

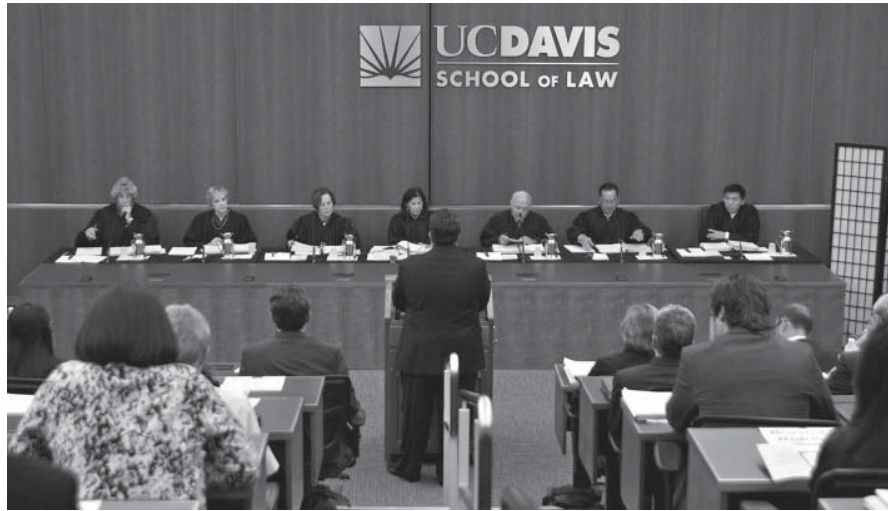
Special Session of the

Supreme Court

Davis, California

October 3, 2012

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WEDNESDAY, OCTOBER 3, 2012
SPECIAL SESSION
UNIVERSITY OF CALIFORNIA DAVIS SCHOOL OF LAW
DAVIS, CALIFORNIA

The Supreme Court of California convened for a special session at the University of California, Davis, School of Law, 400 Mrak Hall Drive, Davis, California, on October 3, 2012.

Present: Chief Justice Tani Cantil-Sakauye, presiding, and Associate Justices Kennard, Baxter, Werdegar, Chin, Corrigan, and Liu.

Officers present: Frank A. McGuire, Clerk; Jorge Navarrete, Assistant Clerk Administrator; and Gail Gray, Calendar Coordinator.

CHIEF JUSTICE CANTIL-SAKAUYE: Good morning. Welcome to the special oral argument session of the California Supreme Court.

For more than a decade, the state's high court has held oral arguments at different venues throughout the state. These special sessions are an important part of our public outreach, and also an expression of our commitment to inform Californians not only about the courts, but also the role of our judiciary in our democracy.

I would like to begin by introducing my colleagues on the bench. They're seated in order of seniority. Alternating between my right and left, to my immediate right is Justice Joyce Kennard. Next to her is Justice Kathryn Werdegar, and to her right is Justice Carol Corrigan. Next to Justice Marvin Baxter on my left is Justice Ming Chin, and to his left is Justice Goodwin Liu.

Also with us today is the Court's very able Clerk/Administrator, Frank McGuire. I believe this is Frank's first special oral argument session.

I'm also particularly pleased to be here at the law school. I graduated from here in 1984 and have nothing but fond memories of my professors and fellow students, as well as deep appreciation for the school.

The school was noted then for its innovative approach to legal education. That hasn't changed.

I read in the paper recently that the school is actually celebrating its 30th anniversary of the Immigration Law Clinic. Congratulations. I remember when I started it was a fledging clinic.

I also have congratulations to a new clinic. I understand that this fall the school began operating the California Supreme Court Clinic, which gives students the invaluable opportunity to work on actual cases pending before our Court. So under the supervision of Aimee Feinberg—Aimee, are you here? Thank you—students will research and write draft briefs on behalf of clinic students and clients. Students enrolled in the clinic will explore California Supreme Court practice and procedure, study principles of effective appellate advocacy, and meet with seasoned appellate practitioners from different areas of legal practice, as the clinic provides pro bono legal services to individuals and organizations pending before the Court. The admirable goal of this clinic—and all the fine clinics in this law school and other law schools—is to make theory practical. In the end, these clinics turn out better students, better practitioners, and all of us from court users to bench officers benefit from this training.

