

# A Lawyer by Accident – Bernie Witkin’s Early Life and Career

## Conclusion: Preparing for a Public Life

BY JOHN R. WIERZBICKI

### Introduction

**B**ERNARD E. WITKIN (“Bernie” to everyone) was never a judge, never held elected office, was never a professor, and except briefly after law school, never practiced law, yet he arguably had the greatest positive influence on law in California of any person. The *Review* is honoring Bernie with a two-part article focusing on his early life and career. Part I,<sup>1</sup> published in the Fall/Winter 2020 issue, explored the unlikely circumstances that led to his appointment in 1930 as California Supreme Court Associate Justice William Langdon’s private secretary.<sup>2</sup> This article, the second and last, focuses on Bernie’s years working for Langdon, from 1930 to 1939. These were the critical years in which Bernie developed the analytical skills and legal acumen that propelled him to become California’s most renowned legal scholar. In this period, he fashioned his great work, the *Summary of California Law*, into the treatise that transformed law in California. But it was also a time when Bernie would receive a personal lesson in the promise, and the perils, of a public life.

### “One-Seventh of the Work”: Bernie’s Time with Justice Langdon

In June 1930, Bernie and Justice Langdon had reached an arrangement concerning his new role as Langdon’s law clerk. Bernie would write all of Langdon’s opinions and legal memoranda for the court. In return, in addition to his salary, Langdon would permit Bernie to continue to publish and sell his bar review notes (which he entitled the “Summary of California Law”) and teach a twice-yearly bar review course. Bernie later described it as being offered “the magnificent sum of \$275 a month, and all I had to do was one-seventh of the work of the Supreme Court of California.”<sup>3</sup>

It turned out to be a solitary endeavor. According to Bernie, he rarely saw Langdon to discuss the cases or opinions with him. He didn’t even see him at oral argument, since law clerks never attended. Instead, when Langdon was assigned an opinion, Bernie would write it by himself from the record and the briefs. He then

1. John Wierzbicki, “A Lawyer by Accident, Bernie Witkin’s Early Life and Career. Part I: A Suitable Replacement” (Fall/Winter 2020) *CSCHS Review* 27–32.

2. Also called a “law clerk,” which will be used throughout the article. Today they are known as judicial staff attorneys.

3. Unpublished interview with Bernard E. Witkin (Sept. 9, 1986), Witkin Archive, California Judicial Center Library, 1986, 7.

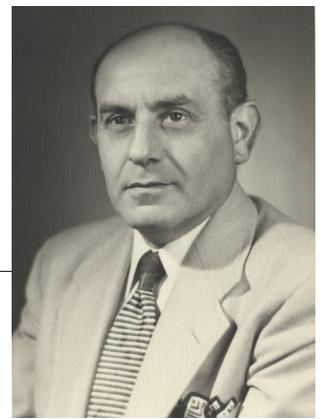
would himself type the original and seven copies (one for each justice on the court) and place them on Langdon’s desk to sign.<sup>4</sup>

In a speech given to the California Supreme Court Historical Society in 1995, Bernie described

his experience working for Langdon. The story involved the financing of the Golden Gate Bridge. The California Legislature had passed a statute to allow certain Bay Area counties to create a bridge and highway district. The district adopted plans for a bridge spanning the Golden Gate and sold bonds for its construction. Opponents of the project, led by the Southern Pacific–Golden Gate Ferries, fought so vigorously in court that a group of bankers, as a condition of purchasing the bonds, insisted that the California Supreme Court rule on the bonds’ validity. To get the case before the court, the secretary of the bridge district refused to sign the bonds, and the district’s directors sought a writ of mandamus, seeking an order compelling him to sign. Argument was held and the public eagerly anticipated a decision.<sup>5</sup>

Bernie recalled what happened next: “Well, one day my boss, Justice Langdon, walked into my office and announced that the court was sore as hell at Chief Justice Waste, because he had assured the reporters that the court was working night and day on the case, and it hadn’t even been assigned to any Justice for an opinion.”<sup>6</sup> According to Bernie, the Chief asked each justice to prepare a memorandum regarding the matter. Bernie wrote the memo, Langdon submitted it, and because no other justice had done so, the Chief assigned the opinion to Langdon.

