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HEADLINE: FAINT BAR HEARTBEAT DETECTED

A small thing, perhaps, but one I thought worth sharing. My pal Charlie doesn't just do a repertory act with Mr. Astor-Vanderbilt (please see previous installments). He also practices law – sometimes in my appellate ball park - and he had an evocative experience lately, in that line.

He lost a decision on an appeal, but that's not the item. What caused him some what you might call mental distress was the court's accusing him of misrepresenting the law on a point. But that's not the item, either to me, although it seemed of some moment to Charlie.

What happened next was that Charlie wrote a petition for rehearing, charitably allowing as how the court might legitimately disagree with him on the point, but had they considered Jones v. Smith, Brown v. Green, and §42753, subdivision j, of the Astrological Code in the process? Suggesting, as it were, that there may be a difference between reaching a different conclusion and leveling accusations. But that's not the item; all of us come up with that kind of response, the only variation lying in whether we mail 'em or round-file 'em.

THE LETTER OF THE LAWYER

Charlie mailed his and thereby hangs the item. Next thing he knew, he got a copy of a letter to the court from opposing counsel – somebody he knew only slightly better than Adam's off ox – saying: "Hey, judge, I don't think you meant what it sounds like, but if you did you're all wet. I know Charlie was making a legitimate point, even if I don't agree with it."

And that, folks, is an item. A small thing, perhaps, but since hearing about it I've been willing to state my occupation more loudly. Maybe the esprit of the bar hasn't suffered brain death yet, after all. Maybe there are still some of us left who strive mightily but eat and drink as brothers and sisters. That ray of hope was worth a lot to me.

Contrapuntal postscript: At the time I heard about all this, we were entertaining a London barrister as our house- and office-guest, and I described the episode with the kind of undisguised pleasure normally reserved for an announcement that the Rams are moving to Ventura and appointing me as coach. Our English cousin replied: "Why, of course! What else would opposing counsel do?" What else, indeed. - is a lot we can learn from them, but you can't take away the discovery that some of my colleagues understand already.

Plain postscript: Charlie says a couple of people have attempted to reassure him by saying there probably was nothing personal in the court's opinion; doubtless, the judge just didn't read his clerk's draft closely enough. Oh. I repeat, Oh. Charlie was not assuaged. Neither am I.

RETURNING, ROOSTING FOWL

That reminds me of something I heard from another lawyer, whom we'll call Joe. (We columnists, a sly lot, say we'll call somebody something either because that's his name or because it isn't. Take

your choice.)

A few years ago the word got out through the grapevine that the law clerk for one of the really crackerjack appellate justices in the area where he trades had it in for Joe, who's is the same line of work as I. This apparently stemmed from some grievances, the nature and identity of which were lost in the mists of antiquity.

For reasons far too unimaginable to recount here that kind of thing tends to scare the bleep out of some lawyers, so Joe finagled a chance to ask his Honor, himself, if there was any truth in all this. He was told, yes, there sure was. As a matter of fact, the clerk had come and told the judge she had this hangup, following which she was not allowed near any of Joe's litigation. Joe, when he thought it over, even had to acknowledge that he'd been doing fine in that court. So, all in all, it was a pretty tenable solution, but unfortunately one that will only work with a healthy dose of candor – intellectual and otherwise.

But there's a sequel. A few years later, Joe was on the commission that evaluates judicial appointees and, to and behold, the clerk's name came up, and very controversially at that. Joe led the scrap to get her through on the theory, I guess, that a judge with strong prejudices who admits them is better than one that doesn't. I asked him afterwards if he didn't feel a glow of self-esteem over such a praiseworthy act, and he answered: "Yes, actually you could say that. And you'd be lying in your teeth. But I'm glad I did it, anyway." I would have felt better if he hadn't added that the gal was sitting in traffic court somewhere in South Riverside.

MEMO TO LAW BOOK PUBLISHERS

On the assumption (which, I admit, is open to challenge, at least from shareholders) that law publishers really try to produce things help us lawyers in the pursuit of justice – and perhaps even our daily bread – I have some suggestions of books we're all aching for which appear to be unobtainable.

