EDITOR'S INTRODUCTION

Internment, Forgiveness, and Mediation, Not All at Once

OCT 04, 2019

BY ROBERT ROSBOROUGH

MCBA's lawyer members no doubt learned about the first Korematsu case in law school. One of the low points in Supreme Court history, the Court upheld Fred Korematsu's criminal conviction and hence the constitutionality of the WWII internment of Japanese Americans. 40 years later, in 1983, many of our members had finished law school when the Northern District of California decided the second Korematsu case, overturning his conviction based on prosecutorial misconduct. It is debatable whether the first Korematsu case is still good law: Chief Justice Roberts purported to overrule it in last year's Trump v. Hawaii decision, but the "overruling" was dictum in an opinion reflecting many of the same faults as the original Korematsu case. We reprint Stan Yogi's reflections on Fred Korematsu and the Korematsu cases in anticipation of Dale Minami—one of the lawyers who got Korematsu's conviction overturned—giving the keynote speech at MCBA's (https://marinbar.org/mcle-fair/?id=4) MCLE Fair on November 14th. It will be interesting to hear Minami's opinion of Trump v. Hawaii and current immigration detention policies.

The question of forgiveness no doubt arose for Fred Korematsu and perhaps Mr. Minami can give us some insight into Mr. Korematsu's stance and whether it played a role in his approach to the legal process. Our readers will be aware that we have been examining the role of forgiveness in the law in a series of articles and we bring you the latest with Eileen Barker and Barbara Monty's article on forgiveness in ADR. Learn what forgiveness is and is not and when it may play a role in ADR and the law more generally.

The desire to forgive or to be forgiven is sometimes a need of a party in litigation and ADR. It is just one of many possible—often unstated—needs a mediator may delve into. Is that wise? Gordon McAuley

discusses what makes for a good mediation and a good mediator. His article will be useful not just to mediators but to anyone who represents parties in mediation. Also be sure to check out the membership luncheon recap for both sage advice and insight into the workings of the California Supreme Court from retired Justice Kathryn Werdergar. Many thanks to our political columnist, Greg Brockbank, who did double-duty this month as Guest Editor, and as author of a profile of a particularly interesting non-profit, Environmental Forum of Marin.

Don't forget that, as with our magazine-style quarterly issues, even with our ordinary monthly website issues, you can easily download the issue as a pdf for offline e-reading or printing.

PRESIDENT'S MESSAGE

Been Through the Fire Before

OCT 03, 2019

BY CHARLES DRESOW

Our Constitution is an aspirational document, seeking to protect ideals of our human rights and liberties. As the political dialogue of our country devolves into name calling and disorder, our Constitution provides not only guidance but something more important: Hope.

Hope that our country and its institutions will not just endure, but evolve in a positive direction. Our Constitution was born out of revolution, tested in wars, and evolved through amendments that recognized changing times and values. At its core, our Constitution has granted liberties, ensured a democratic form of government and protected individual freedoms. The government it has created is a government of laws. It is not a government of one, or even of many. It is of the people, by the people and for the people. It is a government that reflects our Constitutional values and ensures the freedoms enshrined therein.

Johnny Cash's Ragged Old Flag, although written about our flag, contains a stanza equally applicable to our Constitution:<blockquote>And the government for which she stands
Has been scandalized throughout out the land.
And she's getting threadbare, and she's wearin' thin,
But she's in good shape, for the shape she's in.
Cause she's been through the fire before
and I believe she can take a whole lot more.</blockquote>

As lawyers, we swear an oath to protect our Constitution. It is our duty to ensure that our Constitutional principles endure through this troubling time of discord. We can do this by continuing to do our jobs to the best of our ability. We can do this by representing our clients and causes vigorously, but with civility. As political tensions and societal controversies escalate, we as lawyers must make an effort to be

stabilizing and calming forces for our clients and causes. Our profession assisted in the drafting of our Constitution. It has been critical to its evolution. It is essential to its power. We can demonstrate that the system still works during our current stormy cultural and political climate.

Paramount to this demonstration is representing our clients and causes with civility in the face of the virulent, aggressive and sometimes insulting brand of discourse populating our national politics. We can be the calming force that teaches others that disputes can be handled with equanimity and respect for the other side. In the face of scorched earth tactics, we have an opportunity to be the teachers of respectful dispute resolution.

What Forgiveness Offers Plaintiffs in ADR

OCT 02, 2019

BY EILEEN BARKER & BARBARA MONTY

<h4>Barbara</h4>

Any discussion of forgiveness must start with at least a brief summary of what we are talking about when using the term "forgiveness." (For additional discussion, see our previous article, (https://marinbar.org/news/article/?type=news&id=341) Forgiveness: A Collaborative Assessment of the Value of Forgiveness in a Litigation Practice, published in the July 2018 issue of the Marin Lawyer.)

WHAT FORGIVENESS IS.

• Being willing to drop the narrative about something unjust that happened, to stop going over and over the story of how unfair it is and how "bad" the other party is.
• Letting go of resentment, indignation, or anger related to what occurred.
• Realizing the past cannot be changed, and making a decision to accept what happened.
• Focusing on the present and maximizing the future.
• Turning one's attention away from the other party and from what they did; letting go of the need to change them, or to punish them.
• Turning one's attention to oneself and what is needed to move on.
• For the benefit of the one doing the forgiving, not the person being forgiven.

WHAT FORGIVENESS IS NOT.

• Seeing what happened as unimportant.
• Diminishing the damage caused.
• Forgetting what happened.

• Ignoring or minimizing the pain caused by the other party.
• Requiring an apology.
• Necessarily a spiritual or religious act.
• Easy.

<h4>Eileen</h4>

WHEN MONEY ISN'T ENOUGH.

One of the main focal points of the legal system, including mediation, is determining the appropriate amount of compensation, if any, for a plaintiff. Lawyers, insurance adjusters and mediators square off against this task and are often uncomfortable discussing anything else, including issues that may be of great importance to the parties.

Plaintiffs certainly need legal and financial solutions, but they may also have non-monetary needs such as healing, peace and closure. Forgiveness provides a vehicle for achieving all of these, while also enabling parties to release intense feelings, such as anger and resentment, that can make mediation of the monetary issues difficult to impossible.

In contemporary jurisprudence, we say damages are intended to "make the plaintiff whole." This is surely the quintessential legal fiction, a convenient story we tell even though we know it's not true. Aside from cases that solely involve monetary injury, how many plaintiffs really feel "made whole"? The question is: Can we do better, at least in some cases? And if we can, should we try?

FORGIVENESS IN MEDIATION.

