

LASCHER AT LARGE  
By Edward L. Lascher  
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Recently I witnessed one of the most interesting discussions I have ever encountered. It involved a bunch of appellate lawyers trying to decide whether to take a friend-of-court position in a case then about to be the subject of a petition for review by the Supreme Court: Neary v. Regents of the University. The issue was whether parties may settle a case pending on appeal, with one of the conditions being a stipulated reversal of the judgment in whole or in part. The Court of Appeal had held that they could not.

The discussion consumed the better part of an hour and engaged expressions of opinion by virtually everyone in the large room, sort of a microcosm of what I always dreamed the collegial legal profession could produce – a dream that very seldom comes true. I started with an opinion, and ended with the same one, but that was only because the last change I made (and there were many) happened to be in that direction. I found both sides almost equally persuasive and you could delete the "almost" most of the time.

I soon came down to the question of what is the role of the courts. Is it primarily to make law, in which case the Court of Appeal was right in saying the court and not the litigants should decide what decisions are proper and what ones erroneous. If their role, however, is that of resolving the dispute presented by the litigants, it pretty much follows that the litigants ought to be able to un-present that dispute.

Tellingly, the adherents of the latter view pointed out that, if it is the obligation of the parties to present any wrong decision for judicial evaluation, it would follow that any time a party believes the result of a trial to be wrong, unjust, or unlawful, that party would be obligated to appeal, whether he or she wanted to or not; otherwise we were just haggling over timing. Conversely, one of the adherents of the other view mused that he found it very persuasive that the decision should be up to the parties, but he then asked a telling question: What if you're talking about the Exxon Valdez? What, indeed! There were a lot more gradations than any of this since, as I have said, it was a come-true dream of watching the legal method in its finest action.

How did it all come out? Well you might ask. The group couldn't agree on anything except that the issue was so important the Supremes should decide, so they addressed their amicus curiae urging to the fact

that the case should be taken up, and didn't give the Magnificent Seven any guidance on what to decide after that occurred. It is very unlikely there was any causal connection, but shortly thereafter review was granted and the case is now pending on the top floor. Personally, I hope to go and take a kind of busman's holiday listening to that argument. I wonder what the comparisons will be between that debate and the one that took place out at the Ojai Valley Inn.

For it was there that this occurred. Every spring, the California Academy of Appellate Lawyers holds a retreat with its membership and a selection of California and Ninth Circuit appellate judges participating in some few-holds-barred and utterly confidential ruminations on the appellate scene, an event which has given the word "Ojai" a secondary meaning among the appellate fraternity. (And, no, I'm not violating any of the confidence, since this occurred at the business meeting which only the lawyers attend.) It would have been interesting to involve the guests and see what impact that had on the discussion, but that would have invoked secrecy; besides, judges are a group with quite a different point of view, including Supreme Court members, a fact normally invaluable to share but not on that particular question. Anyhoo, keep your eyes on Neary, which should hold an interesting outcome.

#### Brave World

I recently had the unwonted experience of an opponent's petitioning the U.S. Supreme Court for certiorari. Hardly had that transpired when I got a letter from a law firm in Washington stating they had "noted" the filing of the cert petition and "thought you might be interested to know of our firm", that being followed by two pages of self-aggrandizement and a sort of letterized firm brochure, complete with biographies of all dozen or so of the members, the whole thing advising me of exactly what the writers thought they were good at and what they thought would be good for me.

Funny, I thought one-on-one solicitation of business was still taboo, but then I don't keep up worth a darn. I would say that anybody who writes such a letter almost guarantees my overwhelming suspicion that it's the last firm I'd ever consult.

#### Two Tips

Speaking of collecting, I suspect there are a number among my readership who share my enthusiasm for stocking a home wine cellar. One of the few social values of a column like this is a chance to share good things with bar colleagues, and in that spirit, I'd like to extend an opportunity to any of those who share my vinous preoccupations to do themselves a favor by getting in touch with, and onto the newsletter mailing list

of, The Wine Club down in Santa Ana. (Who says nothing good ever comes out of Orange County?) I was tipped by a lawyer friend, myself.

It is a little shop with an amazing inventory of almost all reasonably accessible Californias – and sometimes even fleeting availability of some of the truly hard to gets – plus quite a fair cross section of French and Italian imports. All of these are sold from a monthly list, at some of the best prices findable, and they're even conveniently deliverable, especially in Southern California. In between the listings, there are interesting tidbits of opinion, recipes and the like, plus an occasional stress on a single winery or the like. It's worth the phone call or note to get in on this happy enterprise. (The Wine Club, 2110 E. McFadden, Suite E, Santa Ana 92705; 714/835-6485 or 800/966-5432.)

Another recommendation involves parking at Burbank Airport. (Since I think lawyers comprise about 89% of those flying between there and the Bay Area – or at least that's what it looks like every time I'm on board – this seems like an acceptable subject.) They've just installed valet parking. A truly great system for people in a hurry. Of course, there's one other thing: You have to pay, but at 15 bucks a day, not that much more than ordinary parking. When the time is crucial I heartily recommend it.

#### Topic A

I was in court up in Alameda County lately and was pretty intrigued at the case on trial when I arrived at the relevant department. It was a civil action by a guy currently being retried for special circumstance murder one against a scientific boffin for allegedly honking up some chemical testing at an earlier trial. It was fascinating because the concept seemed so bold and also because it's recognized that this is the first time it's ever been attempted. Kinda surprising that such is true when you think of the massive amounts of science and quasi-science that are infused into most capital trials.

It was fascinating for another reason, too: The current criminal trial is the fourth for this accused. That made it seem like a good example of what I have heard a couple of cognoscenti term as “the Lascher View” on death penalty policy. I will accept that charge. My position is that our state and society are spending a greater portion of resources to try and kill a handful of people than the results justify. In my view, the result of sending a few people to the green room just isn't socially desirable enough to warrant all the funds and intellect and principle that we're diverting from education, health care, homelessness and other objectives of state policy. Conceding, for the sake of argument, that all the other protestations by the pro-execution advocates are valid, I notice that none ad-

dress the cost/benefit analysis which seems cryingly needed.

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