

Tim Reardon: All right, just by way of introduction, this interview is being conducted as part of the Appellate Court Legacy Project, the purpose of which is to create an oral history of the appellate courts in California through a series of interviews of our retired justices who have served on our court.

As I just indicated, I am Tim Reardon, an associate justice, and we are honored to have with us today the Honorable James Marchiano who served on the First District from September 1998 to March of 2013. And as a personal matter I want to welcome you Jim as well as on behalf of the Legacy Committee, it's a great honor to have you here, and it's good to see you and see you doing so well.

Justice James Marchiano: I feel honored to be here, thank you!

Tim Reardon: Okay. Unlike many of our justices you are not born in California, but you were born in Detroit and according to my notes you left at a fairly early age and came out to California. Can you tell us, maybe just a little bit about your family in those early stages of your life and development?

Justice James Marchiano: Actually I am the son of immigrant parents. My father came over from Italy when he was in his late teens and ended up in Detroit with some relatives. My mother and grandmother came over in 1912 to meet my grandfather Louis, who was an Italian coal miner did get to go to Royalton, Pennsylvania where coal-miners were, and one of the nice things we were able to do is find on a website, it's the [www.ellisland.org](http://www.ellisland.org), anyone who came over from Europe between 1890 and 1920 is now on that website.

So there is Russian Jews and Irish and a lot of Italians came over at that time. Most were from southern Italy, my parents were from Northern Italy, they were Piedmontese from Piedmonte — Piedmontese, close to the Swiss Alps that's where the Olympics were in Turin.

Anyway, on the website it actually showed my grandmother Margaret Bonfonte, she was 25 years-old and in those days the clerks had meticulous handwriting just like court clerks used to. So you can read everything on the manifest and it's there in the correct manifests and it describes everything 25 with this auburn hair, no lice, she was not a Communist, she was

not an anarchist, she had \$2 in her pocket and she was meeting my grandfather Louis and with her was the six-month-old daughter my mother Rose Louise Bonfante that proceeded to describe her and she too was not an anarchist or communist and so they did settle in Royalton, Pennsylvania and then later my mother married my father in Detroit, there is an Italian connection there.

Then there was an opportunity in Albany, California to work for Wonder Bread, to be a bread truck person to have an area to cover and that area actually was large, it was Alameda County and Contra Costa. So we lived in Albany for a number of years, a few years and then he was transferred primarily to Contra Costa which was growing into the Concord area, and that's how we ended up in Concord. My sister, older sister and my younger brother Mike and I, the three of us grew up Concord, we have lived in Concord since 1952 up until law school and when I got married.

Tim Reardon:

That's a very interesting history.

Justice James Marchiano:

Yeah, I just wanted to add that when I was on the bench just as an aside, I never talked about the immigration background, and some of the justices would talk about this, and there is one famous justice who talked about growing up on a potato farm in Oregon, which is true and wonderful.

But I always felt that perhaps that's important and it established many of my ideals, goals and values, but I felt it was a family thing and that you should earn something on your own, it shouldn't necessarily depend upon the immigration status.

But I want to say I'm very proud to be a first-generation Italian and then all three of us went to college, my brother, my sister and I, and then went on to other things in our lives.

Tim Reardon:

That's quite an accomplishment, it adds an interesting history, I was going to say that now you are in Concord and you attended high school in the East Bay in Contra Costa.

(00:05:00)

Justice James Marchiano: Well, actually I went to a prep seminary. After the Eighth Grade I went to St. Joseph's college in Mountain View, and it was connected to St. Patrick's in Menlo Park, and the idea of the prep seminary is that you would go there for four years of high school and then four years of college later and then four years of theology if you wanted to become a priest. But the education was to give you a well-rounded liberal arts education in preparation for that. So we studied Spanish, Latin, ancient Greek, chemistry, physics, trigonometry, rhetoric, poetry, all types of world history, and then eventually I got my BA degree in Philosophy through St. Patrick's College, stayed for a year of theology and then left and went to go Boalt Hall after that.

Tim Reardon: All right, I have a note of that and I was going to say I my cousin Johnny Highland, who I think you know, used to visit him regularly at both St. Joseph's and St. Patrick's.

Justice James Marchiano: John Highland was in India. We had four teams down there, a very good athlete, he was also very good in track, I remember.

Tim Reardon: Yes.

Justice James Marchiano: Anyway go ahead.

Tim Reardon: Well, I have a note as well, as you went to Boalt Hall, you got your degree, J.D. degree and then you took and passed the Bar, and you joined then the Bledsoe firm in Oakland as I understand.

Justice James Marchiano: In San Francisco.

Tim Reardon: Excuse me, San Francisco.

Justice James Marchiano: No, that's okay, it was Bledsoe Smith, Cathcart Johnson and Rogers. When I was at Boalt, one of the courses that I enjoyed was the Trial Practice, and wanted to do trial work, civil trial work. I was planning to go back to Contra Costa County to Concord. I had clerked for the district attorney's office when I was in law school and also clerked for Cole, Levy and McBride, a very good local firm; Tom Cole was the supervisor, Dave Levy was the city attorney for several cities and Tom McBride had been the city attorney for another and that was also the firm that Sam Conti, the famous federal court judge

came out of, but they wanted me to come out there but the trial part of it was not what I thought it might be. In the meantime the Bledsoe Firm interviewed at Boalt and offered me a job and explained the training that I would get and the types of clients they had and so I opted to go with the Bledsoe Firm which was about a 20-person trial law firm, I am doing a large amount of insurance defense work, but they had a broad range of clients which helped to make my career. They represented Bart, they represented Kaiser Hospital medical malpractice cases and doctors and medical malpractice cases, Safeway, a lot of products liability, so it's a wide range of work and these were men and women who actually tried cases. They were in court, at least three or four trials a year that we would help prepare and then they would pass down smaller cases to us, so that I did actually end up trying a fair number of cases while I was in San Francisco with them.

Tim Reardon:

And Jim, you were there pretty much in the 70s in 1978, and then you joined the prestigious firm of a Crosby firm in Oakland.

Justice James Marchiano:

Right. There is a short story in that. By that time Clara and I had moved -- Clara, my wife, and I had moved to Walnut Creek and we had three children and the work at Bledsoe was wonderful, but it was stretching me thin. I was doing cases in Marin County, San Mateo and felt it would be better to be in the East Bay, so several firms from Concord approached me about joining them and then I thought it would be good to go back to Contra Costa County and I knew the judges and I had done some work for the Bar out there. But then in the meantime the Crosby firm also heard of my possible leaving and they needed somebody to head up their medical malpractice division in Oakland.

And so two of the partners came over and we had several discussions, met with them and it was a grand opportunity that I am glad that I took. So I joined Crosby, Heafey, Roach & May and did trial work for them. Just as an aside they were a small growing firm, they were about 30 lawyers when I joined them in 1978 and when I left in 1988 we were 150 lawyers and our claim to fame was that we were largest firm between Oakland and Chicago, in that space anyway.

(00:09:43)

Tim Reardon: Okay, and you joined the firm in 1978 and you were there for approximately 10 years, in 1988 you decided to join the bench, you had an interest in joining the bench.

Justice James Marchiano: Before that, I had taught while I was at Crosby, Heafey and at Bledsoe both, I taught a trial practice course, Guy Kornblum, who had worked with me at the Bledsoe Firm, went over to become an Associate Dean and he was teaching a seminar in Evidence. It was advanced Evidence for those who wanted to go into trial work. It was a paper course in the beginning and he quickly realized you can't teach Evidence purely as a casebook paper course it fits into a trial setting.

So he worked up some evidentiary problems and then asked myself and Joel Rogers to come over and teach a section to the students at Hastings, and we quickly saw, it couldn't just be evidentiary problems, it had to be in the setting of a trial.

And so the course was set up that we would do individual problems, given we would lecture on how to cross-examine an expert, we would lecture on seven-seven-six in trial or taking depositions, then we would have the students go through that and we're very fortunate that some of the superior court judges from San Francisco, Judge Merrill and others would come over and they would preside over these little vignettes at 7 o'clock as we taught the students.

And from doing that teaching, at both places late in the evening or sometimes on Saturdays, I thought about becoming a judge and some of the students encouraged me, and then a nice thing that happened when there was an opening in Contra Costa, several of the judges in Contra Costa County also said, would you be interested in an appointment? And at the time Governor Deukmejian had just come in, he was a Republican and I think rightfully he wanted to make some changes. The philosophy of the court had gone one way in the 70s as you will know Tim, because you were in the AG's office, anyway but I was a registered Democrat, a lifelong Democrat and I had done civil law, and he was more interested in the beginning in appointing people from the district attorney's office. I'll wait for your next question and explain what happened.

So I did fill out an application, At the encourage of these people not thinking anything was going to come of it because of the civil background and I was a Democrat.

Tim Reardon: You are like me, a Deukmejian Democrat because Governor Deukmejian appointed me as well and I am a Democrat, but you mentioned Guy Kornblum, he is a classmate of mine at Hastings, so I know Guy very well.

Justice James Marchiano: Well, then you would know Marvin Baxter and David van Damn, yeah, they were all classmates I think.

Tim Reardon: Yes, they were. In fact we had an interesting -- I won't take too much time, but Marvin Baxter interviewed me when I was being appointed by Deukmejian and he said I see you went to Hastings, I said, yes, I did, where did you go, he said I went to Hastings too. It was such a large class. We figured it out. I did not know him at the time, but by the time we got through the interview I felt I got to know him pretty well.

Justice James Marchiano: Well, let me pick up from there just a bit. I had a couple of strokes of good luck in terms of the appointment process. I had been active in the Association of Defense Council and the President of the Association the year that I was on the Board was from Fresno, Lowell Carruth, with a wonderful firm down there and another member was Jack Chinello and he was from that area down there too and they heard about my application and they both said, Jim, we think you might be a good judge, and I said, well, I am not sure what's going to open the door up there right now and then Lowell says to me, he said, well, I know Marvin Baxter and I'm on his committee down in Fresno in terms of local qualifications for judges, let me talk to him and then Chinello says to me, I can go one step better.

I have season basketball tickets behind Marvin Baxter at the Fresno games for the Fresno Bulldogs and Baxter is a die-hard sports fan, as you know, he said, let me also contact him. And then one other thing happened, I had a huge case that took many months. It was a legal malpractice real estate case with some high-powered attorneys, and one of the attorneys was from Martinez, but he had represented Reineke, when Reineke was a Lieutenant Governor and had problems, ethics problems and that type of thing, and very -- Jim Cox was the attorney, he is a very good lawyer. Well Cox unsolicited

sent me a copy of a letter in which he was recommending somebody for a judgeship.

(00:15:00)

And in the last paragraph, he said, I have worked with Jim Marchiano on these cases, and he would make even a better candidate. So, yeah, it was very nice.