Consider the case of a woman who was struck by an automobile while crossing the street and crippled for life. In mediation, the driver's insurance carrier made a settlement offer which the woman's attorney advised her to accept. She was reluctant but eventually agreed she would take the offer on one condition: The insurance carrier had to arrange for her to meet the driver of the car that hit her.

The attorneys on both sides tried to explain to her that this isn't how it works, that the parties do not generally ever meet. But the plaintiff stood her ground. It was important to her to be able to meet the driver face-to-face. While the insurance carrier was skeptical that the meeting could be arranged or that it would be a good idea, he agreed he would try to set it up. To his surprise, the driver readily agreed to meet with the plaintiff. The accident had weighed heavily on her and she too needed closure.

When the two women met, the plaintiff had the opportunity to fully explain what had happened to her, how it impacted her and how it forever altered the course of her life. The driver listened attentively, and let the woman know she understood the consequences of the accident and how difficult life was for the plaintiff as a result. The driver apologized and asked the woman to forgive her, which she did. The two women cried together, hugged and said they would pray for each other.

Through this meeting – initiated by the plaintiff herself – the parties were able to fully acknowledge the events that connected them on a human level. And this helped them achieve closure.

<h4>Barbara</h4>

PUT FORGIVENESS ON THE MENU.

As a mediator, I speak not only with the lawyers but also with the parties beforehand. I try to get the "back story" of the dispute to identify the emotional hot spots. The pain and outrage and sense of injustice are often driving the conflict. Depending on the type of dispute and the character of the parties and lawyers, I may openly discuss with them the benefits of forgiveness. I consider the role the emotions may play in fueling the litigation, and make sure they are addressed in mediation.

With plaintiffs, I make sure that their pain is acknowledge and legitimized not only in the beginning but also throughout the process. It is also important to focus in on when that pain is driving the mediation and getting in the way of resolution. If plaintiffs can see that the defendants may not have had an "evil" intent in causing the harm, or may not have meant the harm as a personal affront, this can help not only in reaching a resolution, but also in providing some peace to both sides.

Practically, I may say in the beginning of a mediation that our goal is to resolve the conflict, which may

require compromise. The focus is not punishment, but on helping all parties move on with their lives.

When representing plaintiffs, I find that I am sometimes tempted to be drawn into the "we good, them bad" mentality. Sometimes plaintiffs want their attorneys to share their outrage, and do everything possible to punish the defendant. I have had numerous clients over 32 years of litigating who wanted a "pit bull" attorney to "go after" the other side for "blood." I must admit, for years I accepted that role and succeeded, in that we achieved what we thought were good results.

In recent years, as I integrate elements of forgiveness into my practice, I find that I listen more carefully to plaintiffs for the hurt they are feeling. I step into it and acknowledge their pain and avoid demonizing the other side. If I can stay focused on what is really in the best interest of my clients, I see that de-escalating the conflict does not mean my client won't "win" the lawsuit. I now refuse to be vicious with opposing counsel. I take thorough but kinder depositions. I know I do not need to personally decimate opposing witnesses on the stand to make my case. In many ways, it is more challenging for me to acknowledge the feelings of my clients and of opposing parties, to focus on making our case, and to remain professional and courteous with opposing counsel.

What does this have to do with forgiveness? It keeps the focus on what is most beneficial to my client. It moves away from punishing the other side, opening up the pathway to resolution. When plaintiffs can acknowledge their hurt and suffering, and keep the focus on themselves rather than on the other party, it will be much easier for them to move on, whether or not the other side apologizes or acknowledges wrong-doing.

FORGIVENESS-INFUSED MEDIATION.

In a neighbor dispute over trees and views, the uphill neighbor wanted her view opened up, but the downhill neighbor refused to prune his trees. He valued his privacy and his heritage trees and criticized his uphill neighbor for not being a "nature lover."

As the mediator, I discovered that the uphill neighbor bought her home because she loved the view of the hillside and felt her downhill neighbor had never been friendly, failing to even greet her when she said hello. She felt that the "tree-hugger recluse" did not belong in what she wanted to be a friendly

neighborhood. She wanted him to remove most of his trees, so that she could have a panoramic view, and open up his yard so that they could interact. She told her lawyer that she was prepared to go to trial and take her chances no matter what it cost her.

We were able to resolve this dispute but only after having several joint sessions with the parties where they were able to explain their positions to one another. It was not just about the trees. This conflict was about each party taking the actions of the other personally. My work in this case was to help the parties depersonalize the actions of the other and have the willingness to let go of the old story about how "bad" the opposing party was.

We did not talk specifically about forgiveness, but I kept in mind some of the elements – especially not taking the acts of other people personally and seeing the other as just doing what they thought was best for themselves. We talked about how the neighbors could live together in peace and that how that might be worth more than actually "winning" the case. We worked on not being offended by the other's actions, and instead collaborated as a team to resolve the conflict.

<h4>Eileen</h4>

SOMETIMES IT ONLY TAKES ONE.

In some cases, only one person is willing to forgive and it can still make a tremendous difference in the outcome of mediation.

A few years ago, I was contacted by a woman who was about to attend a second mediation to negotiate the settlement of a business partnership. Her future well-being depended on the outcome of the mediation and she was scared. Her ex-partner was a wealthy and powerful man, used to getting his way. The first mediation had not gone well and she did not feel her lawyer or the mediator would be successful in negotiating with this man the second time and she feared they would pressure her into accepting a weak offer.

Here, my work as a forgiveness specialist was helping her prepare for mediation. She needed to find her inner strength, which had been beaten down during the partnership. She had to forgive herself for giving

her power away to her former partner, and find acceptance for difficult things that happened in the partnership. In the process, she took back her power and found her voice. When she attended the mediation, she stood her ground and the matter successfully settled that day.

ETHICAL ISSUES.

Forgiveness can raise concerns for lawyers about how it meshes with their professional obligations. On one hand, lawyers sometimes question whether forgiveness falls within the scope of their training and expertise. On the other hand, some lawyers express concern that they will have no work left if their clients forgive.

In our society, lawyers are seen as experts in resolving conflict. They are the ones people turn to for help in resolving difficult conflict. And yet, legal education does not adequately train lawyers to fully address the needs of clients who are beset by difficult conflict. We suggest every lawyer should be conversant in what forgiveness is and is not, and how it can benefit his or her clients. Without this information, lawyers cannot meaningfully assess or serve their clients' best interests, which is, after all, the primary ethical obligation of every lawyer. This doesn't mean every lawyer needs to be a forgiveness expert. But it does mean that in appropriate cases, lawyers should be able to counsel to their clients, help the client make an informed choice and refer them to a forgiveness specialist.

The crux of the matter, however, may be that some plaintiffs "might" be willing to settle for less money than they otherwise would take, once their anger and hostility are defused. Does this present a conflict of interest for an attorney working on a contingency fee basis? You bet it does.