I would also like to single out thanks to Shama Mesiwala—Shama, please raise your hand. Thank you—an appellate attorney for the Third District Court of Appeal, who volunteered her time to help prepare the high school students today in anticipation of oral argument. Like me, Shama is a proud graduate of UC Davis School of Law and represents the public service ethos that pervades this school.

Other notable connections between the law school and the court system include Cruz Reynoso, former Associate Justice of the Supreme Court, who is a Professor Emeritus here. Good morning, Cruz. Senate President Pro Tem Darrel Steinberg, who was my law school classmate. And also alumnus Judge David Rosenberg from the Superior Court of Yolo County, former presiding judge there, now a member of the Judicial Council. I think he is not here, but he'll be joining us for lunch. He's also now a valuable member of the Judicial Council, the statewide policymaking body of the judicial branch.

Of course, it takes an innovative dean to make an innovative law school, and to continue the law school as an innovative law school. It is my pleasure to introduce Dean Kevin R. Johnson. I would like to express the Court's great appreciation to Dean Johnson for his interest in the California Supreme Court

extending the invitation here. Our thanks also goes to the professors, lawyers, law school staff students who worked to make this event successful.

Dean Johnson.

DEAN JOHNSON: Thank you, Chief Justice. I feel odd, if I step back like this, I turn my back on you. So I'm going to be sort of catty-corner here.

I want to welcome the California Supreme Court to the UC Davis School of Law. It is a great honor to have these oral arguments in the Kalmanovitz Appellate Courtroom. This is a new courtroom. So far we've had the Ninth Circuit Court of Appeal. Last week we had the California Court of Appeal for the Third District here. We also had the Attorney General's debate, one and only Attorney General's debate, between Kamala Harris and Steve Cooley in this courtroom, and we're distinctly honored to have the California Supreme Court here today.

We're proud of our relationship with the California Supreme Court, with having Cruz Reynoso on the law school faculty, with having the Chief Justice as an alumnus of the law school, and having our new and wonderful California Supreme Court Clinic.

Today we're joined by many friends of UC Davis School of Law, general public, students, faculty. We also have high school students from Davis Senior High School, the Pioneer High School in Woodland, and West Sacramento Early College Prep Charter School.

Now, I want to take this opportunity to thank publicly the Chief Justice of California, Tani Cantil-Sakauye, who made possible the special session at UC Davis School of Law. We are proud that she is alumnus of our law school, and we also are proud that she's alumnus of a UC Davis undergraduate degree. She's been extremely generous with her time to the school and has regularly come to talk to first-year students about the ethics of the practice of law. She's done this for many years, including last year after becoming Chief Justice. She also was a speaker at our commencement in 2011. And, actually, last year we had Justice Liu come speak at the commencement, and I may be asking another of the justices if they'll speak, because—but I'll save that for later.

Welcome to UC Davis School of Law. Thank you for being here, and thank you to the California Supreme Court.

CHIEF JUSTICE CANTIL-SAKAUYE: Thank you, Dean Johnson.

In conjunction with the Court's special oral argument sessions, today's briefs relating to the cases the Court will be hearing today have been posted online, along with synopses of the issues and the descriptions and the operations of the California Supreme Court, the State's judicial system, so that these materials may be studied ahead of time before today. Students from local high schools, as mentioned, were able to review the materials and discuss them, and they're either here observing in the courtroom, or they are with a local judge or lawyer serving as a mentor to discuss the cases, or they're viewing the oral arguments in their classroom on the California Channel, which today is again broadcasting the proceedings not only to the schools, but across California.