So through that he calls Baxter, Marvin Baxter, his appointment secretary to at least look at the file, then he called me up for the interview. He is low-keyed, he wants to know what's going on in the local community, but he has a way of finding out whether you love the law and how passionate you are about it and whether you will be diligent and also your philosophy a little bit, but without going into philosophical qualifications.

So we had a very good interview and then at the end I said, well, do I have any chance at this? And he said, well, all things being equal if there is a Republican and the Democratic, we are going to appoint the Republican, I will tell you frankly. And I said, well, I am not changing my party affiliation and so that would be hypocritical. He said, don't, he said, well, just wait, something might happen. And then nine months later, out of the blue, I get this phone call from him saying, if you are still interested we'd like to appoint you to the Superior Court in Martinez. We have heard good things about you, would you be interested.

And then if I could add just a footnote to that, at the time I was earning a very good salary at Crosby, Heafey, and the starting salary for a Judge then was \$96,500 in 1988, a good salary, but I had four kids on their way to college, they were grammar school and high school and they were all college candidates.

So I sat down with my wife to look at our finances, we said, can we do this on this salary? And she was only working part-time. And so what we did we ended up refinancing the house, so it would bring down the interest rate, and then with the money that Crosby, Heafey paid to me to buy out my interest in the corporation, it was a legal corporation, I bought zero-coupon bonds that came due hopefully the freshman year, the niche, that would go to college.

But it wasn't until I would say 12 years later that with Chief Justice George's efforts that the judges began to get those good pay raises. It took me about 13 to 15 years to get back to the salary that I had at Crosby, Heafey when I started. But I never complained about it and I never -- and I told other judges that -- or people that would apply you shouldn't complain. You know what you're getting into, it's really an opportunity to do public service and the public service and the interesting cases, working within the community really is the offset against the salary considerations.

Tim Reardon: Yeah. So in 1988 you were appointed by Governor Deukmejian to the Contra Costa Superior Court and you served 10 years on that Court, what kind of assignments -- I assume you did a wide range of --

Justice James Marchiano: Right! When I -- as often happens, I was appointed late in the fall, so some of the assignments had been made. The Civil Fast Track had its four or five judges assigned. Eventually they wanted me to get into that area because it was my background. But I also wanted to learn criminal law, because I wanted to be a well-rounded Judge.

Well, the first of my assignment was general trials, meaning you do mainly criminal trials and then if the Civil Judges needed help you would back up on the civil side. And so my first case on the Monday after I am sworn in on Fridays was this robbery case and I still remember that the defendant had a prior conviction and the public defender made a motion to sever that. And they weren't helping me out they were helping each other out, in fact there is some antagonism between the two offices out there.

So I spent the whole noon hour researching whether this could be done, and I came back and I said, I found this case *People v. Bracamonte*, and they both kind of laugh out loud because the Bracamonte motion was well-known to everybody. At least I found the right case, granted the severance, but I was fortunate in that Judge Arneson, Richard Arneson had been on the bench out there, and he kind-of took me under his wing, and he would meet with Doug Swager, a wonderful Judge who came to the Court of Appeal, and myself, every morning at 7:15 we'd have coffee with him. And this went on for years, and in my case I would tell, I am going to have stupid questions about the criminal law, the questions

about sentencing so we could be uniform within the county.

And so he would answer all these questions patiently, and I would run things by him about what I thought I was going to do, and so I did criminal trials for about four years and then they switched me over to Fast Track and we were the only truly true Fast Track court in Northern California. We were set up like the Federal system, each of the four or five judges doing that had cases assigned to him or her but handled all those cases from beginning to end.

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And this led into something else. A couple of the judges, who had done that assignment, weren't quite as efficient as perhaps they should have been. So there is a backlog of about 800 cases when I took over that caseload.

So what I did, I started a mediation program and I mentioned this because this mediation program was actually adopted by other courts, the AOC also used it, and eventually it led to my being State Trial Judge of the year for the entire State. But what it was, was that on the morning of trial I would schedule three trials or four trials hoping some would settle, some would, some wouldn't, and looking at the one case that I was going to try. So then I decided to bring in the special mediators on the morning of trial. These are attorneys that I knew who were very effective in rather respect of the Bar. And they would come into court. The program was called the SMART Program (Special Mediators Actively Resolving Trials). And so I would swear them in, in front of the parties to make it look very formal and then send them out to meet with the parties to see if the case could settle and explain that the cases might not all get out. Well, that program became successful.

So then as an adjunct to it, I said, we need also to have some courtrooms where we can assure people that they would get out. So I started a program where the trial was no more than five days, and if they would waive the jury I would get an experienced trial attorney who would be sworn in as a pro tem. We would provide the clerk and the bailiff and they would have to, the parties provided the reporter. But it was called Trials on Time. It was the tough program because these were little trials but important cases, it would be no more than three or

four or five days because the lawyers were donating their time.

So we got rid of some of the small stuff that way. Then I thought, well, we are doing this at the backend, we need to do it at the front-end and pick up some of these cases and try to settle them before they get to trial.

And so I was lucky to have an intern from Davis and I had a law student. So I had him do an inventory of all my cases, I want to see what do I have, what's the estimated length of trial and how many were automobile cases.

Well, it turned out, 40% of the trial of the filings were automobile cases, and of those 40%, 80% were worth less than \$50,000 so they could be sent to arbitration as you remember.

So then I knew the insurance companies, it was Allstate, State Farm, Farmers and AAA insured 90% of these defendants.

So I got them to agree to go into early mediation and was called the EASE Program (Extra Assistance to Settle Early), they had all these acronyms that the Bar loved it. So we would get lawyers to meet with them and get these -- and there was mainly auto cases to get rid of them or they would go to arbitration.

So that cleaned up cases at the front-end. We went from the auto cases to commercial cases to a wide range of cases and then had this kind of model for mediation out there. But the Bar really was very effective, and it still is there although they called me two years ago saying that the Judge in-charge of the program now doesn't like those acronyms. So we are just -- that's the way so we got rid of them.

I said it doesn't hurt my ego. But as I said then Alameda County came out to check on it San Francisco had a backlog of cases and they wanted to do something similar, and then the AOC heard about it too and incorporated some of our concepts into mediation programs that they were teaching. But I am actually quite, quite proud of that.

Tim Reardon:

Yeah, you should be because it sounds like a very good system and --

Justice James Marchiano: Well it worked.

Tim Reardon: -- starting from scratch.

Justice James Marchiano: Right! And it didn't cost anything except the lawyers' time and my time late at night. What I would do too is that I would stay to settle cases and they knew this. In the morning I would get in at 7:15, meet with Judge Arneson until 8. Have coffee going for the lawyers and would do motions and sentencing between 8 and 9 o'clock, do my jury trial from 9 to 4:30 and then bring in cases that needed special attention to settle and work on those from 4:30 until they would settle. And sometimes I would stay, 7, 8 or 9 at night because I didn't want the cases to unravel overnight.

I'd call home to a very understanding wife that I am going to be late for dinner, and I remember one night we were there and I lost all track of time, it was a big condominium defect -- construction defect case and I had the homeowners come in, because I wanted to get the case settled, and I began smelling pizza, and I said, what's pizza doing in my courtroom?

(00:25:05)

And the head of the homeowners said, judge, we are hungry, it's 8 o'clock, so we sent out for pizza. But it turned out the case did settle. So I did that over a period of time too.

But there is a method to my madness, I wanted to get rid of those cases and get those cases behind people.

Tim Reardon: Well, it sounds like you were very effective in doing that. Well, in 1998, now you have done your thing in the trial court.

Justice James Marchiano: Well, I will tell you what happened there. In the mid-1990's, some of our senior judges retired, and so they moved me back to the criminal side, and we had a number of death penalty cases that needed to be worked on. And so they asked three of us to be the Death Penalty Panel, so Judge Flier, Judge Patsy and myself.

The AOC provided grant money for a clerk for one year. It was interesting, she had clerked for Broussard so she

brought the Chief Justice -- I mean, Justice Broussard, so she brought a certain (inaudible) to what she wanted to look at. But they brought her so she could help us with the pretrial motions and in return for her assistance she was going to write a death penalty handbook; the trial bench did not have that.

So we were working on that with her, having standardized voir dire questions and then handling Phillips motions and certain motions, and evidentiary problems, and then as motions came up during these trials, we would work with her and she would be like a research attorney for us, and we also had other heavy cases. So they assigned me to do that.

She was only there one year it was a \$50,000 grant, which was not a lot of money for an experienced attorney in the mid-1990s. She ended up being the head research attorney for the Sacramento Superior Court.

But we didn't have anybody to do that afterwards so I continued in helping to put together some aspects of that trial book, and then trying some cases.

So in my last year, in 1998, I ended up trying three death penalty cases in 16 months. And my goal was to do it fairly, dispassionately, very, very important cases to make sure the jurors understood the system, and they did understand the importance and the solemnity of it, because of the nature of the charges, but to start on time and finish on time.

And I would work with the lawyers a year in advance and we would set a trial date and handle all these motions in advance, but we are going to start this case on time. And in jury selection we are going to get a jury within a week, a week to -- five to seven days. It's not going to take all month.

We will use questionnaires that you have helped design. I will do a lot of the examination. I will give you time to ask questions also. We will go through the hardships.

So we developed a methodology. And so the cases all did start on time and finish on time, and I think that the jurors also learned about the justice system, learned about human nature and the importance of their serving.

Tim Reardon: Yeah, that's quite -- I mean, that's quite a feat, three capital cases.

Justice James Marchiano: I had done one other a couple of years before; in fact, it was with Bob Coakley, who later became -- it was his last case, he was the Assistant DA that was out there.

It was an interesting case in which the defendant had killed three women because they didn't follow his code; it was cold-blooded killing, and then he had a history too of trying to kill a woman in Nevada and some other things. But he ended up -- he wanted to plead guilty to the charges and then try the penalty phase. And his lawyer was good, but had some mixed emotions about that.

I still remember there was an excellent article in the Notre Dame Law Review that covered that subject. So we covered that, and then took a very careful plea naturally, because of the nature of that case. But that was tried mainly on the aggravating and mitigating circumstances on the punishment side of the case. It was an interesting case.

He was found -- the jury found the special circumstances and found the death penalty. I reviewed it, as you are supposed to, looking at the evidence at that time, and that was like in 1994. And it wasn't affirmed by the California Supreme Court until 2004, and now it's winding its way through the Federal Court system.

Tim Reardon: A long history.

Justice James Marchiano: Yes, yeah.

Tim Reardon: Now, this is basically in 1998 and at that time, having done so many things, you decided to seek an elevation to the Court of Appeal.

(00:29:48)

Justice James Marchiano: What would happen on that was, Gary Strankman had been elevated; he was from our court. In fact, I took his place in Martinez, and there were several openings, and Mike Phelan was over here too from Contra Costa; both wonderful judges. And they suggested, you know, you might apply and there are these openings.

