

SEPTEMBER 1985
LASCHER AT LARGE
By Edward L. Lascher

This one time, Joe says it ain't so, and it ain't. It turns out the State Bar didn't pony up any dough for Bob Raven's campaign; the entirety of the club's contribution was loan of a banner, something up with which I really think I can put. I'm also told that no State Bar staff time was expended. As Bob put it: "My good partners footed the bill and supplied the staffing which, some of them say, might explain why our firm is 51st out of 50 in profit per partner."

The mystery, of course, is why State Bar officialdom deemed it cute to be evasive on the subject. They didn't just fail to choose the lesser evil: they managed to embrace an evil which wasn't there. There's a lesson regarding the Bar's image, the reasons for it, etc. I don't think it's even that hard a message to hear -- for most of us.

OTTO KAUS

If wishing were talent, insight, perception and wisdom, every word and phrase issued under this logo would convey, in the very best way, thoughts needing expression. Wishes aren't, though, and so my words and phrases don't often do justice. Seldom am I as conscious of that as when I face the matter of bidding farewell to Justice Otto Kaus.

We're going to have to find our way without his help and inspiration for the first time in two dozen years. He may be the first judge in history whose given name will probably be retired like some ballplayer's jersey. (I also am keenly mindful of the fact that there is simply no California judge who can match his job of marrying.)

They don't come any better, they come at all only rarely, and when they go they leave a hole. Despite being on the sharp end of a healthy dollop of his decisions (especially lately), I nonetheless feel deeply saddened and even somewhat frightened at the prospect of a California bench he doesn't grace.

It is unlikely our legal history (or even legal legend, which may be more important in this instance) will reflect nearly as much Kausian influence in his Supreme Court role as it will find in the 492 published opinions, 29 dissents, and 21 concurrences at the C.A. level. Not to mention the never to be known quantity of unpublished opinions and ghost writings. His five years of being infallible because final were of major importance, to be sure, but pale by comparison to the range a brilliant mind and lucid pen could work in four times as long a period.

More than raw duration, though, one must consider ways the role of an intermediate appellate court differs from that of a last resort tribunal. One deals with the Great Issues, cutting edges, the much-debated and dramatic -- both by the nature of the beast and by dint of the power to decide what it wants to decide. But law, like life, is not so epic: it is more mundane, not at all optional -- and infinitely more inclusive. An intermediate court must deal with what trial courts and the populace give it, with no choices, no chance to "pass", no decertifications. It copes with the body of the law, not its aspirations: it fixes broken bones and tries to cure a few ills, but doesn't devise new methods of heart transplantation. As a result, it has the fullness of life as raw material.

That proves the undoing of a regrettable number of those who sit on such courts and either don't know life or can't cope with it. But it also furnishes unlimited scope for the Otto Kauses who know and can. They have the opportunity to build working models for the rest of us.

EVER UPWARD

All this brings up a sad topic, to which I've alluded before: The Upwardness Imperative. I've now had two chances to observe it in tragic judicial-career action at close range. First, the bitterness and disappointment inflicted on somebody who probably would be at least a finalist in any effort to choose the

best single trial judge in California history – a judge patently saddened and lessened in his own estimation because he did not become just another, unnoticed subaltern in the appellate ranks. Now, by seeing the toll exacted from Otto Kaus – who, after all, is a person before he is a jurist – and his loved ones as the price of becoming one of seven mug shots in the pictures outside the supreme courtrooms. The aging, the psychophysical strains, the controversy, the too-evident joylessness – these simply are not adequate consideration for the debatable coin of higher rank.

It is time to give attention to our structure in human terms instead of organization-chart or cybernetic ones. We need a form of judicial egalitarianism, by which judges would be psychically rewarded for doing what they are good at, instead of aspiring to whatever ranks further up the hierarchy. We've all seen the phenomena: the loved and respected trial judge who gets raised one notch and disappears, or the off the wall elevation of some super court nobody who turns out to have been born and bred for writing opinions; the David Harum whose lifetime dream is to talk horse sense to muni court disputants being elevated into the misery of weighted caseload conceptualizing; the achiever of a lifetime dream who finds the Supreme Court unbearably lonesome, in-turning and monomaniac. The miracle of a Donald Wright and the tragedy of one of this generation's most facile legal intellects frustrated in a post of symbolism and management instead of having time to judge (as an intransitive verb). There's the problem that Justice Kaus illustrates so well. The body of work he produced on the Court of Appeal is not something anyone can be promoted above; it's a career's output to which judges should aspire.