The vast majority of cases, as many as 98 percent of the nation's legal disputes, are resolved at the state court level. The seven justices of our court hope that today's court session will help all of you obtain a better understanding of California's judicial system, and of the rule of law that protects all of us, serving as the cornerstone of our democratic system of government. I expect that someday one of the students listening today, whether here or at the law school or through the broadcast, one, or many, will be at the counsel table prepared to discuss and advance development and understanding of the rule of law, and some day you will be in our seats.

The California judicial branch is in an extraordinary period of innovation and change. Your understanding of the California judicial system and your support of its efforts to improve justice and public's access to justice will be vital to our efforts.

So on behalf of the entire court, once again, thank you for inviting us and for making today's special session possible.

The court will now take questions from UC Davis law students as well as high school students from the area before we proceed with oral argument in the first case. So we invite the first question at this time.

STUDENT: Hello. My name is Richard Andrews. I'm a second-year JD/MBA student here at UC Davis, and this is my question.

During the past fiscal year, 75 of this court's 86 cases were decided unanimously, and the total dissent rate for the year dropped to a century low 2.3 percent.

Are these numbers an anomaly or a likely trend for the future? What factors are likely to have contributed to the court's high rate of agreement during the past year, and is a high rate of agreement desirable?

CHIEF JUSTICE CANTIL-SAKAUYE: Thank you, Mr. Andrews. I'll take that question.

First of all, let me say that looking back at less than the year's full season for the Court's oral argument is probably not the greatest measure of trend or future prediction.

The second thing I would also add is that unanimity is not something that I think can be judged in terms of good or bad for the deliberations or the workings of the court. And the court's decisions and the court's deliberation and thought processes that manifest themselves in opinions can't be counted by pure number count. Because what unanimity fails to take into account, I believe, is the incredible collaboration, accommodation, deliberation, and thoughtful exchange of important ideas that ultimately are carved into and made part of the opinion.

And so when you talk about anomaly or trend, it is too early to tell. We couldn't say regarding the dissent rate. In terms of whether or not what factors contribute to the high rate, again, hard to say after one year together, even less than a year together as a full bench, but also the factors that contribute to the success of the California Supreme Court are the scholarship, the intelligence, the collegiality, the trust and the exchange of information that may or may not lead to unanimous opinions or a thoughtful split or a thoughtful concurrence and dissent.

Is unanimity desirable? It depends on what you look at to your highest court. In my view, it is desirable because the highest court takes on questions of conflict and important issues of law. And we seek to provide clarity and guidance for the California courts, one of the largest courts in the nation, the world's largest law-trained judiciary.

And so is clarity good? Certainly, it provides affirmative guidance, and it provides security knowing the rule of law with the unanimous decisions. So I believe it does provide a useful guide for those who are trying to maneuver the conflict school of law in California.

STUDENT: Thank you.

CHIEF JUSTICE CANTIL-SAKAUYE: You're welcome.

STUDENT: Good morning, Justices. My name is Sofia Cardenas. I'm a senior at Davis Senior High School.

My question is, do you have suggestions for lawyers appearing in your court? Do you have advice for brief writing as well as advice for oral arguments?

CHIEF JUSTICE CANTIL-SAKAUYE: Justice Kennard.

JUSTICE KENNARD: Thank you, Chief Justice.

In writing a brief, a lawyer should be concise and focused on the relevant issues. Longer briefs are not necessarily more persuasive. Also, the writer of the brief should not cloak the arguments in legal jargon which ordinarily are not easy to understand for the average reader. To me, writing in plain English generally helps the reader.

A final point as to brief writing. Every statement of fact in the brief should be supported by citations to the record, and every statement of law should be supported by a citation to a statute, constitution, a court decision or other recognized authority.