And I had done -- I had been a trial judge for ten years and tried all types of cases over there and settlement conferences and pretty much , and helped the Bar, was active in the community, pretty much had done what I wanted to do. So I filled out the application and, again, I was a Democrat applying to Pete Wilson.

Davies from San Diego was his appointment secretary, and he was very good, and he interviewed me. It was a very good interview and he noted the party difference, et cetera, and then I was fortunate enough to be nominated to the position in the Bar. The Bar was very supportive.

Since this is being taped, just for posterity, I was found exceptionally well-qualified at that time, and again, when the presiding judgeship came up a few years later.

My claim to fame is that I am the only one who was appointed by Republicans as a Democrat, both to the Superior Court, Court of Appeal and then later on the presiding judgeship that was with Gray Davis.

Tim Reardon:

Yeah, I was noticing that irony. Well, you are in 1998 appointed by Governor Wilson, as you indicated, and then in 2001 you were appointed by Governor Gray Davis to the position of Presiding Justice of Division One.

Justice James Marchiano:

There is a small story there. Gary Strankman was a wonderful administrative Presiding Justice, as you know, as well as being a Presiding Justice he had started a different methodology for reviewing cases, and one that he wanted continued, and one that he had turned Bill Stein out on, and Bill was very much in favor of it, and Doug Swager, who was on our Division, was also in favor of it, so we wanted to continue that system.

I was willing to defer to Bill and thought that he should be the PJ. He did not want the position, and both Doug and Bill asked me to apply for it so that we would keep the same system.

Historically, in 1917, and Reardon saying, what's he going back to? There is a wonderful Irish judge, Lennon, who was the Presiding Justice of Division One. And as you know from this Legacy Program that started from the Centennial celebration of 1905 to 2005, there are various historical retrospectives that we did. And the Court of Appeal started in 1905; before that we didn't

have a Court of Appeal, and there were only two divisions up until 1917; Division One and then later Division Two.

The Supreme Court was getting all of these industrial accident cases, the predecessor to workers' compensation. This was part of the progressive legislation. And so they were inundated with cases and so they began dumping more cases back down on to the Court of Appeal. And at that time you ran for the position; it wasn't until 1934 that the position of a justice on the Court of Appeal became appointed.

And so you ran by party, and so you had certain people, if they are running, they are running for good reasons and bad reasons. You have good workers and bad workers.

Well, within Lennon's division they were getting behind so he started the conferencing, and he says, I am giving each of you x number of cases, we will meet on this date, we will discuss these cases, and then by the following month I would hope you would have many of them written up, and very short opinions. But by making it accountable and setting dates like that, he helped clean up the backlog.

So Division One had done cases like that and then kind of got away from it, and by the early 19 -- around 1990, and you probably remember this, there was a two or three-year backlog here at the Court of Appeal, and it was serious, and it became kind of a whip used by people to get cases settled. There is no sense appealing, you will be up there for three years. And Strankman realized that that was wrong.

He had worked with Jim Scott on another division; I think Division Three, or Scott had had this method in mind that I am about to explain, so when Strankman came, he pulled in all the cases into the division. Some of the cases had sat downstairs, all of them were pulled in. He got a handle on them, how many did we have, and then split them up four ways among the four justices, and then said, we will conference these cases every two weeks, picking up from where Lennon had stopped.

And I want you to each of you summarize the case that you will be authoring, and then the other two justices who were on that case can ask questions, we will try to reach a consensus and then we'll meet with our research attorneys and give them some direction based upon our conferencing. And by making that unaccountable he cleaned up the backlog, it took four or five years and a commitment by the judicial assistance, the secretaries as well as the judges to do that.

Well that's the method that we were using when I came, and it made sense. I had two wonderful research attorneys that I inherited from Bob Dossee, Lynn (ph) Armstrong and Pete Beckwith and they were used to this system. And so the judges – and also what Strankman did, he counted the number of cases that would come in each year and then would split it up into every two weeks; we'd have to pool X number of cases to stay current. So sometimes our draw might be 16 cases, 20-22 depending upon the number of cases that were pending, and then they would be split up that way.

So you meet with the attorney after the conference, explain how – at least the way I did it, I would explain how I wanted the case written up. This is my rationale for it, I would give them the research that I had done. Give them books from the library, from my office, case citations and then I would tell them this is a 5-pager, or a 10-pager or a 20-pager, I wasn't holding them to that, but I was trying to explain the 20-pager was much more complicated. The 5-pager you can probably cut right through that, we don't want a long opinion, essentially that's what I was telling them.

Then they would come back during the process and they might say, well judge, on the summary judgment I'm not sure you got this right. I was looking at the declarations and maybe we should approach it this way and then I would look at that and then send a memo around to the other judges saying that we are going to change our approach for the following reasons. Look at my draft and the reasons for it, if you disagree let me know.

And then the attorney would give me a draft and then I would sit down to make the draft my own and then pass it around to the other two justices for their comments and then it would be put in pre-oral argument form. So we did things at the front-end and I have had some

justices who will say, well, that's a lot of work and at one conference one of the judges said, why aren't you taking away the fun of the hunt? So I came back and asked Lynn Armstrong, am I taking away the fun of the hunt? She said, judge, I am not a hunter, please continue doing it the way you do, it keeps us on target and we like to do it that way.

And so then after Gary Strankman retired then the panel wanted to continue doing that, and so I said I will continue with the same process and became PJ and it went from there.

Tim Reardon:

That's where you were elevated sort of presiding justice by Governor Davis and keeping your non-partisan practice in order? Did you -- and you kept this -- if you were going to point to one person who was kind of influential or instrumental in the good that you accomplished as Presiding Justice I assume that it would be probably Justice Strankman, you learned a lot from his style --

Justice James Marchiano:

Yeah, absolutely! I was also blessed just with rudimentary values, at Bledsoe, Smith, the lawyer -- the attorneys there besides being excellent trial lawyers, they were involved in community affairs and taught and at Crosby, Heafey, very prestigious firm but Ed Heafey taught at Boalt, Richard Heafey taught up at the USF. Chris Gasparage was active in trial practices in the medical malpractice area and they always encouraged excellent work and they would review your work. And then as a partner in the firms I had associates assigned to me, but I would also be meeting with the partners on the quality of the work.

So I would say that those firms also influenced me to a great degree and then Judge Arneson who is a wonderful judge and then Strankman as you said.

I had one interesting experience I think it is worth commenting that you don't know about -- and only a handful of people do with Governor Davis and Burt Pines who was his appointment secretary at the time. There was an opening in the Supreme Court and there had not been a Latino judge and there was not an African-American judge at the time -- no, in fact the opening was when the justice went to the Washington, DC Court of Appeals.

Tim Reardon: Janice Brown?

Justice James Marchiano: Janice Brown, you are right, and she had been an African-American but there was that opening. But Davis had just been appointed and you had 16 years of Republican appointments at the trial level.

(00:40:02)

They were looking for some candidates and they wanted some trial judges or Court of Appeal justices. So they were looking around and he wanted to appoint a Democrat that he had appointed two Democrats in Fresno in the Fifth District, and so their names were available. And when my name came up for the presiding judgeship as a Democrat also I had some very nice laudatory letters by the Appellate Bar and by various organizations. And so a couple of important people said, well, Marchiano is a Democrat.

And so Burt Pines calls me up and he said, would you -- and I said, we are considering you for this position; I am interviewing for that, would you be interested in the Supreme Court? And I said, well -- I said, I am not sure if I am worthy of it, and he said, well, we think you are, and I would like to ask you some questions. In the meantime Carlos Moreno's name had been floated and the newspaper articles were glowing and it was true, he is a wonderful, personable somewhat liberal judge, he fit the mold that Gray Davis would want, and it was pretty clear he was going to get that appointment.

Everybody knew that he was going to get it, but they wanted to have the process of looking at some other people. So I answered a few questions and then I said to Pines, I said, am I really a viable candidate? I said if I am not, I am not going to put my family and friends through all of this and the press and the whole thing. I said, I see the handwriting on the wall here.

Finally after some prodding from me he said, well, we do have one person in mind, and so with that I said, well, why don't you consider the other couple of Democrats that you have with him, but don't consider me for that position and I would be very happy to be considered as PJ of Division One, I said, that would be quite an honor for that.

Tim Reardon:

That's an interesting story, and I think we appreciate your mentioning that that kind of gives you a flavor for your own integrity and cooperation that's marked your term on this court.

When you first became PJ, I think you may have already answered that question, did you make any major changes that you pretty much follow it?

Justice James Marchiano:

We pretty much followed it, Justice Margulies was appointed. She is very diligent and liked the methodology. Her judicial assistant had been used to doing it this way where from before, so yeah, it worked. And two things happened during this period of time. The number of cases at the Court of Appeal began to go down and this made our work a lot easier. When I first started in 1998 up to maybe 2000, I worked weekends as well as during the week, because with our system I had to read my briefs and also read the briefs of the other judges that I was assigned to so we could have an intelligent discussion at our conferences. So it meant that I was doing a lot of reading because we had a heavy caseload.

Well for many reasons and I am going to get into that in a minute. The caseload began to go down and so what we did after Bill Stein retired, and with his successor, instead of conferencing twice a month as we were doing, we would conference once a month.

And instead of conferencing every case what we would do is the justices would pick out cases they wanted to conference that they felt needed input, or if they had been reading the briefs on cases that they were assigned to but not authoring, they would also say, well, I would also like to discuss Marchiano's case in this area too, because I have got some ideas about that. And so because we didn't conference every case and because the number of cases had diminished, we could do this once a month.

The other thing we did too was on writs, and this was controversial in the beginning with Susan Horst who had been the writ attorney for years and who is a wonderful writ attorney as you know, but does things her own way, and her own way usually was the right way. Well, we used to do the writ conferences weekly. Well I began looking at this, and I said, we don't need to do it weekly and I said, if we do it every two weeks then judges can

arrange their own personal schedules in a better way. You don't have to worry about missing a conference, and so we began doing the writ conferences every other Wednesday instead of every Wednesday. But then if urgency came in, or emergencies came in or something needed to be discussed, we would meet in a group. It wasn't necessarily kept for that conference if it had to be decided before that.

So it was modified a bit, but we did keep the case methodology of reviewing the cases in advance so that we would reach a consensus ourselves or somebody might have a dissent or might have a contradiction. Sometimes what would happen is at the conference somebody would have a different viewpoint and I would say, well, let me see if I can work that in.

(00:45:05)

Let me see if I can modify your thinking about this and so it made for a more balanced opinion writing. Although there were a handful cases that we just had disagreements on which is healthy, because it's good to get various view points.

Tim Reardon:

Again, I checked the record, the background and everything else from 1998 to 2013, Fran, our librarian, head librarian just kind of counted up the number of published opinions that you personally authored and I think there maybe more, but you had about 160 published opinions and you did these opinions in addition to your administrative duties as the presiding judge over Division I.

