

LASCHER AT LARGE
By Edward L. Lascher
April 1990

Among those checking in on the continuing subject of civility among lawyers was Diane Berley of Woodland Hills, who states she and her partner have been lucky enough "to maintain continuing, collegial relationships with many who have opposed us" although she has undergone a few of the kind of experiences which I have discussed in these pages lately. She adds:

"By contrast, during the summer of 1987, when I was pregnant with my second child, two different divisions of the Second District and one in the Fourth District were very accommodating with respect to not scheduling either arguments or filing deadlines during the month before, and the six weeks after, I was scheduled to deliver. After reading your January column, I shudder to think what would have happened had I come up against acrimonious opposing counsel and an unsympathetic court. I would like to think that your unfortunate experience – at least in the context of appellate practice – was an aberration."

From what the other mail tells me, my problems may not have been all that aberrant. However, I join Ms. Berley in hoping for a higher standard of humane, professional courtesy at the appellate level.

Welcome News

The doctrine of expressio unius est exclusio alterius does not apply to this subject. Somewhat buried in the legal press recently was the fact that Governor Duke has nominated superior court Judge Norman Epstein to the Court of Appeal. That seems a fine, well deserved and somewhat overdue selection and I congratulate both selector and selectee. In a recent period of extremely high quality choices for the upper bench, this one is anything but an exception, but is a conspicuous example.

Mid-Year Musings

As consort to the president of the Ventura County Bar Association, I enjoyed attending the mid-year "Leadership Conference" of State Bar executives and local bar representatives recently. The experience generated two conclusions that were obvious and some a bit more subtle.

The first of the obvious pair was what lies at the center of attention among practicing California lawyers today. It's the Fast Track programs.

During the weekend of the conference, it was a rare subject that did not display some impact of Fast Track, a rare gathering that didn't produce its share of atrocity stories. Clearly, the amount of friction generated by any system which puts a premium on hostile controversy between plaintiffs' counsel and defense counsel and between judge and both lawyers is going to result in a lot of heat.

The other obvious message I gained from the experience was kinda sad. Apparently it's not as much fun to be involved in the governance of the State Bar as it was a dozen years ago when I served on the Board of Governors and then the JNE Commission. While there was a certain amount of predictable politicking in progress – after all, the Board of Governors, in particular, is coming up to the time when it does its major thing, electing a president – there didn't seem to be the jollity and raillery that used to characterize the machinations. It was all terribly real and earnest and I found this not only disappointing but also a little hard to believe.

Let's face it, what those who run our State Bar club do is more important to them than it is to the rest of us within the profession, let alone to the public at large. I think it's time for our management to lighten up a bit; not only will it make their demanding lot somewhat easier to bear, but also will improve their performance, since happy bar execs produce happier decisions and results. It may not be quite as easy on the ego to treat it all as not entirely joke free, but it works better.

I heard one good suggestion: Why don't the Board of Governors, Executive Committee of the Conference, and some of the other governing bodies circuit ride, conducting meetings in various counties around the state, passing out agendas in advance and inviting the local lawyers to watch their club's governance in action?

This is an idea which comes up from time to time and is usually met by a decision to hold one meeting in San Jose and another in Fresno, with no warning to the locals and no realistic reason for anybody to attend. Uh, folks, that isn't quite the idea. You should drop in on Eureka and Visalia and San Luis Obispo every couple of years, and put out beforehand an agenda of what you'll be going through. I think the attendance and interest would be surprising if the opportunity were extended to areas which don't normally have the chance to see how the State Bar operates. Sure, there would be some inconvenience involved for governors and their opposite numbers, but if you ask me, we don't elect them for their own convenience and what worthwhile activity is totally inconvenience-free? It's time for that change.

Role Muddling

There is a problem regarding death penalty representation in California. (There's certainly more than one, in point of fact, but I want to address one nobody else has seemed to notice.) For about a year now, the Supreme Court has, in effect, required anyone appointed to represent a defendant on a direct appeal (the commonly-used euphemism for death penalty appeals), to agree also to handle state and federal post-conviction writ proceedings, habeas corpus in all except a tiny number of cases.

The court's objective is clear and laudable. They appoint one lawyer (who can associate at least one other) to take the appeal, so it only makes sense that he or she handle all the writ proceedings for the same defendant, because that lawyer's familiarity with the record and issues results in a conservation of attorney time and therefore avoids some unnecessary expense and a significant amount of wasted time, since all the lawyering resources are already in place. Neat solution, right? Wrong.