“That was a Wednesday; and I collected the 4-foot stack of briefs and records, and took them to my Berkeley home. On Saturday the justices as usual attended the Cal–Stanford football game, and on Monday, I delivered



Bernard E. Witkin formal portrait, circa 1950s. Photo: Bernard E. Witkin Papers, MSS 0701; box 8, folder 5; California Judicial Center Library, Special Collections & Archives.

4. *Id.* 9.

5. “Golden Gate Bridge Bonds Ruled Valid,” *San Francisco Chronicle*, Nov. 26, 1931, 1. The ensuing decision was *Golden Gate Bridge and Highway District v. Felt* (1931) 214 Cal. 308.

6. Speaker’s notes, “The Supreme Court of Yesterday and Today,” a talk by B. E. Witkin to the California Supreme Court Historical Society, Sept. 29, 1995, Witkin Archive, California Judicial Center Library, 3–4.



Bernie, Alice, and Zara Witkin, circa 1933. Photo: Bernard E. Witkin Papers, MSS 0701; California Judicial Center Library, Special Collections & Archives.

the opinion in *Golden Gate Bridge and Highway District v. Felt* upholding the validity of the bonds. Justice Langdon was listed as the author, and others joined him, which was enough.<sup>7</sup>

At the time, no one knew that Bernie wrote not just this opinion, but all of Langdon's opinions. When the newspapers praised Langdon for a well-written decision, Bernie had to learn to be content with that. He was not alone. Bernie later claimed that nearly all of the opinions on the Waste Court were written by the law clerks.<sup>8</sup>

Associate Justice John W. Preston, Langdon's colleague on the court, lends support for Bernie's account. In an article published in October 1931, just a month before the issuance of the Golden Gate Bridge decision, Preston described the court's process of opinion writing. According to Preston, Chief Justice Waste assigned 90 percent of the cases to individual justices, who would prepare the decision without consulting the others. These were "one-man" opinions, simply passed along for other justices to sign. "The court never convenes as a court, nor in chambers, in consultation, to approve opinions so signed previous to their filing. When they bear a sufficient number of signatures and all the Justices have examined the same and have had an opportunity to express their assent or dissent, they are filed, usually at the instance of the author."<sup>9</sup>

Preston saw this process resulting from a court incapable of keeping up with the onslaught of cases. "Because of restrictions placed upon the court by the constitution and by the further reason that the court is two and a half years behind in its duties because of the mass of litigation heaped upon it, one-man decisions were mandatory."<sup>10</sup>

7. *Ibid.*

8. Gordon Morris Bakken, "Conversations with Bernard Witkin" (1998–99) 4 *Cal. Supreme Ct. Hist. Soc. Yearbook* 109, 111.

9. "Preston Urges Changes in High Court System," *San Francisco Chronicle*, Oct. 6, 1931, 14.

10. *Ibid.* [Editor's note: for more on Witkin, Langdon and Preston, see pages 26–29, this issue.]

## The Summary of California Law Becomes a Treatise

With his work at the court receiving no public recognition, Bernie busied himself with his bar review business. He self-published a new edition of the *Summary of California Law* in 1931, and again in 1934, and sold copies to law students and prospective lawyers. He expanded his bar review course by entering into a partnership with Jack W. Chance, a friend from law school practicing with O'Melveny, Tuller & Meyers. Bernie would teach the course in San Francisco and Chance in Los Angeles.<sup>11</sup>

Bernie's approach to preparing these early editions of the *Summary* was straightforward: "I simply took the original material, added the new cases, expanded the outline accordingly, profited by whatever commentary appeared in the law reviews."<sup>12</sup> As his work at the court and his writing of the *Summary* intertwined, he began to envision a much greater publication, one that would encompass his ideas about the law and how the parts of it interconnected.

"I was working for the Supreme Court and I was constantly scanning all the advance sheets and selecting [cases] — it [the *Summary*] began to accumulate content. It was no longer a case of selecting material that was valuable for a student taking an examination. It began to be an updating of current California law. That necessarily meant two things: first an expansion in volume and second, a more sophisticated treatment, abandoning simplicity and going into more detail."<sup>13</sup> He would select only those cases that "I thought from the basis of my experience or from my imagination or from guess work had something to contribute instead of merely a regurgitation of existing law."<sup>14</sup>

Changing his method of selecting material was only one aspect of the *Summary's* metamorphosis. More importantly, Bernie sought to reformulate the organization of the law. "[W]hen I started putting the subjects in text order instead of just as a summary for law students, I studied the outlines of major treatises, and the major encyclopedias (*Ruling Case Law*, *Am Jur* and *Corpus Juris*), and the restatements."<sup>15</sup> From there, he developed his own arrangement, to which he would come to apply all new cases, statutes, and legal developments. "[T]he original outline is conceived with a study of the available

11. Letter from B. E. Witkin announcing bar review course in Los Angeles for 1931, undated, Witkin Archive, California Judicial Center Library.