So, do any of those maybe two or three stick in your mind, I know many, you probably have many in mind but in the interest of time we probably should --

Justice James Marchiano:

Well, I can go through all 160 if you would like. What we can do is write the greatest Notre Dame running backs of all time, we will start at number 1 and go to number 100. There are two things about the approach within the Division I would like to comment on and then I will answer your question directly. The District as a whole -- and this was my perception is as I was here was, did not reverse as many cases as were reversed in the 1980s and the early 1990s. And there are many reasons for that.

One, and at least in our Division when I was giving some words of wisdom to new people that would come in, you start with a California Constitution the case was supposed to be reversed if it's a miscarriage of justice, so that has to be something significant that infects the case, goes to the heart of the case. And then we have our standards of review, the abuse of discretion, you know and other standards, the beyond a reasonable doubt and then per se reversibility if it goes to constitutional issue.

But a lot of it is simply Harmless Error under the Watson Standard and because a number of trial judges like yourself or myself were pointed to the court, we can appreciate that every trial is not a A+ trial, some trials are C, C+ trials, B- trials, but they are done fairly. And the trial judges worked at it, the attorneys have worked at it. And even though, in my idea I would meet the attorneys every morning before trial would start to say, do you have your witnesses lined up, are there any motions any surprises, so I would be prepared myself, the same thing at noon time I would bring them in 15 minutes ahead of time to try to make sure that we would iron things out.

But despite that things have a way of coming in, and so no trial is ever perfect, but the recognition of that is that not every trial needs to be reversed, and so the reversal rate on the criminal side was probably may be 5% or 6%. And the reversal rate on the civil side was probably 10%, 12% and these are much different from what it had been before, but there was a reason for that.

So, then in my approach on these opinions I was starting with these principles and looking at the record in those big cases myself. I also wanted to write an intelligent opinion that would be understood by a layperson or by the litigants, if they were involved in the case.

As you know, we have had – there is a handful Supreme Court cases where they get in to some difficult issues, you end up reading the opinion two or three times. Reading a page two or three times, isn't that right?

Tim Reardon:

Very true!

Justice James Marchiano:

True, and it's puzzling, but that shouldn't be that way, the English language should be straightforward.

And so I wanted to write opinions that made sense and that people could appreciate, the man on the street could appreciate and follow this, but I would reverse if the case called for a reversal, then it should be reversed.

I also was blessed with good research attorneys, Pete Beckwith, Lynn Armstrong, Paul Kenny, I ironed out the kinks that he had from your Division when they came over to ours.

Tim Reardon: Paul is a good man.

Justice James Marchiano: He is a good writer, and then at the end Renee Torrez came over from the Sixth District to work with me at the end. They were all good writers, but they also knew my style. And then in the second area too is that I always viewed opinions as collaborative.

(00:50:02)

And it doesn't always work out that way, because I sat in other Divisions when there was a conflict and would make suggestions and sometimes the suggestions were accepted and they worked, but my position was that if I sign off on an opinion even when I am not the author, my name is on there and I really reached the position that I did because of letters by a lot of lawyers who had respect for the work that I did as a lawyer and as a trial judge, they had certain expectations.

And if they saw my name on an opinion that was kind of odd, they would say, well Jim, why did you sign off on that thing? And so it should be collaborative, even though it might have been Stein and Swagger and Marchiano with Stein writing it, you know, I want to approve what is there and we were lucky at least during those days that sometimes Stein would say to me, well sit down with my research attorney on this one area of civil law, you may know it a little bit better than I do and you can work out a change in the opinion with Julia Partridge. And so we would rewrite it.

So, anyway the point being that if your name goes on it, whether you are the author or whether you are the second or third judge on it, it's part of your product. And so that also affected how I approached it.

And then the other thing that was interesting, we went to Appellate Seminar, you were there about six years ago and they brought in these writers and research attorneys from Minnesota and other places and one of the suggestions they gave at the end of the day and some people were headed out the door to the golf course and did not even pick up on it.

But it really made good sense, and this is what I try inculcate in our Division and some of the people would do it and some wouldn't do it. You should try to understand the case by the first paragraph. It used to be that the judges would write, this is an appeal from the granting of the summary judgment and we are going to reverse it because of this.

And then they would get in to facts down below and get in to the history of it, what was encouraged and really worked was to look at it historically, look at it at the trial court level and look at the issues, and it was very simple. If you had a fraud case, somebody bought a home and was claiming that the house wasn't what it was represented, that there were defects in the foundation.

Anyways, but it would start up that John Jones bought a home from the Smiths. And after getting in to the home he found these problems as follows: he tried to recover from them, they refused, so he filed suit. The trial court -- the jury found the facts, then the trial court found for him and awarded x number of dollars.

The defendants have appealed because they feel the verdict was wrong in this way, one, two and three. So you have got the facts and you know what the case is all about going in to it, if you follow me.

Yeah and it made sense, and you know I never quite thought of it that way for about ten years when I was on the bench. And so gradually what we are trying to do that in some of our opinions also, changing it around.

Now you are asking about the opinions, they are all and we all say this, but it's true Tim, and I think, you and I are very similar in this way, each opinion is really important whether it's published or not published. It's important to the litigants and they should understand it. And it's important to move the cases as quickly as we can to get the litigation baggage off their backs because

people get hung up in litigation way beyond what they should, and this should really go on with their lives that they can and get that off the back of them and that's one reason why the handling of cases in a timely way is very, very important and that's really our first and primary job on the court.

You know outreach and writing and other things are important and there are good outlets for judges but our primary responsibility is to get those cases out on time in a fair manner so that people can go on with their lives.

So, all of those cases were important, whether it's a Wendy case that came up by a public defender without any real issues to look at. Unpublished opinions, we had some unpublished opinions that we went back and forth on should we publish them, we tried to be conservative there and not publish more than 10% within the Division. We would get request from the parties and look at those very carefully and if there is a reason to change our minds, we would.

But the one case I guess, I think it is over was the Mehserle case was one of my last cases involving the BART police officer and it came up on appeal with both the victim's family feeling that what happened in Los Angeles was unfair and then the Police Officers' Association and their counsel that represented Mehserle, feeling was unfair on that side that it was an accident.

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You know that when he pulled the Taser and used the Taser instead of his – he thought it was the Taser and pulled his firearm and we looked at that case very carefully, it had some significant issues, they brought in several appellate lawyers for Mehserle, but after looking at the whole record and substantial evidence and what the law is and distinguishing Civil Rights cases where they had some defenses that they wanted to raise, we wanted to write something that was understood and very careful.

And it was not an easy situation for the BART police when it occurred, so when Pete Beckwith wrote this up with me, I said we want the timeline here, we want to do everything, whoever reads this and understood what went on that night, not what the newspaper said, not

what that snippet of the video might have shown because there is much more to it.

So we wrote that case with some care, so that it could be understood.

Tim Reardon: Yeah, I think it was very well written, and understandable.

Justice James Marchiano: Yeah, section by section with lead-ins and explaining why we did what we did, and I tried to do that really on a lot of my cases and try to be that way. We had one whimsical, may be whimsical is not the proper adjective for a judge, but it was a cable car case involving the turntable down on Powell and a worker got injured and he wanted to sue under some exception and the question was whether it was a real property or personal property and that would change the Statute of Limitations.

So, I sent Beckwith to the Cable Car Museum and I said once you get all this history of the cable car for me, and he did and then the first part of the opinion which actually talks about holiday and the cable cars that were first drawn by horses up to Nob Hill and then how it evolves in to the Muni system and in to the system today and how the turntables were actually put together.

So it had some good stuff in it, but at the end it was Beckwith's idea, he said, now that we have reached this verdict we are ending this with two rings, and two rings means for the conductors when they have those contests that they are very well satisfied.

And it was clever but it was fair. And you have to be careful in using humor, you can't make fun of the lawyers, you can't diminish the issues, but sometimes you can put a little bit of that in there, if that was the case and then that year when we were exchanging Christmas gifts among the staff, Beckwith gave me a cable car ornament for the Christmas tree when I was there.

So, we did have fun and we had cases like that that you would dig in to, and yet, they were time consuming but you like to writing them, yes.

Tim Reardon: That was – I recall our opinion very well, I enjoyed it. Back on the record and I had some kind of concluding areas I wanted to cover because I know you are very knowledgeable in these areas, you have been very active in court administration and judicial education. Could you give us example of the activities that you have been involved with and –

Justice James Marchiano: Well, I was in the library committee and people kind of laugh about that. It's an interesting background there, when -- for years there were separate libraries, the Supreme Court had its own as you know, and the Court of Appeal had its own and when we were over at the other building -- that Marathon and I first joined, I thought it was the strangest thing where I would go upstairs and knock on the door for permission to get entry into the Supreme Court Library and I was a justice who wanted to do research, and I said, it's like they are trying to hide something from me.

Well, fortunately the Chief Justice and the Presiding Anderson here, and Chief Justice and -- before George's time I think or it might have been George. They said, once we move back into this building this was full, so let's combine the two libraries and put them in one place with all the books and everybody can use them, but because everybody is provincial what they decided to do is have three trustees from the Court of Appeal, and three trustees from the Supreme Court serve as the Board of Directors and the Chief Justice would be the vote-breaker that was never needed.

But there were difficulties that let the Court of Appeal Librarian go and another one go and brought in Fran Jones and there were a lot of difficulties there that Paul Harley and I had to work through some litigation that we had to work through.

I mean extra work that we did and some approaches that we had, the two things that I did upstairs was Fran Jones who was the Head Librarian had the National Librarian's Conference in Philadelphia.

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She wanted somebody from the board to go to back her up and to give it some luster.

And no one wanted to go and she said, judge, would you mind going? And then she said, it will worthwhile, so I said, all right. Well it turned out it was wonderful from this standpoint, the meetings were, we toured University of Pennsylvania Law School's Library and then we got a side trip from Philadelphia to Washington DC to see the US Supreme Courts behind the scenes during the summer and to also look at their library.

When we are at the US Supreme Court Library they had this title on this room and I asked what's going on there, and I said are these lawyers and they said, yes, but they are not the elbow clerk, they are not the clerks for the justices. These are reference and research librarians that are here all the time and if a justice from the Supreme Court needs some articles and need some help on personal things they are available. If you need statistics on capital punishment, if you need to know the amount of tonnage going in to Miami Beach, they will gather all this material.

And I said to Fran you know we could use something like that back here at the Court of Appeal and/or the Supreme Court that we have things all the time, and she said, you know that's a good idea.

So, I prodded her on that and they hired one person with a law degree who also had a library degree to be the reference and research librarian, and from that, and then I was encouraging the judges to use them and they turned out at least in my case in some opinions and other things I worked on, they were very, very effective and they finally expanded I think to four and the Supreme Court uses them.

So, I was very pleased about that happening. Another very simple thing was when we were at the Penn library, they had all of the cases labeled by what was there, whether it was Civil Procedure, Federal Procedures, so you just looked at the side of the case. I said, Fran, this is so easy, we need to do that, because otherwise you are going up and down all those bookcases to find something and so she came back and put everything in order and put a Table of Content on all the side shelves.

