

NEW MEXICO BAR ASSOCIATION

INTERVIEW – JUSTICE GENE FRANCHINI

June 28, 2007

INTERVIEWER: TERRENCE REVO

VF – Virginia Ferrara
TR – Terrence Rivo (Interviewer)

FRANCHINI INTERVIEW - SIDE ONE, TAPE ONE

TR: This interview is part of the oral history project sponsored by the State Bar of New Mexico and its Senior Lawyers' Division. I am Terrence Revo, the chair of the Senior Lawyers' Division of the State Bar. Today is June 28 and I am interviewing Justice Gene Franchini in my office in Albuquerque, New Mexico. Before we get started, I would like to state for the record that I asked Justice Franchini how he wished to be addressed today and he told me that he wished to be addressed as Gene.

GF: That's true.

TR: All right. So with that in mind, Gene, would you tell us what life was like in your family and in your community as you were growing up in Albuquerque?

GF: Well, I was born, Terry, here in Albuquerque in 1935. Both of my grandparents, both the Franchinis and the Valles came here at the turn of the century, 1898 and 1899. Albuquerque was a small town then. When I was born, I don't remember this personally but my folks told me there were about 30,000 people as opposed to about 5,000 when my grandparents got here. And they stayed here and brought some of their families over, their brothers and sisters, and we spent the rest of our lives here in Albuquerque and in New Mexico.

TR: Now you grew up on was it Fruit or Roma?

GF: No it was on Marquette.

TR: On Marquette.

GF: 715 Marquette, NW. It's still there.

TR: What businesses or professions were your parents in?

GF: My father worked first for the Anchor Liquor Company which was a wholesale liquor company. After the war, the Second World War, my father and nine other individuals borrowed \$10,000 apiece, a magnificent sum of a hundred thousand dollars, which was a lot of money in the those days, and started the Southwest Distributing Company. And he was the secretary-treasurer of that company so he was in the wholesale liquor business. That Southwest Distributing Company also was the home office for Thunderhead Oil and Gas which sold asphalt, and we also distributed at the wholesale level not only liquor, wine and beer but also foods throughout the State of New Mexico and in Southern Colorado.

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TR: That's fascinating. How about the community around you when you were growing up when you were a teenager, what was that like?

GF: It was in the 1950s and it was an altogether different era. There were only actually four high schools in Albuquerque. There was Albuquerque High School, there was Highland High that was brand new, and then we had St. Mary's, we had Menaul and Albuquerque Indian School. So the community was very small and was very, very close. When we entered into athletic competition it was a war just like all high school athletics should be, but other than that it was a very friendly, very close atmosphere and no matter what of those high schools you went to, even to this day I can count many, many friends who went to every one of those schools. And it was a very close relationship.

TR: Was there anything about your childhood or your adolescence that influenced your decision to become a lawyer?

GF: You know, Terry, I've got to tell you that I can't remember a time when I didn't want to be a lawyer or didn't know that I was going to be a lawyer. I don't know how that happened but it was just a fact of my life that that's what I was going to do.

TR: Was there anybody in your family or your extended family that were lawyers?

GF: No. There were some Italian boys who had become lawyers and one of them, the one that was most prominent was Gino Matteucci. Rolando Matteucci, his cousin, was also a lawyer. There was also Mr. Dick Civerolo whose family came from Gallup who was a lawyer. But nobody in my direct family practiced law until I started.

TR: Were you the first one in your family to go to college?

GF: No, I wasn't the first one in my - well, my immediate family, yes, but in my extended family no. I had an uncle and a couple of cousins who had also gone to college.

TR: Where did you go to college?

GF: From St. Mary's high school here in Albuquerque I got a scholarship to Loyola University in New Orleans, which was called Loyola of the South, and I went there for two years on a combined business and law program. I got to tell you this, I want to show you how smart I was. I spent two years there and it finally dawned on me and I finally came to the conclusion that was the only law school in the country that was still teaching the Napoleonic code, and so I decided that maybe I ought to go complete my first degree, which was in business with a major in accounting and I came back to the University of New Mexico. And after I got my first degree here, I went on to Georgetown University in Washington, D.C., for my law degree.

TR: Now Georgetown in Washington, D.C., is a ways away from Albuquerque.

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GF: It certainly is.

TR: So how did you make that connection?

GF: You know, that connection was made many years before and the real connector I think for Georgetown and the State of New Mexico was Dennis Chavez, Senator Dennis Chavez, he went there. And when he became United States senator, particularly during the depression years, he would recruit young men to come to Georgetown. He would give them jobs as clerks, elevator operators, etc., in the United States senate and that's how it started. And then Senator Montoya, who was there before, a congressman, also kept that up. And there just seemed to be a steady stream of New Mexico young men at that time who were going to Georgetown, particularly to the law school.

TR: That's fascinating.

GF: That's how it happened.

TR: When you went to law school in Georgetown were there any women in your class?

GF: Very few. As I recall, there were five women in my class. Four of them were nuns and none of them graduated.

TR: Why was that?

GF: What a difference, huh?

TR: Why was that?

GF: You know, just a longstanding I think prejudice in law schools, generally speaking, not only at Georgetown, that they looked at an old, old opinion of the Supreme Court of the United States that somehow says that the nature of women was such that it was just indecent for them - I don't think that's the word that they used - for them to engage in the banter and give and take of a courtroom. In any event, it was very, very difficult for women in those days to go ahead and get through law school.

TR: Were there any professors at the law school who functioned as role models for you or inspired you in the legal profession?

GF: There were very many but one in particular that stood out in my mind was a man by the name of Kenneth Pye. He was a professor of law who taught me criminal law and procedure. He also taught me some contracts. He was a man who had the tremendous ability to organize subjects and particularly courses in a fashion I've never quite seen before. And he was a tremendous influence on me. He left Georgetown to become the dean of the Duke Law School and then became president of SMU and passed away about three years ago while he was in that position.

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TR: That sounds like a fascinating guy.

GF: He was a fascinating guy. The most fascinating thing about it is that when I had him in law school he was a very thin, wiry fellow. When he passed away as president of SMU I think he weighed over 325 pounds. I don't know why but he had that kind of a problem.

TR: When you were going to law school did you know what kind of lawyer you wanted to be, or what kind of practice you wanted to have?

GF: Oh, I think I probably had some ideas but as you know, as well as anybody, what you decide, or what you wind up doing is decided for you by other people, namely, your clients. And so I was particularly interested in the criminal law and I was interested also in business law because my background all the time I was growing up was in business and accounting. And so I was interested in those two fields particularly.

TR: Were there any courses that you took while you were in law school that impacted you, that said, you know, I really want to do this kind of work?

GF: Oh, I think every one of them did. I was interested in all of those subjects. I was particularly interested in the criminal law courses, and I was particularly interested in contracts and agency. Ninety percent of the law school curriculum, at least in those days, was really business based. And when young people used to ask me afterwards what do you think I should major in before I go to law school I would always tell them business because all of the terms that are used in all of those courses are business terms and you're about four years ahead of the game if you learn those and the differences between a corporation and a partnership, and a limited partnership, and what a bill of exchange is. And it's really important. So all of those subjects and all of those questions were of particular interest.

TR: When you were in law school were there any other people from Albuquerque or New Mexico who were there with you?

GF: Yes. In fact, Justice Richard Ransom and I started at the same time. He went straight through so he graduated a little bit before I did. There were a couple of other young men from New Mexico who were not at Georgetown in law school in Washington, D.C. There was Joe Duran. I don't know whether you remember him, Terry. He lives now in Puerto Vallarta, Mexico, I understand. Also with me were Ted Montoya who was a year or so behind me at Georgetown while his brother was first a congressman and then a United States senator. So, yeah, there were several of us.

TR: Before I go into questions regarding your legal career, Gene, I want to talk a little bit about your family and your life outside the law. So when did you get married?

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GF: I got married when I was 25 years old right out of law school. That marriage didn't work out. And then I married Glennie Hatchell 28 years ago in 1969 and we've been married ever since.

TR: And she's still talking to you?

GF: She's still talking to me, and she's still laughing at my jokes, which is really something and she's heard them 4,822 times if she's heard them once.

TR: Well, maybe we ought to interview her at some point.

GF: Listen, that would be a lot better interview I think.