Regarding attorney appearances in this court for oral argument, my advice is to look and act like a professional. Looking into the audience today, I notice that everyone looks very professional. The lawyer should be thoroughly prepared on both the facts of the case, as well as the relevant statutory and decisional law.

The lawyer should expect questions from the bench. Instead of showing annoyance, as sometimes has occurred, the lawyer should welcome the opportunity to respond to whatever concerns a justice has raised and have a discussion with the justices, which we hope may help the court in arriving at a decision. Lastly, oral argument is a chance for the justices and the attorneys to engage in a helpful discussion to clarify or shed light on the complex issues in a particular case. That way, oral argument can assist the court in rendering decisions.

To me, what is fair is entirely subjective. The losing party may think it is the most awful decision authorized by the court, and the winning party may think, oh, this is just one of the best decisions ever. It is all subjective.

Do not evade or ignore any questions from the bench.

Recently, I asked the attorney in a case a question. The lawyer responded, “That is not the right question to ask.” I presume the question was too difficult to answer for the lawyer. I then told the lawyer, “Well, just two oral arguments ago a similar response was given by a lawyer to a question posed by my colleague, Justice Ming Chin, and Justice Chin, without missing a beat, said to the lawyer, ‘We get to ask the questions; you get to respond.’ ”

My final point, don’t address the court as “you guys.”

STUDENT: Hello. My name is Kelly Volkar, and I’m a second-year student here at King Hall. Thank you for this opportunity to appear before you.

All law students aspire to have fulfilling careers. Many law students aspire, specifically, to become members of the bench. Speaking as a law student who falls into both categories, what advice could you give me and my fellow classmates regarding various career paths one could take in order to be well suited to become a judge because the path is not obvious?

I was particularly hoping that you could expound on why you chose the path you did and why you did, and whether you did so with an eye towards one day joining the bench.

CHIEF JUSTICE CANTIL-SAKAUYE: Justice Corrigan, how about that one?

JUSTICE CORRIGAN: How about that one?

You know, Kelly, I always worry about people who say from the time I was five years old, I knew I was going to be President of the United States. When I was five years old, I knew I was going to be a cowgirl. Fortunately for me and the agriculture industry, my views kind of evolved on that.

It seems to me that you and everyone would be well-advised when thinking of a career path to choose something that you’re really, really interested in, that you think is going to be fulfilling and important, because you’re going to spend a lot of your time doing it. And chances are, if you pick something that you’re excited about and interested in, you are going to be pretty good at it. And as your confidence in the field evolves, you will get recognized by other people for being good at what you do. If you develop that reputation, I promise you that there are going to be amazing surprises that will come your way in your career.

You know, this is a wonderful country. I don't think that there are many places where a little kid from Stockton or a potato farmer in Oregon or the giant metropolis of Fowler would necessarily be the first person thought of to go on the Supreme Court, and yet here we, and all the rest of us with similar stories, find ourselves. And I can also bet that at age five not one of us thought we were going to be here.

So I guess the most important advice I can give you is don't ever forget where you came from. Don't ever let where you came from get in the way of where you're going, and never let where you're going become more important than who you become along the way. If you do those things, Kelly, you're going to be fine.

STUDENT: Thank you.

STUDENT: Good morning, justices. My name is Daniel Tutt. I'm a senior at Davis High School.

My question is, what steps are taken to ensure that your rulings are both current and resilient?

CHIEF JUSTICE CANTIL-SAKAUYE: Justice Chin.

Thank you, Daniel.

In case you're wondering, I'm the potato farmer from Oregon.

Daniel, your question really has two parts. In the law, we call that a compound question.

You don't happen to want to be a lawyer, do you?

STUDENT: I thought about it.

THE COURT: Well, I'll break it down. You first asked about the steps we take to ensure our rulings are current, and that's a very important part of the work that this court does. Justice Kennard just gave you an outstanding summary of the process, and it starts with a briefing. So in order to be current, that's where we start.

