

## Orrick's Hermle Hits Back at Nasty Depiction in Ellen Pao's New Book

That Ellen Pao has nothing nice to say in her new book "Reset" about Orrick, Herrington & Sutcliffe litigator Lynne Hermle is not surprising. Turns out, Hermle doesn't have a lot of nice things to say about Pao either.

By Jenna Greene

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That Ellen Pao has nothing nice to say in her new book "Reset" about Orrick, Herrington & Sutcliffe litigator Lynne Hermle is not surprising. Plaintiffs aren't usually too fond of defense counsel who beat them at trial, especially in a case as deeply personal as Pao's.

According to Pao, Hermle is (among other things) "gratuitously vicious" and "seemed to me to be like someone who had been beaten down too many times—she could no longer see any good in people and attacked without any sense of scale or humanity."



Hermle, it turns out, doesn't have a lot of nice things to say about Pao either. In a frank conversation with Kellie McElhaney, the founding director of the Center for Gender, Equity & Leadership at UC Berkeley, Hermle responded to Pao's take on her and the trial, as well as the media coverage.

"I found Ellen to be a person who has an extraordinary lens through which she views the world, and it's a very distorted lens," Hermle said, according to a written transcript of the conversation. "I did have one good laugh, though. She describes me as someone who, in her perception, was beaten down by life. I have many, many flaws, most of which I'm quick to admit, but feeling as though I have been beaten down by life is not one of them."



Lynne Hermle of Orrick, Herrington & Sutcliffe

Pao, you might recall, sued venture capital firm Kleiner Perkins Caufield & Byers for millions, claiming gender discrimination and retaliation.

It was the employment discrimination case of the decade, attracting massive attention and serving as something of an indictment of sexism in Silicon Valley.

The case went to trial in 2015 in San Francisco Superior Court, with Hermle leading the defense for Kleiner Perkins and Pao represented by Alan Exelrod of Rudy, Exelrod, Zieff & Lowe and Therese Lawless of Lawless & Lawless.

She wanted at least \$16 million in damages, but walked away with nothing. The jurors deliberated for three days, and split 10-2 on a verdict for the defense.

Pao, who has a J.D. from Harvard Law School, is now an investment partner at Kapor Capital and the chief diversity and inclusion officer at the Kapor Center for Social Impact. Her autobiography which was published in September, has received considerable buzz, including reviews in *The New York Times* and *The Washington Post*, and is shortlisted for the 2017 *Financial Times* and *McKinsey Business Book of the Year*.

In the book, Pao implied that jury selection was unfair, writing that “the judge allowed Lynne Hermle to keep asking the same question over and over until every person who believed there was discrimination in tech got booted off the jury. If you said you thought there was bias, you were dismissed.”

Hermle responded, “If you know anything about courtrooms and trials, and she is a lawyer after all, jurors don’t get challenged because, as she said, they believe discrimination exists. We were in San Francisco Superior Court. Most San Franciscans are likely to believe that discrimination exists, and if you had to exclude folks because they believe discrimination exists, you’d never see the jury in a San Francisco employment case.”

She continued, “Each side had the jurors’ questionnaires. Both sides followed up with concerns about the questionnaires. Jurors were challenged, and then stricken by the judge, because they said, under oath, that they couldn’t be fair because they had preexisting views which would prevent them from hearing the evidence and deliberating with an open mind.

“We ended up with a very fair and diligent jury. I’m sure Ellen’s lawyers believe that, because they, like us, had peremptory challenges they didn’t use.”

In another passage, Pao criticized the Orrick team for having “one black woman associate with them. In what seemed to me like bad management and terrible optics, she was seated by herself in the audience section, separated from the rest of her team by a short wooden wall, and charged with all the menial tasks, like getting witnesses bottles of water and carrying boxes of documents.”

Hermle strongly objected, calling that a “really unfair and false description.”

According to Hermle, “Megan, who is African-American, was a new associate fresh out of law school when we were hired on the case. She was on the team from the very outset. She worked on briefs, she worked on discovery, she attended depositions, including depositions at which she was introduced to Ellen, and she attended all of the trial and all of the witness preparations. It was a fantastic opportunity for a young associate, including to work with a group of women litigators.”

But Pao “minimized Megan’s contribution and implied that we trotted her out for purposes of the trial, which is disturbing and actually downright offensive,” Hermle said.

She added, “I think she was trying to imply that we wanted to look more diverse than we were, which is ridiculous. We had a four-woman team, plus my partner Joe, who came in to help with experts. Oddly, Ellen made up another fact in the book, claiming there were men on our team writing briefs behind the scene. The briefing in the case was done by the four of us women who were the core team.”

Pao wrote that the most painful part of the trial was being cross-examined by Hermle. “As a witness, you can’t be too defensive, you can’t interrupt, you can’t correct everything because that makes you seem unfriendly and unlikable. You’re limited in how many times you can say something like ‘Actually, that’s not what I said’ without coming across as too pedantic or too difficult. And I felt Lynne knew that and so she twisted the facts with impunity.”

Pao continued, “She was constantly pivoting, making up statements, distracting jurors with unrelated misinformation, and overall building a false narrative. She couldn’t ask a straight question because she was always trying to trip me up.”

For the record, my colleagues at *The Recorder* covered the cross. It was definitely tough—Hermle “grilled Pao with sometimes brutal questions about why she didn’t complain when her male peers hit on her or made inappropriate sexual remarks,” wrote

Marisa Kendall, who's now a reporter for the San Jose Mercury News. But "When Pao did disagree with an assertion Hermle made, Hermle was ready with either a video or a printed transcript of Pao's 2014 deposition."

The Recorder's overall verdict? Hermle's performance on the cross was "masterful."

Hermle said, "I think that from Ellen's perspective, there were attacks by me on her during the litigation. But my attacks were on a story that I believed was implausible and clearly false. So it's another example of finger pointing at a woman in an unnecessary way, I think, to minimize or distract from what was actually happening."

Hermle also offered an aside on what she found to be one of the most annoying aspects of the trial: reporters writing about her clothes and hair.

"My courtroom clothes are the same every day," she said. "At trial, I wear black pants, a silk blouse and a jacket. I have short black boots that I wear because I'm running down halls, and I have what in essence is 'mom hair.' It's just the most boring, basic hair ever, and to see all that attention, to see me described as giving my opening in a leopard print top, or the colors of my jacket, or my helmet of hair, was mostly just surprising.

"And it was particularly surprising, because my opponent, Alan Exelrod, is a beautifully dressed man. He has lovely suits. I'm assuming they're Italian, but I don't know. If anyone had clothing worthy of comment, it was Alan, because he looks very good, and so it was surprising."

She continued, "There was one day when there had been a few comments about my hair, and I was more annoyed about it than I should have been. My husband would often stop by, just as a show of solidarity, near the end of the day, he'd sit in the back row. That day, I looked in the back to see if he was there. And

there was a distinguished looking man, who I knew but in my trial brain I couldn't place, and he pointed to my hair and gave me a thumbs up. And I thought, 'What the hell?' And I turned back around and then I realized, that's my hairdresser of 20-plus years."

Still, she makes a bigger point that I wholeheartedly agree with—this is not how trials should be covered.

"[S]ome of the reporters who were reporting on those things would view themselves as feminists and writing the feminist point of view," Hermle said. "I think they should have given some thought to whether this is really the way we want to portray a strong woman in a professional setting. And the answer to that should be no. It really didn't have anything to do with what should be reported on."

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