Many years ago, I mediated an age-discrimination case in which an elderly woman lost her job because her position was terminated. She was crushed by feeling unwanted and unappreciated after working 35 years with the company. When this was discussed with the company representatives in a separate caucus, they were adamant that the termination was not personal and was solely due to the business need to terminate the position. They offered to talk to the woman to explain this and they were open to finding her another job at the company. Surely this would be good news for this plaintiff. Yet, when I shared this with the plaintiff's attorney, he admonished me that under no circumstances was I to say anything about this to the woman. To underscore the point, he emphasized: "We are only here to talk

about money." He refused to even discuss it with his client.

Please do not be that lawyer!

For additional discussion of the role forgiveness can play in mediation and ethical issues raised, see Eileen's law review article, The Case for Forgiveness in Legal Disputes, 13 Pepperdine Dispute Resolution Journal 205 (2013), available at (http://www.thepathofforgiveness.com/lawyers/) www.thepathofforgiveness.com/lawyers/.

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The Korematsu Case: Supreme Injustice for 40 Years

OCT 02, 2019

BY STAN YOGI

Editor's Note: In 2017, Stan Yogi, a former staff member of the ACLU of Northern California, wrote the article below, which we reprint in a slightly shorter version in anticipation of MCBA's annual MCLE Fair on November 14th. Dale Minami, one of the lawyers who successfully overturned Fred Korematsu's WWII conviction decades later, is the keynote speaker at the Fair's lunch.

Fred Korematsu was a true hero who willingly took on the huge burden of being arrested, convicted, and imprisoned for his defiance of the WWII Japanese internment law in order to test its constitutionality. The U.S. Supreme Court made one of its greatest mistakes when it upheld his conviction. With the help of Minami and the ACLU of Northern California, Korematsu eventually obtained a reversal of his conviction in 1983, along with a rare apology and reparations in the Civil Liberties Act of 1988, signed by President Ronald Reagan. In 1998, President Clinton presented Korematsu with the Medal of Freedom, and California made January 30th a state holiday in Korematsu's honor—the Fred Korematsu Day of Civil Liberties and the Constitution—the only holiday honoring an Asian-American anywhere in the country. Reviewing the history of this case reminds us that grave injustices occur in our legal system, but with the determination of citizens like Korematsu and lawyers like Minami, it is possible to correct them.

<h4>Fred Korematsu Lessons: The Price of an Executive Order, 75 Years Later</h4>by Stan Yogi

Fred Korematsu is one of my heroes. As a young man, he defied the government's World War II orders forcing Japanese Americans from the west coast into camps. The ACLU of Northern California represented Fred all the way to the U.S. Supreme Court which, in an infamous decision, accepted the government's contention of "military necessity" to imprison an ethnic group.

At the time, many Japanese Americans, including Fred's family, criticized him for challenging the government, leaving him an outsider in his own community.

After the Supreme Court upheld Fred's conviction, he felt as if he had lost his country.

In the post-war years, Fred rarely spoke about his case. Even his daughter and son only learned of it through their high school social studies courses.

Nearly forty years after his Supreme Court loss, researchers discovered documents proving that during the war government attorneys intentionally suppressed evidence favorable to Japanese Americans and argued to the high court that Japanese Americans' loyalty to the United States was suspect, even when they knew that was false.

A team of young mostly Japanese American attorneys provided Fred pro bono legal representation to reopen his case. Their hard work and the government's feeble defense convinced a federal judge in 1983 to overturn Fred's conviction.

He dedicated the final decades of his life to ensuring that others would not suffer the same unfair discrimination Japanese Americans endured during World War II.

He spoke nationally, urging listeners to stand up for Constitutional rights. His message became more vital after 9/11. He lent the weight of his name, with its echoes of the government imprisoning people for looking like the enemy, to 2003 amicus briefs on behalf of prisoners, including American citizens, being held without charges, representation, or trials.

Fred especially liked speaking to students. One of them was me. In 1983, soon after his judicial vindication, Fred visited UCLA. I attended his talk and was struck not only by his remarkable story but by his quiet dignity. He did not have a big personality. But he clearly was a strong man who spoke simply and with the power of someone who had withstood daunting challenges with great humility.

He believed it was important to educate as many people as he could about the United States

government unfairly imprisoning Japanese Americans. In a soft but firm voice, he told audiences to ensure that the government does not strip the rights of unpopular minorities. “Stand up for what you think is right,” he counseled.

His example is all the more timely and important now with threats to Muslims, immigrants, refugees, women, people of color, and LGBT people. Children and youth need to know that it’s vital to organize and fight against unfairness.

Just as we all need to remember to speak up against injustice, as Fred did.

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^{Stan Yogi photo credit Michael Woolsey}

All I Really Need to Know About Mediation I Learned in Kindergarten

OCT 02, 2019

BY GORDON D. MCAULEY, ESQ.

"Live a balanced life."

Robert Fulghum's poem, "All I Really Need to Know I Learned in Kindergarten" reminds us of the guidelines for living a good life in our global schoolhouse filled with other classmates. Arguments sometimes result from forgetting these guidelines. Resolving those arguments, or "lawsuits," often is the concern of a mediator. Mediation offers litigants a way to avoid the expense, unpredictability, and general chaos of facing a judge or jury armed only with the show and tell lawyers think they can sell to their clients' fellow students. Most lawyers who have tried a few cases know that the judge or jury seldom is as "smart" or predictable as the lawyer expected (or told her client). We often are surprised by an outcome that does not meet our very rational and intelligent predictions. In fact, after getting the verdict, about fifty percent of litigants are very surprised and disappointed because the verdict favored the other side. Tantrums often follow those verdicts, "unbalancing" the lives of those involved. This article discusses the basic practices for achieving a successful mediation from the viewpoint of a mediator long removed from kindergarten, and will provide some of his, and Mr. Fulghum's, insights into the process of dispute resolution and how to get along with our fellow classmates. These observations likely will sound familiar to anyone who attended kindergarten.

"When you go into the world, watch out for traffic."

If your client is the plaintiff trying to remedy a wrong, or the defendant looking to patch up the claims alleged against it, litigation is a highly charged, emotional road trip. Imagine the kids screaming in the

back seat for months without end. And, while certainly expensive, the annoyance of litigation costs often is far exceeded by the emotional tolls and detours of extended fighting. Once a lawsuit is filed, a sandbox slight becomes a full-scale tantrum and any prior totally cool relationship with your classmates may never fully recover. The longer the journey lasts and the more roadblocks encountered, the more the financial and emotional investments of the parties and their counsel compel them to seek a final "victory" to justify that investment. Those litigation travel costs are even more wringing when the opponent is an acquaintance, neighbor, business associate, or former spouse. Business litigation also diverts employees and management from more productive pursuits, miring them in discussion of past problems rather than exciting them with the prospect of graduation to new business success.