TR: And your kids?

GF: We've got five children, four of them are still living. Three of them live here in Albuquerque and the fourth one is a teacher soon to be principal in Washington State.

TR: Now one of your daughters is a lawyer, is she not?

GF: Yes, Nancy, the youngest. All the rest of them were successful.

TR: And did Nancy become a lawyer because you were an example or a mentor to her?

GF: You know, Terry, that's a good question and I think so, and I kind of hope so. I was on the district bench and there was a murder trial in Carlsbad, New Mexico. And the Supreme Court sent me down there to try the case because all of the judges in the Fifth District at that time took a powder. This was a very big case. It involved, the victim was a very, very famous man down in that area. And I was going to be down there for about 18 or 19 days and Nancy was about three years old. And her mom and I, I was on the bench and her mom and my mother brought Nancy down with them to visit. And when I came up on the bench they say all rise, you know, like they usually do, and Nancy from the back of the room says, it's just daddy. And her mother tells me that later on that day she says, I want to be a judge, too. And her momma said, well, you know, you have to go to law school first. And she says, okay, I'll do that. This is when she was three years old. And as a matter of fact that's exactly what she did.

TR: Is she practicing here in Albuquerque?

GF: Yes, she's at the law office of Casados and Mann. She's a trial lawyer and she's on the defense side of the case.

TR: And does that bother you at all?

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GF: It doesn't bother me but the people ask me all kinds of questions, where did you go wrong and what did you do to that young lady that you made her go to the other side of the fence.

TR: Did you know Ed Casados when you were younger?

GF: Oh, he was a very good friend of mine and I thought he was an excellent lawyer, and I was so pleased when Nancy went with him because I knew he would be a great mentor and a great teacher for Nancy.

TR: What kind of support has Glennie been for you during your career as a judge?

GF: I wouldn't be where I was if it wasn't for that woman. She's been a tremendous influence. When I decided to run for the Supreme Court and I told her she didn't talk to me for a while, and after she got over the shock she ran my campaign and she was really something. She really is.

TR: I've known her for a long time, as I've known you, and she's a remarkable woman. Let's talk a little bit about your legal career. Where did it start? Who did you work for? What kind of work did you do?

GF: I went directly from law school after passing bar in with Rolando Matteucci and Avelino Gutierrez and we formed a partnership called Matteucci, Gutierrez and Franchini. And that's where it all started. Our offices were in the Simms Building. And then later on when the Bank of New Mexico right across the street was built, we moved into that building. Things were such that because of a serious illness suffered by Mr. Rolando Matteucci I was shoved into the position where I tried I think probably seven major jury trials in the first year of my practice and all seven of them went directly to the Supreme Court of the State of New Mexico, because they were a test for me as far as they were going to test also the cases. We didn't have a court of appeals in those days. So in the first year I was in major jury trials seven times, and then the first two years I think I was in the Supreme Court of the State of New Mexico eight or nine times, and I don't think I was there that many times in the next ten or twelve years. So it was a pretty active practice very, very quickly right off the bat.

TR: Well, given that trial by fire that you just described, how do you think that molded your attitude towards the practice of law and other lawyers?

GF: Practicing law in New Mexico, and particularly in Albuquerque at that time, was a real pleasure. The bar was small. My number as far as admissions are concerned is 851, and they tell me that they took them in order in those days. And I got in August 11, 1960 and my number was 851. I don't think there were 3,000 lawyers in the whole state, maybe a little fewer than that. I think there were something like 300 in Albuquerque. And so not only was it an experience trying cases against these older people, but these older men would also be teachers and would really help you actually during the trial, which doesn't

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happen any more. And to watch them operate and to be in trial with them was not only a very exciting experience, it was a great training experience. And I don't think I'll every forget it.

TR: So some of those people that you tried cases against you just referenced, who were they?

GF: Well, for one, and one who I think had a tremendous influence on me, was Lou Sutin. And I also tried cases against Jim Polonis. That was the old law firm of Iden and Johnson. Do you remember Judge Johnson?

TR: Yes.

GF: They had an influence on me also, a tremendous influence on me. I don't know whether you remember him, but in that same law firm was a trial lawyer who I thought was just an excellent trial lawyer named Richard Cooper. I tried a case against Richard Civerolo who was an excellent trial lawyer. Bob Tigert. Just to name a few. I'm going to miss some. But every one of these men had an influence on me.

TR: You raise an interesting dichotomy, or comparison, that the lawyers that you were trying cases against when you were a young lawyer actually tried to help you out.

GF: Oh, yeah.

TR: As opposed to what we see today where there's actually very little of that. Why do you think that was?

GF: I wish I knew the answer to it, Terry. I think the biggest factor is that the bar got bigger. And another factor I think that's present is that the people that are going through law school today and for the last say 20 years or so, the emphasis has been I think different. The emphasis has been more on making a buck and making it a business rather than a profession. And I know that that line gets very, very vague at times but I think a combination of those two things has influenced it. You know, you can't get to like each other or trust each other unless you know each other. And you can't know each other unless you spend time with one another. I'm thinking about the bar meetings, for example the state bar meeting that's coming up. If they draw four to five hundred people out of a bar association that has now almost 7,000 people it's going to be a good turnout. Everybody went to the bar when I was a young lawyer. Everyone went to the bar association meetings and everyone went to the state bar meeting no matter where it was held because it was fun. And you got to sit and visit with friends and it had a great influence on the way you practice law and the way you trusted one another. Today everything has to be in writing. If I make you an offer or you send me a counter offer, everything has to be in writing. And if it's not writing, there's something suspicious about that. I've got to tell you that I probably settled 500 cases over a cup of coffee or a drink with any number of lawyers that I've mentioned and it didn't necessitate anything other than shaking of the hands, sometimes we didn't even shake hands, we said, okay, and that

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was it. And, you know, times change and the circumstances change but I think those are some of the elements that stick out in my mind anyway.

TR: One of the things that occurs to me that I've heard about in Albuquerque and not heard about in any other legal community is the concept of a street lawyer. You're familiar with that, I assume?

GF: Sure.

TR: Tell us about that and tell us what you observed and who the people were who were the street lawyers.

GF: I don't think that it's any surprise that 80 percent of the practice of law in any community, and particularly this was true of Albuquerque and Santa Fe, were controlled by less than ten percent of the lawyers. You get the banks, the insurance companies, the public service company, the railroads, and those had a tendency to go to the larger law firms. Everybody else was competing for the 20 percent of the practice that was left. And the 20 percent of the practice that was left had to do with problems of the ordinary person on the street getting rear-ended by a bus, having an automobile accident, a contract for the purchase of a piece of property, a house, a vacant lot that went haywire, went sour. Very little employment law in those days as compared to now. There wasn't a bunch or a big corporate practice, it was very, very small. I must have formed in my legal career a hundred or a hundred and fifty small corporations. My practice today, well, for example today most people specialize. I think I had one of the most general practices that you could have. And it just happened that way. And thank god it happened that way. I think I would have gone nuts if I had to do just one thing.

But I practiced trial law and I tried all kinds of cases, not only personal injury cases but contract cases, corporate case. I tried all kinds of cases. I practiced in the field of probate. I practiced in the business law field from soup to nuts. And I even did a little bankruptcy, if you can imagine, and never thought twice about it. I'd think four times about it now. There's so much of it and it's so much more complex now and so much bigger that to have a general practice like that is almost impossible. But that general practice and that taking those, fighting for that other 20 percent, making yourself available to try those cases is what a street lawyer is all about because those cases arose from the street. And that's why I think they call it that.

TR: Who are some of the top street lawyers that come to your mind that you knew during your career?

GF: Oh, gee, I mentioned a bunch of them already. Gene Klecan, that's a great lawyer. Now there's a guy who was a plaintiff's lawyer primarily and then became a defense lawyer and then became a plaintiff and defense lawyer combination in his career. And he was a street lawyer. All of these lawyers were street lawyers when they first started out. Dick Civerolo was a street lawyer. Rolando Matteucci was a street lawyer. Lou Sutin was a street lawyer. There was just a lot of cases outside of the big bank, and so forth,

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insurance kind of cases that were street lawyer cases. Most people were active in that practice.