12. Unpublished Interview with Bernard E. Witkin (June 13, 1984), transcript in the possession of the Witkin Legal Institute, 15. Portions of this interview appeared in Charles B. Rosenberg, "Bernard E. Witkin: Interview with an Iconoclast," *Los Angeles Lawyer*, Sept. 1984, 13–21.

13. Witkin Interview, 1984, *supra* note 12, 12.

14. *Id.* 19.

15. "Bernard E. Witkin: Interview with an Iconoclast," *Los Angeles Lawyer*, *supra* note 13, 15.

better works in each of the subjects, but used in my own methods to reflect California law problems and to give them the proper highlighting.”<sup>16</sup>

It became his second nature. He later described it this way: “I don’t [have the law in my head] — I have the structure in my head. That’s the important thing. . . . [I]t’s that placement and structure that counts. Not a vast accumulation of memorized ideas.”<sup>17</sup>

By 1936, Bernie was ready to reveal his new vision to an audience beyond the law student and test-taker. He would sell his Fifth Edition of the *Summary* widely to judges and practicing lawyers. It would come to change California law and practice. Over the next 85 years, California judges would cite to it, and to new treatises created from it, in more than 14,000 published opinions. In time, experts, judges, and practicing lawyers would acclaim the *Summary of California Law* as the leading authority for understanding California law.<sup>18</sup>

### Targeted in the Anti-Communist Hysteria

The growth of the *Summary*’s influence, and the acknowledged brilliance of its author, were not pre-ordained. In December 1937, Bernie’s reputation was dealt a blow from which both he and the *Summary* might not have recovered. A lawsuit was filed claiming that many in labor, government, education, and the film industry had conspired to bring about a communist takeover of the West Coast. It alleged that Bernard E. Witkin, private secretary to Justice Langdon, held meetings of communists to further this conspiracy. It made front page news throughout the state.<sup>19</sup>

No evidence existed that Bernie was a member of the Communist Party, had communistic beliefs, or held such meetings. Instead, Bernie found himself caught up in the labor unrest and anti-communist hysteria prevalent at that time on the West Coast, a forerunner of the McCarthyism that would later grip the country in the 1950s.

The suit was brought by Ivan Cox, a former secretary-treasurer of the International Longshoremen’s Association local in San Francisco. The union was led by Harry Bridges, who was the central figure in the General Strike that brought San Francisco to a halt for several days in July 1934. Cox had been voted out of office and accused of having unexplained shortages in the union

local’s accounts. Cox held Bridges responsible for his ouster and sought revenge.

Opponents of the union claimed that communist agitators, foremost among them Bridges, caused the labor unrest, and vowed to remove him.<sup>20</sup> If Bridges were proved to be a member of the Communist Party, he could be prosecuted under California’s Criminal Syndicalism Act, which made it a felony to belong to any organization that advocated or promulgated violence as a means of “accomplishing a change in industrial ownership or control or affecting any political changes.”<sup>21</sup> Because Bridges was not a U.S. citizen (he was Australian), he could then be deported as an undesirable alien. Bridges consistently denied being a communist.<sup>22</sup>

Cox went to the American Legion to tell his story.<sup>23</sup> The Legion and its partner organization, the Associated Farmers of California, were the principal warriors in the anti-communist crusade in California in the 1930s. While the American Legion supplied the troops, the Farmers provided the strategy, logistics, and financing.<sup>24</sup> Many local sheriffs and police forces supported them, most notably William “Red” Haynes, captain of the notorious anti-communist “Red Squad” of the Los Angeles Police Department. They also had ties to the California Highway Patrol, the state Bureau of Criminal Identification, and Army and Navy Intelligence. The Legion and the Associated Farmers had between them an extensive network of informants and files on more than 1,000 suspected subversives.<sup>25</sup>

Harper Knowles, commander of the American Legion Branch in San Francisco, and later executive secretary of the Associated Farmers of California, seized this opportunity to get Bridges. Cox swore out an affidavit, which Knowles witnessed, and which was then used to draft the lawsuit. Although the suit focused on Bridges, it named many other persons, including Bernie, and thousands of John and Jane Does.<sup>26</sup>

Langdon’s dissents in the *Mooney* and *Billings* cases may help explain why Bernie was named a defendant in this suit. Apart from Bridges, the labor issue that most captured the public’s attention in California was that of pro-labor activists Tom Mooney and Warren Billings, who were convicted of murder for the Preparedness Day

16. *Ibid.*

17. *Id.* 16.