So, judges who weren't very clever can find out what is there and did some other things. Just as an aside, I was working on a talk I was going to give. And I remembered Chief Justice Rose Bird who could be

different had given a talk to the State Bar in which she quoted Bruce Springsteen and Springsteen was the troubadour for the poor and working class.

And I knew there was something clever in it. So, I called the research and reference people, I said it's back in the 1980s, so I am putting you to the ultimate test. I want you to find this for me and sure enough they did. I mean they were that good, that they found the speech and I can honestly say that they never let me down in anything that we were looking for. We also encouraged the legislative history that that was expanded because I suggested it – and I mean Fran also agreed and we keep a depository as you know of statutory history up there.

So, those are some of the accomplishments there. I served on other committees but the most important one was probably the Jury Improvement Task Force Committee. I was asked to serve on that when I was at the trial court as I was leaving. It was comprised of several Court of Appeal people, AOC people, Trial Judges and people with an interest in Jury Reform.

And when I was on the bench as a trial judge, I mentioned I wanted to start cases on time and finish them on time, I would also tell the people that most of you don't want to be here, but I hope that after you serve in my department that you will thank me for the opportunity to contribute to the justice system to learn about the law, and to learn about human nature and you will think it's a worthwhile experience.

And then I had a method of explaining the voir dire, what we are going through. I would also try to be fair in the trial. I had a couple of trials where the lawyers would ask repetitive questions and I would finally cut them off and I would say to the jury, do you understand what the attorneys have been trying to get at? And they said, look the record indicates that the juries had even said yes, do you want him to continue in that area any longer, let the record indicate? They say no, and the lawyers didn't always like that.

But it moved the case along, we would set time limits on some of the civil trials and this was for the jury. The lawyers would say it's going to take two months to try this product's liability case, and I said, no. I think you guys can do it in four to six weeks.

What I am going to do is I will tell the jury six weeks, but I think it's closer to four and I will give each of you a week and a half to two weeks to put your case on and you can make a motion to extend that for a good cause and we will do it. And I promise you that we will be session from 9 o'clock to 4:30 each day, so you will have a full day.

(01:05:02)

Invariably, most of those cases finished on time and it caused them to tighten up the examination of the witnesses so that it was clear to the jurors.

And then I was very much interested in the waiting time; the jurors had to wait all the time, they were on standby. At one time it used to be for two weeks if they were called for service, and then it went to one week, but you had to physically be in Martinez for a week. If you were a doctor or a dentist or any working person, that's terrible.

So the Chief Justice put together this Jury Task Force Improvement Committee, what can we do? And after numerous meetings with very good people, we had multiple recommendations, most of which were passed. One was to go to one day of jury service, which meant that if you were called for service, you would only go in for that day, and if you were selected for a panel that the case settled, you can call them the night before and you wouldn't have to go in at all, and then you are excused for a year.

If you were sent to a department and they didn't use you, you were finished. And the utilization rate would go up, because you need to bring in more panels, but admit that most jurors wouldn't even have to come in or would only serve one day.

The second thing we did was that you would get two or three different forms of jury summons, and this would be confusing. So we worked it into one form. It also saved time in the jury service rooms, so it saves money for the postage and all that. So it was one form that was comprehensive.

Then the biggest reform was in terms of making the case understandable to the jury. So we had jury

innovations. Some of the innovations were things you might have done and some were newer.

One was allowing the jurors to take notes, and we would make notebooks available, we have the instruction on that; you have to pay attention to the witnesses, look at them, and the trial transcript would supersede any notes that you might take. Leave them on your seat and we will lock them up and no one will see them, but they are available for jury deliberation.

Well, I would say two-thirds of the jurors like to take notes; it was their method from school or whatever it was.

We would also tell them, you can ask questions. You have to write out the questions, give it to the bailiff. I will discuss it with the attorneys and I may decide we will ask them or we won't ask them. You tell them you are not here as a detective or an advocate, you are not a lawyer, but you might have something that's bothering you, so they could ask certain questions.

About half the time I would show it to the lawyers; you can follow-up on this if you feel it's important. Some of the jurors think it's important.

Then they had the jury notebook itself, where they could keep copies of photographs, the intersection, medical pages from the medical records; that were very important. So they would have their own copy that they could annotate and they would leave that on their jury seats, and then have it available in the jury room.

Another was the mini opening statement. The judge would always describe the nature of the case; some judges would just read from the information or read from the complaint that was filed, and it would be in legal terms. Well, we would allow each lawyer two or three minutes as part of the opening session of voir dire to explain what the case was about, and the lawyers can make it much more interesting.

And then the jurors would hear the explanation; we tell them, it's not evidence, what the lawyer says is not evidence, but this is what this case may be about. And that way then they could -- there were fewer excuses for hardship, because the jurors would understand, hey, this case is interesting, I want to serve on this case.

Then on the jury instructions, all the jurors got copies of instructions. So these were all innovations.

One innovation that somebody recommended, and a few courts did, if you knew the case would go into the defense case, that there would not be a non-suit, they would sometimes ask to have experts juxtaposed, the plaintiff's expert and then the defense expert, if you could do that, if you could do it economically and if the experts were available to do it. There were a whole series of these.

So in the administrative standards they were approved, and courts were encouraged to do this.

Five years ago they were busy at Martinez and I ran into a couple of the judges that I knew; one was going to be on vacation and I said, I will tell you what, I will take a week of my vacation time and cover for you, if you can assure me that one of these two cases will go. I wanted to see how these jury improvement ideas were working.

And so I went out and tried the case, and we used these, it was a civil case and the lawyers -- I shouldn't say the lawyers were delighted to have me because -- well, I knew them, I know most of the Bar out there and they know what my attitude is about starting on time and finishing on time, and it actually worked, and they liked doing it too. So I am somewhat proud.

(01:10:03)

There was a group of us that did this, but we all bought into it and thought it was a good idea to make service understandable and user-friendly, so people don't feel like their teeth are being pulled out when they get that jury summons.

Tim Reardon:

I think all those reforms that you have indicated are excellent, and I think most of them have been adopted or --

Justice James Marchiano:

One other one that's come up in the criminal cases is reopening closing argument, which people thought was controversial. It was done in the Federal system, it has been done in three cases that I know of, and it has been approved, where if the jurors have questions or they seem to be hung up, that the court on its own or if the

lawyers suggest it, they could open up argument on that issue, just briefly, to argue the issue. Again, to see if that can break whatever the deadlock is.

And according to Jackie Connor, who was a very good trial judge in Los Angeles, who tried a lot of cases; she is now retired, she was on our committee. She was the proponent of that down there as I was up here. She tried it several times and it worked well, yeah.

Tim Reardon:

Well, that's obviously a very important aspect of the law because it affects so many people, and I am thinking primarily jurors, and if they can gain a better understanding of what's going on, what's happening and the time constraints.

Justice James Marchiano:

We did a study out in Contra Costa and the population out there was like 900,000 at the time. One of the other ideas, Contra Costa is a large county, just as an aside, so jurors came in from Discovery Bay, which is out by Stockton; they came in from San Ramon, which is by Dublin; and they came in from Kensington, believe it or not, Kensington is in Contra Costa County, so we would get professors from UC. But it would take them time to get in there, and that's a major commitment to drive in everyday, and it's also a commitment to give up their time.

I remember one farmer from Oakley standing up, and he says, judge, I don't mind being here, but use my time; last time I just stood around. And I said, well, if you serve, I will promise you that you will use that time.

So yeah, it's important that the jurors are treated properly and fairly.

Tim Reardon:

No question about that.

Justice James Marchiano:

Out of the 900,000, 20,000 were called in to serve one year; they weren't all used, but between a huge panel of say 400 for a death penalty case or 200 for a sex molestation case that had a lot of exposure and that jurors don't want to serve on, but the point being that you have a captive audience of about 20,000 people coming in.

The other thing we did, we also started a program. I was in the building where the jury assembly room was. A judge would go down at 9 o'clock and welcome them

and thank them for their service and explain that there is some waiting time.

Or if the case settled, that case would go to that department and the judge then would thank them and say, it wasn't for naught; the fact that you were here probably caused the case to settle, rather than just letting them wander out and wander away. So we tried to do that.

We gave them donuts and coffee every morning. They were conducted into the jury assembly room so they wouldn't be out with the witnesses as they waited for the session to start each day. And the bailiff would bring coffee, tea, and donuts in, which was a minor expense that we would bear; the judges bore that, but it was just a little touch to try to make the service easier.

Tim Reardon:

Right! That area required a lot of improvements and I am glad to see that they have been undertaken.

I know you have been very active in your own community, in the church; could you describe any of those activities?

Justice James Marchiano:

Okay. Well, I was on the St. Vincent de Paul Board, which is a wonderful organization. Let's say, you get a bang for your buck, very low overhead. And they serve the poor in all capacities in terms of they now have job training a component; vouchers for housing for a couple of nights for families living in their car, and their motels will take these vouchers; bags of food, food vouchers. It's a wonderful organization!

I have also been involved in the Food Bank for Contra Costa, Alameda, and I have been their MC for the Comedy Night, which kicks off kind of a rivalry among all the firms to raise money and cans of food. We have had various wonderful comedians come in that will perform.

(01:14:56)

I tell one joke and they like it because I am very awkward at it, so it's a chance to have some fun with the judge, yeah and I have done that.

And then with the Bar Association I have done programs for them, now that I've retired, they have Bridging the Bar for the new admittees, they asked me to be the

keynote speaker for that and I have done a series of articles for the Bar oh about six years ago, they asked me to write a case on rough justice or some interesting case.

So I put together a fictional situation involving this Judge Carlton in Department 47, we have a Department 45, but we don't have a 47, but then it was based on a composite case that we had been involved in one of my cases actually that was over, and then, it was very well that was very received, then they asked me do one in the next year so I did another one, so I did whole series of those, and those have all been put into a published work. What they do is give it to people that have done good things for the bar as kind of a thank you.

Yeah, and then it's been fun, it's been fun doing this, it's been the Judge Carlton series with the same public defender running through. One was on three strikes, one was on a conservatorship, one was on a legal ethics problem, one was on a case that it was related to something we had here but I make sure I am not commenting on any those cases, involved a fellow who committed a robbery and was in State Prison for 10 years, almost institutionalized his schedule et cetera, got out and within four days went back to the same bank committed the same robbery and the same clerk was still there and he was promptly arrested outside and his defense was it wasn't robbery because he did not form the specific intent to permanently deprive the bank of its money, he wanted to get caught, and that's it. So there was questions about the instructions and the expert and the whole thing and due to institutionalization he couldn't live on the outside, he wanted to get back into prison.

So the story takes place elsewhere but it's a win-win situation. If they buy the defense that will probably get-off with the lesser, if they don't then he is getting his way back into prison, so it's a series of stories like that.