TR: I remember when I came to town that there were a number of small offices right on Fourth Street south of the courthouse and it seems as though there was a lot of what I would call street lawyers in that area. Ben Traub comes to my mind.

GF: Oh, yeah, and Dick Traub.

TR: And I found those people very interesting and they were also willing to teach.

GF: That's right.

TR: Particularly somebody like Ben Traub.

GF: Sure. And they had those small law offices. It was due also to the fact we had no office space in this town. There was the First National Bank Building that was full, and there was the Sunshine Building on the other side that was full, and the rest of the town downtown, which was primarily on Fourth Street, was where a lot of those business people were. One of the ones that was a great street lawyer and probably the dean of plaintiff's lawyers is Joe Smith, and his partner for a long time was Lorenzo Chavez, great street lawyers and great teachers that influenced a lot of people.

TR: How did your career evolve from those early days when you were trying all those cases that you referenced?

GF: Evolved? They just kept coming. I think one of the big things that probably got me known more than anything else is when the court appointed me to represent Reyes Tijerina after the courthouse raid. That was a case that had national publicity and was all over the world as a matter of fact. And when he was arrested, he turned himself in, and of course didn't have any money. And so the Supreme Court appointed me, it was the District Court with the okay of the Supreme Court, to represent Mr. Tijerina, mainly I think because I could speak some Spanish. And that was a case that took about three months to pick the jury and to try the case. And it was the only case in which Mr. Tijerina came out not guilty on the four counts. That's a story in itself. We could go on for three or four weeks about that case.

TR: Can you give us a thumbnail sketch because everybody knows about that case.

GF: Well, when that thing first hit and they had that courthouse raid up there in Tierra Amarilla, big political lawyers from all over the country were coming in. One of them that I remember was Bill Counselor from Chicago that wanted to get into this political case. And it really wasn't a political case. It arose out of the fact that Mr. Tijerina was an expert in the area of the land grants and he was pretty knowledgeable about the Treaty of Guadalupe Hidalgo that gave tremendous, gave legal position to those people who were

heirs of land grants both from the Spanish and Mexican and Indian land grants. And as a matter of fact, the Treaty of Guadalupe Hidalgo is in our constitution of the State of New Mexico as one of our bill of rights, right up there at the top.

So in any event, he formed this group and called it the *Allianza* and they were fighting for their rights as far as the land grants of New Mexico is concerned. They had a meeting up in Coyote, New Mexico, and it was a meeting that the attorney, district attorney for Santa Fe County really was bothered by and he went up there and made several arrests, or sent the state police to make several arrests. Unlawful assembly if you can imagine. This was in the 1967, '68 time. And they took these people that they arrested to Tierra Amarilla to the jail there. And they were going to arraign them on a certain day. A lot of people showed up.

Now there were no checks coming into a courthouse. In Tierra Amarilla in those days everybody was armed in the courthouse. Everybody. They didn't have any clickers or anything to check for weapons. In any event, an altercation happened in the lobby of the courthouse. Reyes Tijerina and his daughter and her boyfriend came in with a body guard and there was a state policeman making a phone call in the lobby of this courthouse. And I don't know what happened but somehow the policeman made a sudden move and the body guard shoots him in the leg and drops him at the same time where all of these people are being herded into the courtroom for an arraignment. And all hell breaks loose and some people take the jailer and take the prospective defendants into the council room for the county of Rio Riva and the rest of them they move up into the clerk's office. Reyes Tijerina isn't there. So his daughter goes running out of the courthouse and says, daddy, daddy they're killing our people. And here comes Reyes and he goes up into the clerk's office and to make a long story short, now they don't know what to do because they've got some people in the county commissioner's office and they've got people in the clerk's office and there's gunfire all over the place. Nobody gets killed, which is a miracle.

And Governor Cargo is out of the state and he finds out about it and he activates the National Guard and here comes tanks up to the courthouse. They circle the courthouse. By this time Reyes Tijerina is gone and he's hiding out in the hills. And so they take all of these people to a little town outside of Tierra Amarilla which is called Conjilone, which means corn, and it was just a mess. So in any event, there's a big manhunt and Reyes Tijerina turns himself in in San Isidro, New Mexico, to the state police and a trial ensues. It was a trial of him and there were a trial I think of seven other individuals. And they were before Paul Arrazolo in the district court here. And it first started off trying all of these defendants 54 counts each. And Paul put up with that for about three weeks. We were in the process of trying to pick a jury for all of these people, some of whom, for example Reyes Tijerina, was subject to the death penalty because one of the charges was capital kidnapping which subsequently was thrown out as being unconstitutional but if you injured somebody to such an extent that they could die from their injuries while they were being kidnapped, that was capital kidnapping in New Mexico and you could get the death penalty for it.

So about halfway through the jury selection for all of these cases Paul decides to sever the cases and he tells the DA, who were special DAs by that time because the DA from Santa Fe wouldn't handle the case, it was Jack Love and a fellow by the name of

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Garcia, blind man in Santa Fe, he says go out, pick one defendant and three charges. So they go out and they come back in and we're waiting there and they say we're going to try Reyes Tijerina. That was no surprise. We're going to try him on capital kidnapping, on assault on a jail and on battery of a police officer that could cause death. That was the death penalty and two 10 to 50s. Assault on a jail was an old charge out of the territorial days that was also taken over into the state. And so in any event, when that happened I turned to Tijerina and I said, Reyes, those are the only three charges they've got that they can't prove. They can prove the other 52 but those three they couldn't prove. And the way it worked out, they couldn't prove them and that's why he got acquitted on those.

TR: What a story. Thank you for sharing that.

GF: Oh, there's a lot to it, I'll tell you.

TR: How did you get to be a judge?

GF: It's not because I'm so brilliant, okay? What happened is that I happened to go to school at the same time with a fellow who became governor of the State of New Mexico, Jerry Apodaca. And Jerry and I played football against one another, he played for the south and I played for the north in the All-star high school football game. And when Jerry became governor one of his closest friends, and one of my closest friends was Bob McBride. And he appointed Bob to the district judgeship here in Albuquerque. And when that happened there was a group of us who were really happy to see Bob go to the bench but we advised Jerry at that time there may be a problem because Bob was a state senator and he voted for a pay raise while a state senator. We've got a little quirk in our constitution that says you can't take that job if you do that. If you create a job where you increase the emoluments thereof you can't take that job, you have to be resigned from the senate or the house for a period of a year before you can take that job. And they thought, oh, well, nobody will say anything about it.

Well, they did and they filed a lawsuit and it went all the way up to the Supreme Court of the State of New Mexico and the Supreme Court says you have to leave. It was a three to two decision. And so here we go again. And they say, you know, we meet and they say who's going to be the judge. And they say you are. And I said, no, not me. No, you ought to do it. No, I don't want to do that. You can go fishing a lot more than you're being able to go fishing now. And that got my attention. And I said, well, you know, I'm not too keen on this. And the governor called me and says I want you to do this. And I said, Jerry, thanks a lot, I know your chosen people, why don't you choose somebody else once in a while. He says I want you to do this. I said okay. So I leave a job that I'm making real good money at and I take this job and I bring home my first paycheck and I give it to Glennie and she says where's the rest of it. I said that's it and you take care of it. And so that's how I became a judge.

TR: What year was that, Gene?

GF: 1975.

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TR: You know, you said something in your last answer that jogged my memory. I remember you telling me that you were a high school football coach.

GF: And I was a high school football player, too.

TR: And so which high school did you play for?

GF: St. Mary's.

TR: St. Mary's?

GF: Yeah.

TR: All right. And so when were you the coach?

GF: Oh, way after I became a lawyer. I was a coach at St. Mary's after I had become a lawyer and I was helping Babe Pereni, who was my coach, coach a team that he had. That's a story in itself, too. Do you want to hear some of the members of that team?

TR: I was just going to ask you because I know who they are.

GF: John Brennan. Manny Aragon. Joe Alarid, Judge Alarid. Judge Ted Baca. Arnold Melbihess. Chris Lucero, who was a lawyer up in Taos and then became an author and now I think he's practicing law down here, downtown. That were just some of the members of that football team.

TR: Wasn't Michael Alarid on that team, too?

GF: No, Michael was later. But Joe was, Judge Alarid was.