"Hold hands and stick together."

The wisdom of a mediated settlement has gained such wide recognition that trials now are becoming rare, as are trial lawyers who have tried more than a handful of cases to a jury. A good settlement makes sense and allows the parties to resolve their differences without handing the outcome to twelve classmates picked for their inability to avoid jury duty ("the dog ate my homework" does not work), or excluded because they have subject matter experience that could be useful in deciding the dispute. Thus, the following are observations about what elements contribute to a successful mediation and how the mediator can create the environment for settlement. And, while holding hands with your classmates after a settlement is a reach, the kids might still be able to play together again.

"Wash your hands before you eat."

What makes a good mediator? First, the mediator needs training to be effective. Why training? Isn't being a litigation lawyer with subject matter expertise enough? NO. Being a good mediator takes skills that attorneys lose in law school, and do not develop in a litigation practice.ⁱ For example, it is critical for the mediator, like your kindergarten teacher, to be a careful listener. Litigation attorneys are good at thinking on their feet, but often are bad listeners (your closest classmate may confirm this). They typically are busy thinking of responses to an opponent's courtroom arguments before the opposing counsel finishes her sentence. Many states require mediators to complete significant coursework to become a certified mediator. From your author's experience, every hour of the coursework is important for learning to view a matter neutrally, to suspend judgment, to become a better

listener, and to gain that most essential component for successful mediation (and for kindergarten teachers): patience. In other words, mediation training deprograms our law school training. Mediators need to wash their hands of that law school and litigation experience to be effective mediators.

“Put things back where you found them.”

A mediator must listen not only to what is being said by the parties, but also to what is not being said. The mediator must identify a person’s real, but often unshared, concerns. That is, what really is driving the plaintiff’s litigation or the defendant’s defenses? A demand for money, typical in civil litigation, sometimes is really a plea for acknowledgement that the plaintiff was hurt, or was “right.” Plaintiff often is looking for sympathy, validation, or an apology. An apology can be a powerful contribution to the settlement process. Even if the defendant does not admit any responsibility for the plaintiff’s complaints, an acknowledgement of the plaintiff’s problems often is an important step to resolving the lawsuit. Likewise, a recalcitrant defendant may feel betrayed by the plaintiff, and have significant emotional, as well as financial, concerns that must be addressed before a settlement is possible. Settlements may allow classmates to return to their pre-dispute classrooms.

“Play fair.”

A mediator also must suspend judgment. That is, the mediator truly must be neutral. This is difficult for everyone, but especially for an experienced litigation lawyer who takes sides in every matter that crosses his desk. The litigation attorney weighs every factor to determine how it affects the client’s case. However, the attorney also might unconsciously ignore information if it does not fit within her trial theme.ⁱⁱ If it does not, the attorney diminishes the weight of, or even fails to hear, contrary evidence.

In a neutral, or “facilitative” mediation, the mediator is not there to judge who is right or wrong. Doing so colors the mediator’s view of the case, and may subconsciously affect the way he or she helps to navigate a resolution. Pondering who is “right” creates a conflict for the mediator who is trying to find a prescription to cure the malady of litigation. A good mediator helps the parties decide a successful remedy for the damages alleged in the lawsuit, including any unstated issues that are motivating the dispute. If a party thinks the mediator is being unfair, and biased against that party, the

mediation is doomed to failure. The mediator will get a well-earned “F” on his report card.

“Don’t hit people.”

Perhaps the most critical attribute of an effective mediator is patience. Neutral/Facilitative mediations follow a pattern: they do not settle quickly. Each side believes they are “right” and urges the mediator to get the other side to compromise to achieve a fair settlement. In almost every lawsuit, however, each side has positive and negative aspects to their case. The mediator needs patience to get the parties to acknowledge the “bad” parts of their case when they only want to focus on the “good” parts. Highlighting the bad parts is not judgment by the mediator, but rather a Socratic method to get the party and its counsel to honestly calculate the possible effects of the other side’s arsenal. Thankfully, your author never has been hit after discussing the “bad” parts of a case.

Another reason for patience by the mediator, and especially by the parties, is because compromise is painful, and we all try to avoid pain. It takes time for a party to accept less, or pay more, than they “should.” The mediator needs to understand that compromise is difficult for people and cannot be hurried. Small steps are sometimes frustrating for the parties, but mediators who push for big steps can end up pushing parties right out the door without a settlement.

“Flush.”

A mediator substantially increases the chances of settlement if she creates the environment for specific critical, cathartic stages to happen. Your author begins his sessions by going around the table and asking every participant if they are there to settle the case. Making a public statement of that desire can change the focus of participants from getting free discovery, to looking for common ground. Next, plaintiff needs its day in court. For many plaintiffs, the mediation is their first chance to explain the case to a neutral party. This can serve as the plaintiff’s forum to get it off his chest. This cathartic moment can be the first stage in getting the plaintiff to resolution. Without that feeling of being heard and understood, the plaintiff is less likely to settle the case. For the defendant, this also may be the first occasion to assess what impact the plaintiff might make on the trier of fact. This is particularly important where a claims adjuster is attending the mediation.

"Draw and paint and sing and dance."

Plaintiff's attorney should make an opening statement. This presents a stage for her to demonstrate to her client, and to the opposing counsel, that a competent advocate is handling the case. It also lets her client and defense counsel know that plaintiff's attorney understands her case completely, has analyzed the issues and legal theories, and is prepared to proceed to a successful trial. Likewise, defense counsel needs the opportunity for an opening performance to accomplish these same goals.

"Say you're sorry when you hurt someone."

The final necessary catharsis is for defendant to participate in the mediation, and demonstrate concern about the case. Defendant (and counsel) must actually listen to what is being said by the other side. An acknowledgment by defendant of plaintiff's concerns may help plaintiff let go of the pain, and look for resolution, even if an apology by defendant is not appropriate.

"Play and work some every day."

Whether it is the named defendant, or the insurance company claims adjuster, a decision maker needs to play and work in the mediation: that is, be part of the process. The subtleties of changing settlement dynamics must be experienced at the mediation. Having the decision maker on telephone standby to get only second-hand reports of those dynamics may significantly reduce the chance of settlement.

"Be aware of wonder."

The mediator must project a positive demeanor. When it looks like the parties have gone as far as they are prepared to go, and settlement is still just a remote possibility, the mediator must remain positive and instill confidence in both sides that a solution is available. This goes beyond merely having patience, and requires an optimism that is not the stock and trade of litigation lawyers. The mediator should have faith in the mediation process because he knows that given enough time and motivated parties, mediation produces settlements.

