line, "A tired old man lay on his death bed, turning and twisting in his last hour" and so forth. *[laughing]*

Anyway, so I was interested in doing radio work and I was interested in . . . certainly I thought I might want to do sports on radio. But my father and brother convinced me, "You ought to go to law school." And I'm thinking, oh, well, you know, I'm young enough, I'm 19, what the heck?

So my frustration was, all my life was, I just think I could have been a disc jockey or maybe a radio commentator. And so

television came over and the thing I learned when I was in dramatics was I liked working with voices; I could imitate people and so forth, but I don't think I was a very good actor as far as use of my body was concerned. I remember when I was in Hollywood High, I tried out for the senior play and there were two male roles; both of them went to professional actors. One of them was Barry Jaeckel, who was nominated for an Academy Award in the movie dealing with the lumber industry that Paul Newman was the star of.

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There was Richard Erdmann, who was also under contract to this. He became a pretty well-known producer and director. So they beat me out, which I guess is tough competition. Now, when I went to Hollywood High it was an entirely different school than it is today. Today it has over 60 different ethnicities; the largest group are Armenian. When I went to Hollywood High it was primarily a WASPish school and most of the kids, their parents worked in the motion picture industry, and a lot of us were aspiring . . . In junior high school I took part in plays and musicals and so forth, and in Hollywood High I had to choose between journalism, debating, and dramatics; you could only take one class.

So I chose debate instead, but the school play and the school musical was independent of the regular drama classes, so I took part; I was in some talent shows and things. My frustration in my life was maybe I could have made it in show business. But the answer is I didn't—

David Knight: I'm going to stop right here. I need to change my tape.

Miriam Vogel: Let's go back to where we were before we stopped for a second. I just wanted to say in response to your statement that you could have been an actor is that the legal profession would have suffered the loss of the talent and many years that you brought to it, particularly the court. But that brings us back to judicial philosophy, and one of the things we have not talked about so far is whether you can articulate a philosophy that you had over the years you served the judiciary.

Robert Feinerman: Well, it's hard. I handled each case on a case-by-case basis. And I've felt that I was not an activist from the standpoint of trying to make new law except that to the extent that I might disagree with precedent. And I had a right to do so as a Court of Appeal justice, I might add.

In talking with appellate attorneys like Ellis Horvitz . . . Ellis, I think, is one of the deans of the appellate lawyers in the state. Ellis and I practiced across the street from each other on Beverly Drive in Beverly Hills. We used to eat lunch together quite often; I've known Ellis for years. And talking to other appellate

attorneys, he said that I was considered as being sort of a moderate, at the middle of the road, in the approach that I utilized. Not purposely, but I guess that's a label that people had on me. For example, when I was in the criminal courts I was there before we had that sentencing statute that exists today, and we had an indeterminate sentence law so that someone was sent to state prison for the term prescribed by law; and the board, the parole people, would make the determination of how much time they had. We didn't have factors in aggravation, factors in mitigation; although when I went to Santa Monica later on, I did try some criminal cases occasionally—not very often, maybe two or three a year.

But what I was going to say was crimes of violence got the maximum sentence from me. On the other hand, if someone was there, a couple were there, when abortion was a crime, we never sentenced a couple. I had to abort a trial because of the health problems of a woman to jail (*sic*); or if a guy was arrested for two marijuana cigarettes, he'd get a tap on the shoulder from me. Today it's a misdemeanor. In those days it was a felony; possession of one quarter of one ounce of marijuana was a felony when I was the supervising judge of the criminal courts.

I was going to say that from the standpoint of approaches to problems, I basically was Gestaltist, because in my psychiatric training I did a lot of reading of Kurt Levin, who was at the University of Michigan and developed the Gestalt theory.

So I've utilized that approach in criminal law—for example, in probable cause for arrest. I also utilized the Gestaltist approach with respect to civil things; in other words . . . And I've written cases of which basically I've said the configurations and patterns that evolve from human experience are not necessarily the sum of their constituent parts; that you have to approach problems not on a straight-line, black-and-white basis like what many individuals do, many lawyers do, and many judges do. But you approach it like a group of vectors interacting in the force field, each one impacting the other in the ultimate synergism that one looks at.

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So that I find that people develop their philosophies as the result of their backgrounds, their economic experience, their experience with their parents, with their children, with their spouses, their . . .

Miriam Vogel: Put this in terms of how you decide whether somebody has proved a breach of contract action or a tort action of some sort. How would you take these things?

Robert Feinerman: Well, it's easier in the criminal field. Let me start with that and move on to the civil field. Rose Bird and I . . . I got along very

well with her. We once had a public discussion with respect to when you have sufficient cause to stop someone from investigation and when you have probable cause for arrest. Her belief was you must have one factor which is by itself sufficient to constitute a basis for purposes of stopping someone for purposes of investigation and also obviously for purposes of arrest. I said, "No, Rose, I think you're wrong." I said, "You look at it in a Gestaltist fashion."