TR: So who were some of the other members of your football team that you coached that later became lawyers?

GF: Well, the ones that I mentioned. I think there must have been some others but I don't remember right offhand, Terry.

TR: So with all of those guys on your team how did you do?

GF: We came in second in the state. We lost by one point to St. Michael's of Santa Fe on a missed extra point. So that was a pretty good football team, it really was.

TR: And what position did you play when you were playing ball?

GF: I played both ways, so I played a quarterback on offense and I played safety on defense.

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TR: And the time that you spent on the district court bench, you said that you got appointed in 1975...

GF: Uh-huh.

TR: And you stayed there until when?

GF: Until 1981. I resigned in 1981.

TR: What were the circumstances around your resignation?

GF: The state had passed a mandatory sentencing law and one of the crimes which bore a mandatory sentence was assault with a deadly weapon. And I had a case of a young man who was convicted of that crime, and the jury without me saying so came in and said guilty but we recommend leniency, not knowing of course there was a mandatory sentence. And after I got a pre-sentence report which showed that this young man's record was better than mine I didn't think that jail time was appropriate. And so upon a motion being duly made by defense counsel I ruled the mandatory sentencing provision unconstitutional as being a violation of separation of powers, specifically. I also thought it was unconstitutional as far as equal protection of the laws. But in any event, I sentenced him to the period of time and then I suspended it. And then it's kind of convoluted but in a case, not that case but in another case that I also happened to be the judge on and gave the person the whole sentence, the Supreme Court on its own said that mandatory sentencing was constitutional and then sent back the case to me to resentence this young man that I put on probation. And I resigned, I said let somebody else do it, I won't do it.

TR: That must have raised lots of issues for you and Glennie and the people who were close to you.

GF: You know, not really. It was very clear to me. You know, I've said in talks, and I really mean this, whenever getting and keeping a job, any job becomes more important than doing it to the best of your ability, the job probably isn't worth having in the first place. And I really believe that. And of course there was some concern, well, what am I going to do now, but I wasn't really concerned about that. I'd had a successful practice before and I said we'll do it again, there may be a lull but we're going to be all right. I don't want to spend the rest of my life with a razor blade in my hand every morning where the chances are 50-50 that I'm going to shave or cut my throat. I'm just not going to do that, I'm not going to live that way, so this is the way we're going to go. And I started a new law firm and we went at it again and it turned out very, very well.

TR: So how long were you in private practice until you went to the Supreme Court?

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GF: Well, before I went on the district bench it was 15 years, and then after I resigned from the bench I practiced another 9-1/2 years before I went on the Supreme Court. I didn't want to do that either, as a matter of fact. But that's another story.

TR: We'll get to the Supreme Court in just a second. In those 25 years in private practice what cases that you haven't already talked to us about did you find the most interesting or the most challenging?

GF: Oh, there were a number of them. One of the ones that sticks out in my mind was a case of Pohl versus Womak. The defense counsel in that case was Lou Sutin. And this was a bus company case where this bus stopped at a driveway rather than at a bus stop and the lady stepped off. And it was in December, it was dark, and she really tore her leg up. And the principle, the thing that made it interesting was that the law, New Mexico hadn't decided it yet, but for a common carrier for hire they owed the highest degree of care to their passengers because their passengers are paying for it. And this was the law in California and a number of other states. New Mexico hadn't decided it. And so we got to go to the jury and I was arguing before Judge McPherson the highest degree of care. And Lou Sutin, who is an excellent lawyer and was the chairman of the UJI - see, New Mexico had no UJI in those days, they used California UJI - said it's not proper in New Mexico because we're a common law state and there are no degrees of negligence at common law. And his argument was you can't have no degrees of negligence at common law and say that the bus company, a transporter for hire, has the highest degree of care because negligence is the failure to use due care. And if you say a highest degree of care you're saying that you have degrees of magnitude. Pretty good argument. And McPherson wouldn't go for it.

So he let it go to the jury and I got a verdict and up to the Supreme Court we go and made the argument in the Supreme Court again, that the highest degree of care does not mean any degrees of negligence but don't kid yourself. If I'm a brain surgeon operating on somebody's brain and I'm also a driver of my automobile, nobody in a practical sense can say, look, I don't have a higher degree of care practicing surgery on a person's brain than just driving my car. And that isn't degrees of negligence, that's just another way of saying that what's normal in that kind of a business is what is required. The Supreme Court went for it. The most interesting part is that even today in the UJIs, okay, we don't say for transporters for hire highest degree of care, there's that they have to use due care. And then there's a footnote at the end of this that says - and you're probably aware of this - it's one of the factors that you should consider.

So I don't know whether I won or lost that case. I won, I got the verdict, but I didn't win or lose that case.

TR: Any other cases that stand out in your mind?

GF: Yeah, there was a case, Jaramillo versus Anaconda - these are all in the Supreme Court - where at Cebolleta, New Mexico, west of here they were blasting for uranium. And Cebolleta had a number of houses, all adobe houses, and this particular client's house began to crack. And so we sued the mining company that was blasting out of Cebolleta

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because this was a dangerous instrumentality. And all you had to prove, you didn't have to prove negligence, you could be as careful as you wanted to be, but if the blast caused the damage you had to pay. And so there was - this case lasted several weeks, and it wasn't a big case, we got a verdict and the damage I think were \$7,500 - the important thing was that there were about nine other people in Cebolleta waiting to see how this case is going to come out and the statute of limitations was running, okay? So none of those other people actually - I don't know whether they went out and settled with them or not. But the argument was that the blasting didn't cause the damage, I mean that's their only defense.

And they had this expert witness who came in from back east somewhere and you couldn't ask for a better expert witness. I mean, this guy under oath said things like I have more information in my portfolio on the effects of blasting than the entire United States Bureau of Mines. And he also said I was the man who figured out how to make a tunnel under the state capitol of Tennessee without one pebble or one brick being damaged at all in that tremendous capitol building in Tennessee, and I did all of the blasting for it. Very impressive. And, you know, it was true. And so that's the kind of a conflict we had. So I said I have to do something with this jury and I got up and I said, you know, ladies and gentlemen of the jury, you have been honored. You have met a man here today who has told you under oath that he has more information than the entire United States Bureau of Mines. This is a man who speaks only to God, and just by appointment, his not God's. It was a wonderful experience. I thought the opposing counsel was going to kill me. And luckily he had gone back to wherever he was going to because he would have the other lawyer's head. But that case is in the Supreme Court. The argument that the defense counsel was making was that the physical facts were such that the jury could not find that it caused the damage. And the Supreme Court said, oh, yes, this isn't a physical facts rule, this is just up to the jury. But those are two cases out of many.

TR: During the period of time that you were on the bench about six years, the District Court...

GF: Uh-huh.

TR: ...bench about six years, aside from the case that you described before where you had the sentencing issue....

GF: Uh-huh.

TR: ...what other memorable cases come to mind?

GF: One that comes to mind is the case of Goff versus Pharmacia Laboratories. That case is also I believe in the Court of Appeals, was not granted. But that's a case where the test for medical testimony and medical malpractice cases was changed from the strict locality rule to what the standard of care is nationally. I was the district judge and the law at that time was that it was the strict locality rule. Unless you had a doctor in the same

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profession in the same speciality testifying against another doctor in New Mexico that he was negligent or did not fall into standard of care you couldn't get to the jury. And there was a motion for summary judgement made. And I ruled that the law was clear in New Mexico but then I went on for two pages in the record saying I think this law should be changed, I think it definitely should be looked at. And it just rankled me that the standard in New Mexico was something less than it was nationally. You know, how dare you be that. Anyway, it went up to the Court of Appeals and Lou Sutin wrote the opinion and reversed it, and it wasn't appealed to the Supreme Court and it came back and now we have the general rule rather than the strict locality rule in New Mexico.

TR: You know, I remember when I first came to town meeting you and you were District Court judge at that time, it was 1977, and I also remember meeting Maggie. She was your...

GF: Everything.

TR: Everything.

GF: Yes.

TR: How did she help you do what you needed to do?

