

LASCHER AT LARGE  
By Edward L. Lascher  
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One of California's most distinguished and admirable lawyers recently shared with a few of us a story told by a United States Senator from a southern state who once served on that state's supreme court. (Why is it that I always picture somebody thus describable as being from Arkansas?) It consists of a colloquy between the judge and a good ole boy he ran into on the street.

JUDGE: It was nice seeing you in our court last month, Joe. But I did want to mention that we usually like counsel to wear coats and neckties when they argue before us.

JOE: Oh, yeah, I noticed the other guys.

JUDGE: But I want you to know that the way you were dressed didn't have a thing to do with your losing the appeal. We didn't let that affect us at all.

JOE: That's too bad.

JUDGE: 'Too bad'? I don't understand.

JOE: That would've been a helluva lot better reason for losing than any of the ones you wrote down in that opinion.

All-Stars

Among football fans, an item of conventional wisdom is that the real All American teams of college players are not selected by sports-writers, coaches or public ballot. Rather, they are named some months after the season, when the professional teams put their money where their votes lie by drafting ex-college players to play for pay.

I recently dropped into an excellent Southern California restaurant and got a vivid reminder that a similar process exists when it comes to judges: The real winners are not picked by "Judge of the Year" plaque-awards, but by the parties who can say yes or no to having a retired judge preside rentally over litigation. At an adjoining table I saw about a half-dozen judges who have been around for a while on the superior court

and most of whom were known to me to be among the stars of the judicial show. Also present were a couple of representatives of some of the outfits that package rent-a-judging. The conversation looked like it was a pretty intense business, with a lot more at stake than the quality of the rack of lamb.

Before our very eyes, I realized, the All California Judicial Team was preparing for some important new additions. About a month later, at least two of those present had announced their imminent retirement and plans to go into private judging. Nature's due process in action, I guess.

### Judicial Misdemeanor

Now that I have reached my present ripe age, I find the tendency to reminisce and go through "what if" reveries very difficult to control. (By the way, the use of the verb "reach" in the preceding sentence seems a bit unfortunate. It has the connotational overtone of something for which one has striven and finally achieved. In actuality, age 62 is something one is dragged into, not something one pursues. But I digress.)

The other day, I got to thinking about what it would have been like to be a judge, had that occurred. Most of the thoughts had the concept of a lucky near-miss somewhere in the process. But one thing I got to thinking about was what I would have liked doing, and I can tell a couple of things about that. The most conspicuous is the fact that I would have liked making decisions, ruling, that is to say.

Can't see any reason why it would be any fun to send people out in the hallway to see if they can settle a problem. Much more pleasure in sending out a lightning bolt. Heck, that's what a judge gets paid for and, besides, it seems like the fun part of the process. Lawyers who never make motions or objections would sure not have been my favorites.

That, however, is not typical of all judges. Something my favorite writer on the legal scene (me) once wrote comes back to mind. There is nothing immoral about a judge who hates making decisions, any more than it is immoral for somebody who doesn't like the water to be a scuba diver. They're both just in the wrong line of work. I thought that 20 years ago, and I still do. (Being opinionated is another judicial trait of some significance.)

All this came up because I enjoyed a letter Super Court Judge Eric Younger wrote to the Times about the Souter hearings. I liked his last thought, which was to the effect that it didn't make sense for the Senate to spend as much time as it did listening to a parade of people who obviously don't know what a judge does for a living. 'Tis true, alas. Obviously,

if we are to have judges selected with the advice and consent of the senate, we should find out something about their judicial fiber, and not just hold a beauty contest. But it seems to me there are better ways of going about it than have been disclosed in this latest instance.

#### Freudian?

In one of the regular mailings that go out from Courts of Appeal to counsel during the course of a case's sojourn in those august bodies, I find that the Second District here in LA has some interesting spelling programmed into their word processors: They term one of the parties the "appallant". I don't think that's a glitch, either. I think it accurately portrays the judicial attitude toward the party who appallingly seeks to set aside a masterful judgment of the Super Court.

#### Indiscreet

I'm developing a new pet peeve with the appellate courts. (They have this enormous facility to generate a new one for me whenever an old peeve dissipates.) The current one is with the practice of talking about review of a summary judgment order as invoking the discretion of the trial court. The immediate stimulus of the observation is Crocker Nat. Bank v. Emerald, 221 Cal.App.3d 852, 859, but that is far from the only offender.

In my appropriately humble opinion, an order granting summary judgment is as far from a discretionary act as any I can imagine. (To be sure, there may be discretion to deny, although I'm not sure of that, and there are discretionary procedures addressed to the trial judge, but I'm talking about the substance of granting summary judgment.) If the moving papers, read against the opposing ones, show a material fact to be without substantial controversy, the motion should be granted; if the papers don't show that, it cannot be. The existence of a substantial conflict is a fact, and as such it either exists or doesn't exist. What's discretionary about that?

This is a concept which seems well known to most trial judges; they know what the test before them is. I just wish their cousins upstairs would stop riding that equus defunctus.

#### The Oregon Trial

College scouting for No. 1 Stepson had us visiting Portland and vicinity lately. Wow! Now I see why the Oregonians are so uptight about keeping Californians out of their state, except as tourists. If I lived in Oregon I'd want to keep everybody, from wherever, out of the place all the time.

I've long thought that Vancouver, B.C., was the most charming city on the West Coast, but Portland is right there in the competition. The place is not only lovely to look at, with an agreeable climate, but also well stocked with two of the major necessities of life: good book stores and plenty of local wine. As to the latter, I thought the Oregon product clearly superior to the much more touted Washingtonians and surely the equal of some of our own Californians. Anybody know any place locally where you can get hold of 'em?

Our northern friends are doing something wrong, however. If they want to keep us out of the place (see above), they ought to quit treating us so nicely when we visit. I thought the whole scene was charming, very easy to take. I suppose if I'd been in a moving van instead of a Hertz car, the treatment might have differed a bit, but that's life.

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