18. This recognition is even embodied in statute: “The Legislature hereby finds and declares that Bernard E. Witkin’s legendary contribution to California law is deserving of a lasting tribute and an expression of gratitude from the state whose legal system, he, more than any other single individual in the twentieth century, helped to shape.” Cal. Educ. Code, § 19328.

19. *E.g.*, “Suit Calls Film Stars Communists,” *Los Angeles Times*, Dec. 10, 1937, 1; “Deposed ILA Officer Sues for 5 Million,” *San Francisco Chronicle*, Dec. 10, 1937, 1; “Vast Red Plot Charged by Ex-I.L.A. Chief,” *San Francisco Examiner*, Dec. 10, 1937, 1.

20. Charles Larrowe, *Harry Bridges and the Rise and Fall of Radical Labor in the U.S.*, Brooklyn: Lawrence Hill Books, 1972, 46. *See also*, Henry Weinstein, “Harry Bridges and the *Los Angeles Times*: Unlikely Free Speech Allies” (Fall/Winter 2020) *CSCHS Review* 19–26.

21. Cal. Stats., 1919, ch. 188, p. 281. The Act was repealed in 1991.

22. Larrowe, *Harry Bridges*, *supra* note 20, 59.

23. *Id.* 192.

24. Kevin Starr, *Endangered Dreams: The Great Depression in California*, New York: Oxford U. Press, 1996, 162.

25. Larrowe, *Harry Bridges*, *supra*, note 20, 192; Starr, *Endangered Dreams*, *supra* note 24, 174–75.

26. Larrowe, *Harry Bridges*, *supra* note 20, 191–93.

Bombing in 1916 in San Francisco, in which ten people died.<sup>27</sup> Despite widespread concerns about the fairness of the trial, the court twice denied Mooney and Billings relief during the time that Langdon served on the court. Langdon dissented in both decisions, most recently in October 1937, just two months before the Cox lawsuit was filed.<sup>28</sup> Mooney later praised Langdon, and castigated the other members of the court, when he received his pardon at a ceremony in the state Assembly chamber in 1939.<sup>29</sup> Naming Bernie as a communist, and pointing out his association to Langdon, could have been a way to raise suspicions about Langdon and his motives in these cases without attacking the justice directly.

Bernie's heritage and family ties present another plausible explanation. Bernie and his family, who were of Russian-Jewish heritage, had arrived in San Francisco after the 1906 Earthquake. They were not alone. During this time, so many other Jewish immigrants from Eastern Europe had come to San Francisco that it was likened

by some as "an invasion from the East."<sup>30</sup> These new arrivals found acceptance in the city difficult.<sup>31</sup> The Preparedness Day Bombing in 1916 made things worse. Along with Mooney and Billings, two Russian Jews were implicated in the attack.<sup>32</sup> The Soviet Revolution the following year further heightened suspicions against Russian Jews.<sup>33</sup> By the mid-1920s, the Witkin family had moved out of San Francisco, resettling in Oakland.

Bernie's older brother could also have unwittingly brought unwelcome attention to him. Zara Witkin, a civil engineer, had joined other American business

leaders in visiting the Soviet Union in 1932. While there, the Soviet government appointed him "Chief

Rationalizer and Consultant" for all building projects of its Second Five Year Plan.<sup>34</sup> The appointment made national news back in the United States.<sup>35</sup> Zara returned two years later and went on a speaking tour about his time in the Soviet Union, highlighted by a speech at the Commonwealth Club in San Francisco.<sup>36</sup> It would be simple enough to link Bernie's Russian-Jewish heritage, and Zara's work in the Soviet Union, to build a plausible story that Bernie had communist ties.