GF: She protected me and she also chastised me when I wasn't doing the right thing. If I made her angry, all right? She would send people in to see me about every 32 seconds and I would have to run out and say, Maggie, I don't know what I did but I'm sorry would you please leave me alone to get some work done. But Maggie was really tremendous. She was my secretary before I went on the bench. And she had been a secretary for a man who was in private practice in Colorado and became a judge in Colorado and she wouldn't go. And I asked her to go with me and she hemmed and hawed but she finally went with me. And I think she's famous for being a secretary. Not only was she my secretary but after I left she was Judge Deaton's secretary, she was Jude Woody Smith's secretary, she was Judge Brennan's secretary and she was Judge - he's passed away now - secretary. She's still there. She's not a secretary for a judge any more but she is working in the main office at the courthouse. I think she's close to being retired. Maggie's an icon of clerks and secretaries in that courthouse.

TR: How did you get to become a Supreme Court judge?

GF: Justice Ken Wilson had been appointed by Governor Carruthers to the Supreme Court and he was a republican, a good judge, I think he did an excellent job, and he had to run in that one partisan election. And there was only one democrat who was announcing for the democratic nomination to the Supreme Court, and it's a lady named Franchesca Lovato in Santa Fe. And I was concerned that this was not going to be the right nominee, and I was concerned about the Supreme Court, and I started calling people trying to get them to run for that office. There were any number of them that I called and each one of

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them had one excuse or another for not doing it. And the last one I called was Rosiara Sanchez and I said, Rosie - by the way he was at Georgetown, too, getting his masters when I was getting my first degree at the law school, I said, Rose, you've got to do this, you know, you've just got to. And no, no, he wasn't going to do it. And I was really at my wits end and he said, well, damn it, if you're so interested in it why don't you do it. And in a fit of pique, honestly, I said, okay, I will. This was January. By March you're supposed to have 3,720 signatures of democrats who say if this turkey runs I'll vote for him. So I go home and I say, Glennie, we're running for the Supreme Court, we need 3,720 signatures by March 15 and I'm leaving for Boston tomorrow and I'll be gone for a week taking some depositions. That's when she didn't talk to me for a month and a half. To make a long story short, she got something in excess of 12,000 signatures in that short period of time and I won the election in the primary against Franchesca Lovato, and then I beat Ken Wilson and that's how I became a Supreme Court judge.

TR: Give us an overview of your career as a Supreme Court justice in New Mexico. And then maybe we'll go back and talk about some more details.

GF: I was blessed by going onto the court at a time where I think it was - other people called it the Camelot court. My wife has also called it the Camelot court. And there was, when I first went on there was Justice Sosa, there was Justice Ransom, there was Justice Baca, there was me and there was Justice Montgomery. And finally the court was Baca, Frost, Montgomery, Ransom and me. And that was one of the most delightful experiences. Not that we always agreed, because we didn't. But we all knew each other and had known each other and had great respect for each other for many, many, many years. And those conferences were really enlightening and delightful because we would really get into it. And we weren't gentle but we always had great respect for one another. And I think that court put out some of the great opinions in the history of the State of New Mexico. And the reason I say that is ALR, as you know the American Law Reporter, that period of time that we were on there, I counted them at one time, but between the five of us we must have had 14 or 15 cases reported in ALR, Second, which are the cases in the area that they print them in for the whole country, trends. And that was the most delightful thing.

TR: We're running out of tape, we need to change the tape.

GF: Sure.

TR: So we'll go off the record for a short period of time.

GF: Okay.

(Side two, Tape One)

TR: We're back on the record now. Gene, we were talking about the Camelot court and various different decisions that were of national record through the ALRs.

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GF: Uh-huh.

TR: Can you tell us, without divulging any secrets, how the Supreme Court during your day would discuss a case and come to a decision as to how a case should be decided?

GF: Sure. When the case is filed in the Supreme Court of the State of New Mexico it is assigned an author automatically. It's done by rote. And then it's set for briefing and it's set for oral arguments. And then after the oral arguments you meet in what they call the holy of holies right behind the Supreme Court bench. And the youngest member of the panel who is not the author goes first. And it goes around the table. And the questions are two: How would you decide this case, and why. And as you go around the table you will find out, number one, how the thing's going to come out, but you'll also decide number two, whether or not there's going to be a dissent, and number three what are the issues that are going to be developed and how are they going to be developed. And then the process starts and the opinions are written, and then they are distributed throughout. And as the signatures are collected and errors and omissions are made and the editing is made and the different languages used, it finally culminates in the opinion, which is then signed and published.

And those conferences are excellent forums to see where the thinking is and where the linkage is as far as deciding these cases are concerned. And you can go in there thinking one thing, and thinking diametrically something else. One of the things that hardly ever changes the opinion of a justice is the oral argument, okay? But those conferences do. And those conferences are a very educational experience. And when you're serving with the kind of men that I'm talking about serving with, and you hear their legal reasoning and their way of writing and their way of describing what it is that's important to them, it's like taking a refreshing shower, it really is.

And that isn't always the way it is. It's a forced partnership at best and you're lucky when you get a combination, like I was fortunate enough to have a portion of at that time, of people that have good minds and even greater hearts and the ability to converse with one another. And it's an experience that's unique. I never thought I'd have it and I'm so glad that I did.

TR: What happens if the appointed author is not in favor of the opinion?

GF: He becomes a dissenter.

TR: He becomes a dissenter but does that person write the opinion anyway?

GF: No, then the one who is in the majority who happens to be next in line will write the opinion for the court. That hardly ever happens. That hardly ever happens.

TR: Again, without disclosing any secrets, is there any of those, any kind of funny things that happened that you could tell us about?

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GF: Oh, yeah, lots of funny things. I don't know whether I can tell you about them but there's a lot of funny things. I remember one time when I was first there and I was not the author and I was the youngest member in the case. I don't even remember what the case was about but I said I would decide this case for this reason and in this way. And my friend Dick Ransom said something to the effect that's got to be the dumbest reason I've ever had in my life. And I said do you think you can do better? And he says, yeah, I think so. I said what do you have to say about it? And he was right and he did do better. But he changed - he didn't change my mind but the way he got there was a little bit different and a heck of a lot better. But that kind of thing happens from time to time

But even when there's a conflict and there is a real difference of opinion it isn't a cause for any anger or anything else. I mean, this is an issue that's being decided by this court for the first time, and as you know as a lawyer there are - you can go both ways. And the thing that stands the test of time is the reasoning behind it and the precedence behind it. And sometimes you have to choose. And sometimes a minority view will not be the majority view of that court, and vice-versa, sometimes the majority view of that court will not be in conjunction with the minority that other states hold. So it's a real experience.

TR: You retired from the Supreme Court when?

GF: In 2002, the last day of December 2002.

TR: And so you went on in 1988, so....

GF: '90.

TR: 1990.

GF: Uh-huh.

TR: So you're on for about 12 years or so?

GF: Twelve years, uh-huh.

TR: During that 12-year period to your mind what were the most significant cases that you were involved in?

GF: I wrote Byers, the Byers case and the Sears versus Nissan case. One was when New Mexico after 40 years adopted as a measure of damages the loss of consortium, spousal loss of consortium and also children's loss of consortium of their parents if they were killed in a wrongful death action. It also establishes, or established in Nissan the - or whether it was - it may have been Romero versus Byer, the value of the life itself, taking it off from a pure economic standpoint, what is the value of a life if that life is taken through the negligence of another.

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Another one that I wrote toward the end of my stay there was the Delgado case of intentional actions of employers that are of such a nature that they are taken out of Workers' Compensation and into the tort area. Those are three that stick out in my mind.

TR: I was very happy to hear about the Romero and Byers case because it was my case.

GF: I remember that.

TR: And the gentleman that died in that case was one of these extraordinary human beings, Mr. Romero, that I just felt compelled, knowing what the law was I felt compelled to challenge that. And I was very impressed by the reasoning, and of course very happy with it. And Terry Word's case was the Sears Nissan case, the companion case with that. What do you think the most difficult case was for you while you were on the Supreme Court?

GF: I think the most difficult cases for me were in the area of the criminal law. For example, there is just no clear distinction in the State of New Mexico between first and second degree murder. And the reason for it was not a legislative error but I think was an error on the part of the Supreme Court many years ago. Murder in the first degree is the killing of one human being by another human being that's deliberate and premeditated. That's what the statute says. The Supreme Court, and I can't remember the exact case, decided that deliberation included premeditation, which I think is a monumental error. So that the net result is that every intentional killing of one human being by another human being is potentially a first degree murder case. You say so what. Well, so what is a heck of a difference in the penalties. And particularly the death penalty.