We have outstanding attorneys who practice before the court. They brief the questions thoroughly. They, presumably, look at all of the current

information, cases, and law review articles that are written on the subject, and present them to us in what Justice Kennard described as the briefs. These documents are anything but brief, but they are very helpful to the court in determining what is the current state of the law that applies to the particular facts that are before us.

Justice Kennard also described the oral argument, but in between the briefs and the oral argument, the court does a lot of research and work on its own in order to make sure all the materials that have been submitted to us by the outstanding attorneys are accurate and up to date. After that, we bring everyone to oral argument. We really use oral argument to refine the points in the opinion that are the most important.

Now, let me give you an example of another way that the courts and judges throughout the state keep current.

In this age of such rapid advancements in science and technology, we determined some five, maybe six years ago now, that we were going to have continuing education for judges. The topics include advanced science and technology, not something judges deal with everyday. The first one was done at the Salk Institute, and the subject matter was gene therapy and addictive disorders. The second one was, I believe, at UC Irvine, one of your sister universities down south, and the subject matter was neurology, the study of the brain.

This is an invitation. Perhaps we could have one here at UC Davis to take advantage of the outstanding scientific technology experts that you have in various fields. I was thinking of wine, and maybe a little wine tasting. On the resiliency question, that is also a very important part. We want our opinions to stand the test of time.

How do we do that? That means we look at not just the case that is in front of us and how it will affect the parties that are in front of us, but how it will affect future cases that come before the court. That really is the test of resiliency.

There are many opinions of the court that have been around for centuries. We hope that ours span that test of time, but, again, we live in an age of rapid advancement in science and technology. We have problems that come before us that our Founding Fathers never heard of: Smartphones, computers, all of the information technology brings out, search and seizure issues, and privacy

issues. So as we look at those issues, we have to look at new and understand the technology, which is not always easy, but we always do our best.

Thank you for your question.

STUDENT: Good morning. My name is Alexander Rich. I'm a third-year law student here at UC Davis. I have two questions.

The first is, what are the practical consequences of the state budget cuts to California's judiciary? And, secondly, what has the judiciary done to mitigate those consequences?

CHIEF JUSTICE CANTIL-SAKAUYE: Thank you. Justice Baxter.

JUSTICE BAXTER: Thank you, Alexander. And I'm the one from Fowler, all 2,000 of us.

Actually, the practical consequences of the budget cuts to the state judiciary affects all Californians, especially those who rely on the courts to resolve their differences.

The highest priority of the Judicial Council is access to justice. And court closures resulting from the budget cuts and furloughs seriously impinge on that goal. Let me just give you an example.

In my home county of Fresno, which I think other counties can present similar stories, in Fresno County, as a result of the budget cuts, the Superior Court had to take very drastic action. And that drastic action was to virtually close all of the courts in the rural portions of Fresno leaving open only those in the metropolitan Fresno area.

Now, Fresno is a large county geographically, and you have thousands of acres of farmland. And in the outskirts of Fresno, you have communities some of you may have never heard of before, but communities like Firebaugh and Coalinga, Reedley, and a number of small farming communities that for decades have had courts within their communities. So overnight, those courts were all closed.

Now, if you could picture yourself living miles and miles away from downtown Fresno, this seriously impacts access to justice. The farm worker living in Firebaugh, for instance, who does not have a vehicle and who wants

justice as a result of a dispute or a citation or whatever it might be, simply does not have access to justice as a result of these closures.

Secondly, it has had a dramatic affect on court employees. Many have been terminated. Furloughs are a commonplace, but the work continues. So those that are on the job are doing double duty.

Another practical consequence is the impact these cuts have on attracting highly-qualified attorneys, especially successful, very successful, attorneys in private practice to transition from practicing law to becoming a judge. It is a difficult situation in the best of worlds; it is worse during the climate that we have now.