"Clean up your own mess."

These comments are addressed to neutral mediation. There are other mediation models, including the one where a retired judge (school principal) or mean old trial lawyer tells each side that their case is a miserable failure, and only a fool would take it to trial. This is called an evaluative mediation. While that method is sometimes successful, a neutral mediation has the advantage of the parties choosing the terms of settlement. There is far less chance of a settling party's remorse undoing a settlement the day after a neutral mediation, than after having second thoughts about a settlement impressed upon it by an authority figure. Besides, what attorney wants to hear that he cannot properly evaluate a case?

"Warm cookies and milk are good for you. Take a nap every afternoon."

There you have it: kindergarten technology to cure the common lawsuit. The settlement will be on terms each classmate agrees upon. How many students handed a report card (i.e., verdict) can make that same claim? After you settle, treat yourself to warm cookies, milk and an afternoon nap.
<hr><sup>ⁱ In fact, law school training changes the personality and perception of lawyers from what they enjoyed on entering law school. We become more analytically abstract, and diminish our innate ability to deal with emotional and interpersonal contact. Law school trains us to be less flexible, bad at active listening, and to lose our ability to recognize the importance of mutual respect, equality and security, i.e., the soft skills. Guthrie, The Lawyer's Philosophical Map (2001) 6 Harv. Negotiation L.Rev. 145. In other words, we lose our kindergarten skills.
ⁱⁱ The fancy terms are belief disconfirmation and cognitive dissonance. Harmon-Jones, A Cognitive Dissonance Theory Perspective on Persuasion in The Persuasion Handbook: Developments in Theory and Practice (2002).</sup>

Kelley Reid

OCT 01, 2019

BY THE MARIN LAWYER

The Marin Lawyer recently sat down with MCBA Director Kelley Reid, Partner in the San Rafael office of Borton Petrini, LLP.

What is your practice area?

I have been practicing insurance defense trial litigation work for approximately 46 years in California, although when I started, I also represented plaintiffs.

Do you have a particular emphasis?

I have had a potpourri of defense cases, ranging from automobile accidents, ski accidents, river rafting tour accidents, horseback riding accidents, premises liability, products liability cases, medical malpractice defense cases and every other kind of case you can imagine.

Why did you decide to become a lawyer?

Since I was in the fourth grade at Grant Wood School in Cedar Rapids, Iowa, and my father was a claims adjuster for an insurance company there, I had the desire to become a lawyer with the advice (and fatherly influence) my dad gave me.

What is the best thing about being a lawyer?

I think the best thing about being an attorney is that you are able to provide people with guidance on how to resolve their problems in a civilized manner, keeping in mind that it is much easier attracting bees to

honey than to vinegar. And I love meeting people and representing people who have jobs from all walks of life—there's never a dull moment because you're always learning something brand new.

Why do you live in Marin?

Let's put it this way: I did my time in Cedar Rapids, Iowa, raking leaves and shoveling snow, mowing yards and delivering papers, and working in a supermarket. I was one of those kids who walked five miles to school. At Florida State University in Tallahassee, I went through the Air Force ROTC program, came out a Second Lieutenant and was immediately accepted into law school at the University of Florida in Gainesville. I came out a Captain, passed the Florida bar and the Air Force sent me to Castle Air Force Base in Merced, California, where I was an officer with the Judge Advocate General's Office from 1969 to 1972. I met some attorneys who had been practicing law in San Francisco, decided I would take earthquakes over hurricanes and moved to Sausalito when I got out of the Air Force. I met my wife there and we moved to San Rafael and then Ross, where we have lived in the same house for the past 32 years. I love the people here and the beauty of Marin, the easy access to the ocean and to skiing, not to mention the vineyards of Napa and Sonoma.

What do you love to do when you're not busy practicing law?

I joined the San Francisco Rugby Club in early 1972, as soon as I'd moved to Sausalito, and played rugby up to age 49, about 19 years. We played all our games at the Polo Fields in San Francisco and I still hang out with my rugby teammates, still having a good time with one another, singing songs and having a pint or two!

After every bone in my body started aching, I decided it might be in my best interest to keep my body intact, and so after listening to a barbershop quartet at a Mother's Day festivity at the Elks Club in San Rafael, I decided to join the Marin Golden Gate Barbershop Chorus and which I have been a member of now for 12 years.

Tell us about your family.

My wife, Mary, plays the violin in the College of Marin orchestra and in a chamber group in Terra Linda

and is a schoolteacher. I have three sons, Gordy, 38; Robbie, 36; and Jimmy, 34. And I have four grandchildren!

If you could pursue any other career besides law, what would it be and why?

I have always liked giving speeches and being master of ceremonies and, therefore, I think I would like to be in the entertainment world. Being realistic, I probably could be a private investigator, tracking down people, places and things for parties involved in litigation. I've also done a fair number of mediations as a mediator.

Why did you join MCBA?

Since I moved my practice to San Rafael, I wanted to get to know all the attorneys and judges in Marin County.

If you had to pick a single highlight of your career, what would it be?

The thing I am most proud of in my legal career is to have been elected to the Ross Town Council for two terms, from 1990-1998, and being elected mayor of my town on two occasions, as well as to the position of president of the Marin County Council of Mayors and Council Members by my fellow council members from all 11 towns and cities in the County of Marin. I am presently the town treasurer and I have been in that position since 1998. In addition, I'm very proud of serving on many different boards of organizations in Marin County, ranging from the Kentfield Rehabilitation Hospital to the Frank Lloyd Wright Conservancy. All of this goes to giving back to the community, which I think is very important for every attorney.

What hard lessons have you learned practicing law that spill over into your former role as a city council member?

How to compromise and be willing to discuss issues and be prepared to change your mind or alter your decision or opinions from time to time in order to get the job done for the good of the people. I also learned to listen.

What types of books do you read for pleasure?

John Grisham novels, World War II history and Shakespeare plays.

Favorite legal flick?

That's easy: My Cousin Vinny.

Favorite type of food?

My mom's chicken and rice specialty, which my wife has learned how to cook, together with coffee toffee pie (in case your doctor tells you you're supposed to gain weight!)

Go-to drink for those special occasions?

Cabernet or Chardonnay. Maybe a glass or two of Champagne at weddings!

Best way to unwind?

I usually go home and watch all the news programs I can and then watch sports. I attend rugby games involving my sons, go to my wife's violin concerts and sing with my barbershop chorus. Also, all of Ross's picnics, parades and other events and I love the Marin Shakespeare Company and attending their plays at Dominican University's outdoor theater.

