ORAL HISTORY OF JULIA PENNY CLARK
Fourth Session
October 30, 2018

Ms. Upadhyava: October 30 at the Law Offices of Bredhoff & Kaiser, 5:28 pm. I'm here with Julia Penny Clark. This is Moxi Upadhyaya. This is our fourth session and oral history of Ms. Clark. During the last session, we discussed a few items that Ms. Clark mentioned that she had prepared in the course of her clerkship, and in correspondence, that she had discussed, but actually was lucky – well, I was lucky to receive copies of them in between the last session and this session; so we wanted to discuss them and we will append them to the oral history. I'd like to start with Ms. Clark's resume, which we found, which appears, which she found, I can take no credit, appears to be possibly, I'm guessing dated some time circa 1975.

Ms. Clark: Yes, I'm almost certain, yeah, well, it was the resume I used in applying for a law firm job for when I finished the Supreme Court clerkship.

Ms. Upadhyava: And what Penny and I both sat and thought was interesting looking at the resume today is that the resume reflects her incredible achievements in her distinguished undergraduate career – the fact that she was first in her class at UT Austin, Order of the Coif, and her service on law review, and other accolades, as well as her first two employ – her published note and her first two employers, Justice Lewis F. Powell of the U.S. Supreme Court and Judge Braxton Craven of the U.S. Court of Appeals for the 4th Circuit, as well as her references which I think any person would have loved to have. Justice Powell, Judge Craven, Dean Keaton at UT law school, Professor Ward and Professor Charles Allen Wright of Wright & Miller fame; and these

phenomenal references, achievements, are listed in her resume but we were both talking a little bit about the fact that one of the first sections of the resume, or the first section of the resume, is information, personal information – where she was born, when, her marital status and her height and weight and I just have to ask Penny if you can talk a little bit about whether this was the convention at the time in 1975 and what you understood other people to be submitting in connection with their job applications or their resumes because today, that would not – I certainly would not be putting my height or weight.

Ms. Clark: Neither would I. laughs.

Ms. Upadhyava: I don't even think my husband knows that, so I just, I am really curious to – and frankly, I mean it's not in any way controversial, but I wouldn't be naming where I – I wouldn't necessarily put my birthplace and it's just a really interesting section about your biographical information. I was curious if you could talk a little about that.

Ms. Clark: Well, it certainly was my impression at the time that that was the convention in resumes – that they did include that kind of personal information. The thing that struck me when I read this was that it was in the top line rather than the very bottom. Now, when you see personal information on a resume, certainly an application for a law firm job, it's the very last item, if it tells you that the individual is married, or not married, or what their language skills and hobbies are. It's usually interesting but it's the very last thing. The other thing that I recall is that for at least students at the University of Texas law school, preparing resumes for job applications and clerkship applications – they all had a photograph on them, so that's exactly what I was looking for when I

found this was a copy of the resumes that I had printed for my law clerkship applications from law school, and I could not find that but I do recall having a photograph on mine, as did everybody else in my class.

Ms. Upadhyava: Oh you did?

Ms. Clark: Yes. No, I that was what we did, we would all go and have a photograph taken and I can't even now remember where I had a photograph taken. Nothing comes to mind in the neighborhood of the law school, where I could have done that; but there was a picture because I remember it quite clearly.

Ms. Upadhyava: Well, I have to ask a follow-up question which is the fact that you listed your marital status and your height and weight. I mean, I cannot imagine a scenario in which your height or weight would come up in a legal job interview, but did your marital status ever come up in an interview for a clerkship or a job?

Ms. Clark: Not that I recall. But it was right there on my resume. Laughs.

Ms. Upadhyava: That's right.

Ms. Clark: No, I don't remember anyone ever asking, but I didn't – I haven't applied for any jobs since 1975.

Ms. Upadhyava: Lucky.

Ms. Clark: Yes.

Ms. Upadhyava: Do you know whether the men were putting this sort of biographical information in their resumes? Do you recall whether Judge Bryson had done so?

Ms. Clark: I think so. That's my recollection was that was the standard practice. Everyone did.

Ms. Upadhyava: That's really, really interesting and I had to ask about it because it's really interesting that, you know, now days, all the resumes I see, you're right. At the very end, have some, sometimes concocted personal interests so that someone stands out, but clearly you didn't need any such flourishes on your resume, but yeah, that's just a really interesting convention at the time, so.

Ms. Clark: It is. It's an artifact.

Ms. Upadhyava: Well, we will append that to it as long as you have no objections, we'll append that to your oral history. We also received a letter dated March 15, 1976, which is after Penny finished her U.S. Supreme Court clerkship and appears had been probably a first or second year associate at Bredhoff & Kaiser, although---

Ms. Clark: First year, right.

Ms. Upadhyava: Right. You may have received – I don't know if you received credit for your clerkship when you came in with a different status or that you were a junior associate.

Ms. Clark: I was "the" junior associate in the firm, yes, and at that point, I'd been practicing for three months, so, March 15, 1976.

Ms. Upadhyava: Okay. So it's interesting to me – this is a letter that's written – directed to you, from Judge Craven on the Fourth Circuit and appears after some introductory comments that you had sent him a brief that you had potentially assisted on or worked on that had been filed in the Fourth Circuit and it seems that you had reported to Judge Craven that you liked the work and he writes to you that, "I'm so glad that you like your work. I had all but

despaired of women really liking the practice of law, which has very little to do with whether or not they can do it, but things are looking up." Beginning the first week of January, Susan, who is, as you said, Judge Craven's wife, but-----

Ms. Clark: Yes, yes, Susan Craven.

Ms. Upadhyava: ---"got turned on by participation in a trial and has been turned on ever since. This morning, she is in Bryson City before a federal jury trying to talk them into a verdict in excess of $100,000. The defendant's last offer was $75,000. She works at least a 60 hour week but seems to love every minute of it and previously did not. This is really interesting to me because it appears that at this point, Judge Craven's at least commenting, seeing some sort of shift in women becoming more involved in the practice of law, as well as what clearly appears to have been his long-standing hope that he would see that shift of more women joining the practice of law. It's clear from his letter that he's pleased with this.

Ms. Clark: Oh he was – oh yes, he was very much in favor of women practicing law and generally had the view and expressed the view multiple times that he thought in many respects women would be better lawyers than men. But he was definitely not one to discriminate against women practicing law.

Ms. Upadhyava: Do you know whether the law clerk class after you, did he have more women among his law clerk ranks after you?