In August 1938, eight months after filing the suit, Cox repudiated his affidavit and the case collapsed. Cox later claimed to have protested that he did not know all the people named as defendants in the suit but was told not to worry, because "[y]ou're helping the government, enabling it to construct its case around what you actually know."<sup>37</sup>

The lawsuit, and ensuing publicity, could have devastated Bernie's career. Fortunately, it did not do so. But Bernie learned that even a relatively obscure role at the court could not shield him against unsubstantiated calumny. When taking on a more public role, Bernie would need to pay careful heed to his reputation.

### With Chief Justice Gibson

Justice Langdon died in 1939 and Governor Culbert Olson appointed his finance director, Philip Gibson, in Langdon's place. With the arrangement that Bernie had reached with Langdon now over, Bernie prepared to leave the Court. He had managed to obtain a position at a law firm, but "hated the very idea" of practicing law.<sup>38</sup> Fortunately, he would be interrupted as he finished packing up his office. "There was a knock on the door. A little guy came into my office. He said 'I'm Phil Gibson.' I said, 'I'm Bernie Witkin.' He said, 'I know you. What are you doing?' I said, 'I'm going downtown to practice law.' He said, 'why don't you stay here. I need you.' In a split second I thought this is the right guy, so I said, 'okay, it's a deal.'"<sup>39</sup>

A friendly collaboration quickly developed, contrasting sharply with his former distant relationship with Langdon. "I went to work for Gibson and this time I wrote all the opinions BUT he read them and we discussed them. We disagreed occasionally. They were his opinions. I was a professional, he was not, but they were



Autographed portrait of Chief Justice Phil S. Gibson. Photo: Bernard E. Witkin Papers, MSS 0701; box 43; California Judicial Center Library, Special Collections & Archives.

27. For the influence of this event on Bernie's appointment, see Part I of this article.

28. See *In re Billings* (1930) 210 Cal. 669; *In re Mooney* (1937) 10 Cal.2d 1.

29. Richard H. Frost, *The Mooney Case*, Palo Alto: Stanford U. Press, 1968, 484.

30. Fred Rosenbaum, *Cosmopolitans: A Social and Cultural History of the Jews of the San Francisco Bay Area*, Berkeley: U. of Calif. Press, 2009, 200.

31. *Id.* 202.

32. *Id.* 184–85.

33. Rosenbaum, *Cosmopolitans*, *supra* note 30, 189.

34. "Local Engineer Heads Soviet Building Work," *San Francisco Examiner*, Oct. 6, 1932, 3.

35. "Russia: Balkhazhstrov Conserved," *Time Mag.*, Oct. 17, 1932.

36. "U.C. Engineer, 2 Years in Russia, Finds Soviets Neither Ideal Nor Complete Failure," *Oakland Tribune*, Aug. 24, 1934, 7; "Soviet Suffering but Nearing Industrial Independence," *San Francisco Chronicle*, Aug. 25, 1934, 3; "Ex-Soviet Official Bares Red Secrets," *San Francisco Examiner*, Aug. 25, 1934, 3.

37. Larowe, *Harry Bridges*, *supra* note 20, 194.

38. Witkin Interview, 1986, *supra* note 3, 10.

39. *Ibid.*

his opinions. That was the first time that I recall anybody on the court having that much participation.”<sup>40</sup>

With the death of Chief Justice Waste in 1940, Gibson was elevated to chief justice. That November, he appointed Bernie as the court’s Reporter of Decisions. One of Bernie’s new duties as reporter was to certify that a court’s opinion had accurately cited to an authority before publishing the opinion. Just a few weeks after his appointment, Bernie had the unique experience of certifying the first citation to the *Summary* in a published California Court of Appeal opinion.<sup>41</sup> It must have been for him a heady experience. He had entered the law by accident, through an impulsive response to a university registrar’s question. Then,

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40. *Ibid.*

41. *Forman v. Goldberg* (1941) 42 Cal.App.2d 308.

through an unlikely set of circumstances, he became Langdon’s law clerk, which instilled in him a burning desire to be “in the middle of where the law was being laid down.”<sup>42</sup> Now that an appellate opinion had cited to the *Summary*, he had achieved this in the most literal sense. His time of preparing for a public life was now over. He had arrived. ★

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JOHN R. WIERZBICKI is Co-Director of the Witkin Legal Institute. He is a graduate of UC Berkeley, the University of Virginia (with a master’s degree in history), and Georgetown Law. He also serves on the board of the California Supreme Court Historical Society. Copyright 2021 John R. Wierzbicki.

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42. Witkin interview, 1986, *supra* note 3, 7.