The rub is: What's the cure? Don't ask me; I'm just a problem identifier, who doesn't want any kind of "promotion". But we'd sure have a better judicial apparatus if somebody could devise a way of achieving a benign form of "from each according to his or her abilities."

EXPLANATORY NOTE

The foregoing two items were written on a lanai in Kailua, before the event described below and my reaction to it. I have concluded the comments above remain valid – if not without some difficulty.

VIEWED FROM AFAR

An unpredictable, unmanageable and uncapable-with avalanche of disaster-pregnant crises, yesterday-deadline demands and other impedimenta of the worst of my thirtytwo years in the Foreign Legion of the mind which we call the practice of law, recently forced us into a choice. Between: 1) emplaning for Kailua-Kona for seven days' R and R in that most seductively comforting of the world's restorative venues before the next (and not-long-off) series of D-Days: or 2) enambulancing for the nearest trauma center's IMCU (Intensive Mental Care Unit) for the Section-Eight road out of combat. We made the dumb choice, electing to repair and refit instead of shopping for cell padding.

The sixth day of that incomparable island in time on an island in the Pacific, life – or what passes therefor in a lawyer's existence – dropped the other shoe. The one case in which Supreme Court review simply could not be refused, out of the four hundred some in which I've petitioned, reached the top of the stack.

It wasn't exactly your mill-run appeal; that nobody ever contended. California's then most senior judge described the trial as a real guilt or innocence quest he had always wanted to encounter, but never had: we played to standing-room crowds for thirteen months; it got more media attention than all my other cases in history, combined. Appellate-court clerks flocked to hear the arguments.

Hardly a slam-dunk simple one. It took a famously-fast appellate panel seven months to get itself ready to hear argument – and then, when everybody assembled and the adrenalin was well distributed, they put it over for another quarter-year, needing more time to get ready for the hearing. It produced a hundred pages of opinions, counting the bitter dissent (which, if you aren't current, has become an endangered creature). The prosecutor publicly stated his pleased surprise at the C.A. outcome.

The stakes weren't exactly trivial, either: Two murder one convictions with special circumstances, and life

without possibility of parole from Folsom. Leaving three kids doubly orphaned, and two families (yes, including the parents and grandparents of the "victims", who were defendant's wife and stepson), shattered but still ultra-loyal to him. All this because, on the advice of his lawyer (Bill Clark's former law partner, by the way) defendant had taken out insurance on his wife (as she had on him) a few weeks before he was found in the Pacific. Because he saved the wife's and son's bodies -- for the coroner it turned out -- at the risk of his own life. And because Dr. Noguchi was able to choreograph one way the tragedy should have happened, which he deemed inconsistent with some details supplied by defendant, the one victim who survived.

Legal stakes, too. The C.A. majority blandly acknowledged that much of its holding was first impression, and also that it found plenty of error -- but none of it deemed harmful. (The D.A. repeatedly described one of those errors as the "linchpin" of his entire case during trial.) There was a clear conflict with the holding of another opinion published a week before the argument.

Art Bell wrote tellingly about the decision's impact on search and seizure law, a major bar group broke precedent to support our petition to the high court, and we sought help from a platoon of legal experts -- who delivered it unstintingly, with palpable fascination with the facts and issues.

There was one other factor. I wasn't in the ocean and I can't see into other people's minds or hearts. I don't know if defendant "did it"; more accurately, I don't know if there was anything which was "done" (and neither did half a dozen nationally recognized pathologists find any evidence other than of a boating accident). But I've hung around courts for a quarter century and I know when there's substantial evidence -- at least I know when it is as extravagantly missing as it was this time.

Obviously, People v. Roehler was bound for the highest court, right? Wrong. It didn't get a single vote for review there. Every one of those seven justices, and every clerk, apparently regarded such a case as boring, unimportant, pedestrian: after all, it doesn't involve the death penalty. They were wrong. Cruelly, disillusioningly, unforgivably, tragically. Maybe not all should have voted to review, maybe not even enough to grant, but zero votes out of seven in such a case? No tolerable way!

The impact, even on such a battle scarred, grizzled, seen-it-all vet, has been devastating. I've been well treated by the legal profession over the years, have reaped rewards that are both tangible and of infinitely more valuable psychic coinage. The latter couldn't survive a 60-second phone call; I'd trade the former instantly for the return of my ideals, faith, credulity, beliefs. My illusions, it now seems.

Sanity demands trying to put down some of what was printed on the film of my mind by that hideous light. But not this month, not this soon. In October, I'll describe California criminal justice viewed from Kona.