Ms. Clark: He certainly had some after I left. I was not the last, but I don't remember any precise names or numbers.

Ms. Upadhyava: Another couple of documents that Penny was able to find is a

memorandum that she wrote to Justice Powell, while she was a law clerk on his staff, dated October 1, 1974. This is a memo, Penny, that I believe is the one you were referencing in our previous session; is that correct?

Ms. Clark: Yes.

Ms. Upadhyava: You mentioned that the purpose of this memorandum was to advise Justice Powell and give a recommendation for how he might tackle the problems of equal protection, cases of equal protection laws applying to women.

Ms. Clark: Yes, that's right. There were several cases that term and he, I assume he asked me to do this, but I doubt that I undertook it entirely on my own because it's essentially a law review article. It's 30 pages, no, 40, 48 before the footnotes.

Ms. Upadhyava: Yes, yes. 54 is what I counted, but yeah, you're right.

Ms. Clark: Yeah.

Ms. Upadhyava: That's including the footnotes.

Ms. Clark: That the idea was to help him have a framework for thinking about the several cases involving gender discrimination that the Court had to decide that term. It may be that some of these had not yet – the petition had not yet been granted. That seemed to be the impression I got as I was reading through it. This didn't, interestingly, this memo didn't deal with *Weinberger v. Weisenfeld* at all, so they must have granted cert in *Weinberger v. Weisenfeld* at a later date, and then we addressed that afterwards, but I don't have a copy of that separate memorandum – at least not in that folder. I might conceivably have one somewhere else.

Ms. Upadhyava: When you found this in your files, when was the last time you had read this?

Ms. Clark: Oh goodness, probably 1974. I had totally forgotten that I had kept it and I just looked in an old folder thinking I might find those resumes that I was looking for and there were two memos on onion skin paper typed with carbon paper that were definitely old memos. I had stashed them away.

Ms. Upadhyava: What was your impression when you reviewed this, October 1, 1974 memo?

Ms. Clark: My impression was that as a law clerk, I knew a lot less than I thought I did. Laughs.

Ms. Upadhyava: Laughs. Why do you say that?

Ms. Clark: I suppose the tone of it comes across as rather overly confident that I figured out just how to resolve all these problems. Laughs.

Ms. Upadhyava: Laughs.

Ms. Clark: I find that as I get older and older I have more doubt about things I used to think were certain, but I did, I still agree with most of what I said here. I wouldn't, I think events have overtaken us in a number of respects and now, 26 plus 18, 44 years since I wrote this, but I think I still have the basic beliefs and inclinations that this memo reflects.

Ms. Upadhyava: There are few parts of the memo that I wanted to point out and get your take on. One overall comment I'll make is that there are portions of the memo where you definitely discussed pending cases, past jurisprudence of the Supreme Court and recommendations that you make based on the standard and the law; but there are also sections where you are discussing the climate, the history of the civil rights movement, the differences between the equal rights movement for women versus the civil rights movement for minorities,

or African Americans, and it appears that a lot of your observations, your opinions, may have been based on your personal experience or possibly your opinion which obviously was borne out of your having reviewed a significant amount of case law and statutory authority. I'm curious to know whether you think that you were probably the only person in chambers who could have taken on a memo like this and given this sort of nuanced overview of the movement itself and opinions as to how to move forward; and if you're too modest to say whether you were, whether you think Justice Powell asked you to do this for that reason?

Ms. Clark: You know, it's hard for me to say. I think, and the chances are good that I discussed this with my fellow clerks as I was working on it. I probably wasn't just totally isolated and not talking with them about their views. I would guess that – and you also have to take into account that to some extent this is colored by the fact that my audience, Justice Powell, had already stated some views in the area and had signed onto some decisions so that clearly I wasn't going to come in and say, I think you should throw overboard everything you've done so far in the area of gender equality and gender discrimination. So the objective was to try to help him think about these new issues as well as the other issues that were likely to be coming up after this immediate batch of cases; and harmonize them with the views he had already mapped out for himself. One of the things to recall is that when he was appointed to the Court, he had a long and very distinguished career in business law. He had very little exposure to Constitutional law of any character, except as it related to taxation, which he had done some of. He had

very little exposure to criminal law, so he made clear to us law clerks early on that he was relying heavily on us to provide for him the background that he would need in any constitutional or criminal law cases, to understand where the immediate issue fit into the broader jurisprudence in that area. He was much more inclined to feel that he could, on his own, work his way through a business law case without special help from his clerks, so I think he must have asked me for this soon after I arrived in chambers. It represents a lot of research and it's dated October 1, so whether he particularly thought that I, as his first woman law clerk, was the right person to help him find his way through a thicket of rather challenging gender discrimination issues at the time, or whether it was the outgrowth of just some kind of random assignment process that I ended up with these cases and then I was the one to write it. I'm not sure. But I, somehow I wouldn't be surprised if it was not random – either because my fellow clerks may have said, oh you should take these cases; these will interest you – not that they would have necessarily thought about them differently, but they may well have been thinking, well, of course you should take the gender discrimination cases.

Ms. Upadhyava: Well, you managed to turn the memo around pretty quickly because you started in August.

Ms. Clark: In August, yes.

Ms. Upadhyava: By October 1 had submitted it to the Justice.

Ms. Clark: Right. And in between that ----

Ms. Upadhyava: ----not enough work to do---

Ms. Clark: ---right. As I was telling you last time, this was a very, very intense job and

there was a lot of work going on in chambers. That was between August and October 1, we were also getting ready for the first conference on cert petitions. The first Monday in October, you come in and you've got a pile of cert petitions up to the ceilings and the court has to vote on which ones it's going to take and we were preparing for the first month of oral arguments, so there was a lot of work going on during that period of time. I see that I cited some law review articles. I am quite impressed that I managed to find time to read them.

Ms. Upadhyava: Laughs. Well, it's really impressive. I have to direct your attention to page 10 of the memo. This is – in reviewing this – there are really interesting, really interesting parts of this memo, but in analyzing the differences between – one of the threshold ideas that you had to explain and distinctions you had to make, or thought you had to make at the beginning of this memo was the difference between the civil rights movement and the movement for women's equality and you make a really cogent argument, you know, persuasive argument for how they are different and one of the primary reasons being that women have been – or have either – if they haven't been directly involved in the political process, they've had access to those who are directly involved in the political process. At least they had more access than oppressed, other oppressed minorities; and in your analysis, you state, and I quote, "the most critical difference between racial discrimination and sex discrimination is that many women still want and need the special protection of sex based distinction. It might be reasonable to take the special protection away from women of my generation. At this time you're about 25, 26?