Tim Reardon: Well, you retired, can we say retirement so you retired last year --

Justice James Marchiano: March.

Tim Reardon: March of last year and what have you been doing in retirement?

Justice James Marchiano: Well, the main reason I had planned to stay on another year in – as you know from talking to me privately I had some health issues come up in December and January, and I really needed time off, time to have some medical exams, some tests and stuff, time for myself; and as PJ, I never took more than maybe 10 days vacation here or there, never two weeks or 14 days and my philosophy really wasn't fair to push off everything on the associate justices. They didn't have that position, and I was appointed to and so I will do the job.

So we reached a point in January where our caseload was current, and as I mentioned before the caseload has diminished by 25% in the last 15 years, and one of the byproducts of that is from all these civil programs that very few civil jury trials come to our Court and the number of civil jury trials has been cut by 80% in some counties, Contra Costa used to have 30 a year, they are down to 9; San Francisco used to have 70, they are down to 30; Alameda County used to have a 100, they are down to 40, because of ADR binding arbitration these cases are settled so these cases aren't coming up to the Court of Appeal.

The number of Wendy cases seems to be up and at least 10% of the criminal cases closer to 15% when I left are Wendy's meaning that they are easy to handle, they don't have any controversial issues. So our caseload was under control then we had a full staff and so I wanted the time off, so I announced it to the judges and the staff that I was going to retire in three months, I'd continue working on some of the cases and I was willing to stay on past the March 15 date and come back, did work on some things that I had put together with something's happened, and Judge Sepulveda came in and I found her in my chambers. It was just like that and so, yeah, and then she explains she was asked to take my place, so with that then I left in any event.

So then I did -- some of the medical things, I've done some things with the Bar, the other thing that I wanted to do was to have time for traveling, and there is a wonderful program called Road Scholar, and it's not the Rhodes in England it's R-O-A-D, and it's an outgrowth of Elderhostel.

(01:20:01)

They have a Signature City Program, where we went to Memphis, as the Music City and the center of the Civil Rights Movement. And for five days we were at a centrally located hotel; it was right around the corner from Beale Street, which is a Rhythm and Blues, B.B. King's Club is there, other clubs are there. But in the morning a professor or somebody will lecture on The History of Music for an hour, and then take you out to Sun Studios, where Elvis Presley, Carl Perkins, Jerry Lee Lewis and Johnny Cash first started, and the first rock and roll record is there, and it's a wonderful historical walk down memory lane.

Then they take you over to the Stax Studio, where Rhythm & Blues with Isaac Hayes and others started, and they have all that. And then later in the day you go to Graceland naturally for Elvis. Then the next day you go to the Rock 'n' Soul Museum that has all of the vignettes, then across the street is the guitar factory, the famous rock and roll guitar factory. So we did that. We went to different places like that. We went to some historical places that were tied into music.

Then the second half was on the Civil Rights, and Martin Luther King had been assassinated at the Lorraine Motel. The motel has been bought by the Civil Rights people and it's there, and they have -- the room is there. You walk up the steps, you actually look into the room. The bed is pulled back, the newspaper and everything is there, as it was on that day.

And then even more ironic, right across the street is this old brick building, and the bathroom window is partially up, where James Earl Ray shot Martin Luther King. Well, they bought the building. It's an old brick building that's been converted into the primary Civil Rights Museum, not just involving King, but the whole Movement. And so we went there and to some other places. We went to the Baptist Church that he spoke at; went down to where the Memphis garbage people were. There was a garbage strike and higher wages that caused them to be there.

So it's really a way to learn about a city in going to places that we normally, if I had gone to Memphis, I would have done some of this, but getting the insight up close and personal from these very good lecturers, and then a guide is with us answering questions and gets you into all the places too. So we did that, and we did

that in St. Louis. We were planning to do that also in Ottawa and Toronto; it's three days in each place.

Then the other thing that I did was 13 years ago I had gone to Cuba, much to the chagrin of Strankman and others, but actually it was through Diablo Valley College. Had a legitimate program; the Spanish department got a license to go. You enrolled and got one unit of credit, and kept a journal. But it was a very good program, run by a former lawyer, who has gone into global travel business, people to people like this, knows Cuba well.

Anyway, 13 years later he brought back the same program through DVC, and my wife Claire had not been able to attend, and I had not traveled overseas, and I call that overseas because of some leftovers. I had prostate cancer and went through treatment here; I was at Court actually, drove myself over to UCSF for radiation treatment. It worked out fine until the end; had some complications which left me with some urinary problems, causing the use of a catheter from time-to-time. So it ended up, I was concerned about that.

But in working this out; it's a wonderful program he had in Cuba to Havana, Cienfuegos, beautiful town, and then Trinidad, a colonial town. And you met with some of the people there.

And I wanted to compare the changes and it's safe to go, so what we did, we were able to fly to Miami, stay overnight, and then the flight from Miami to Havana is less than an hour. The hotel was always available and then the guide knew about my situation and it worked out well.

But this trip to Cuba was fabulous; the music, the history, the people. I speak some Spanish and I went by the courts, which were all closed, but it was...

So what we are trying to do is use some of this time to travel. I have grand-kids in Virginia. They are going to come out for the Easter vacation; we are all going to go do Yosemite together. And then later in the year, the whole family; I have four kids, two sons and two daughters, all the family and the kids, we are all going on an Alaska cruise. So I have been doing that.

The Bar has asked me to write some articles. I did an article that was well received on the five unintended

consequences of ADR, and this has been published in various places.

I continue to write the story involving Judge Carlton; each year they have asked me to do that. And so I just finished one on a civil case that appeared in their journal in February.

(01:25:05)

I am not doing private judging. I got calls from all of the services, they all know me. When I was on the Superior Court I did many, many settlement conferences for ten years and have my own methodology, and I would stay late. So the lawyers in the community know me.

Three years ago, when they shut down the courts, one or two days a month, I got a call from the civil fast track judges who said, could you ever help us with settlement conferences on our day off? And I said, sure, I will carve it off and I will use the holiday.

So on every other Wednesday we went out to the Bar office and they gave me a couple of cases to settle, and I was able to do that for four or five months. But I don't have a burning desire to do settlement conferences anymore; I really got that out of my system when I was on the Superior Court bench.

Our pension is excellent and so you don't need the extra money. I mean, unlike some of your colleagues that were here, that we all know, and they are all wonderful judges that got caught up in it, and do good work. I mean, it's their work that has lowered the caseload of the Court of Appeal, because the Court of Appeal is a funnel, the cases are funneled up from the trial court to the Court of Appeal. But all those big cases are going to JAMS and ADR and Judicate West and other programs.

And that's why on the article I wrote, one of the things I commented about the unintended consequences is that some of the significant civil issues are not percolating up as quickly as they did years ago, because these cases are settling; the cases that had these issues.

But between traveling and family, local Bar activities, I will be involved in the Food Bank Comedy Night in May and other programs that I keep busy.

And there's lot of personal things I put off around the house. People will say, how do you fill up your time? I say, just anytime you make a telephone call to any bank or have to take a personal place, it takes half an hour to go through it.

Tim Reardon: No, it sounds like you have a full plate.

Justice James Marchiano: It's fine right now.

Tim Reardon: Great! Well, as a member of this court and a member of the Legacy Committee, I want to thank you personally for giving of your time and talents, and I mean that seriously, to do this interview, which will be of great assistance to the bench, to the Bar and the citizens of the State, and learning more about the judiciary of California.

You have served this Court with distinction, you have been a good friend, and I appreciate you doing this interview.

Okay, thank you very much!

Justice James Marchiano: You are welcome! It has been my pleasure! Before we go off, I do want to comment, I was blessed to be surrounded by very good trial judges, and then coming to Division One with Strankman and Stein and Swager and then the successors there; Margulies and Bob Dondero and Banke, that's part of it, because you want excellent work.

And then I was blessed to have, as I said the four research attorneys worked with me and knew my idiosyncrasies and put up with a lot of things. And then Sharon Fikes was there 13 years -- no, no, 15 years with me, 15 years, yeah. And again, she put up with a lot, because I was somewhat demanding.

And then it was through working with people like you who were on the bench that made it enjoyable, Tim. So thank you, thank you very much!

Tim Reardon: Thank you Jim for doing this and you are held in the highest of regard here at the Court and the community and among your other friends, so thank you for doing this!

Justice James Marchiano: Thanks!

Tim Reardon: All right! Well, today's date is August 25 and we have with us -- we are honored to have with us again, I should say, Justice Marchiano, Presiding Justice of Division One, who has retired.

And for the record, we had a previous interview of Justice Marchiano, and in the course of that interview I kind of explained what the Legacy Project was, so I will spare the listeners or viewers that introduction.

But I do want to say we are honored to have Justice Marchiano again with us and will proceed on that basis, just by way of further explanation --

Justice James Marchiano: I am honored to be here and I am honored to be with the David Frost of the First District conducting this interview here. Yeah, Justice, go ahead.

Tim Reardon: And that would be David Knight and we are honored to have him as well. David has been tremendous with the Legacy Project and videotaping all the interviewees.

(01:29:59)

Well obviously I am going to say that it's an honor to have you here again and we appreciate you taking the time and coming over and doing the re-interview. It's not really a re-interview it's more of an addition to some of the things we discussed at the last interview that maybe will emphasize or deserve some more emphasis. And I thought in discussing it with you via the email exchanges that maybe we could start with something I didn't have an opportunity of seeing, and that is, the celebration of the 100<sup>th</sup> anniversary of this Court which was held in the Los Angeles, and I know you attended and were involved in that anniversary celebration. So maybe you could tell us a little bit about that because the Legacy Project grew out of that anniversary celebration.

Justice James Marchiano: The Court of Appeal celebrated its 100th anniversary in 2005 commemorating the beginning in 1905 with one division in Los Angeles and a division in Sacramento and Division One here in San Francisco, it was not Division One at that time it was just a little three-person division.

In conjunction with that we were asked to do some research at each of the districts, and so in this district

the five divisions designated somebody or some persons from their divisions to do a research on how their division began, some memorabilia celebrating that, some important people that might have been associated with it, some important decisions. And what was interesting about doing it, from my perspective for Division One, as a presiding judge, it caused us to go back to look at the history and we were the first division, and at that time three distinguished judges were appointed Hall Harrison and Cooper, Judge Ralph Harrison being the Presiding Justice who had served both on the Supreme Court was a well-known local attorney and then came back to serve as a Commissioner to the Supreme Court writing decisions and it was the Commissioner's role with the Supreme Court that the Bar criticized these kind of absent judges writing opinions for the Court that led to the creation of the Court of Appeal to help with the workload.