See, the death penalty in New Mexico has caused me great problems because - it's not important that I'm in favor or against the death penalty, everybody knows I'm probably against it, I am against the death penalty. But it causes me problems because it has to be first degree murder to be the death penalty. And in New Mexico it isn't how you kill somebody that gets you the death penalty but who you kill. If you kill a policeman deliberately while he or she is on duty, that can cause the death penalty. If you kill a person who's a witness, that can be the death penalty. If it is a killing of one prisoner by another prisoner in the penitentiary, that's the death penalty. And if it's so easy to have first degree murder, see you can have first degree murder of a policeman, second degree murder at a penitentiary, and because there's that difference those cases caused me some concern. And even to this day it's not completely cleared up.

To answer your question specifically, that area also bothered me. And some of the new laws with regard to driving while intoxicated have concerned me, mainly because of the mandatory increased sentences that has caused. And I'm not - as you know, I'm a really serious opponent of mandatory sentencing because I just don't think it gets the job done.

TR: You talked before when you first went into practice about the collegiality and the willingness of even opposing counsel in the middle of a trial to help you out as a young

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lawyer. It also sounds like that same type of collegiality and same type of cooperation was there while you were in the Supreme Court.

GF: Yes.

TR: It feels in the practice of law today that that's not there. What do you think happened?

GF: You mean not there in the practice of law or not there on the court?

TR: Not there in the practice of law.

GF: Okay.

TR: I don't know what happens on the court.

GF: I think like we started this, Terry, I think one of the main reasons is the numbers, how many people are practicing the law today and how diverse their practices are. Nobody's really a street lawyer any more, they're specialists. And it is a series of specialists practicing in specialized areas. And there's a lot of them. And if you don't know somebody, if you don't know each other like we know each other, it's impossible to like each other. And if you can't like each other, you certainly can't trust each other. And if you can't trust each other, then you have a war from the very beginning to the very end and it never gets better, it always gets worse.

The rules of procedure, both civil and criminal - we haven't talked about this - but I don't know why - and I'm guilty, mea culpa also - but there's more and more and more and more rules. And the theory is that if you pass these rules it's going to make the practice of law easier. That is at worst a lie and at best a misconception. I've never seen passing more and more rules make anything easier, it just makes everything a little bit more difficult. Judge Astle, who is a very good friend of mine, used to call the rules of civil procedure the rules of civil harassment.

TR: I remember that.

GF: And he may be correct. But the way that the law has expanded, the rules of practice have expanded has caused this problem. We didn't need rules of ethics. We didn't need rules of professionalism. You just knew it. I mean, I teach at times courses on professionalism and courses on ethics and sometimes I wonder, you know, didn't these people have any parents, how come we have to talk about these things. But we do have to talk about them because it's something that's very important and it can be the death knell in this profession, it really can.

TR: Back in the early days when there were so many fewer lawyers and the legal community really knew just about everybody in the community, there weren't the ethics decisions and professional, the focus on professionalism that you've referenced. How did the

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community deal with unethical lawyers? How did the community feel, the legal community I'm talking about, the lawyers...

GF: They went out of business. They went out of business. Nobody hired them. Nobody hired them. It was a very small community and if somebody put it to somebody else and they were a lawyer, or for that matter a doctor or an engineer or an accountant or anybody else, everybody knew about it. And they moved, or they went down the tubes financially. Also, if somebody - and this doesn't happen any more either, I wish that it did but it's because it's too big now - but if somebody was stepping over the line or was acting questionably, the older lawyers would say, hey, how about let's go out and have a cup of coffee, or let's go to lunch and let's have a talk. And they would have a talk and say, you know, cut this crap out, what are you doing. You know, this is a profession, this isn't a war, what are you trying to prove. There's no hiding the ball or anything like that. It was just a more open and more congenial atmosphere that for one reason or another, as we talked about, doesn't happen so much today.

TR: Along that line I've heard some attorneys say that part of the reason that we need these ethics rules and professionalism guidelines and those type of things is that the judges have not been tough enough on attorneys who either step over the line or participate in what's commonly called the Rambo style litigation. Do you have any thoughts on that?

GF: Yeah, a lot of them, but you're going to run out of tape again. For starters there is a feeling out there, and it's probably true, that federal judges are more strict and tougher about enforcing the rules than state judges. And that's probably true but you've got to look at how the judges get there and stay there. The political forces, unfortunately, are a lot stronger on state judges than they are federal judges and therefore federal judges don't have the problems that state judges have when it comes up for partisan elections, or for that matter retention elections. Public opinion be damned as far as the federal court is concerned. It can't be damned as far as the state courts are concerned. And if you get crosswise with a big enough percentage of the bar those people can really hurt you.

But also remember this, and I've taught these courses, too, professionalism is a two-way street. Of course the lawyers have a duty and responsibility professionally to the public, to the courts and to one another. And so do the courts. So do the courts. And judges sometimes, after they get to that position, maybe it's something in the robes, but they get the idea that they are unassailable and they can treat people, particularly lawyers, in a fashion they shouldn't be doing it. For example, if you're going to chew out a lawyer you never do it in front of his client, you never do it in front of opposing counsel. Never. It's absolutely unacceptable. If you have something to say to a lawyer, bring him and tell him in such a way that it will be beneficial.

I'll give you a story. Do you remember Charley Driscoll?

TR: Sure.

GF: God love him, a wonderful person, excellent trial lawyer and an excellent law teacher. I was on the bench for six months and I'm trying this case, it was a rape case, and Charley

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is the defense lawyer. And Charley is a good defense lawyer and is trying the case and the judge because he's a new turkey on the bench, all right? So we're going to pluck a few feathers. And I put up with it for the better part of about two days, okay? And then I said this has got to stop. So we take a break and I send the jury out and I said, Mr. Driscoll, I'd like to see you in chambers. And I leave my robes on and I take my gavel and I walk back into chambers. And Charley comes in and he says, yes, sir. I said relax, Charley, you're doing a hell of a job out there. But when we go back out, when I pick up this mallet that's your cue to go into action. And he says what do you mean? I said when I pick up this mallet I want you to take your right ear in your left hand and your left ear in your right hand and pull your head out of your ass or I'm going to plant this mallet right between your eyes. No more problems. And we were great friends before and we're great friends every since. But, see, you don't have to hold people in contempt and you don't have to be difficult, or in the phrase of the day a hard ass. There are other ways to do that and there are other ways that you can treat one another to where you never get to that point where it becomes as acrimonious as sometimes it has.

TR: You talked about elections and now what we have, retention elections.

GF: Semi.

TR: Semi-retention elections. Do you have a feeling whether, or a belief of one system being better than the other?

GF: No. There are any number of systems in the United States. They all have their pluses and they all have their minuses. I am opposed to out and out election of judges because it is so susceptible to public opinion. And you really can't let a person, if you're a judge, your personal opinions, whether they be political, religious or otherwise, affect your judgement as to what the law is and applying it. And I don't like appointments for life because human beings get old and they get sick and they get staid in their ways. And so that kind of a system has its drawbacks. As far as systems go, this system that we have is probably the closest to a combination of the two. But even the election by retention has got its faults. I'm thinking of a Supreme Court justice by the name of White who on the Tennessee Supreme Court, brilliant lady, very good judge, and she did not write the opinion but she joined in a death penalty case where they reversed the death penalty and the pro death penalty people in Tennessee just pillaged her. In New Mexico we have to have 57 percent, which I think probably is unconstitutional under the federal constitution. But it really doesn't make any difference whether it's 57 or 50, if they want to get you, if you've got an organization that really wants to get you, whether it's DWI or death penalty or whatever, domestic violence, you just pick it, it happens to be the hot issue of the day and they've got money and they really want to go after a particular judge, they can get him or her. And that's a problem because if it scares the judicial officer into ruling not according to what the law is or what he thinks or she thinks the law is, but rather what the opinion of the appointing authority or the electing authority is, that's when the rule of law gets really shaky and you've got some real problems with that. I do.