First of all, the number of judgeships in California lags greatly behind the figures recommended by the National Center for State Courts. So the number of judges doing the amount of work based on the caseload in California is too low. Secondly, the retirement plans for new judges are watered down and aren't nearly as attractive as the retirement plans for the older judges.

So the climate is very, very discouraging for those who would be willing to sacrifice the economics of private law practice to go into the public service and fulfillment associated with serving on the bench.

Now, in terms of mitigation, I'll have to say the Judicial Council, headed by our Chief Justice, has been doing everything possible to keep the cuts at a minimum and to mitigate the consequences; working with judges, the California Judges Association, and judges and justices throughout the state. We have done our best to convince the Governor and the legislative leaders that the judicial branch is a separate branch of government and must be adequately funded in order for the branch to discharge its constitutional obligations.

I say this recognizing that in view of the current economic climate, we must share some of the pain, but there's only so much pain you can share without compromising your basic responsibilities.

Also, in mitigation, we have ongoing efforts by the Judicial Council that's gone through legislation that will create various efficiencies, cost savings, and new revenues for the courts. These efforts include substantial input from judges and court executive officers throughout the state all committed to accomplishing more with less. Specifically, to help the problems, to mitigate the problems associated with court closures similar to those I described in Fresno.

Court rules and legislation are in the process of being adopted for remote video pilot projects in traffic and truancy cases, and e-filing and other technological efficiencies are being advanced and pursued. But the real solution, when you get right down to it, the real solution lies in the rebounding of our economy. That has to occur in order for the cash revenues to increase to the point where the judicial branch can be adequately funded so that we can do our job.

Thank you very much, Alexander.

STUDENT: Thank you very much, Justice Baxter.

STUDENT: Good morning, Justices. I'm Tessa Peters, and I'm from Davis Senior High School.

The California Supreme Court selects only a small number of cases each year. My question is, what factors do you consider when deciding to hear a case?

CHIEF JUSTICE CANTIL-SAKAUYE: Justice Werdegar.

JUSTICE WERDEGAR: Thank you.

As your question suggests, we are like the United States Supreme Court, a court with discretionary jurisdiction, except that there's one category of cases where we have no discretion, and that's the death penalty. From the moment a judgment of death is pronounced in the trial court, that case comes to us. It doesn't stop at the intermediate court. Otherwise, we do exercise discretion. And given the fact that we have, as has been mentioned, the largest judiciary in the world—that certainly includes the federal judiciary—many people are surprised by that—we couldn't possibly handle all the complaints about decisions below. We get approximately 7,000 petitions for review a year. We accept approximately three percent.

Except when we're in oral argument, we meet every Wednesday morning over coffee in the Chief's chambers to vote yes or no on petitions for review. And to grant a petition for review, it takes a majority of the members of the court, four members, to vote to grant.

So what are our criteria? The most prominent and first criterion is if there's an existing conflict among the Courts of Appeal. There are six Courts of Appeal in this state, but each court has multiple, multiple jurists, so conflicts

are inevitable. And if they emerge, it is our duty to resolve those conflicts as the last voice on the issue.

Another criterion is whether the case presents a question of statewide importance as to which there may not be a conflict, but it is important that the highest court, the last word, speak to the issue. An example of that would be after the voters several years ago, I think four years now, passed Proposition 8, which you might recall established an amendment to the California Constitution to say that marriage in this state is only between a man and a woman. As you will recall, the California Supreme Court before that had held, as a matter of state constitutional law, that same-sex couples have an equal protection right to marry.

After our decision along came the proposition amending our Constitution, and it was important that our court decide whether that amendment, purported amendment, was valid. And you probably all remember what we did decide. We decided that it was; that the voters through the initiative process had the power by a majority vote to amend the state Constitution. There was no conflict, but the issue was the kind that we should speak to.