Well Harrison was a distinguished judge but San Francisco, and this is what we learned at the time, was going through one of its turbulent political times when Abe Woolfe was the boss who got control of the City Hall, the Government, the cable cars, property out in the sunset, a brothel Downtown and even tried to get control of the courts, and in those days the judges ran by party and they were elected by the people and in Harrison's case Woolfe had blocked Harrison so that he couldn't run for office and somebody else who was nominated fortunately that person lost at the election, and then a new judge came in, but ironically Woolfe was later prosecuted and the Appellate cases came through this division, and needless to say Justice Cooper who became the Presiding Justice after that, was no admirer of Woolfe who had gotten rid of his good friend Harrison and so that led to some interesting cases and things that went on and Woolfe ended up actually spending time which was remarkable in San Quentin.

And then ultimately the release and then filed bankruptcy. His cohort who was on the -- that was on the board of supervisors who I can't remember, whose name I can't remember, also served a little bit of time but came back and ran again and naturally San Francisco was reelected, but it was interesting tracing that history and then that also led us to a subsequent judge from -- say 1917, 18, 19 in that era an Irish Judge, Judge Tom Lennon, and Lennon by that time that the courts began to build up some of the backlogs that

some courts are famous for and he was concerned about it and he was the justice that started the conference system.

He read about it in the American Judicature Magazine how other courts and other states had started a conference system that made the justices accountable and by giving certain number of cases and meeting on those cases at a certain date they had to be prepared to discuss them meaning that those cases had to at least been in a posture to reach some type of resolution, some type of discussion.

So he was the one that actually started the discussion process but it was through this anniversary that caused us to go back and look at that, that brought out some old history for the Court that made it very interesting to us.

(01:35:06)

Tim Reardon: Yeah. That Abe Woolfe was quite an interesting person in San Francisco as well. So --

Justice James Marchiano: Just as an aside, when he was being prosecuted some member of the union that supported Woolfe came in and shot the prosecutor and that was a separate case but then the new prosecutor that they brought in to continue the prosecution of the other miscreant was Hiram Johnson, the famous progressive governor that led the initiative process in many favorable Liberal Bills in the 1914-1915, but that's where he got it start, it was where he was prosecuting cases that ended up in our division.

Tim Reardon: Well, that's an interesting history from that perspective. Jim, I know that you and Division One have been very instrumental in the educational front, and I know your division and you have personally been involved in the educational effort, and you kind of summarized that for me in this email, but maybe you could just elaborate a bit. I know there have been, not just educational effort in this country but abroad as well.

Justice James Marchiano: We've always tried to do some type of practical outreach which would not dislocate the Court. Some of the divisions have gone out to other counties but that means having the CHP go with them, having local bailiffs and sheriffs involved in, it's a logistical problem.

For us we did two things. We did at the local level where we would partner with law academies, the Richmond High School and Balboa High School with the teachers who were there. We would send them copies of the briefs of an important case that we felt would be of interest to the students. And then lawyers would meet with them, discuss the briefs and discuss the issues, then they would come over to court, and come to the Court of Appeal to see a case, and then before they would actually watch the case one of the justices would meet with them to explain the appellate process, and to explain standards of review and what they might expect that day without discussing the case that they were going to watch.

Then they would watch the case, would watch oral argument and listen to our questions and it was usually a case that was designed for high school students. A subject that they should be interested in, and then afterwards the lawyers would meet with them for kind of a post mortem discussion about what happened and what they expect, and then once the case was decided we would send a copy of the opinion to the teacher. We then pass out copies to the students so they could see a case from beginning to end. And we would do that in the fall and in the spring with the Richmond High Academy, Balboa High, and some other schools.

Then the other outreach that was remarkable had to do with some of the foreign courts that came here. While I was on the bench the International Judicial Academy asked me if I would be interested in going to an overseas program on International Law. Justice McAdams who has invited Justice Flier, most of the judges that were invited were Federal Court judges from the East Coast.

Anyway, in conjunction with that I was able to go to The Hague and then learn about International Law and then came back to San Francisco thinking that that was the end of it.

But Jim Appel who was the director of it, wanted to partner with some of the important courts from Asia. So he invited over the Supreme Court of the People's Republic of China, and they were coming through San Francisco and they were going to stay overnight here on their way to Washington, DC to go to some programs there.

So he contacted me and he said, would your Division be willing to host them here in San Francisco, and so they came over and there was a Mandarin translator, we met with them, spent several hours up in the beautiful judicial conference room, explaining the history of the Court, how we function the difference between the Federal system and State system, our funding and answering questions.

And then, that proved to be successful so then they invited over the Beijing Court of Appeal, the justices from the Beijing Court came by, came through the following year on the same basis. Then after that the Court from Tibet, it was the Tibetan Supreme Court, and what was interesting in that case there is problems between Tibet and China.

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All of the members of the Tibetan Supreme Court were Chinese, there weren't any Tibetans, but they did have several younger women that they had tried to promote.

They were most interested in police brutality; the Mehserle case and other cases had been prominent at that time and how that could go on. And I could easily have argued with them about oppression in Tibet and the Tibetan police and all that, but we tried to handle that with some diplomacy. But it was the same type of program with those three courts when they came through.

Then when they came through a fourth time, I called the Director and I said, really, I don't have that much time to do this all the time, and there were several Chinese judges on the San Francisco Superior Court, so I put them in contact with them so the program could continue through them and I could continue with some of the work here.

But it was remarkable to have the Supreme Court of China here in this building asking very pertinent questions about our judiciary.

Tim Reardon:

I remember when they were here. Let me ask you another area, which I thought maybe deserved some emphasis was the type and quality of cases that you have seen as PJ, but also prior to that as an Associate

Justice and how the type of cases we have got have changed?

Justice James Marchiano: I started in this court in 1998, and at that time Justice Strankman was the Presiding Justice and I became Presiding Justice in 2002, and then I was here until 2013.

When I first started our caseload was anywhere between 32 and 38 cases a month, split up among four justices, and we had to meet on a regular basis to keep on top of those cases. We were busy all the time and it was a wide range of cases that we were seeing. There were many interesting issues that were percolating through the system.

But in the meantime, ADR was growing in the justice system among lawyers and trial courts, and as a result of that and some other factors that I will mention in a minute, the caseload began to decline from 2002, 2003, 2004, to 2010, it actually declined by about 25%, and there were unintended consequences of that, and it was also good. It gave the justices a chance to really catch up, a chance to spend time on larger important cases that we wanted to spend time on.

But what was happening on the civil side is that we were getting very few civil jury trials; most of the appeals were motions for summary judgment or demurs that were sustained without leave to amend, and there weren't that many. So the civil appeals went down, which was the big factor in the cases decreasing.

But on the other side, as the number of cases decreased, the length of opinions seemed to go up, and we were trying to work on that in our Division. The make up of the Division changed, some of the research attorneys changed, and you had newer judges coming in and were trying to impart the importance of being succinct, clear opinions so that lawyers didn't have to read the opinion a second time to understand it.

But in talking with the reporter of decisions for our cases, I asked him about that, because it was my sense. So he looked into it and he said, I can't give you a number of words, he said, but I have looked at the computer bytes, and he said really the cases are the opinions are about 30% longer than they were before. Not in your case, because you have always tried to be

succinct and to the point, and it's true, and there are a number of the old-timers that that was their philosophy.

And I can't say whether that is good or bad, but that has continued up to the present time, where Occam's Razor may not be used perhaps as much as it should be.

Then the other change was in the number of pro pers appealing, and that's because, especially in family law, it has become so expensive that in most of our courts here in Northern California from which we receive appeals, in family law dissolution cases at least 70% of the cases now one side is unrepresented and is pro per. And in 50% of the cases both sides are pro per.

And there are those that are dissatisfied with the results who don't quite understand in the legal system, so we began to see more pro per cases.

(01:45:01)

The other phenomenon are the Wendy cases, and these are cases where a lawyer -- these are criminal cases where defendants are entitled to an appeal and the appellate lawyer is appointed for them. The appellate lawyer will go through the case and the issues and then advise the court, I can't find any issues, but would you look at it independently to see if there are some issues that I might have missed, and if so, you can send it back?

The number of Wendy cases which do not require as much time in terms of writing but do require the same amount of time in going through the record are also increased, so that we had more and more Wendy cases.

And then the final, the other change I noted was the Supreme Court began deciding important criminal issues that had been percolating in the system, where one district had gone one way in sentencing, in parole, a lot of areas, so that in a lot of criminal cases, those issues became decided, so we didn't have a lot of fresh and new issues.

So the make up of cases between 2004 and 2013 in terms of number, the length of opinions, and I would say quality to a certain extent, there were always challenging cases, we know that, that there are cases that require extra attention and careful writing and

precise writing so the reader can understand the basis for the decision.

But I will be candid, one of the reasons besides health and length of service and other things that caused me to retire was that it wasn't quite as challenging for me towards the end, and we were relatively current and so at that stage I just felt it was time to move on and let somebody else step in.

Tim Reardon:

I know you -- I think you indicated you value the judges that are assigned to the court, whether there is a vacancy or whether or not the PJ decides to have a vacancy filled with an assigned judge or not. Do you have any current views on the value of those assigned judges?

Justice James Marchiano:

Using assigned judges to fill in while there is a vacancy, we saw it firsthand Justice Swager and Justice Bill Stein both retired within three months, very productive, very good writers, outstanding judges. We were hoping to get an appointment within four months, five months, six months, and so in the meantime we had a pro tem appointed, and it was Judge Dave Flynn from Contra Costa County, whom I know, very good. He had been a business attorney. He has worked on both civil and criminal cases while at the trial court, very well-respected and a good writer. So he came, but his appointment was limited to four months; the trial court wanted him back within four months.

And that worked out for that period of time. We were able to handle it because we simply reassigned the research attorneys within the division. Each of the judges then worked with three research attorneys instead of two, and we also had a central staff attorney, and that worked out for that period of time.

Then when he retired, Judge Steve Graham from Marin County, who had been a prosecutor, civil attorney, and then on the Marin County's Superior Court for a period of time came over; very diligent.

And the problem is though that with just the three of us, two of the justices, myself and Justice Margulies had to be on every case, had to always be available in terms of writs and matters of that kind, because you needed two sitting justices. The Chief wanted at least two sitting justices, knowing that there is no point in bringing in a

fourth trial court or retired judge, and we were able to handle the caseload. The appellate caseload had diminished, as I indicated, and Steve Graham liked the work and he had good attorneys.

Then it lingered on, it went into a year, and then another year-and-a-half, and then sadly that was the time when I developed prostate cancer, and fortunately, I was able to do the radiation here in San Francisco, at UC; it was actually on Divisadero, which was close to court, and I was able to drive myself there, and people offered to drive me there. But I was tired and didn't have any major complications from it. When I went through it, it was six weeks, but then at the end I did and ended up with some urinary problems with my urethra.

(01:50:05)

And I was at home in bed and it's the first time I've ever missed any time from work in my life with an indwelling catheter that you can cringe when you sit there day in day out I was able to do some of the work from home but you're in no position to do that, so we contacted the court for assistance because in essence I wasn't there day-to-day and there was no assistance available because we were going through the budget crunch at the time.