Ms. Clark: 25, I think. 26 at most, yeah.

Ms. Upadhyava: Who have had much the same educational and career opportunities that men have had. Equal pay laws could take up the slack, but many women were denied the opportunity to prepare themselves for equality. They want and need laws that give them economic protection and it would be unwise, if not unjust, to take their protection away in the name of equality. I wanted to get your thoughts on that comment and looking back on it, what you were thinking at the time, if you recall, and what you think of it now.

Ms. Clark: Well the context of course was that there were many people at the time including now Justice Ruth Bader Ginsburg who are arguing that sex should be determined to be a suspect classification with what was widely regarded as the necessary effect that no gender classifications could withstand equal protection review; so if it's a suspect classification basically, there will be no laws that make a gender classification; and it seemed to me, and I knew from conversations with Justice Powell, that he was strongly of the view that there are indeed differences between men and women which can, and should be, taken into account for certain purposes, but that the law needed to deal with the kinds of things that were – that the Constitution needed to deal with – laws that were intended to keep women from advancing, to keep women from being equally educated and having equal opportunities. One of his daughters is a lawyer and so he clearly had her in his mind. His wife was a stay-at-home mother/housekeeper, not housekeeper – she always had a housekeeper – but house, uh a stay-at-home----

Ms. Upadhyava: A homemaker.

Ms. Clark: Right. She had a very gracious home. She played tennis. She had lunch with her friends. [She also did community work and was on the Board of the Colonial Williamsburg Foundation.] Lovely, lovely person, but I doubt she had ever worked for salary or a wage and in fact, I think it was our first – I think it was the year we were law clerks, she invited the law clerks over to their apartment for Thanksgiving dinner and she told us, this is the first turkey I ever cooked myself. So, in his mind were these two distinct groups of women: the younger generation who were trying to make their way as equals in the world of work and economics and on the other side, the women who had devoted their lives to making homes for their husbands and their children. I was very much in tune with that because my mother was one of those women. She didn't have all the advantages that Jo Powell had but she had given up her career to make a home for her husband and her children, and I felt very strongly that it would be a very poor use of equal protection law to say that those laws that were intended to protect her and women like her, such as social security provisions providing income to widows, that you should take those away in the name of equality when those women had no choice. They couldn't go back and retool as you would retool a factory or a business and say, okay, things have changed. They were past the point that they could then go back and prepare themselves for a career and earn a significant amount of money. So the challenge in the gender area was to say how do we distinguish between those things that are legitimate and that are needed given what our society has done to hold women back up until this point; and those things which would continue to hold women back if you don't change them; and so,

one of the points I made in here – I reread this this morning – was that some of these kind of transitional things really have to be done, not by the courts, but by legislators – that there need to be the kind of refined attention that could say we're going to protect a group of people who have reasonably relied on a situation that has been in place for a long time, while at the same time making sure that this distinction based on gender doesn't hold back women who are in the new generation and ready to move forward. So that was definitely one of the themes of my thesis – that, and I knew that it resonated with him. I knew that it was important to him as well because he recognized that there were many women like Jo , who needed the protections the laws provided for widows who had devoted their lives to making a home for their family.

Ms. Upadhyava: You had – your opportunities – you've received – you thought by that time, given your own experience, that you – things had reached ---------

Ms. Clark: ---an acceptable level. It's interesting because obviously we had a long way to go and we still have a long way to go, so it's not as though the problem was magically solved by – and I don't mean to even imply that----

Ms. Upadhyava: Yeah, no.

Ms. Clark: I think I was probably overly optimistic at that time and I was assuming that things were better than they were, and better than they even are now, maybe, but it certainly – I could see the change as we've discussed before. It was a period of rapid change, women entering professions and entering fields that they had long been excluded from, or at least had been tiny minorities in.

Ms. Upadhyava: Continuing on about the memo, is there anything that stood out to you, that you were, you know, as you were reading it?

Ms. Clark: Oh, quite a few things did, but one of them, again on the gender classification theme on page 16, I was discussing a Utah statute, which required child support for males to the age of 21 and child support for females to the age of 18, except that marriage would terminate it in either case, at a younger age. But the Utah Supreme Court tried to justify the favored treatment of males on the ground that it is quoted as a salutary thing for the male to get a good education and/or training before he undertakes the responsibilities of providing a home for his family, and then women, females, the court said, tend to get married sooner. Since the earlier age of marriage was going to cut off child support in either case, that wasn't a suitable basis for the distinction and I noted the only distinction left is the notion that the state should give males an enforceable source of support up to the age of 21 so that they can educate themselves while the female is left on her own at age 18 because she has a lesser need for education and then I put in, Pardon my outrage! I was clearly not buying the notion that fathers should be able to stop supporting their daughters when they reach age 18.

Ms. Upadhyava: Was this one of the cases that the court was reviewing? Or was this in your – actually I can…..here's what it was. *Stanton v. Stanton*.

Ms. Clark: It looks like there was an appeal pending so this was under the Court's jurisdiction, which was an appeal as of right, from a State Court of Last Resort upholding a statute against the constitutional challenge. I don't recall what the Court did. I would hope they did exactly what I recommended which was simply to reverse summarily.

Ms. Upadhyava: That might be interesting--------I'll have to go back and take a look.

Ms. Clark: --------yeah, it should be reported in that term.

Ms. Upadhyava: Any other thing that stands out – any other parts of the memo you'd like to discuss.

Ms. Clark: Well, one of the things that really struck me because I was discussing racial discrimination in a lot of places as the pattern against which gender discrimination issues should be judged, not necessarily ending up with the same result is that I used the word "Negroes" to refer to what we now call African Americans, and I remembered that Justice Marshall strongly preferred the word Negroes and as he described it, he said, I fought so many years to get people to use the word Negroes, I'm not giving up on it now; and that was when there was a tendency to use the term "black" or "blacks" as a substitute and he really did not like the substitute. So, I think, at least within the Court, there was a tendency to use the word Negroes at the time. You'd have to go back to look at the Court's opinions from that term to know if that's the way the Court, in its public- facing writings, did the same thing. But that was something Justice Marshall had a very, very visceral reaction to.

Ms. Upadhyava: And he had communicated that to other members of the Court?

Ms. Clark: Oh yes, yes. He was not shy about making his preference clear.