Rarely, but sometimes, we will engage in what we call a “rescue mission.” This is not usually a good idea. It is a case where we see that, in our judgment, an injustice has occurred. The case does not present a question of significant legal importance, perhaps no conflict, but it touches us in some way. We cannot engage in what we perceive to be “rescue missions” too often. There are, as I say, too many cases in the State of California, and the Courts of Appeal are where an injured person has the opportunity to seek redress of an error.

So those are the factors that we consider in deciding to hear a case.
Thank you for your question.

STUDENT: Thank you.

STUDENT: Good morning. My name is Margaret Moody. I’m a third-year law student here at UC Davis.

My question overlaps from my classmate Alexander’s question.

California’s budget crisis is impacting the state court system just as law school tuition is skyrocketing. And as Justice Baxter noted, the economic crisis has left many Californians with unmet legal needs.

How can law students and you lawyers most effectively advocate for justice at this moment? What can we do in our careers or volunteer endeavors

to ensure that the integrity of our justice system not be undermined by the economic woes?

CHIEF JUSTICE CANTIL-SAKAUYE: Justice Liu.

JUSTICE LIU: Thank you, Margaret. Nice question, not only for law students, but indeed for all members of the bar at whatever stage in one's career.

I guess I would tackle your question by just focusing on the aspect of unmet legal needs, which is a more general phenomenon not specific to the budget crisis that we currently face, but something that's with us all the time, and, of course, it is exacerbated by the current budget conditions.

An interesting statistic is that here in California there's roughly one legal aid lawyer per every 8,000 indigent people in California.

I saw on a Web site maintained by UC Hastings an interesting graphical way of representing that, which is that if you were to fill AT&T Park, where the San Francisco Giants play, with poor people, there would be exactly five legal aid lawyers to serve that entire park.

So what that means is that legal aid lawyers, per se, are not going to be the exclusive, or even perhaps the primary way through which people who cannot afford legal service get their needs met, and those needs are many. They relate to the substance of everyday life: housing, benefits, custody, divorce, probate. I mean, there's just many possible interactions of the legal system.

So I will offer the predictable and familiar exhortation, that all lawyers, whatever you end up doing in your career, have to engage in some form of pro bono work. Now, I'll embellish that familiar exhortation with a few other comments.

California does not require attorneys to do pro bono work, but like the American Bar Association, the California State Bar recommends that every licensed attorney do 50 hours of pro bono work a year. I will wager to say that most attorneys don't meet that requirement, nor do they even come close. If you think about it, 50 hours is a week's worth of time in a busy law practice. And one might think about this both from the standpoint of what you like to do as a new lawyer and also from the standpoint of what established lawyers who run these law practices do in terms of creating incentives for people like you to meet that recommended guideline.

I'll add one more thing, which is that although the California State Bar does not require pro bono work, the statutes of California include in the Business and Professions Code in section 6068, a provision directing that it is the duty of every attorney "never to reject for any consideration personal to himself or herself the cause of the defenseless or the oppressed." That's a rather quaint way of expressing things, but if you pause and think about that language, "never to reject for any consideration personal to himself or herself the cause of the defenseless or the oppressed," that's a pretty serious duty. And it is one that's written into our code, and it is one that every lawyer needs to take seriously.

So I would just say that as you take your oath when you become a lawyer, and you do take an oath, you think seriously about what that oath means. And, indeed, every time all of us think about what it means to practice law, we should remember what the oath means, and I think that will be a partial way towards motivating a solution to the problem you identified.

STUDENT: Thank you, Justice Liu. Thank you, your Honors.

CHIEF JUSTICE CANTIL-SAKAUYE: I thank each of the students who formulated questions and addressed them to the court, they were all excellent and probing, and I think we all learned something here today. I hope that our responses provided some insight into the workings of our court system. I know that the justices appreciated your participation and that of faculty and attorneys who assisted in this program.

The Reporter of Decisions is directed to capture the special proceedings on the minutes so they will be included in the Official Reports of the decisions of this Court.

At this time, I would ask that Frank McGuire call the calendar.