There was no one else available and so the only thing that happened was the – our Writ Assignment was put in abeyance because a sitting judge and a regular judge, the two of them couldn't decide a writ, it would always take two sitting judges and I wasn't available to go through all those petitions with them.

So then after about four weeks I was able to get back to court and we caught up a bit and everybody worked very diligently. I was in contact with the Governor's office on a monthly basis and the appointment secretary – I think this was during Schwarzenegger's, she kept saying well we are looking into it, we are looking into it then I had other judges write letters and finally, finally they made an appointment and it was like 18 or 19 months down the road and I will say that that was a very difficult time for us in the latter part, waiting for these appointments to occur.

In the meantime, because it was taking so long some of the attorneys or research attorneys were concerned about their position, so when there were other vacancies they moved into those other vacancies to have a sure thing. We also had a very good judicial assistant secretary and she applied for a job upstairs with the Court of Appeal because so much time had gone by and she wasn't sure what would be happening. So we were decimated in terms of the number of people, but as we sought help, help was unavailable, we couldn't hire at the time and yeah, we felt the brunt really of the budget problem.

Tim Reardon: Right. You got through with though a gentleman, I know it probably took some extra effort and –

Justice James Marchiano: Well, our Division had a reputation starting with Strankman to get opinions out on time and at one time we were able to get a waived case where oral argument was not requested, get the opinion out within three months of the filing of the final brief, and on orally argued cases four to five months, which meant that these cases were moving through the system the way they should and we had really an emphasis on time as well as quality in order to get the litigation baggage off of these people so that they could move on with their lives, and that's really how the system should be.

As you know from the 1980s, when you were still an attorney and then as you took the bench, the timeframe could be as much as two years, two and a half years for these decisions to come down and it became kind of a culture that it was just accepted and really it should not be that way. And so then later when we didn't have the resources and we were slipping back 6 months, 8 months, 9 months, it bothered us in Division I, but then after we got personnel back, we were able to move it up pretty well.

It was still a matter of working with newer justices, getting them used to the system and trying to encourage them to write a little shorter, shorter opinions that in order to work on something else, yeah, yeah.

Tim Reardon: In the course of many years as a judge and as an attorney there has been changes, we've discussed some of those, but do you see any major change in the practice of the law from the old days until now I mean do you --

Justice James Marchiano: Well, the biggest change is the diminishing jury trial. I have looked at the statistics that the AOC has kept at the Superior Court level for our District. And for example, Alameda County always has had the most jury trials because of the size of the county and they were at around a 130 jury trials and that's a lot for all of the judges around 1998, 2000. There are now a half of that; Contra Costa County was at 40 cases a year; jury trials, they are down to a 5 or 6 and it's unbelievable because they have judges assigned to fast track each of whom is only doing one or two civil jury trials the entire year.

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San Francisco, the same thing has happened. The number of jury trials has been cut in half in San Francisco than in smaller counties, they don't send as many cases up here.

So the jury trial is a lost art, lawyers are accustomed to settling cases, accustomed to going to ADR, to outside dispute resolution and after a while this becomes a way of life.

And if you are trying cases, you aren't developing that ability, and to get good at it as you know, it's like playing tennis or golf or some other sport that requires repetition, and you get to know yourself and you get to know your opponent by doing it on a regular basis. And then part of it is just a cost of litigation.

When I was trying cases I could go into the court with one big briefcase. Today they have their cart with multiple briefcases and lawyers pulling other boxes with them.

And so the cost has so skyrocketed. And corporations and insurance companies are conscious of that. And so, they are looking for ways to get out of these big cases early also, based on cost of defense, that the litigation cost can be so expensive that they are trying to settle cases.

So on the civil side we have really a diminishing number of cases, but that's also led to a problem in the law that important civil issues are not percolating up through the system because these cases are all being resolved at the trial court level.

And the ones the issues we see as I mentioned may be on summary judgment, but we are not seeing the finality in terms of certain tort cases, contract cases. It's taking a longer time to get through the system and then get up to the Supreme Court for a final decision.

And then, then the second phenomenon is the mobility of lawyers. When I was practicing, if you are with a firm and you are doing well and you like the firm you would stay. It was like a lifetime commitment, these were friends.

Today, people move around every two or three years. One firm swallows up another firm. At one-time we had Brobeck, Phleger And Harrison, they no longer exist. Heller Ehrman, they no longer exist and these were outstanding local, Pillsbury, Madison & Sutro, is now Pillsbury -- no it's Pillsbury Owens or something out of Boston.

So there is great mobility and less loyalty within the system, and the layoffs that have occurred with the economy, firms will shrink during hard times and expand during the good times.

When I was practicing we tried to keep everybody, during good times or bad times. We followed a moral obligation they had families; they are part of our family of working lawyers. And so we would do whatever we could to keep them on. That isn't true any longer. If there is a problem and the senior partners and big firms aren't earning, the big bucks that they expected, they have some heads roll and that's a common phenomenon today too. We never saw that some years ago, yeah.

Tim Reardon:

Yeah, on the same point just an aside, I have a very good friend who out of USF Law School went to Brobeck, became a partner, and I don't know how many years he was down there, and in talking with him he talks about the firm like a family and it's kind of sad to see that element changing. But time marches on and I don't know if it's always for the best, but that's the reality that you have discussed.

Jim, are there any -- we have covered so many points, first time around the second here, but --

Justice James Marchiano: Why didn't you take a look at my script, and we have covered them, I don't want to take up your time. Your time is very valuable and David has – oh, there is one that we didn't touch on and it is there well, and David Knight who works for the AOC should put earplugs on it at this stage.

I am going to be candid about this. I was appointed in 1988 to the trial court, the Contra Costa County Superior Court, and at that time CJER was a independent educational system providing education for judges. So I went to their program for new judges and it was outstanding.

These were all good judges, either at the Court of Appeal level or experienced trial court judges talking jury instructions, motions, how to handle cases, how to handle law and motion, very, very practical courses.

(02:00:07)

The AOC was much smaller. Probably at that time maybe a hundred people and they were dedicated to serving the judges, being available for research and backup. Somehow, over the years as both of us know, the number of departments increased. The number of services increased until finally in the mid-2000's, there were up to a 600-700 employees with departments, divisions, graphics department, passing out pens, passing out calendars that celebrated the Chief Justice's important dates of his career.

Really functioning more like a corporation and money was available. They were well-funded. Then the budget crunch came and you have the Supreme Court, Court of Appeal, the trial court all of whom needed funding and then you had this other entity that was supposed to be serving the three courts the AOC with large numbers of people.

If you needed, for example, I was on one committee and they were talking about bringing in an outside consultant, and somebody mentioned, well, why do we need an outside consultant? They said, well, don't worry, this person is an expert from Boston, so how can you bring them in?

So don't worry about it, we have the money to bring the person in and they did have the money that

year. Some of that went on, and then it came to ahead when the court with good intentions, and the AOC with good intentions wanted a computer system that was uniform throughout the state, so all of the courts could communicate with one another and so that we could go to a standardized e-filing. But it turned out, as happens in government prognostication, the original cost went up and was going up and was going up, until it was into the hundreds of millions of dollars, and then the question was raised, as we have this budget crunch, can this money be spent better elsewhere?

And it became the equivalency of the bullet train that they want to build from here, from Los Angeles to San Francisco that's going to cost billions of dollars. And so finally in response to that, as you know, the Judges Association had long been supportive of AOC and of the Judicial Council and the member of the Judges Organization also sat as an advisory person, well, some of the judges became disillusioned and so they formed their own group, and I think it was the Alliance of Judges was the name.

And there were a few on the Court of Appeals, not here, but in Southern California that became vocal, and then in Sacramento, Los Angeles and some other courts that were under-funded, they were complaining about the funding with the AOC. And with this computer system, where hundreds and millions of dollars were supposed to be allocated to fund all of these programs, whereas the trial courts weren't getting the money that they needed.

And we did lose sight of the fact that our primary mission, our primary responsibility is to resolve disputes fairly and quickly, at all levels, whether it be at the Trial Court level or Court of Appeal level.

The Court of Appeal we had the outreach that I have mentioned that I tried to keep in house, but that had expanded, where you could get -- you could go to other places and they would pay for it. They had award programs; the judge of the year, where some judges were put on the committee with the AOC and they traveled to different locations to interview and select the winners of the judge of the year award. Now, that's not to belittle those who got those awards.

And then there were other programs that were going on that were superfluous to our core responsibility. And so

finally in response to that they did abandon the computer program, and there wasn't money for it in any event, but it caused hardship at all levels.

In our court, as research attorneys retired, there were not replaced; as judicial assistants, secretaries, and they do more than that, retired, they were not replaced, and so we were working under a great handicap.

We had a judicial assistant within our division who had two -- whose both parents were terminally ill and she needed to care for them, and so she was looking for time off and was working with a judge that needed to get some work out, we didn't have any substitutes to bring in, we tried to help her out internally.

(02:05:08)

Remarkably, and sadly, her father died and she had to help -- her mother died a week later, and so she was left with handling the burials of these two parents and then taking care of the estate and keeping up with the work. And she became emotionally distraught, and I remember this, and I spoke with her every morning and I tried to get help internally. And I said, you need to take several weeks off, and I tried to explain that to the administration that she truly needs time off.

And they said, she can have time off, but we have no one to replace her, and she is a diligent person, who didn't want the work left undone and so she tried to juggle all this, really with great hardship.

And there were other examples of that going on within the court and it was really the result of poor managing by the AOC, overspending by the AOC, and finally they had to contract, and some good people were lost.

I mean, David Knight is here today filming, and that's a core activity, filming educational programs that can teach judges, but there are many, many other things. If you opened up the directory of all of the departments, it read like a private corporation, with all these divisions and departments and department heads. And so that was distressing to me and distressing to a lot of judges.

Tim Reardon:

Yeah. I would like to thank, as you have already done, David Knight for being our videographer and assisting in

these interviews by the videotaping of them. So I know your comments didn't reflect at all on David in any way.

Justice James Marchiano: There were some departments; there was a trial jury -- jury trial manual that I was a consultant on and that made sense; it went to the trial judges, it gave them all the practical motions, how to do voir dire, what to do if there is Watson Motions and the things that we were familiar with as trial judges, and it was excellent for the new judge or it was excellent for a judge going from civil to the criminal side to fill in so they wouldn't make mistakes.

So the education component was important and judges need to be educated, but it went well beyond that into other areas that were really very questionable.

Tim Reardon: Well, that's a good note perhaps to end the interview. I want to again thank you for coming over and doing a second interview here. I want to thank David Knight for doing the videotaping of the interview. Any final, final comment?

Justice James Marchiano: No, that's it, no more emails from me. Let me thank both of you, and especially Justice Reardon for his time and his kindness today, and Dave, thank you for being here!

Tim Reardon: All right! Thanks Jim! Good seeing you!

Justice James Marchiano: Yeah, great!

Total Duration: 128 Minutes