What Supreme Court opinion would make a great short play?

The 2001 case of Merrill v. Navegar, Inc., about the 101 California mass shooting and the non-liability of gun manufacturers.

How to Stop Worrying and Start Doing Something About Climate Change with Environmental Forum of Marin

OCT 01, 2019

BY GREG BROCKBANK

In 1972, a group of stalwart environmentalists intent upon averting a future of unchecked development in Marin County formed Environmental Forum of Marin (EFM). Founder Dr. L. Martin Griffin engaged Phyllis Faber, Nona Dennis, Kathy Cuneo and others to convince decision-makers to protect important agricultural lands and natural ecosystems in the county.

My involvement with EFM began in the late 80s, a time of great societal environmental interest. I'd just graduated from law school and started my practice here. EFM is the only environmental organization in the Bay Area to offer a hands-on, comprehensive program in high-level advocacy training with a focus on issues analyses, actionable strategies and effective communication. Called the Master Class program, I couldn't resist.

Every week, we learned an incredible amount about Marin's native flora and fauna, how they came to be the way they are, and the importance of protecting them. The cost was (and still is) quite low, and of course the class members bonded like any school class (Go Class 15!), as we became members of a too-exclusive club of people extremely well-educated in our natural environment. Taught most of each Tuesday for most of the year when I took it (they've since shortened the class considerably, and they now have many classes on Saturdays instead of Tuesdays), it entails either sitting in classrooms (at various interesting sites) or traveling via bus to places that ideally all Marinites should have visited and

learned about, especially in West Marin, such as the Strauss Dairy Ranch. This participatory, in-field seminar gave us an immense trove of knowledge, along with instructions and experience (an advocacy session) in how to use it to make a difference.

A critical component of the Master Class is the design and completion of a stewardship project. Students select a topic and create a goal-oriented project, either independently or as part of a team, and quite a few are mentored by local leaders and former Master Class graduates. Past projects that have motivated real change include the plastic bag ban in Marin County, the Straws Upon Request project, the Marin Open Garden project, the "deep greening" with MCE power of an additional seven municipalities including the county of Marin, the University of San Francisco's purchase of Star Route Farms in Bolinas, and an in-depth look at Marin County's Climate Action Plans. Last month, EFM welcomed its 46th Master Class with keynote speaker Dr. Ellie Cohen, newly appointed CEO of The Climate Center in Santa Rosa and former CEO and President of Point Blue Conservation.

In addition to the Master Class, EFM hosts thought-provoking talks and films year-round. I apparently attended so many of them for a few years that they made me the director of the program, now called the EFM Lecture Series. Recent topics include sea-level rise, land use, transportation and housing, waste and toxins, carbon sequestration, energy efficiency and adaptation strategies to preserve our local ecosystems. Coming up on November 6th is, "Funding Climate Restoration via Philanthropy and Carbon Offsets: Who's Moving the Needle and How Can You Help?" You can register for it (https://www.marinefm.org/event-3563302) here.

Even though EFM has long had only a few hundred members (compared to the thousands of members in the Marin Conservation League and the Sierra Club's Marin members), because only so many people can gradate from the Master Class each year (although that's no longer a membership requirement, nearly all members have in fact graduated from the Master Class), it is considered one of the top environmental organizations in Marin because of the level of knowledge of its members. The kind of people who took the class and became members has changed over the years: it used to be mostly housewives who didn't work during weekdays, and too many of them didn't become activists, but in recent years (decades, really), its graduates have increasingly become impressive environmental activists and advocates, and sometimes professionals. Their contributions during the class and after they graduate are becoming more impressive each year, judging from the presentations of their class

projects and their graduations, which I usually attend.

I'm a firm believer that a major reason we should all do whatever we can now to fight climate change, in addition to saving the planet and future generations from irreparable harm, is to answer our grandchildren when they inevitably ask what we did to avoid the almost-certain environmental catastrophe, and why we didn't stop it. Taking the Environmental Forum Master Class is an excellent way to learn a great deal about our local environment in a relatively short period of time. I sleep better knowing I have that knowledge and can thus better engage with the innumerable environmental issues of today, not the least of which is climate change and the future of our planet.

Marin's November City Council Elections, a Sneak Peek at Our March Primary Election, and Yet Another Look at the Presidential Race

OCT 01, 2019

BY GREG BROCKBANK

Disclaimer: The views below are those of the author and do not necessarily reflect those of MCBA and its members.

<h4>THREE MARIN CITIES HAVE CONTESTED NOVEMBER ELECTIONS IN OUR LAST-EVER REGULARLY SCHEDULED ODD-NUMBERED-YEAR LOCAL ELECTION</h4>You may recall that a new law forced counties like Marin that held local elections in odd-numbered years to switch those elections to even-numbered years (if their average voter turnout percentages dropped at least 5 percent between even-numbers and odd-numbered years), synchronizing them with state elections.

This change has dismayed many local candidates: it forces them to compete with state and national candidates and a few other "larger" local races, such as county supervisor and countywide offices, for time, attention, donations, and volunteers. Voters will probably be dismayed starting next year as well by the overwhelming number of offices they're being asked to consider simultaneously. But it's the law, and 2019 is the last time any odd-numbered-year elections will be held in Marin.

Most elections were already switched to even-numbered years but four city councils took more time. Larkspur is one of them but won't have an election at all because only two candidates filed to replace the two incumbents stepping down.

Here's the lineup for the city councils holding elections next month:

FAIRFAX. Incumbent Renee Goddard (six and a half years on the council), second-time candidate Cindy Swift, and first-time candidate Stephanie Hellman are running for two seats. Goddard and Swift were overwhelmingly endorsed by the only two countywide political organizations that endorse in local races: the DCCM (Democratic Central Committee of Marin), and the MWPAC (Marin Women's Political Action Committee), so we can expect to see those two taking the seats.

SAN ANSELMO. Three-term incumbent Ford Greene, third-time candidate Steve Burdo, second-time candidate Tom King, and first-time candidate Kim Pipkin are the four candidates running for two seats. Burdo was endorsed by the DCCM and the MWPAC ("recommended," officially, as they only "endorse" women), and Pipkin was endorsed by the MWPAC (her voter registration is "No Party Preference," so she wasn't invited to be endorsed by the DCCM).

NOVATO. This is the first election in which council members will have to win in one of the five new districts, instead of at large. There are two candidates for District 1: Susan Wernick, endorsed by both the DCCM and the MWPAC, and Jim Petray – the only Republican of the 16 council candidates filing for the November council races -- who understandably declined to seek the MWPAC endorsement.

