LASCHER AT LARGE
By Edward L. Lascher
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The first half of 1984 didn't seem quite as bad as I'd dreaded. Still, it's nice to think that this time next year we'll be spared: (1) the DeLorean case and (2) "news stories" about the Olympics. Never have so many been so harangued so much about so little.

Ah, but we will still be far from Eden. Just imagine what life could be like, if only:

> You could buy an unscented magazine.
>
> Good shirts still had pockets.
>
> People didn't say, or judges write, "infer" when they mean "imply".
>
> Lawyers understood what an offer of proof is, and when, why and how to make one.
>
> Courts knew what an offer of proof was supposed to be and when, why and how one should be made.
>
> Advance sheets didn't have any Teachers' Retirement cases.
>
> Everything that tasted good wasn't full of salt, fat and carbohydrates.

DON'T LOSE QUITE ALL

Nonetheless, there have been two pleasant surprises in the past month, which may constitute a record, and does inspire some crediting where due.

The State Bar did something very right, actually a couple of things, both concerning the Yarbrough/Jaffe controversy. (If you've been on a space mission, that's the litigation over commandeering lawyers' services and funds to provide representation to indigent civil litigants.) On its own behalf, the Bar's staff – operating at the last stages under incredible human stress (unrelated to the case) – produced a fine brief, articulating in a professional manner the profession's concern.

Perhaps even more importantly, they inspired, guided, clearinghoused (I will not say "coordinated") and generally supervised preparation of amicus curiae briefs by many different organizations and components of the profession, thus enriching and annotating in various ways the basic presentation. There were more briefs filed than one might have liked, but I can't think of one which could have been omitted without leaving the picture of this watershed controversy less than whole. Compliments are due all involved in that effort.

It wasn't enough that the Bar outdid itself; the news media went and did likewise. I expected the coverage of the D-Day anniversary to be embarrassingly hokey. Instead, it was dignified, informative and appropriate in virtually every respect. I was frequently touched at what I saw and read and even learned a great deal new, which is mildly surprising in view of my passion for World War II history.

As moved as I was by the substance of what was reported, recounted and portrayed, I couldn't help (and was glad I couldn't) also being deeply impressed by the way it was brought to us. It showed what the American Press and electronic journalists can accomplish when they put their hearts and minds to it.

EVEN IF IT DOESN'T PAY

On the other hand, my weltschmerz was not notably assuaged by reading in the ABA Journal that 82% of lawyers surveyed intend to use advertising in the future, even if they don't now, 9% are unsure, and a rousing 9% – yes, that is nine – say no, thanks, they have no intention of huckstering. Of interest is the fact that only 21% of those who have tried advertising liked the results. In other words, it doesn't matter whether it does any good or not, we're going to advertise because others do.

I think I discern a misconception. The courts have ruled that the First Amendment permits lawyer advertising, not compels it. Free speech requires that topless, bottomless and middleless lewdity be tolerated, too, but it doesn't require us to clock in at the skin show. Apparently this is too fine a distinction. We have brought Voltaire full circle: I will defend your right to do it; therefore I must do it, too.

I won't. I think classified newspaper ads are disgusting and self-demeaning, the big firm "newsletters" and "brochures" separately, equally and more hypocritically so. I am an inveterate user of the yellow pages (or at least was while the United States still had a phone system), but I wish "book dealers" weren't so close in the alphabet to "attorneys". If we treat ourselves like the people who hawk tours to Las Vegas, inside track to a game show, or silicone implanting, is it really so odd that others do, also? I liked the original way better: I'll defend your right to degrade yourself, but I'll hold you in contempt for doing it!

BLABBING UP A STORM

I see by the papers that L.A.'s new Designated Yeller has been censured for his billingsgate about a judge, this time by the Federal Bar Association. Can the Book of the Month Club be far behind?

Despite that last crack, I submit that this particular exhibitionist should be strongly disincentived about his motorized mouthings – though, I hasten to add, by peer pressure and not by state action. (See elsewhere on this page regarding the difference between what can and what should be said.) I say this in some confidence that this column, and even its author, are unlikely to be accused of timorousness, sycophancy or

oversolicitude toward Those In High Places.