Ms. Upadhyava: It's a period piece.

Ms. Clark: It definitely has its time and place in those days when the debate was should gender be a suspect classification. Should everything, every distinction based on gender be nullified and so at least to the extent that my answer was no, I guess I come out on the right side of history.

Ms. Upadhyava: I'd say. Then we have a November 1, 1974, you liked – a memo to Justice

Powell – you liked to give him memos on the first day of every month.

Ms. Clark: Well, because the cases were argued in the first week.

Ms. Upadhyava: Ah, okay.

Ms. Clark: So that would be the reason. This is the case that I mentioned in the last interview of Connell Construction Company. I got some details wrong, as I learned in reading that; and the issues were, as I said in the first line, this is a complex labor antitrust case and when I reread it, it was so complex, I still didn't understand everything I wrote here. (Laughs) But looking back after all this time, I have had many occasions to reread the opinion in my practice for labor unions and I think, as I may have said last time, basically I took too much credit in writing the opinion for thinking I had come up with something new when it would have been simpler and more direct to deal with it without a construct that law clerks love to put out there.

Ms. Upadhyava: Well, thank you for these papers. Like I said, we will add them to the appendix.

Ms. Clark: And we probably should just make a note that the originals are in the Powell archives at Washington & Lee Law School and they are open to researchers along with all of the other memos that went back and forth.

Ms. Upadhyava: Well, I appreciate that because when you sent them to me, my first question before I got the end of your email was whether these were documents that we could release and so I appreciate that we have that liberty. We spoke in the last session about your first several years at Bredhoff & Kaiser and the work you were doing. I wanted to, kind of as a way to discuss, some of the hallmarks of your career here – talk about some of your more notable cases

and one thing I always like to talk about is a person's first, a litigator's or an appellate advocate's first oral argument because I find, at least in my experience, I remember every single minute of it and preparation, the argument itself and the nerve wracking anticipation waiting for the opinion, and then getting the opinion and I wanted to talk to you about your first oral argument and what the case was about and what your experience was like.

Ms. Clark: The first oral argument that I did was in a case called *Cooper v. Kingsville Independent School District*. It was on behalf of a classroom teacher, Janet Cooper, who was teaching middle school social studies, and Kingsville is in Texas near the King Ranch, Kleberg County, which Kingsville is the county seat of. It's the location of the King Ranch so it's a lot of open range, very western and southern. She was doing a unit on civil war reconstruction and she had a teaching device that was called the Sunshine Simulation. She assigned roles to the various students in the class and some of them were northerners doing reconstruction. Some of them were white southerners and some of them were former slaves. The community erupted. That was – the parents of the students who were assigned roles as slaves were outraged.

Ms. Upadhyava: To a person.

Ms. Clark: Well enough of them that it came to the attention of the school board and she was fired. Now they had a kind of a flimsy excuse that there were some other complaints about her, but those were all extremely minor. She was a member of the National Education Association, which is a union of teachers and one of the programs they have had for many years is called the DuShane Fund, which funds First Amendment and due process litigation on behalf of teachers who

have had their constitutional rights denied. For a long time we did a large number of the appeals in those cases. Someone else would try the case and then the appeal would come to us if it was approved – if the people running the DuShane Fund concluded there was enough merit, that it ought to be one of the ones to be financed and then we, there were two other law firms that did the DuShane Fund appeals, but we had a pretty steady flow of them for a long time. The union now does these mostly in house with a very good legal staff there. But at the time, we were assigned to the *Cooper v. Kingsville Independent School District* case on First Amendment grounds. This was a teacher who was teaching and she was exercising her First Amendment rights within the bounds of the curriculum and she was fired for it. So, a very good trial lawyer tried the case and won it at trial and the school district appealed so this was to the Fifth Circuit and I must have spent hundreds of hours writing that brief. It was sort of my only focus at the time and I researched every conceivable issue that might come up. I can't remember now if there were procedural issues as well as the First Amendment issue. The First Amendment issue was clearly the main issue. When it came time to argue it, I remember being in New Orleans the night before the argument, and practicing my argument over and over again in front of a mirror. I must have been up until midnight just doing my – I was of course petrified with fear and nervous tension – and I don't remember a thing about the argument itself. But when the Court had finished its thinking about the case, they came out with an opinion in favor of the teacher and they ordered the school district to reinstate her to her position, pay her back pay and pay her attorneys' fees. I do

remember my one occasion ever having to testify in a courtroom was in support of the attorneys' fees. (Laughs) Several years later, but I remember that it was a good one. We had others. My favorite of all the DuShane Fund cases, which was one that I was unable to argue because of a scheduling conflict and I had to turn it over to somebody else. I think I had written the brief. It was in Kentucky. It's in this list. Let's see if I can find the name quickly. It was – well, I thought I had marked it, and I probably did but now I don't see it. It's *Banks v. Burkett*. That's it. *Banks v. Burkett*, Sixth Circuit. And this was a teacher who had the bad judgment to campaign against the wrong candidate for the school board and when his candidate lost, he was suddenly transferred. He wasn't fired. He was transferred to a place that was about an hour and a half drive away, over the mountains and this, and I swear this is true. The name of the place to which he was transferred was "Kingdom Come". They sent him to Kingdom Come and I really, really wanted to be the one to do that oral argument but somebody else had to argue it. We won it, so he was also ordered reinstated to his job near his home where he wouldn't have to drive over the mountain every morning no matter how rainy or icy it was. So he was brought back from Kingdom Come.

Ms. Upadhyava: Oh my gosh.

Ms. Clark: But we had a steady flow of those and they were a lot of fun.

Ms. Upadhyava: Now how is it that as a fifth year, a fourth year associate, you were able to argue a Fifth Circuit appeal.

Ms. Clark: Small firm. And a lot of appellate work, so that was, I would think it was relatively standard for us at the time that people were actually on their feet

arguing appellate cases in their first few years at the firm.

Ms. Upadhyava: Did you feel after the *Kingsville v. Cooper* case, did you feel that you had done a good job isn't the right phrase. Were you happy with the actual oral argument that you gave?

Ms. Clark: I'm sure I came away, as I have after every single argument that I've ever done, thinking there was at least one question that I could have answered better. But I don't remember that specifically from that one case. I just don't think I've ever come away from an oral argument without thinking that I've missed an opportunity – that there was something I could have done better.

Ms. Upadhyava: How did your clerkships on the Fourth Circuit and in the U.S. Supreme Court shape the way you approached your preparation for these oral arguments?