In District 3, incumbent Eric Lucan (also currently the Mayor), is seeking a third term and is a well-liked and well-respected veteran, despite still being in his thirties. He was endorsed by the DCCM and recommended by the MWPAC. His opponent, Kevin Morrison, is running for the second time, and once again he's on the attack, distributing copies of his press release calling for his opponent to step down because he claims the city is in terrible shape and has made terrible decisions.

In District 5, where the incumbent didn't run for re-election, there are three candidates (Marie Hoch, Amy Peele, and Mellissa Galliani), all first-timers, all of whom sought the endorsement of MWPAC, which endorsed Amy Peele, who also received the DCCM endorsement.

<h4>A QUICK LOOK AT NEXT MARCH'S LOCAL RACES</h4>This March will see races for Mill Valley, Corte Madera, and Ross city councils, two sanitary districts, and three local judges, but the most excitement will probably be around the county supervisor races. Filing is open from November 12th to December 6th for incumbents; if one or more incumbents fail to file for re-election, the deadline will be extended for non-incumbents only until December 11th.

Supervisor Kate Sears (Southern Marin) announced a month or two ago that she won't be seeking re-election next year, which surprised some, but she's in her 60s and has served for over two terms, and the job can be wearing on even the strongest elected officials. To no one's surprise, three-term Mill Valley councilmember Stephanie Moulton-Peters, liked and admired by nearly all, has announced for the seat, with Sears' endorsement, and will be the prohibitive favorite, although there may be other candidates who jump in, despite slim chances.

Supervisor Katie Rice (Ross Valley and Southern San Rafael), who has also served over two terms but who is a little younger than Sears, is running for another term, and I haven't yet heard any names of potential challengers, although there very well might be. Three years ago she beat a Larkspur councilmember and a former Fairfax councilmember handily, and she will be a strong favorite to win re-election.

Supervisor Dennis Rodoni (West Marin, Corte Madera, and various pieces of Greenbrae, San Rafael, Mill Valley, and Novato) will be running for a second term, and although there will likely be at least one challenger, Rodoni's a strong favorite.

<h4>THE REPUBLICAN CHALLENGERS TO TRUMP</h4>Although the vast majority of interest is on the Democratic side (since despite his problems, Trump is still pretty much a slam dunk to win the Republican nomination), Trump does have three "minor" challengers -- a former member of Congress, and two former governors -- who poll between 1-3%, with Trump at 89% of Republicans.

You have to admire their courage, since Trump is quite vindictive, among his other glaring flaws, and attacks anyone who's not completely supportive of him. You may recall that Senators Jeff Flake and Bob Corker stepped down last year because there was no way they could win their own primaries in

Arizona and Tennessee, respectively, because Trump attacked them after they stood up to him.

Things could change, and one or more of the candidates now challenging Trump might have made a good gamble if Trump somehow collapses under the weight of his too-numerous-to-mention scandals and offensive traits (in fact, I saw an article this morning saying that is happening, as Trump now resembles Nixon in his final days as President), then they will be there and waiting, having filed, if people are looking for an alternative. I think a more likely scenario is that if Trump does collapse under some new scandal, or the cumulative weight of prior ones, or is impeached and convicted, then VP Mike Pence would take over and try to stay Trump's course, and "inherit" his $100M (or whatever) campaign fund, although it may be a little late for him get on the ballot in some states unless Trump steps down or is impeached quickly.

Most scary of all, at least to democracy, is that at least four states have cancelled their presidential primaries so as to spare Trump having to face challengers at all. Since when do political parties playing fast and loose with the rules to favor one member of their party over others take precedence (I almost said "trump") the right of the people to vote for their nominee?

<h4>THE DEMOCRATIC CANDIDATES FOR PRESIDENT</h4>My four prior bimonthly articles this year have all focused heavily on the top five Democratic Presidential candidates, and this one will as well, even though there have only been one to two relatively minor changes in those candidates' positions in perhaps four to six months.

Some wonder why the dozen-plus others below the top five in the polls even bother to continue their campaigns, polling mostly at 1% or 2%, since they rarely get anywhere near or over the "usual" No. 5, who usually polls around 5%. "Former presidential candidate" is a nice part of one's tag line for the rest of one's life, and adding a few thousand (or tens of thousands of) new donors, and national name recognition, for future runs for office are very appealing to many, so many of them stay in the race as long as they can last (i.e., not have their fundraising plummet below their expenses, and/or have their polling plummet).

#5 PETE BUTTIGIEG. When he first jumped in early this year (like most of them), I thought he had no chance, and no business running, since even House members are almost never elected President, much

less a state legislator, so a mayor of a middle-sized Midwest city seemed unfathomable, especially one in his 30s who happened to be gay, which I don't know if the country is ready for or not. I underestimated the appeal of the straight-shooting, articulate, charismatic guy with a dream resume that includes being a Rhodes Scholar and service in the Afghanistan War. Within a couple months, he shot up to about 5th place and 5% in the polls – a relatively meteoric rise – but he's stayed roughly in that position with those polling numbers, give or take a few percentage points, and maybe occasionally passing #4 Kamala Harris in some states.

#4 KAMALA HARRIS. Unlike the top three in their 70s, Harris seems "young" (50s), and perhaps more energetic, but she also has held three impressive elective offices: San Francisco D.A., California A.G., and now U.S. Senator. She generally receives high marks, and is generally perceived as quite progressive, although not as progressive as #3 and #2 above her. Harris is an impressive speaker (maybe not surprising for a 13-year prosecutor) and extremely charismatic. She had what some people (including former San Francisco Mayor Willie Brown, whom Harris dated decades ago) called a Cadillac announcement and campaign rollout, but she, too, seems stuck for months now at her current ranking and polling numbers – maybe 7-12% -- very good, and impressive for a new US Senator, but not moving up fast enough, if at all, it seems, and in fact some say she's dropping recently, and polling 4th or 5th in all-important Iowa, and even here in her home state.

#3 BERNIE SANDERS This a drop of one position for him (after months of being #2 ever since Biden announced some months ago and took over Sanders' temporary #1 ranking), having switched spots with the other very progressive candidate, Elizabeth Warren (who seems to be rising, and is now a lot closer to Joe Biden than she's ever been, or anyone else has ever been). Although she's in her early 70s, she seems much sharper than #3 and #1, both of whom are in their upper 70s, and she provides not only thoughtful and detailed proposed solutions to a wide variety of problems, but also the calm reassurance that she's "just establishment enough," and won't threaten capitalism as much as some fear Bernie Sanders may, whether they are correct or not.