The reason why this facially sensible approach actually is counter-productive lies in the essential nature of the appellate process and therefore goes to the basic nature of the appellate advocate.

We appeal junkies are trained on and subsist on canned facts. Our gospel is what is in those volumes of reporters' and clerks' transcripts, and nothing else. Sorely tempted as we are to do so on occasion, we are foreclosed from adding an iota to the factual array generated in the trial court. If the record says the sun rose in the west, maybe we can challenge it as contradicting universally accepted scientific fact, but we can't go out and drag out any evidence that it really rises in the east; that's not our nature. I have spent a lot of hours over the decades trying to explain this to trial lawyers – and their clients.

Habeas proceedings, however, depend only slightly on the contents of the appellate record. By their nature, writ proceedings are aimed at what is not in the record. Now, appellate lawyers can recognize what's in the record and differentiate between it and what isn't, sure. What they can't do – at least while staying in trained mode – is go out and find the facts and produce them for a habeas record. They have no particular skill at doing that, and certainly not as much as the average nisi prius litigator; worse, most of their training makes appellate specialists have a vector away from fact gathering.

What happens is, you're taking a person whose training and experience build up a mindset which resists the injection of new fact, and telling him or her to go out and master the techniques of doing so. It is possible to learn, of course, but I wonder if it's in anybody's interest to have on the job retraining necessary to this nerve jangling change take

place in the midst of representation of someone on Death Row.

I believe this practice is one that was adopted not just in good faith but in a very sensible effort to rationalize the process. The only problem is that those who devised it are understandably unfamiliar with the craft and character of appellate advocacy. (It's not surprising that we are unfamiliar, because we are so strange and so rare; if there are a hundred people in California who can legitimately claim to be specialized in appellate advocacy, I'd be astonished.) It's awfully hard for us to change our spots, and these are the wrong cases for spot changing.

I'd suggest that there be some thought given to changing the practice.

Judicial Restraint

Justice Earl Johnson of the Second Appellate District, Division Seven, is one of the more reflective of the observers of the judicial scene and I thought I should share something readers may have missed in a dissent he recently produced.

"There is a tendency among appellate judges in writing their opinions, and I am as guilty of this as any other, to discuss tough cases as if they were easy, to characterize debatable answers as being obvious, and to write up razor thin cases as if a vast chasm separates the correct from the incorrect result. We may spend days in the quiet of our chambers trying to formulate our individual positions on a close question, then hours arguing among ourselves, and along the way, shift our views to and fro several times. Yet when we finally get around to writing the opinion, we inform the reader it was a piece of cake. Logic, precedent, and principle all pointed in a single direction and the result we reached was inevitable.

"Well, in all candor, I do not regard the instant case as easy, the answer obvious, or the result inevitable. If nothing else, I hope this dissent exposes the depth of our problem. This time the Legislature has handed us a true conundrum" (People v. Weatherill (1989) 215 Cal.App.3d 1569, 1588-1589).

Perusing Partners

Couple of years ago (or less) a colleague from up in San Francisco, John Martel of Farella, Braun and Martel, gained considerable note for getting a novel on the big city legal scene, Partners, published. Late as usual, I've just got around to reading it, with some mixed feelings. One such feeling is some jealousy on my part, since I think I have my own unpublished manuscript of The Great California Legal Novel languishing in hopes of someday finding a publisher.

A less dog-in-manger reaction is one of some disappointment. Brother Martel obviously has a keen grasp of the attitudes, postures, mores, doings and don'tings of the large, established San Francisco law firm world. The problem is, he presents them in a totally unhumorous fashion, whereas the insights he has, and vouchsafes, practically beg for send-up treatment. His portraits of the plight of exploited associates in general, the particular problems of the female novice in the exclusive-men's-club milieu, and the corruptive effects of the billable hours mania and economic imperatives of contemporary firm business are great, but I couldn't help wishing they'd be packaged in a less – "dire" I guess comes close to the word – unamused fashion. Satire is often the best form of expose known to modern medicine.

Nonetheless, I think the fun of recognition makes the work well worth the investment of readers' time. I'm curious whether other lawyers agree with my reservations.

© Edward L. Lascher 1990