And she said, "What do you mean by that?"

I said, "Well, okay. If one police officer is in the car and he stops the car with six people in it, he should have the right to order them out because for his own safety he's one vis-à-vis six. On the other hand, you have two police officers in the car stopping a little old lady, then at that point he doesn't have a right to order her out. If you have nighttime vis-à-vis daytime you should have the right as a police officer to do more at night than at day because you can see better at day than you can at night. In a high-incidence area such as South Central vis-à-vis Wilshire and Beverly Drive, a police officer should have a right to do more." So I said, "All these things interact together." So I could go on and on.

Miriam Vogel: The totality of the circumstances.

Robert Feinerman: Right. Now, a client in a slip-and-fall case in the tort area and if someone slips on the staircase and they allege that the area was dangerous—okay, well you look at a number of factors. What is the coefficient of friction for that particular surface?

The defense will generally have a reconstruction that will tell you that if you slip on a marble floor and it's wet, it's safer than a dry floor because the coefficient of friction on marble is better; now juries don't believe it.

So if that is the determining factor by itself, okay. But you look at the lighting involved, you look at whether there was a warning sign; in other words, are cones put up, are there yellow things, the area cordoned off. All these factors go into the question of whether there was probable, whether an area was a breach of the standard of care, whether a reasonable man would realize that the area was wet and would not have slipped.

So I'm saying that I approach things on a basis of looking not at one factor, but at all factors. Now, on a breach of contract action . . . Well, again, it's hard. Let me put it this way. Since *PG&E v. Thomas Drayage* and *Delta Dynamics v. Arioto* came down in 1965, Kozinski said in a case involving the building that Manatt, Phelps and Mitchell Silverberg were in, in the Ninth Circuit case, there's no parole evidence rule in California.

But theoretically, under *PG&E v. Thomas Drayage,* whenever a word in an agreement is reasonably susceptible of the meaning to which one side wants to give to it, then the obligation of the judge is to permit parole evidence to come in, whether it be documentary evidence or testimonial evidence, and then make a determination as to whether you're going to consider it or not.

Now, what happens is, is that, there are situations like . . . Walt Croskey wrote a case called *Banco de Brazil* in which he said, looking at the four corners of the instrument, under no conceivable theory is it susceptible of the meaning, any meaning, to which a party wants to give to it.

Now, when I went to law school, you learned that the only permitted parole evidence to come in was ambiguous. But the ambiguity rule no longer exists in California. It's the reasonable susceptibility. So I'm saying, in doing that, in permitting extrinsic evidence to come in, I look at all the evidence in determining . . .

For example, in the mock arbitrations I went through in Texas, we had to determine whether states, quote, "diligently" enforced certain statutes requiring nonparticipating tobacco manufacturers to . . . whether they're doing certain things.

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The question was, how do you interpret the word "diligent"? What is diligent enforcement? And I had people arguing "diligent" means literally diligent. And in other words they must be. It's more than just passive enforcement; it requires more than that. And so we had a big argument going back and forth and even the five retired appellate justices who were part of this mock panel had a disagreement as to what is diligent.

Now, as to what is diligent, my opinion is that you have to permit . . . it's certainly reasonably susceptible to a different meaning, so I would permit extrinsic evidence to come in as by the various attorney generals of the states and tobacco attorneys as to what they intended by the word "diligent."

So I'm saying in doing so I would approach all of this in what I call a Gestaltist fashion. Now, one of my colleagues said that's C-R-A-P. He said, "Either they did or they didn't." He said, "It's like obscenity; you know it when you see it. Either it's diligent or it's not diligent." *[laughing]*

Miriam Vogel: As I was listening to your description, that was my attitude, I confess. "Diligent"—it's one of those things that we take as a given that we know what it means, just as the Supreme Court said in the integration case in *Brown*. "All deliberate speed," you can argue until the cows come home about what they meant. But let me ask you, in terms you've been describing this analytical process we go through, would you say that you were an activist

judge or you were the type of judge who Justice Scalia would approve of today or says he would approve of today by simply doing more than deciding the lowest common denominator issue?

Robert Feinerman: No, I have to disagree significantly with Scalia's approach philosophically. On the other hand, let's take a decision that came down when Rose Bird was Chief Justice, which has to do with the exclusion for intentional acts in insurance policies and the Insurance Code.

