

Bernie Witkin's Bad Advice:

A Personal Remembrance

BY ERIC RATNER

JOHN WIERZBICKI'S ACCOUNT of the early life and career of Bernie Witkin in two recent issues of this *Review*¹ has inspired me to tell my own Bernie Witkin story. My qualifications for doing so are unusual: I am probably the only person in the world (apart from my brothers) who can honestly say that if my mother had heeded Bernie's advice, I would have never been born.

Both my mother and my father knew Bernie, but in very different contexts.

My mother, Catherine Rogin, moved to Berkeley in 1927, at the age of two, when her father accepted a post teaching economics at the University of California and her parents plunked down the princely sum of \$3,000 for a house on the corner of Keith Avenue and Shasta Road in the Berkeley Hills. In 1937, Bernie Witkin and his wife Betty moved into a house just down the street that was owned by Betty's parents. Twelve years later they built the house where Bernie spent most of his life, which was directly across the street from my grandmother (my grandfather having died in 1947), also on property owned by Betty's parents.

My mother was more than 20 years younger than Bernie, so she and Bernie could not have been friends while she was growing up. But Bernie was on friendly terms with my grandparents; the Berkeley Hills were not nearly as built up as they are now, and there were not many neighbors close by. I can remember my grandmother talking about Bernie from time to time when I visited her home as a child in the 1950s, and once she and/or my mother took me swimming in the Witkins' pool. When I attended law school at UCLA in the 1970s, I was astonished to discover that Bernie, whose occupation I had not known, was the man whose books were regarded as the last word in California law.

Bernie's relationship with my father, Leonard Ratner, was that of a colleague at the court. My father graduated first in his class at the University of California's Boalt Hall School of Law² in 1940. That was the year Governor Culbert Olson decided to appoint a Boalt Hall professor named Max Radin to the California Supreme Court. When Radin was rejected by the Commission on

Judicial Qualifications,³ most likely because of his left-wing political views, Olson's second pick was an obscure tax professor at Boalt named Roger Traynor. (How Olson came to pick Traynor is an interesting story in itself. According to my father, Olson sought Radin's advice, and Radin recommended Traynor. After I became a judicial staff attorney at the court in 1986, Justice Stanley Mosk, who had been Olson's executive secretary when Traynor was appointed, told me that California Attorney General Earl Warren, who served on the judicial qualifications commission and cast the deciding vote against Radin, had explained that he did so because of Radin's lack of practical and judicial experience, and that Olson, furious at Warren and wanting to demonstrate the falsity of his explanation, instructed his appointments secretary to find another law professor with a similar lack of experience, correctly anticipating that Warren would vote to confirm him. But I digress.⁴) In turn, Traynor chose my father, who I believe had been one of his students, to accompany him to the court as his first law clerk.

The Commission on Judicial Qualifications confirmed Justice Traynor's appointment as a California Supreme Court justice in August 1940, and he and my father began work at the court. Bernie had been there for a decade by then, first as a secretary and law clerk for Justice Alfred Langdon, and later as a law clerk for Justice Phil Gibson. A few months after my father's arrival, Justice Gibson, now elevated to chief justice, appointed Bernie to be the court's Reporter of Decisions.

I know nothing about how my father and Bernie Witkin got along at the court. Unlike Bernie, who (according to



Leonard Ratner. (Photo: Eric Ratner.)

3. Renamed the Commission on Judicial Appointments in 1960.

4. For those who wish to follow this thread, see Justice Mosk's recounting, as reported in Margaret Levy and Gordon Morris Bakken, "Conversations with Justice Stanley Mosk," 3 *California Supreme Court Historical Society Yearbook* (1996-97) 175. There, Mosk described Governor Olson's response to Earl Warren's announced reason for rejecting Radin — because he was a professor with no judicial experience: "The real reason was, Warren thought [Radin] was too radical I was with Olson in his office when he got the news, and I never saw him as angry as he was. He said 'that Warren is a hypocrite! He's really opposed to him because he didn't like his political views' Then Olson said, 'Get me Gibson on the phone.' He got Phil Gibson on the phone and said, 'Get me another college professor. I want to show what a hypocrite Warren is.' And Gibson scouted around and came up with the name of Roger Traynor. And sure enough, Traynor got confirmed even though he was 'only a college professor' [with no judicial experience]." *Id.* 202.

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; John B. Wierzbicki, "A Lawyer by Accident, Bernie Witkin's Early Life and Career, Conclusion: Preparing for a Public Life" (Spring/Summer 2021) *CSCHS Review* 15-19.

2. The school was formally renamed Berkeley Law in 2020.

Wierzbicki) told the California Supreme Court Historical Society that he wrote all of Justice Langdon's opinions,⁵ my father was reticent about discussing his time at the court. He took the court's confidentiality policy very seriously, and he never talked about the opinions that he had worked on or his working relationship with Bernie, Justice Traynor, or anyone else at the court. Unlike the current court, at which each associate justice has a staff of five attorneys (and there are at least 50 additional "central staff" attorneys who work on petitions for review, habeas corpus matters, and capital cases), the judicial staffs in 1940 were small: I recall that my father said each justice had only a single law clerk. Although Bernie's job as Reporter of Decisions did not require that he be directly involved in the substantive aspects of the court's work, I assume that the justices and their clerks conferred with him on legal questions pertaining to the many decisions that he had worked on as a law clerk. So, it seems highly likely that my father and Bernie would have discussed a number of cases during the year and a half that my father served as Justice Traynor's law clerk, before he left the court to join the Navy following America's entry into World War II.

5. John B. Wierzbicki, "A Lawyer by Accident," *supra* (Spring/Summer 2021) *CSCHS Review* 15, 15.

At the end of World War II, my father met my mother on a blind date. She was then an undergraduate at the University of California. They later became engaged. In 1946 (four years before I was born), my mother, in her telling, was chatting with Bernie, most likely at her parents' house, and she mentioned that she was going to marry my dad; presumably she had somehow figured out that Bernie and my dad had known each other at the court. Bernie was never bashful about giving unsolicited advice, whether or not it was wanted. "Oh!," he cried. "You don't want to marry HIM. He'll run all over you!"

Presumably Bernie's advice to my mom that she should not marry my dad was based on Bernie's awareness, founded on personal experience, that my father (who went on to teach constitutional law for 25 years at the University of Southern California and for two years at Harvard) was an intellectual force to be reckoned with. But Bernie failed to grasp that my mother was no dummy herself and was not easily run over. My dad, I think, was looking for a partner who would be an intellectual match. He found one in my mom! ★

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