

CELEBRATING JUDGE KAY

JAKE DEAR*

Over the past three-plus decades, my wife Maureen (Mo) and I have been privileged to know Justice Kathryn Mickle Werdegar. When I first met her in the mid-1980s, she was “Kay” Werdegar — a standout and very well-regarded staff attorney, initially at the First District Court of Appeal in San Francisco, and then on the chambers staff of Justice Edward Panelli at the California Supreme Court.

When she became an associate justice on the First District Court of Appeal, and then on her elevation to the California Supreme Court, I adjusted. I called her either “judge” (the familiar term used by court staff) or sometimes, given our friendly background, “Judge Kay” — the same term by which our son Adam called her. (Court etiquette note: Unless referring to her in front of a group of outsiders, of course; then, by convention and tradition, I’d default to the formal “Justice Werdegar.”)

Whatever the appellation, over the years I’ve known her she has become an honored and trusted friend. And, together with her engaging husband David, a frequent traveling companion. But this is not the forum

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to describe hiking, dining, and adventures in Nova Scotia, the French and Swiss Alps, and various Northern California venues. So, I'll get to the point and briefly sketch three themes that stand out concerning Judge Kay's twenty-three-year tenure on the California Supreme Court.

First, because she herself had been a judicial staff attorney — and hence personally researched and drafted the various types of internal memoranda circulated within the court as part of the deliberative process — after her appointment as an appellate justice she became rather an inspiration to the court's staff. Moreover, she gained from the staff a special form of respect, which she in turn reflected back. For example, after the weekly petition conference at which the justices consider petitions for review and internal memoranda generated primarily by the numerous attorneys employed by the court's criminal and civil central staffs, the associate justices meet, one at a time and on a rotating basis, with those staffs. Judge Kay was known in these settings to not only engage the staff members substantively on key issues that had caught the justices' attention at the conference, but also to do so personally, by addressing staff members by name. And, having been and worked with court staff, she also brought to bear a certain insider knowledge when considering internal disagreements about analysis regarding matters pending before the court. In these and other respects, she frequently diffused looming or festering disputes by a combination of trademark elegance, sprinkled here and there with a certain blinking, a hand gesture to the chest, and slight gasped whisper, "oh dear." Through it all, she was unfailingly supportive of, and complimentary regarding the fine work of, her own staff — sometimes mentioning, in response to a personal compliment, "well, I have a great staff."

Second, she was an engaged and impressive force at oral argument. Brief background: As a general matter, court staff attorneys don't physically attend oral argument. Instead, we watch a live feed in our staff conference rooms, or we view the internet stream at our computer desktops. One advantage of watching remotely in our conference rooms is that we can comment candidly to each other, during and immediately after argument, about what we see and hear. And one of the things that we often remarked upon when Judge Kay was on the bench concerned how very well she *listened*. It was clear that she rarely walked onto the bench with preconceived questions to ask of counsel. Indeed, this reflected one of her

many strengths as a jurist — she had no agenda other than wanting to help the law evolve in the most natural and prudential fashion. She carefully followed what counsel said from the podium — and then pounced gracefully on the word or phrase that was at the nub of the problem. If and when counsel responded in a fuzzy fashion, she gently but persistently followed up until the matter was clarified, or until it became clear that counsel could not, or would not, do so, at which point, being gracious, she sat back, implicitly invoking the mercy rule.

Third and finally, as alluded to above, she had no apparent agenda. That attribute served her and the court well not only at oral argument, but also throughout the entire process of appellate deliberation and adjudication. And on a practical level, I'm sure it was a welcome feature for each of the three chief justices with whom she served, Malcolm Lucas, Ronald George and Tani Cantil-Sakauye. Under the court's procedures, the chief assigns each newly granted case to him or herself, or to one of the six associate justices, for preparation of a "calendar memo" (a pre-oral argument proposed analysis of a case). Normally a version of that work product, assuming it survives a rigorous gauntlet of internal review, eventually leads to an opinion of the court. In this assignment role, all chiefs have balanced several factors, among them 1) keeping workload relatively even in all seven chambers, and 2) the various justices' particular interest in a given case. At times, and often with regard to a particularly sensitive or complex matter, the chief might put a special premium on trying to ensure that the assigned chambers will produce a document that gets to the heart of the matter as cleanly as possible. Judge Kay was always among the judges who could be relied upon to shoulder such a challenging task.

I'm sure that her colleagues and the court staff miss her presence on the bench, around the conference table, in chambers, and in the halls. I most certainly do as well. But we are all better for her enduring contribution to the court as an institution and to the evolving law — and for the elegant example she set in the process.