The C*lemmer* case was the case that I can remember. That was the case where someone shot someone about five or six times, and in fact there was transference of diminished capacity into the civil area in which, what happened is that, as I recall, the defendant didn't have any through . . . He transferred his first-party rights to the plaintiff and the question was, was there insurance coverage? It was a bad-faith case against the insurance carrier and the insurance carrier refused to defend on the basis that it was an intentional act. And the Supreme Court held that in a given situation where someone reacts—for example, if someone spat in your face and you socked them—then you could not develop the intent which was required for an exclusion under the civil policy.

Incidentally, when Malcolm Lucas became Chief Justice, the *Clemmer* case was specifically disapproved. But now I wouldn't have gone along with *Clemmer*, which the majority did when Rose was Chief Justice, because to me it's an attempt to apply diminished capacity under *People v. Hall*, which is no longer just a California law.

When I was in criminal, if you could show that someone . . . if someone is charged with first-degree murder, has first-degree murder, you have to show the ability to premeditate and deliberate. Now it becomes second-degree murder; you have to show malice and forethought. Now it becomes voluntary manslaughter. And we had case law in California when I sat in criminal which indicated that if you could show that the defendant was either under the influence of liquor, drugs, narcotics, had a mental disorder, a mental disease, or any combination thereof, so they couldn't develop a specific intent to be able to premeditate and deliberate, then it would be second degree and so forth.

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Well, I felt *Clemmer* was an attempt to transfer it and to obviate . . . I thought it was a result-determinative decision, because they wanted to give coverage to this poor guy who was shot, who didn't have . . . and a defendant who had sufficient assets and—

Miriam Vogel: You'd say that was an activist decision.

Robert Feinerman: Yes, that was beyond that point. On the other hand, in our situation with the case I mentioned involving Glendale Adventist Hospital, theoretically, if you wanted to adopt the Scalia approach, you would say the hospital has the right to do whatever it damn pleases, and since this is a Seventh-Day Adventist hospital and they don't believe in the taking of human life, they had a right to take the position they did.

And I would agree with that up to a point of where the family requested a transfer and they refused to transfer. At that point, I think the family's rights to have the gentleman transferred out of the hospital superseded whatever philosophic Seventh-Day Adventist philosophy Glendale Adventist had.

Miriam Vogel: So if I can distill this, then, you would not be activist in most issues. You would limit your decision and limit the role of a judge in making law except in the rare instances where conscience compels?

Robert Feinerman: Yeah, in other words I think the law is a living thing. I don't think you apply it as the makers of our Constitution and the Bill of Rights had. I think that just as in religion, there are people who are fundamentalist who believe the world was created 3,000 years ago and reject Darwin's theory of evolution. They think that dinosaurs existed 2,000 or 3,000 years ago. I think that the Bible has to be reinterpreted in the light of current needs, current demands, and so forth.

Miriam Vogel: Let me bring this interesting discussion to an end by asking you, with this experience, what advice would you have to other judges, to today's judges, dealing with the problems that confront the courts today? What wisdom would you pass along, or to lawyers, either way, or both?

Robert Feinerman: Well, the first thing I think is to be courteous to the people you deal with. I find more and more in the arbitrations I do—and I say this as a temporary judge—that there is a lacking of the courtesy that existed when I practiced law. And I, believe it or not, have gotten briefs in arbitrations where people use four-letter words to describe their colleagues. I have had people argue before me—now, I recognize as an arbitrator I don't have the authority of a sitting judge—and use four-letter words.

Miriam Vogel: Well, they stand in front of us here. I bet something I've heard that you haven't is they address the panel as "you guys." Particularly since there are three women on my panel, it seems not too bright. *[laughing]* It sounds like you see and hear things that are far beyond what we hear.

Robert Feinerman: Yeah, I find the attorneys, at least hopefully in the Court of Appeal, with a tie on and so forth. In arbitrations, I find people come sometimes with jeans and a T-shirt or something. They feel, well, it's informal, so why do I have to get dressed up?

Miriam Vogel: The lawyers as well as the parties?

Robert Feinerman: Right.

Second, I think you know from the standpoint of the bar, I think there's no substitute for preparation. I mean, when I try a case, if I have it available, I'll read the discovery and the other stuff. Sometimes I find when I do a mediation that I know more about the case or cases and the law than the people who come before me. They're winging it too much. So I think that there may be some brilliant people around who can do it, but I think that you have to study the law and know the facts and you have to put in some hard work. I mean, after years of experience, there are some attorneys—outstanding trial lawyers, primarily in the tort field—who can pick up a file and try it magnificently without preparing; but I think most attorneys prepare who do a good job.

Miriam Vogel: No substitute for hard work.

Robert Feinerman: That's right.

Miriam Vogel: Okay. Well, thank you so much for doing this.

Robert Feinerman: It was my pleasure.

Miriam Vogel: Mine.

Duration: 80 minutes
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