Ms. Clark: Well, I definitely had a good sense of what works in oral argument and what doesn't. I knew point number 1, do not read your argument. I knew that I needed to be prepared for the hardest questions with the best answer that I could think of ahead of time, not trying to do it all on the fly, and I had a pretty good sense that within those bounds, if I prepared, if I knew my record and I knew the case law that applied to the issues the parties had briefed, and then I thought about are there any other things that are kind of lurking out there that the Court may want to know, even though the parties didn't brief it, then I would be prepared and that's sort of, that's informed all of my arguments ever since.

Ms. Upadhyava: Okay. Well, there are two Supreme Court cases that you argued. I'm happy to go to those, if you like, unless there is another argument or case that you,

along the way, want to discuss, that you've handled before you got to those two cases.

Ms. Clark: There were a lot of them actually. I've done – I was counting them on this list – more than 30 appellate arguments of which I count only 7 to be losses. Two of them were sort of either a split verdict or a split ruling so we won on some things, lost on others, or it wasn't entirely clear who won. Yeah, it is remarkable; and I've done nine or more trials, all of them in federal court, plus some trials of arbitration cases. So, to kind of round it out, for the last 30 years, almost 43 years. I've also had a very substantial practice counseling employee benefit funds, so that I always felt I had the benefit of I was a person sitting at the trustee table who not only knew the law, but I also had a good basis for judging could you win this in litigation if the issue came up. That's kind of unique. Most employee benefit lawyers are either litigators or they do the counseling work and I'm one of the very few who has done both and I always thought it helps me on both sides. In litigation, I understood the decision-making process; and sitting around the table with trustees, I was able to say to them, you really should do X because you'll never be able to persuade a court that Y is the right answer. So, it's been a busy practice but there was a whole complex of cases in the late 1980s and early 1990s that were known in the office here and by a lot of other people as The *Evergreen* cases, which involved the United Mine Workers pension and health benefit funds. There was a contract clause that had been negotiated in 1978, which essentially said as long as the Bituminous Coal Operators Association, which was the big multi-employer association at the time for coal employers. As

long as the association is party to a collective bargaining agreement that requires contributions to these benefit funds, the employers who have signed onto the funds must stay and must contribute at the same rate as the Association has agreed to. But there was a period of time when lawyers for the fund were somewhat skeptical that that clause could possibly mean what it said, or could be enforced if it did and so it fell into disuse and it didn't spring back up again until the Pittston Company went into a long strike in1988 and everybody said we can't let Pittston leave this fund; it's a very big coal producer. Somebody said, we've heard rumors that this clause over here is something that would make the employer stay in the fund. They came to us. We hadn't been representing them on anything else. I guess they thought given the history of other people ignoring or being skeptical on it, they wanted to get a fresh opinion and we took a close look at it and said, yeah, it certainly seems to say what you think and we don't see any reason why it shouldn't be enforced. We embarked on a long period of litigation to enforce that clause, which we won on summary judgment in Judge Hogan's court and then managed to multi-district a whole bunch of other cases into his courtroom. We went to oral argument in the D.C. Circuit, which would have been around '94, '93 or '94. What I recall from that argument, which was really a very good one, we were the appellee and so, as is always the case when you're the appellee, the other side files a reply brief that you don't get to respond to. In the reply brief, the lawyers on the other side had dredged up a bunch of cases that really didn't have anything to do with our issue, but they were presenting them as dispositive cases and I'm preparing for the oral

argument and I'm thinking somehow in my 15 minutes I'm not only going to have to make my affirmative case, but I'm going to have to explain why it is that these three cases don't do what the employer says they do. So, I'm sitting at counsel table and up comes the employer's lawyer and he hadn't gotten three words out of his mouth when Judge Edwards, who was the presiding judge, said, you have cited these three cases. They have nothing to do with this case. I'm sitting there going, "oh yes, yes, yes, yes, yes." Laughs. It went uphill from there, so it was one of those wonderful, wonderful moments when the court has seen through a ruse that the other side has come up with and it's a delightful experience, one of my best. That litigation carried on for several years after we won the Court of Appeals decision. There were other Court of Appeal cases. There were other District Court decisions. Ultimately the Funds collected something on the order of $170 million as a result of our efforts in supporting that clause.

Ms. Upadhyava: I'm sorry, go ahead.

Ms. Clark: No, go ahead. I'm done.

Ms. Upadhyava: At this time, are you, as you're giving – do you remember what year you became partner?

Ms. Clark: '81.

Ms. Upadhyava: Okay. So, a quick five-year trajectory from----

Ms. Clark: ----which answers the question, did I have credit for my clerkship years? That was the answer.

Ms. Upadhyava: Laughs, yes. Or, you know, they just didn't want to lose you and wanted to make sure you made partner. How is business development coming into all

of this? How are the cases coming into the firm? Did you have participation, in that did you bring these cases into the firm? Or was it that you had some institutional clients who may be the NEA or from the DuShane Fund that were providing these really high quality, interesting cases.

Ms. Clark: The core of the law firm's work has always been the large institutional clients. The United Steelworkers of America, the National Education Association were the two largest at the time I joined the firm. There was one other which was called the Industrial Union Department of the AFL-CIO, which was effectively the old CIO under the AFL-CIO umbrella. It was a slightly smaller volume of work, but primarily it was Steelworkers and NEA. Initially, that made up nearly all of my work. There was plenty of work to do for those two clients and a few smaller clients that I worked on, but starting fairly early, I would get calls with some one-off case that somebody would want me to work on, so I was bringing in little dribs and drabs of business over the years. Like all successful practices that line has sloped upwards, so at this point, I get calls from people who want me to represent them and then the work is coming to me and I parcel it down to younger people who worked with me and for me. There was just a gradual progression over the years as my work came to be known and my clients would talk to other clients or people would see me in certain areas of litigation. My focus since about the mid-80s has been work for multi-employer pension and benefit funds and it's not exclusive, but that's been a large majority of what I've done and I think that's where I'm best known. So in 2010 or maybe 2011, a group of multi-employer funds, pension, health and 401k plans came to me and said, we lost a lot of money in Madoff

investments and we've got some litigation going, most of it in groups of other clients against the bad actors in the matter, but we really think that we need to have somebody look at and advise us whether there are other people out there who we ought to be suing on our own and so that led to a large volume of work that we did for those funds and ended up recovering a significant amount of money for them, in addition to what they recovered from other sources. That was fascinating work. We dug into the whole, all the details about how Bernie Madoff got into this Ponzi scheme, from being a very well respected broker, President of the Stock Exchange, and Chairman, whatever the right title is, whatever he was, and how it had gone undetected for so long, which was fascinating. So the kinds of details – like I go from the coal industry and how the parties negotiated their collective bargaining agreements for contributions to the health and retirement funds, and then Bernie Madoff's Ponzi scheme and lots of other things in between. It's been a wonderful variety of things.