First, would somebody <u>please</u> produce just a plain, ordinary, unannotated copy of the California Constitution? It would even be enough if one were just included in the annual sets of hardback unannotated codes, but even better in the form of a soft-cover pamphlet. (If nothing else, we all could then go around with one in our back pockets, emulating Sam Ervin – a guy worth emulating – on a purely local basis, of course.)

Second, and maybe even more pressingly, we need annually available copies of the major codes, unannotated and separately bound, to throw in our briefcases for trial, (of course, it is understood I refer to an oppressed minority among our profession which gets scant attention from the State Bar or elsewhere: those who divine some benefit in having a statute at hand during a trial.)

I know Parker's puts them out, but they are printed in type apparently designed for senior citizens (another minority to which I belong, but I still can read type smaller than "Run, Spot, run") so each pamphlet is about as thick as a James Clavell novel, thus self-defeating the purpose. West publishes them, too, and theirs are small enough, but they come out about Thanksgiving weekend of the year in question. A couple of other publishers issue them early, but only with all the codes bound together.

Maybe some entrepreneur can see a possible combination in those shortcomings and put out small, individual codes early. However, I'm going to go on inhaling and exhaling until it happens.

SEEN FROM ACADEME

It probably won't surprise you to learn that I frequently get the impression our law schools are not just out of touch with reality, but more like they lack the slightest inkling that reality exists. (One reason it may not be a surprise is because it's occurred to you, too.) The most recent point in point involved my partner, who was asked to judge some sort of interstate moot court competition.

When they sent her the material for doing the judging, she noticed a strange omission in the packet, to wit, briefs. "Tut, tut" she was tutted at, "there's no point in bothering with briefs. They are graded separately and, anyway, they only count 40% and the oral argument is 60%." (My secretary, on hearing me dictate that, muttered something that sounded suspiciously like "Oh, my God." If things get slow around here, maybe she can hire out to the law schools as a reality consultant. But I scarcely digress.) Put that in your pipe and smoke it – which sounds exactly like what happened.

Uh, prof, that's not the way it works. In the first place, in the real world the brief counts 90%, the oral argument 5% and the assigned justice's breakfast 5% – if you're lucky. Or, more likely, 45% brief, 45% what the central staff or extern says, and 10% George Deukmejian's next questionnaire. That fact seems so universally known that I thought it might have even oozed through the walls of academe, but apparently I underestimate the defensive capacities of ivory towers.

The second thing wrong with that concept is a little more subtle – like a bull in a hardware store, instead of a china one – but I thought subtlety was a staple of the legal educator's diet, trouble arising only when one has to cope with simple fact. I refer to the notion that brief and argument can be evaluated as totally separate and isolated entities. Silly old me; I thought what you put in your brief and what you argue to the court were supposed to have a relationship to one another. And that whether they did or not would be an important test of the quality of advocacy. Well, live and learn. As "they" say.

THINK ON IT

Sorry about all this talk concerning the appellate process, folks, but considering how I make my living, some of that has to seep out now and then. I did have one parting thought that never occurred before that I wanted to share.

While you may find this hard to believe, in 29 years at the bar and (especially) 15 years at the column, I have quite a few adverse comments about judges. And, of course, everybody's in a swivet these days over adverse reflections against the fellows and girls in black, thanks to the growing popularity of jogging for judicial jobs.

But, oddly enough, there is one thing I have never – repeat, never – heard discussed by lawyers as a criticism of any judge. That is how frequently one's been reversed. It's just not something we lawyers think about much, and when we do it's usually to admire the guy or gal who's willing to stick its neck out and doesn't try to appeal proof rulings.

Take courage, your Worships – and I don't refer to an English beer. You can even leave off compiling won and lost counts, which most of us don't believe anyway. Calling 'em like you see 'em is one of the last things that will ever turn a lawyer off. (E.g., I think I've heard everything sayable about some of the world-class losers on our Federal bench, five times over, but not even in their case any mention of frequency of reversal.)