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TR: I'm going to go back to something you said just a couple of minutes ago in your last answer. You said that you can't let personal opinions affect your judgement.

GF: No, sir.

TR: Regarding the law. That's one of the criticisms that's been leveled toward you, is that you're too much based, or have been too much based in your personal opinion as opposed to the strict dictates of the law. How would you respond to that?

GF: Well, I don't know exactly what that is. I am a forceful person.

TR: Oh, really?

GF: I've got a very strong personality. But I've got to tell you that I have never in my life intentionally on the bench let my personal views, whether they be religious or political, affect my judgement in a case. I have a tendency, as you can see, to use strong language. I write strongly when I write opinions. And sometimes I think maybe because I write like I do and I talk like I do that I come across too strongly. And because of that people may think, well, I'm letting my personal beliefs influence. I was born and raised and educated a Catholic, and although I may have very definite opinions based upon faith about certain things like abortion, that doesn't affect the way I would decide a law or a case involving that issue. And I have always said and I have maintained that if you can't do that you shouldn't be there. And that's one of the reasons I quit in 1981, because that really bothered my conscience. I had a very strong belief, personal belief even as a matter of conscience that a judge's job in the criminal law was before he or she sentenced an individual who was convicted of a crime they must consider the circumstances surrounding the offender and the circumstances surrounding the offense, and that that function was purely a judicial one in nature. And when the legislature passes a law that takes that discretion and that judgement away from the judges and puts it in the hands, of all people, the district attorney, that affected me so greatly that it really became a matter of conscience for me and I couldn't in good conscience apply that law in the cases that were going to come to me from then on. So I did what I thought was the best thing for everybody, including me, and quit, okay? If a person - let me give you - that judge in the south who wanted to put - became a Supreme Court justice I think in Alabama...

TR: The Ten Commandments.

GF: About the Ten Commandments. If that man as a matter of conscience was so set on that obviously illegal rule, all right? Which clearly it had been. Then he had only one way to go, and that's to get off the bench. Like I did, okay? But not to sit there and say I don't care, Supreme Court, what you say the law is, I'm going to say the law is this way. I've never done that and I never would do that. But if they say that this is the law and I can't live with it as a matter of conscience and I'm on the bench, I have only one way to go. Get out. And that's what I'm saying. And if I give the impression, or I have given the impression, or by my writings in the Supreme Court that my personal feelings or personal

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beliefs, whether they be political or religious, affected my judgements, that's news to me. I just don't remember ever doing that and if I did they should have thrown me off a long time ago.

TR: You know, you remind me a little bit of a sign that was in Judge Woody Smith's chambers, and you've probably seen it, that says if it ain't fair it ain't legal.

GF: That's right. That's right.

TR: Was that like a standard that you apply?

GF: You know, the law is based upon reason. And reason as opposed to rationality is a search, it really is a search for the truth as closely as we can get it in this day and age and how the circumstances are. And the truth is always fair. And so if it ain't fair it can't be the law because it can't stand the test of reason. And that's really where that comes from, I think. And I agree with that.

TR: Now you've partially answered this question through a number of your answers during this interview but I'm going to ask you to see if you have anything to add to it. What makes for a good trial, a good jury trial?

GF: Oh, gee. I'll tell you what makes for a good trial judge. What makes for a good trial judge are three things, and only three things: You've got to be there, you've got to listen and you've got to rule. And if you don't do any one of those three things, particularly rule, then the rule of law and the whole system starts to fail. The trial lawyers who are trying a case before a jury must do three things: First of all in the opening statements they must let the jury know what they think, the lawyers think the evidence will prove. The second thing they have to do is present the evidence, through the testimony and through the documents that they have. And at the end they have to bring all of this together so that the jury can understand the story. What the jury trial is, is the telling of the story. The judge with the help of the lawyers has the obligation to inform them that they have to find out the facts and that they must apply the facts to the law as he gives it to them. And the lawyers have to work as hard as they can to see that that job is done. More often than not the job gets done.

The sad thing is today there are fewer and fewer and fewer jury trials being tried, for any number of reasons. And that's a problem. I'm talking against myself now. I do a lot of mediations, as you well know. And mediation has its place but when it keeps the really good cases from being tried what happens is the law doesn't change, it just sits there and vegetates because unless the attorney tries the case and that case is appealed and the final decision is made by the Supreme Court of the jurisdiction, whether it be New Mexico or any other state, that's the way the law progresses. And it's really detrimental to the whole system. It's detrimental to lawyers when they come in and they say, Terry, here's what happened, what do you think. You've got to tell them I don't know. I don't know. Because it hasn't been decided yet. So that's the down side of this. I see a lot of trial judges today, and I'm not naming any names, and it's across the country,

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it's just not in New Mexico, they have become docket managers instead of trial judges, okay? And I'm saying, you know, they're looking for ways to let somebody else take care of this case, whether it's through mediation or it's arbitration. And what it is, is shoveling paper around from one place to another and not deciding cases, not letting them go and not getting them tried. And I think that's detrimental to the whole system.

TR: That feeds into the perception that the courts have been clogged with too many particularly personal injury cases. That seems to have been a common point of discussion through the '90s and in the 2000s. What's your opinion on that?

GF: I don't think that it's any more clogged today than it ever was. In the area of the criminal law, just for an example, and it doesn't take a genius to figure this out, let's take DWI for example, if you do certain things, if you lower, I'm not saying this is good or bad, but if you lower the blood alcohol content from .1 to .08 what does that do? The potential is there to double, triple and maybe even quadruple the number of cases. If you then add time mandatorily to a conviction for those sentences after first, second, third, fourth offense, what does that do? That increases the number of cases that you have to try. You ain't got enough judges. You don't have enough lawyers. You don't have enough DAs to try that number of cases. And guess what, then we have in the papers, oh, 50 percent of the cases have been dismissed. Well, why is that such a surprise to you. You can't get them tried. And if you have mandatory sentencing, I'm not going to plead guilty, I'm going to plead not guilty and you've got to try me. And then we pass a rule, the Supreme Court does, that you've got to try these things within a year, or six months, or whatever the case is. It can't be done. And so what happens to them is they go down the tubes. And guess what suffers? Justice suffers, and the administration of justice suffers. And they're still trying to figure out why did that happen. You caused it.

And it happens in civil cases as well. You've got a case and you file it and it's a simple straightforward case, the case ought to be tried within the next six or eight months. But then you go into mediation and you go into arbitration and you have these discovery rules and pretty soon this little case becomes a monster. Like the judge in D.C. who lost his pants. They should have shot that guy the second week in his case. But all of a sudden it becomes a monumental thing when it's a really straightforward kind of a case. And it happens both in civil and in criminal cases. The big clog in the courts today, both federal and state, are drug cases, criminal cases, closely followed by DWI and domestic violence, and in the civil area it's big corporate cases, big business cases. They're talking about millions and millions and millions of dollars that tie up courts for years, years. And who takes the brunt of it is poor guys like you that have the other kind of cases, they're standing in line because of this clog and they're blaming you for the clog and you're not responsible for the clog, it's somebody else's cases.

TR: Thanks.

GF: Okay.

TR: I've felt that for a long time.

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GF: It's true.

TR: When you were on the Supreme Court did you go to the legislature on behalf of the courts?

GF: Yes, sir.

TR: Did you find the legislature receptive to some of the problems that you've been talking about?

GF: Yes, but they weren't for a long, long time. One of the things that I'm most proud of from a non-case standpoint is the establishment of the unified budget. This is a thought that I had 25 years ago and it came to fruition when I finally got on the Supreme Court and then I became chief justice. What happens is this: We have 13 judicial districts in the State of New Mexico and depending upon who you have in the legislature some of those districts have more powerful representatives than others. And they would go up to the state legislature on an annual basis or a semiannual basis and they would start lobbying the legislature for things like pay increases, increased budgets, so forth and so on. And what happens is that the jurisdictions that had the most powerful legislators or senators got it and the other ones didn't. And for years you had this disparity between the various districts. And legislators like nothing better than conflict because they can say, well, I tried but I just couldn't get it done.