Ms. Upadhyava: Was there an expectation that I'd say when you first became partner and then as your career has progressed to today, has there been an increased pressure on business development. I found litigation and business development, it can be difficult and have heard that from many others who are in litigation. Or did you find that people generally found you, based on the work you've been doing?

Ms. Clark: More the latter. We always had these stable clients, which most of the time brought in enough work to keep the lawyers who were here busy and so nobody was ever saying, you need to be going out and generating work. I

mean there were a few things we did like they would ask me to make a presentation to, there's a whole organization of lawyers representing labor unions, for example, and I was regularly asked to do a presentation of some sort or another at one of their conferences, so that the lawyers who were making decisions about hiring outside firms for their labor union business would see me there and bring work. In fact, there was the one case that I got from that which was I can't even remember what the presentation I did was. I don't think it had anything to do with this, but the New York Transit Union represented subway workers, had gone on a strike. This was probably their last actual strike in the early 80s, '82, maybe and they got sued by a couple of law firms that said we incurred damages because you were on strike. We had to put up our employees in hotels and we had to pay for limousines to bring them to work and so we're suing you on behalf of a class of all the businesses in New York City for all of the damages that all the businesses in New York City suffered for however long the strike was, 3 days or something like that. For that purpose, I had to learn all about a New York state doctrine called the Prima Facie Tort, which I had never heard of before, and essentially it's often described as the Court thinks it's bad; therefore it's a tort. But it's not quite that simple and I spent, and I remember this was the summertime because it was deadly hot, in the dustiest parts of the Justice Department Library digging through really, really old New York Court of Appeals volumes and finding what there was, like Justice Cardozo and opinions that went way back like that, about the limits on the prima facie tort. I didn't argue that case. The client

argued that case in the New York Court of Appeals but we won it, so the lawsuits were dismissed, no damages. So I mean, these kinds of things would just kind of drop down like a manna from heaven, at various times, like I would do these conferences but there was never a lot of pressure to do it and I think primarily it was just referrals either from clients that were satisfied or people would see my work and would come and ask me to do things. In '93, the autoworkers' union came to us. We'd done some work for them now and then over the years, but they'd never been one of our steady clients. They came and asked me to do a case involving a lawsuit against Navistar International, which makes big tractor trailers – not really tractor trailers, like construction equipment tractors – those sorts of things, and their retiree health benefits. We did some litigation – well, most of it was about venue, fighting over where the case was going to be litigated – and then the parties reached a settlement, which I can't take any credit for. It was a class action settlement on behalf of all the retirees and we had to get court approval; so not only did I have an argument before a very good judge in the southern district of Ohio, who I've seen several times since then, Judge Walter Rice, but we went on a dog and pony show to the cities where most of the Navistar employees were. In one place, they rented this huge arena and we were up on the stage explaining the terms of the settlement in an effort to persuade the retirees to not object, I guess is the way you would have to put it. But that led to a long stretch of work for the auto workers on other retiree health cases, including the last trial that I did in 2010, a jury trial in Abingdon, Virginia, for Volvo truck assembly

workers. So, these things, you know, you get one thing and then over time, it would turn into a lot more activity and it's been nice.

Ms. Upadhyava: Yeah. Very interesting cases too, which you don't always get – that's the really interesting part.

Ms. Clark: That's right. They are very interesting cases, very interesting cases and----

Ms. Upadhyava: So, Penny, you had mentioned there was a trial that you had participated in that you wanted to discuss.

Ms. Clark: Right. This is a – in 2010, it was for the autoworkers representing a class of retired truck assemblers. They worked at a Volvo truck assembly plant that is in Dublin, Virginia, way out in the western stretches of Virginia, and the trial was a week long. One of my class representatives whom I was … there were probably five retirees, that were class representatives … and one of them was a very large man, like, 6'7", 6'8", maybe a couple hundred pounds, really still very strong, even though he had been retired for several years. After the jury came back with the verdict in our favor and everybody pretty much left the courthouse, there were still some retirees around. This one client said to one of his friends, he said, "You know, he says, she can't build a truck but she's a pretty damn fine trial lawyer". Then I came back here to my office I got a call from a woman who was one of the retirees who wasn't a named plaintiff but she had been one of our kind of liaisons to people; helping find witnesses and the like. She said, I just have to tell you this. She said, all this time you've been coming out to the local union and meeting with people and getting ready for trial. I had one associate working with me and she was a second-year associate, so it was – and the paralegals were all women – so it was an all-

female trial team. And she said, "I heard a lot of grumbling. Why did the international union send us these women to represent us; and they were all very skeptical that you guys could do the job". She said, "I was in the courtroom when you gave your opening statement and when we went out and took a break after that, somebody came up to me and said "Wow, she knows everything". And she said, "I haven't heard a single complaint since then." So, my takeaway from that is sort of back to Boswell's dog, which is people are surprised when we women lawyers can do anything at all. They don't expect us to be really good. But when we're really good, it blows them away. So here we are in this tiny corner of rural western Virginia. There are at least now a few dozen, a few score, we had a lot of people in the courtroom over the course of the trial…so maybe a couple of hundred folks who know that women lawyers can do a really good job for them. So, you know, I feel like that kind of experience makes it easier for the next woman lawyer who's going to go in and represent people in that area. But at least the ones who are in the courtroom and who knew that we … that our all-female trial team managed to beat the pants off that all-male trial team on the other side of the courtroom and preserve their retiree health benefits.

Ms. Upadhyava: And this is in 2010?

Ms. Clark: This is in 2010, yes. Yes.

Ms. Upadhyava: Well, I will surmise that I've served … that I still think that a trial bench … that the bar of trial lawyers is still heavily male dominated. But, you're right. I've had the same experiences when I've had a good day in court and … you're right. It's almost a war won really on these singular battles and

moments.

Ms. Clark: Yeah, individual accomplishments and in public so that people see that women lawyers can be just as good as or better than the men. So, anyway, I just wanted to pass that along.

Ms. Upadhyava: And, I appreciate it.