It's not that Sanders has weakened in any describable way (I'm sure all of them wanted and hoped to raise more money than they have), but this an extremely talented top five (and beyond), with the possible exception of #1 Joe Biden, who occupies the top spot by virtue of name recognition, not so much from his 40 years in the Senate as from being Obama's trusty sidekick for eight years. Sanders

still has the killer email list from his last campaign, more donors than almost everyone else put together, and a fanatic base of supporters who can argue articulately that Sanders is best positioned to beat Trump AND fulfill progressives' increasingly fervent desire for significant change in a number of areas. But he's no longer the most likely alternative to the relatively moderate Biden, and has increasingly been displaced in the polls by Warren, who has a growing hold on the #2 spot now, having increased her "approve" rating four points as a result of the September debate, while Sanders dropped one point, increasing Warren's lead in that rating from 2% to 7%. Having a heart attack probably won't help either.

#2 ELIZABETH WARREN. Four years ago I was part of small group trying to draft Warren to run for President, which she ultimately declined to do that year, but which caused Bernie Sanders to wait an extra couple months or so to see how that played out, so I've always been a fan of hers. I supported Sanders for most of this year, but like the opinion of the Democratic electorate, I seem to be shifting (back) to Warren, based on her superior debate performances, thoughtful policy analyses and recommendations, succinct and understandable descriptions and persuasive rationales for those policy positions, and even her daily-or-so emails (I get them from a good number of the candidates) seem less pushy, more matter of fact, and yet enlightening.

Warren could well be the toughest debate opponent for Trump, if he even agrees to do them; he may not. Warren was knocked a little at first for being (I hate this phrase) a "pointy-headed Harvard professor," but I think she's worked successfully in recent months to warm up her public image with her approachable, outgoing personality, and combining policy discussion with personal background at the recent debates.

#1 JOE BIDEN. I've increasingly been describing "Uncle Joe" as a fragile frontrunner, subject to dropping in the rankings and polls if he commits too many gaffes of sufficient severity (his staff even considered recently having him speak less often in public in order to reduce the odds of such gaffes), and his past votes and political positions have also been hard for him to explain sometimes, and sometimes seem out of touch with more modern (read progressive) sensibilities. Ironically, that has not seemed to be much of a problem for Sanders, who has been in Congress for about 30 years, and whose almost always progressive positions inspired progressives three to four years ago, and are doing so again this year, as do those of Elizabeth Warren.

Perhaps most importantly, his policy positions seem to fall short of what most of us progressives want, and it feels doubly troubling to lose the chance we'd have for a progressive President, whether Warren or Sanders, to a candidate who's skating into the nomination and general election primarily on his vice presidency in a still popular Democratic administration a few years ago. But Biden might well be the most likely one to lose to Trump—despite the polls showing him with usually the largest lead over Trump—because of his age and gaffes, which if severe enough could be fatal (which the other top candidates seem less likely to make.)

MCBA Membership Luncheon Report: A Conversation with Retired California Supreme Court Justice Kathryn Werdegar

OCT 01, 2019

BY GREG BROCKBANK

At the September 25 membership luncheon, MCBA was honored to welcome recently retired California Supreme Court Justice Kathryn Werdegar, a long-time Ross resident who served on the Court for 23 years after Governor Pete Wilson appointed her in 1994. MCBA Board member Marie Barnes introduced and interviewed Justice Werdegar.

Justice Werdegar entered law school at Boalt Hall (now the Berkeley School of Law), where despite being one of only two women in the class, she was elected the first woman Editor-in-Chief of the Law Review. When her husband got a job in Washington, D.C., she transferred to the George Washington University School of Law, where she was valedictorian. She then went to work for the Civil Rights Division of the U.S. Justice Department in 1962, during the Kennedy Administration, because of her interest in civil rights.

When she and her husband moved to California, she was taken aback by the lack of opportunities for women in law firms. She commented how circumstances probably directed her where the work suited her well, first as the Academic Dean of USF School of Law, then as a research attorney at the First District Court of Appeal, and then as a senior staff attorney for Justice Ed Panelli on the California Supreme Court. In 1991, Governor Pete Wilson appointed her to the First District Court of Appeal, still very much an old boys' club, where she was the sole woman. Three years later, Governor Wilson

appointed her to the California Supreme Court. She noted how Supreme Court Justice is not a job you apply for and in an unusual move, not repeated since, Governor Wilson made public his list of finalists for the Court, perhaps as a political trial balloon or perhaps as a consolation prize for the runners up.

Well before she took her seat on the high court, it had been shaken up by the "retention" election that failed to retain three of the justices on the Rose Bird Court – which was highly unusual – because of the public perception that too many of them were too anti-death penalty. Then-Governor George Deukmejian, a Republican, had the rare opportunity to appoint three new justices at once, giving the court a conservative tilt for years to come, with a mix of Republican and Democratic appointments since then. Justice Werdegar commented that she believes all of the justices feel that they are interpreting the law rather than making political decisions, noting that of course each of them brings their own life experiences to that task. She pointed out that the California Supreme Court had a majority of women (until she retired), is the most racially diverse state supreme court in the country, and is the most followed court in the country.

Asked about her most memorable decisions (many of which were dissents), she cited the case of Merrill v. Navegar, a gun manufacturer liability case. It arose from the horrific mass shooting at 101 California Street in San Francisco, where a disgruntled client armed with several semi-automatic weapons killed eight people at his law firm. In discussing the case, Justice Werdegar offered some behind-the-scenes insight into the opinion-writing process. She said that the Court has a draft opinion even before oral arguments. She was assigned the majority opinion in Merrill. As is typical, justices make additions or deletions in the draft opinion in order to tailor it to attract particular votes. That process took longer than usual in this case, and oral arguments, which rarely change the outcome of any votes, in fact changed Justice Werdegar's mind, and she ultimately authored the dissent instead of the majority opinion. Statutory law immunizes gun manufacturers from product defect liability but an almost overlooked theory of "negligent marketing" provided the basis for her dissent. She pointed out that this theory recently received new life in a decision in Connecticut, which pleased her.

Asked about the increasing role of technology, she first responded that much of it passed her by, but she did assure the audience that the institution itself keeps up to date and takes advantage of modern technology, even if the older justices rely more on staff.

Asked about the Court's review of statewide ballot initiatives, she said they are always a challenge, because they are often poorly drafted and vetted, and yet one hates to disregard the will of the people and throw them out. Death penalty initiatives have come before the Court several times, reflecting the ongoing division in the state between those who want to abolish the death penalty and those who want to speed it up; in the most recent case, each faction had competing initiatives on the ballot. Since no initiative to abolish it has succeeded, she is certain that we'll continue to see them.

Justice Werdegar also made an impassioned plea for civility, which seems to be diminishing as attorneys (and people in general, especially politicians) increasingly feel like they have to be insulting in order to be seen as forceful. She reminded the audience that we can retain our ethics and dignity, be civil, and still continue to be highly successful.