So we came up with the idea of a unified budget. And all of the districts come into the Supreme Court and have a full discussion back and forth, and this is what is best for the entire judiciary, from judicial salaries to budgets and pay increases for health, and so forth and so on, and filing fees, everything from soup to nuts, and give it to the legislature as a package and nobody's fighting within the family over this, this is our budget. Now you can say this is too much, this is too much, we ought to put more here, more there, that's fine. But this is a unified budget concept and it takes away from the legislature the tendency to make an excuse that they have to choose between this and that between the districts, they can change something within the total budget but it's unified, it's a unified budget. And that was very effective and to this day, from what I understand, they're still using that and that's real beneficial. A few years ago the Supreme Court chief justice ordered all of the presiding judges from the various districts not to come up to Santa Fe, which really, really frosted a bunch of people. And this doesn't do that. They're free to come up and they should come up, but it's to push the unified budget not for just the local but for the jurisdiction as a whole, for the whole judiciary as a whole.

TR: Do you think our state is understaffed when it comes to trial court judges?

GF: Oh, sure. But they're getting better all the time. It's getting better all the time. I think every state is probably understaffed. With all of these things that we just talked about there just isn't enough people to handle them if you really want to try these cases. And since they can't, they're doing other things with them. But, sure.

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TR: Do you think it's appropriate to use alternative dispute resolution such as mediations and arbitrations in the smaller cases, like here in Bernalillo County cases 25,000 or less?

GF: Oh, sure.

TR: Do you think that's a good thing for the judiciary as well as the legal system?

GF: Oh, I think it's the best thing for the clients, you know, because in mediation you can get some things done that the court can't do and that the lawyers can't do. And if you've got a confident mediator who knows how to mediate and can put the cards on the table as to what, you know, you're likely to expect and get the best deal for everybody concerned, sure it works, it works wonders and I think it's very beneficial. Not all cases, though, are mediatible and not all cases should be mediated. And to make that differentiation takes the lawyers and the judge some time to weed through.

TR: Oftentimes in a mediation what the mediator will tell you is that, well, there's this undecided point of law that directly affects your case and aren't you better off trying to get that resolved now when you don't know the answer as opposed to trying the case and having to take it up to Santa Fe and get an answer that you might not be happy with.

GF: One of the first things I tell the people in the mediation - and I think you've heard this - I've been a judge at various levels during my lifetime, let me tell you something that's going to make everybody real happy, especially the lawyers. I'm not judging this thing today. I'm not going to make any rulings in this case. What I'm going to do is show you a way, both of you, to cut your losses because you're both going to lose. If this is a way of not having to go through a real formal anxious type of proceeding and probably come out worse than you are today, this is your one opportunity to avoid all of that nonsense and to get it done now.

TR: I think I've heard that.

GF: All right. And it works, and it works because it's a good way to do things. All a client knows is what their lawyers have told them and their friends have told them about their case. If they didn't think they had a good case they wouldn't have come to the lawyer and filed the thing in the first place. It's not the mediator's case or job to reinforce how good a case they have. What the mediator's job is to do is to tell them what the problems are. Because I have seen some of the greatest cases in the world go right down the tubes. I was the lawyer in some of them. It happens, and you well know it happens. There is no such thing as a perfect case. And if you have enough experience you can tell them these are some of the problems, you know, and so these are the chances you take.

TR: How do you reconcile that position with what you said maybe about an hour ago that not enough cases are getting tried, the law is getting stagnant because not enough cases are being tried and not enough cases are being taken up to the Supreme Court?

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GF: Your case, for example, Romero and Byers, and Sears and Nissan, all right? Those cases were cases that involved two principles of law that were almost encased in concrete for a generation, both loss of consortium and value of the life itself. If it hadn't have been for the fact that the federal courts certified those cases to us, it probably still would not have been decided, all right? The loss of consortium case was based upon a New York case that was reversed by the Court of Appeals of New York 35 years ago, all right? And we're still here stuck with it 40 years later. The loss of value of life itself was based on a case gone to the Supreme Court also 30, 35 years ago called Stang that nobody had come up with. So here's what happens: You get that kind of a case and you know here is a case that's a significant case and it's worth a lot of money and you go to mediation. And the defense knows it, too. And so the defense says I'll put two million dollars on the table to settle this case. And that's a lot of money, okay? And you don't know whether you're going to win or lose it. But you know that if it comes out the way you think it's going to come out and the law changes, this case could be worth five million. But it's going to cost you probably \$344,000 to try it, okay? Those are the things, and I'm not casting any rocks but those are the things that come into play. I really want to hug the lawyer or hug the judge and really have great respect for them that take those chances and they go with it, like you went with it, and come out with the kind of ruling you do. Because, see, you not only won that case and did something for Mr. Romero or his family, his heirs, but you have affected I don't know how many hundreds perhaps thousands of cases in the future. And not only did you do that, you did something that you don't even know that you did, and let me tell you what it is - and Professor Occhialino, God love him, I think he's terrific, pointed this out. We were the last state in the union to adopt loss of consortium, okay? The last state of all the states. We are the first state to expand it tremendously, okay? Than any other state. All right, children, parents in fact, de facto parents, etc., etc., etc. But what it didn't say is how much is that worth. And that's what the juries have to decide.

TR: That's the jury's problem?

GF: And that's the jury's problem. But you see the implication.

TR: Yes.

GF: The principle I'm talking about I think still stands but those are the things that come into play in the meantime.

TR: We've don't a lot of talking, Gene, about judges and cases and lawyers. I want to shift your attention to the juries, you know, the 800-pound gorilla in the courtroom. Do you believe that the juries and the jury systems have changed in, you know, your number of years of practice?

GF: Oh, I'm sure. I'm sure that they have. I've got to tell you right off of the bat that I am a great believer and a great defender of the jury system but I think jurors have changed for

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a number of reasons. They are more educated today, by the internet if nothing else, and they are influenced by any number of other things that perhaps 20 years ago or even ten did not have any influence on them. But I still say as a system and with the proper instructions of the court it is a system that works better than, and certainly as well as, any other kind of a system because it really is the community who shapes the law and shapes the value of things over the long period of time based upon legal principles. And although it's changed, I don't think that it has deteriorated. If anything, I think maybe even it's gotten stronger.

TR: There is a belief, particularly among plaintiffs and personal injury attorneys, that the insurance industry and corporate America have had this stealth program in place to poison the jurors against plaintiffs and people who come into court looking for money. Have you seen any evidence of that?

GF: Not in New Mexico but I certainly have seen it in other states. I have seen it be particularly true in the State of Texas where "tort reform" has taken a hold of both their legislature and their courts to such an extent that it worries me about the state of the law in those areas. But surely, you know, the insurance companies have spent millions and millions of dollars to try to influence and they have influenced in a number of areas jurors and juries. I don't see any particular effect like that in New Mexico. You're always going to get those juries who are more liberal in their evaluation depending upon their locale in a particular state. You're always going to get that. But as a general rule of a complete shift in the way juries act and the way juries decide, I can't say that I've seen that in New Mexico. I may be wrong but I haven't seen it.

TR: Generally speaking - we've been pretty specific about the number of cases or types of cases you've handled both as a practitioner and from the bench - generally speaking what do you think your most significant contribution has been to the practice of law or the legal community in the State of New Mexico?

GF: I'll leave it to you and the rest of those people to decide. You know, I've tried to do what I thought was the right thing based on the law from the very beginning to wherever this life of mine and this profession of mine winds up. And I hope that when it's all over the best compliment that anybody can give anybody in this profession is I think he did what he thought was right.

TR: One last question. Any words of wisdom to the younger attorneys, the attorneys who are just being admitted to the bar, the attorneys who are going out there trying to set up their own practices?

GF: The best of luck. And don't forget why you became a lawyer in the first place. And that's to make sense out of this life and to help those people who just don't have the ability or the money to help themselves.

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TR: All right. Before we close, is there anything else that you'd like to ask? I've been asking you lots of questions.

GF: No. No. This was a lot longer than I thought it was going to be.

TR: Well, actually it was just about the same amount of time as I thought it was going to be.

GF: Okay.

TR: Right about two hours. Gene, I want to thank you so much.

GF: Sure, my pleasure.

TR: For your willingness to come in and share what are obviously some very personal things as well as your perspective from both sides of the fence. And I thank you again personally as well as on behalf of the senior lawyers' division and the state bar.

GF: Well, thank you very much.

TR: Thank you.

GF: Thank you.