Ms. Clark: But, you had asked me to talk about the Supreme Court cases?

Ms. Upadhyava: Yes.

Ms. Clark: I'm going to start with the one that should have been my first Supreme Court case but wasn't. *Goodman v. Lukens Steel* which was a case I tried in Philadelphia probably in 1981 or thereabouts. It was about a 32-day bench trial; and then I argued the Third Circuit appeal and the Supreme Court granted cert on our petition and … actually, I guess it was the plaintiff's petition but we cross-petitioned on our issue, and they were both granted. It would have been mine to argue except my first child had the bad judgment to be born the week before the argument. So, I wasn't about to try to prepare for an argument for a Supreme Court case a week after giving birth. I'm sure there are some women who are tough enough to do that, but I didn't think it was a good idea. So, I sat at counsel table and participated as a first chair to the lawyer who actually argued it. I passed him notes and corrected him at least once when he misstated the record.

Ms. Upadhyava: A week after having your first child?

Ms. Clark: Yeah.

Ms. Upadhyava: You were sitting at counsel's table?

Ms. Clark: Yeah, I was. My mother came and she took care of the baby while I

went to court.

Ms. Upadhyava: Okay.

Ms. Clark: But, the first case that came to me actually to argue was *Beck v. Pace International Union* in 2007. To say that it was a highly technical pension issue is an extreme understatement. But the gist of it was that an employer wanted to terminate its own defined benefit pension plan and purchase an insurance company's annuities to pay those benefits in the future. The union tried to persuade the employer instead of purchasing annuities, to merge the assets of that plan into a multi-employer plan where the employees could continue to earn more benefits. So, for instance, you take somebody who's maybe got 10 years of service, their benefit is going to be very small. If they can continue earning benefits then when they came to retirement they would actually be able to retire with a decent pension. The employer wasn't interested – simply said no, and the union sued. We weren't even involved in any of this. The union sued in California to get a judgment to say that the employer had breached a fiduciary duty by not even considering that possibility of the merger; and, they won it in the Ninth Circuit, at which point the Supreme Court granted cert. The client, which was the Steelworkers, the union Pace was the paper workers, which had merged into the Steelworkers somewhere about that time. The Steelworkers' general counsel knew why the Court had granted it. It was a total one-off case. It was a unique case and there was no conflict in the Circuits. There was nothing except there were at least four justices of the Supreme Court that thought this was wrong and by God we're going to fix it. So the Steelworkers' general counsel hired us to do

the Supreme Court brief and argument and asked specifically if I could do it, and bless his soul, he said "We don't expect to win this case." He said, what we want to do is to, at all costs, preserve the ruling of all of the Courts of Appeals that when an employer is trying to figure out what to do with the assets of a pension plan that it is subject to its fiduciary duty, it has to make those decisions in the best interest of the people who are benefitting from the plan, which is a pretty important ruling. It means that if they were then going to go to that insurance company and buy annuities, they would have to make sure the insurance company was a solid insurance company, that it wasn't just the cheapest bid for the annuities. So, that took a lot of pressure off me. I mean, here we were briefing and arguing this incredibly technical issue on a sub-sub-subsection of ERISA and many opinion letters by the Pension Benefit Guaranty Corporation that sort of tangentially had some relevance to it. As it turned out, we ended up with a major *Chevron* deference question, and Justice Scalia was still alive and he was really big on Chevron deference. So, we wrote the brief and I prepared for argument with the total intent of yes I want to win this case if at all possible. Just affirm the Ninth Circuit; it's okay. But also knowing that my client was not going to be devastated if we lost as long as we could preserve this legal principle that they were most concerned about. So, it took a lot of the pressure off being my first Supreme Court argument; and, the main thing I remember as I was getting ready … I went over the day before my argument and listened to some totally unrelated arguments, just because it had been a number of years before I, since I had been at the Supreme Court for any oral argument; and I just wanted to kind of get myself

back into that atmosphere. I remember thinking I wasn't nearly as nervous as I had been just a couple of years before when I was going into the Fourth Circuit to defend a jury verdict on behalf of a different class of retirees, a class of retired rubber workers. That was really fresh in my mind at that time, and I had been just absolutely terrified because in the Fourth Circuit you don't know who your panel is until you show up the morning of the argument, and there were still plenty of conservative judges who could have been on my panel; and judges are surprisingly resistant to these retiree cases, and so … I had come to really, really love my retirees when I was trying the case in North Carolina. It was a two-week trial and they were there for us every day bringing us home baked zucchini bread and hugging us in the hallways between, when there was breaks, and I really, really cared about those retirees and I really, really cared about the outcome of that case and I went into that argument terrified. I went into the Supreme Court argument just nervous. It was a big difference, and to me, the biggest difference was just that there were nine of them, and I knew who each of those nine was, and I had a pretty good idea where each of them was coming from, compared to the Court of Appeals where you walk in and you find out the panel the morning of the argument and you get three names to put with faces, but you don't really know the jurisprudence that each of those judges represents. So, there's a lot more uncertainty in the Court of Appeals argument. With the Supreme Court, you know pretty much where each of them is coming from, and I thought I did quite well at the argument. I, the questions came rapidly and I fielded them all. There was one when Justice Breyer asked me a question and it wasn't one that I had anticipated, so I was

sort of turning over in my head, what's the best answer to this, and he leaped in and said, "I knew it; you wouldn't be able to answer that question." I just smiled and said, "Justice Breyer, I was just trying to make sure that I understood the question before I started to answer it." I thought why would he be "I knew it, you wouldn't be able to answer that question." As it ended up, I lost nine to nothing, but Justice Scalia who wrote for the Court said that I made my clients' position seem almost reasonable and we preserved the fiduciary principle that the client cared about. So, I counted that as a victory in a case they had granted for the clear purpose of reversing the Ninth Circuit. That was the best I could come out of that case with.

Ms. Upadhyava: Sure.