Judicial office – and especially, for reasons that do not totally escape me (but we won't bruit about here and now), federal judicial office – has effects on its holders which need objective, principled, expert and forthright examination and discussion. In my view, it is one of the principal duties, not just rights or privileges, of the organized bar to supply such appraisal and even (however rarely) remonstrance.

This is not a universally shared opinion, however; some of my colleagues believe the bar's role to be that of cheerleader, if not pom pom boys and girls, for the judiciary, everything it does, and every one of its brethren and sistern, whether stumblebum or savant. I suspect that attitude is motivated by perceived self-interest, but that the perception is, in fact, myopic in that nobody profits from a bench that is less than it could be.

But there is a world of difference between responsible, restrained, consensus-seeking analysis of and comment upon judges and, for that matter, the general state of the judiciary, on the one hand, and headline grabbing, self-aggrandizing and business promoting popoffery which inspires these remarks. (Eagle eyed readers may note my omission of the offender's name. This is not because of the laws regarding defamation, but because I refuse to supply any more free advertising, even though the kind of clients attracted by such antics are probably exactly what the perpetrator deserves, and vice versa.)

What obtained my goat is the bad light such japery casts on the bar's duty just described. It simply plays into the hands of that supercilious segment of our profession whose battle cry is: "If you can't say anything nice, don't say anything."

PHONOPHOBIA

The older I get (and it seems I've been making a lot of progress in that direction lately), the less my enthusiasm for new causes of action. It has begun to sink in that we've already got a lot more than the world needs. Nonetheless, we do need at least one more: The Tort of Intentional and Outrageous Telephone Solicitation.

So many of what pass for peaceful dinners chez Lascher have been interrupted by WATS wielders that we have evolved a stock answer: "Sorry, we respond to no telephone solicitations whatsoever." That reduces the duration of each individual call, but has no impact on their numerosity. Regrettably, my heritage (if not my age; see above) renders me literally incapable of a simply letting a phone ring. After all, it could always be a judge saying that she had a sudden revelation and was changing her mind. Or something else miraculous.

The ultimate occurred the other night, or more accurately, two other nights. A cretin purporting to represent the National Trust for Historic Preservation – an organization whose existence and aims I applaud but whose methods I now abhor – called and was

given my message just described, although not without a struggle. Eight days later, another one called for the same outfit, announcing that "My card says I'm supposed to call back". When I embarked on delivering some instructions on filing her card, she cut in with "I don't have to listen to you", and slammed the phone down.

That sort of put it in a nutshell. We have to listen to them, but they don't have to listen to us. Perhaps some of my resourceful colleagues can acquaint the perpetrators with the error of that way. That cannot be accomplished by chewing on the poor dupes who do the calling, nor even the sharpies who contract out such "services" – the latter because you'll never find them a week later and they have no assets anyway, the paradigmatic fictitious firms.

No, the way to get attention is to go after those who opt to operate through such telecommunicating tartars. How about a few class actions against the solar energy firms, insurance peddlers, magazines, health studios and firemen's protective societies? Not to mention a few individual lawsuits for a couple hundred in mental distress and a zillion in punitive damages against the stock brokers (is it a sign of the times that I get six calls a week from them?), office supply salesmen and, yes, preservation trusts? I know I've left out a lot of worthy organizations, but I suspect the readers can supply their own nominees.

Seriously, we've come lately to recognize the value and fragility of one's privacy and resulting peace of mind, especially in the supposed sanctuary of the home. I can see little reason why both the compensatory and admonitory functions of tort law should not be applied to defend those interests against telephonic invasion.

Let's hear from the Shernoffs, Greenes, Harneys, Penrods, Cotchetts, Hafifs and the rest of you paladins who've cornered the market in money! You have nothing to win but the undying gratitude of your fellow person if you lead the charge against this evil.

Edward L. Lascher ® 1984