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# 'Dismissed With Prejudice': Trial Lawyers Discuss the Role Race Plays in Civil Cases

"We need to recognize that there is an overall systemic problem that we need to continue to address every day," said Walkup Melodia Kelly & Schoenberger shareholder Doris Cheng during Friday's event "Dismissed With Prejudice: A Discussion on Race and the Trial of Civil Cases" which was presented by the American Board of Trial Advocates.

By **Ross Todd** (https://www.law.com/litigationdaily/author/profile/Ross-Todd/) | October 05, 2020 at 07:30 AM

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Clockwise from Top Left: J.D. Smith Law Office of J.D. Smith; John Sweeney, The Sweeney Firm; Teresa Wineland, Kutak Rock; Lish Whitson; Doris Cheng, Walkup Melodia Kelly & Schoenberger and Salvador A. Mungia, Gordon Thomas Honeywell (Photo: Courtesy Photo)

Sometimes it can take a while for things to dawn on you.

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**Walkup Melodia Kelly & Schoenberger** shareholder **Doris Cheng** was among the few Asian American students in her class at the University of San Francisco School of Law in the mid-1990s. After she gave a particularly passionate oral argument in a first-year class where the professor assigned students to argue cases each week, her professor told her he was surprised. He expected her to be "really quiet."

Recounting the memory during a panel discussion Friday, Cheng said that at the time she took the professor's remark as a compliment. But as her career has progressed, she's faced further incidents of stereotyping as an Asian woman: More recently a mediator refused to look at her and instead addressed her first-year associate colleague, a white man.

"We need to recognize that there is an overall systemic problem that we need to continue to address every day," said Cheng during Friday's event "Dismissed With Prejudice: A Discussion on Race and the Trial of Civil Cases" which was presented by the American Board of Trial Advocates.

In court for her, Cheng says that means being aware of the preconceived notions that judges and jurors might have from the get-go and doing all that she can to keep the trier of fact focused on her client's case. She reminds herself of the basics: Stand up straight. Shoulders back. Enunciate.

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But there are cases where more explicit action is called for, she says. Cheng recounted a day of depositions in a case where she represented a 14-year old African American girl who had a brain infection that wasn't timely diagnosed. When defense counsel questioned Cheng's client's 19-year old sister who had just started college, one of the first questions was had the young woman ever been pregnant before. When her 14-year old client was deposed, that question, again, was one of the first out of the gate from the defense lawyer. When the child's mother was deposed, she was asked if anyone in the household was on probation.

"I was so floored, we had to stop the deposition," Cheng said. "Those are things we can't be silent about."

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"How people are treated and whether they are treated with dignity and respect has everything to do with equality" under the law, Cheng said. When confronted about the racist line of questions, she said some of the defense lawyers became embarrassed and others defensive.

"It's not acceptable and it's not OK and you recognize it and you recognize it for yourself as well as for other people," Cheng said.

Friday's wide-sweeping conversation delved into the legal profession's well-documented, dismal track record itself when it comes to reflecting the diversity of the broader U.S. population. But perhaps the most eye-opening portion of the conversation was the discussion from plaintiffs lawyers on the panel about how juries and insurance adjusters approach damage figures in civil cases brought by plaintiffs of color.

**Salvador "Sal" Mungia** of **Gordon Thomas Honeywell** in Tacoma, Washington cited [a 2015 study \(https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2659875\)](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2659875) from researchers at the University of Oregon which found in areas where jurors have more discretion, such as with pain and suffering damages, they award on average less to Black plaintiffs than to White plaintiffs. The research findings—that plaintiffs of color receive 41 cents on the dollar compared to white plaintiffs in such situations—prompted a "Wow!" from the panel organizer and moderator **John Sweeney** of **The Sweeney Law Firm** in Los Angeles.

"If you are clueless about this, you are not serving your clients of color," Mungia said. "You've got to be on top of your game when your client is a person of color."

Sweeney asked the panelists how they would respond if they suspected that a defendant or insurer was offering a low-ball settlement based on their client's race.

Mungia came back with an example: A medical malpractice case he handled for a Black client suffering mild brain damage. Mungia said the damages were going to be capped out by the \$1 million insurance policy because the defendant doctor had died. Mungia said he expected a settlement offer of \$950,000 given the strength of the case, but the insurer came in with an offer of \$150,000 and only ticked that up to \$250,000 in the weeks prior to trial. He opted to take the case before a jury and got a damages award north of \$1 million. Mungia said having a willingness to take the case to trial was key, but he's still unsure if race played an issue in the insurers failed risk assessment.

"Is that the reason they undervalued the case or was it because of the color of my skin?" said Mungia, who is Latino. "Who knows, right?"

**Teresa Wineland** of **Kutak Rock** in Little Rock, Arkansas, the sole defense voice on the panel, said that she perceives a shift from insurers, which have taken steps to make sure that they have more diversity within their own ranks. She said that in her discussions with adjusters about individual cases she defends, the race of the plaintiff never comes up.

"I hope that that's an area that's improving as time goes on," she said.

### Ross Todd

Ross Todd  
is the

[\(https://www.law.com/litigationdaily/author/profile/Ross-Todd/\)](https://www.law.com/litigationdaily/author/profile/Ross-Todd/)

Editor/columnist for the Am Law Litigation Daily. He writes about litigation of all sorts. Previously, Ross was the Bureau Chief of The Recorder, ALM's California affiliate. Contact Ross at [rtodd@alm.com](mailto:rtodd@alm.com). On Twitter: @Ross\_Todd.

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