Ms. Clark: The second one was harder. I'm not going to say we lost it because in a way we won it, but Courts of Appeals have taken it the wrong way. I think that is the fairest way to put it. But, it's *M&G Polymers v. Tackett*. There was a split in the circuits for about 25 years on the legal standard that would apply in determining whether a collective bargaining agreement was intended to create vested health benefit rights for retirees. So, there's a theme. This is the theme for both of my Fourth Circuit trials had been that very question. Did these collective bargaining agreements create vested health benefits for retirees? The Sixth Circuit, for years and years and years, had essentially said if it's a collective bargaining agreement and it creates retiree health benefits we're going to kind of presume that they're vested. It was always a questionable proposition, but they stuck to it for a very long time. The other Courts of Appeals varied from the opposite extreme, which is we're going to

presume that they're not vested, to what always seemed to me to be the right approach which is it's a contract. You're going to interpret it like you would interpret any other contract. What are the words the parties have used? If that's ambiguous, what other evidence do you have of what they intended? So, after all of those years, cert denied, cert denied, cert denied. One petition after another went to the court with there's a conflict in the Circuits. It is creating all of this forum shopping which was the reason why we had to fight about the forum in the *Navistar* case way back when. Suddenly to everybody's surprise, in 2014 the arguments that had been made in the op certs for all of those years weren't good enough. The Supreme Court granted cert. So, a case which we didn't try or argue on appeal was the Steelworkers' case, and they asked us to handle it in the Supreme Court. So, the employer was arguing, of course, go with those courts that say we presume no vesting. Then they kind of secondarily argued, but if you don't do that, at least say that it's ordinary principles of contract interpretation – no presumptions in favor of vesting. We were convinced that there was no way we were going to get the Supreme Court to adopt the Sixth Circuit's point of view and so we argued very strenuously normal principles of contract interpretation, and here's what those are. You look at the words of the contract and if the words of the contract are ambiguous, then you look at your extrinsic evidence – pretty straight forward. The argument seemed to go extremely well. I had Justice Kagan and Justice Ginsburg and Justice Breyer all asking questions very favorable to my side. Even Justice Sotomayor had questions that were favorable. On the other side, I had Justice Scalia saying I could care less.

These people wrote this contract. If it's unclear, well it's their fault – sort of a pox on both their houses approach and I'm going hmmm, maybe that's okay. Justice Roberts wanting to go off in a direction of saying these are really expensive benefits. Surely, we have to have clearer contract language than this and we had anticipated that and said there are many more contracts with far more money at stake than these and the courts have never adopted a rule that says okay, if it's a really, really big deal, we're going to try to figure out which of the two parties has the bigger incentive to make it clear and punish them if it's not. The basic standard rules of contract interpretation apply. That's what they are, and we ended up with a very odd ruling, which for the first 12 pages says, use the normal principles of contract interpretation. That phrase shows up, I counted them, 16 times in a 13 page opinion. Then, and this is an opinion by Justice Thomas, and then, it says a few things which are just kind of from left field, like to create a lifetime benefit you need clear language. Well, there's no such principle; in fact, the only thing that anybody's ever cited for that is a Corbin treatise, which says on the very next page, okay, we're talking about perpetual benefits, not lifetime benefits. Lifetime benefits aren't perpetual. People die. So, we end up with these kind of weird things pulled in that have been interpreted by several courts of appeals, including sadly, the Sixth Circuit, to effectively say, you've got to have something clear in your contract for these retiree health benefits to be vested. So the aftermath of that opinion has not been especially happy for my clients. I've argued since then two cases in the Sixth Circuit for retiree classes under the new regime and one of them, it was just the Supreme Court

case on remand and the Sixth Circuit kicked it back down to the District Court for the District Court to look at it in the first instance. Then the employer went bankrupt, so that one kind of fizzled out. The other one, I argued in August and the parties have reached a settlement, which will be presented to the District Court for approval on behalf of the class, so the likelihood is we'll never get a Sixth Circuit ruling on that one.

Ms. Upadhyava: But if language has been clear, to be vested, I mean the question of whether the language is clear is a question of law.

Ms. Clark: So you still have to have the Court delve into whether something is clear or-----

Ms. Upadhyava: Is, are the two opposites clear and unclear or is it unclear and ambiguous because those are not ------

Ms. Clark: No, that's exactly one of the key issues, because the Sixth Circuit,with Jeffrey Sutton taking the lead, has effectively said it's not ambiguous if you have language like, these benefits are for life. One of the absolute killers has been, and he says, and this has been repeated in almost every one of the Sixth Circuit's post-*Tackett* opinions, because the collective bargaining agreement says that pensions are vested, that means the parties knew how to use the language of vesting and if they didn't use that language for the health benefits, then that's clear evidence that they didn't intend the health benefits to be vested. The problem is the Internal Revenue Code says "thou must put" in your pension benefit agreement that the benefits are vested. You have to say it and so, when the parties merely complied with the Internal Revenue Code's requirement for pensions, you wouldn't normally then think that carries over to give you any information about their use of different language

in other parts of the agreement that aren't covered by that very specific requirement. Unfortunately, we seem to have lost that battle in the Sixth Circuit, and every collective bargaining agreement will have vesting language for pensions because it must. I'm sure Judge Sutton knew that when he adopted that way of looking at things, so we've battled and we've battled and we've battled and I'm afraid that the employers are carrying the day on that now. For our retirees that we had previously won cases for and gotten affirmed, then there's no reopening. We don't have to worry about that, at least so far, knock on wood. Nobody has come back and said, Rule 60(b), there's been a change of law; you should revisit this. I haven't heard of any such things at all. That's the stuff of which nightmares are made.

Ms. Upadhyava: Right. Things that keep you up at night.

Ms. Clark: But the Fourth Circuit in the two cases I won at trial and got affirmed in the Court of Appeals, were based on normal principles of contract interpretation. The Fourth Circuit understood. That's what we argued to them. We said, here's your normal principles of contract interpretation. Look at this language. If it's clear, enforce it as written. If it's ambiguous, they need extrinsic evidence. So, I think those are stable. I don't think we have to worry about those going away.

Ms. Upadhyava: Well, this new standard seems to be just a different way of saying applying, you know, principles of contract interpretation except it's made more difficult.

Ms. Clark: Right. It's principles of contract interpretation, but then we pretend that these kinds of special rules are normal principles of contract interpretation.

I guess now that the Supreme Court has declared them so, they are.

Ms. Upadhyava: Right.

Ms. Clark: So, that was a challenging argument, but it seemed a lot better at the time. Maybe because I was assuming too much from Justice Scalia's remark about if the contract is not clear, I don't care.

Ms. Upadhyava: Do you go back and listen to your oral argument.

Ms. Clark: No. I cannot. I absolutely cannot listen to my oral argument tapes. I sometimes have to read a transcript for some reason, but no.

Ms. Upadhyava: Too painful. Well, I guess we could conclude for tonight unless there's something you—

Ms. Clark: Yeah, no. Let's conclude for tonight.