

LASCHER AT LARGE
By Edward L. Lascher
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San Diego's Chuck Sevilla, counsel for Robert Alton Harris (one of three lawyers, but the only one with whom I am well familiar), is one of California's superstars, a true Renaissance man whose interests and achievements cover a spectrum from devoted advocate to connoisseur of courtroom humor, with a lot of steps along the way. U.S. District Judge Bill Enright, of the same city, is certainly one of the jewels in California's crown of jurisprudence.

Those two facts seemed to promise a sterling exchange when Chuck appeared before Judge Enright on Harris' behalf at the end of March. Unfortunately, that show was a disappointment, with my vote going to Lawyer Sevilla over Judge Enright fairly emphatically. Not on the substantive merit of positions or judicial response, on which I lack information and even belief. However, I was distressed at the judge's unloading on all of Harris' lawyers, and particularly the major theme which he iterated – that they were trying too hard.

The simple but immutable fact is that nobody handles a capital case appeal or writ because he or she wants to. It can't be done for fun, because there is none, it can't be done for money, because there isn't enough, and it can't be done for professional advancement, because what's the sense of trying to increase one's volume of cases which are such conspicuous losers to the lawyers? When someone appears as counsel in an automatic appeal, you know by the very nature of the process that said lawyer is doing it because it's the right thing to do, because the lawyer feels he or she must. Given that, any surrender to the temptation to take shots at those lawyers for doing their best is unfair and unpalatable.

Somewhat more specifically, I found Judge Enright's major thesis – that overly vigorous representation of persons sentenced to death is bad for the legal profession's image – to be completely wrongheaded. In the first place, it isn't so; the legal profession never looks better than it does when it is acting selflessly, and if we're lacking anything it is enough selflessness. But more importantly, the point of the whole exercise is to try and save a life (however scruffy a life) by as many of the legitimate means as an attorney can bring to bear. That is what counsel are there for. They are not there for PR purposes.

Another thing that appointed counsel knows in a death penalty case is that he or she, personally, is going to offend people in far greater number than those who will respond with admiration. In other words, lawyers in that position are risking their own public image every time they open their mouths or put pen to paper on behalf of a defendant convicted of murder. That they go ahead and do so, because it's the right thing, is something their colleagues and judges should be thanking and praising them for; it's infinitely more important than polishing the image of the State Bar.

One of the less noted ironies of death penalty litigation is that, while it sometimes brings out the finest in lawyers, both on and off the bench, it also creates strains which often bring out the worst. That's just another one of the human costs of the system, but at least it hadn't been thought until now that PR was a factor, one way or the other.

Smart Courage

Speaking of ethical conflicts, the primacy of a client's interests and such-like, something recently reminded me of the case that may have been the most perplexing one I ever got involved in. It must have been almost 20 years ago and only stayed around for a little while, but it sure had me scratching my head then. A lawyer friend brought me the can of worms, consisting of the following facts:

My inquirer was just getting started in appellate practice and had taken on a fairly pedestrian plaintiff's product liability appeal after a surprisingly unfavorable verdict, the kind of case that can go either way, depending on skills and luck of the draw, not to mention the state of the appellate judicial digestion. There was just this one little problem: When he came to see me for advice, he had just discovered that he had put the notice of appeal in the mail rather than hand delivering it, and it arrived a day late. Now, we all know that a notice of appeal is the one thing that has to be filed on time or you're out of luck. What distinguished Joe's case (Joe is not his name) was that nobody else had noticed. He did, though, and he was right in counting 61 days – no weekends or other holidays or anything to make any difference.

What Joe wanted to know was what I thought he should do, other than grind his teeth and curse fate. It was a classic case of legal malpractice. So, he should notify his carrier, tell the client to see some other lawyer and wait for the lawsuit, right?

Wrong. Remember, this was some years back, when the cause of action for legal mal was almost unknown and even more unsuccessful. Plus which, in order to see any damages, his client would have to prove

not only that Joe would have won the appeal, but also that somebody else would have won at trial when it was retried after reversal. Most of us find it a rather hard job in the first place to win an appeal and then win a trial, let alone treating those as the first ante in the poker game.

So Joe wanted to know what I thought of the solution he was considering. My first reaction must have been one of sheer horror, just as I suspect his was when it first occurred to him. But I agreed it was the way to go.

What Joe decided to do was ignore what he knew. He went ahead and acted as if the notice had been filed on time, counting on the unlikelihood that anybody else would check. So he paid for the record, waited for it to come and wrote an appellant's opening and reply brief, both of them crackerjacks. You see, he concluded – and I had to agree – that his client was better off at that juncture with the appeal than with a malpractice claim. If he won on appeal and got a retrial, it would be too late for anybody to count the number of days that had been consumed a year or two earlier. And the client would be better off than she was before she ever walked into Joe's office.

The thing is, it took nerves of steel to do that. I was just consulting and I thought about the case about three times every day; imagine what Joe did. (His office must have been pretty nervous every time they opened an envelope from the firm on the other side: Would it be a respondent's brief or a motion to dismiss?) But his briefs were wonderful, the case compelling and he lost on appeal. I have heard since that the appellate court had a hard time deciding the matter but eventually came down with a sort of weak affirmance. So his client lost there. But the thing is, she didn't lose a thing that she wouldn't have lost had the delay not occurred, i.e., had Joe been super-effective.

I have always wondered if it was the right choice, but every time I wonder it seems to come out in my mind that it was. What I wonder more is whether I'd have the guts. Like I say, it's a case that continues to perplex as much now as it did when I was involved with it, sort of the unforgettable dilemma.

What I suspect is that Joe's solution was not the School Solution. The orthodox answer would be to blow the whistle on yourself, but Joe realized that, at that time and under the then-current climate, honesty might be the best policy for getting a load off his own shoulders and onto that of an E & O carrier, but not the best policy for his client. He not only had the nerve to follow that course, but also had the brains to see it.

I remember one of the favorite sermons I heard my minister grandfather deliver from his pulpit along the south shore of Lake Superior. His message was the search for truth, and he told the congregation it isn't enough to seek truth sincerely; you've also got to seek it intelligently. You can seek Canada with all your heart and soul, but you won't find it if you're going south. Joe had the distinction down pretty nice, it's always seemed to me. What do you think?

Patronizing Saint

Karl E. Meyer recently wrote an essay in the New York Times Book Review section on the subject of newspaper columns and columnists. It was scholarly, which does, I confess, sound like a bit of an oxymoron. But, seriously, folks, it was chockablock with useful data. Like, did you know there is a patron saint of columnists: Simeon Stylites of Syria?

Some of the information, of course was a bit jaundiced, one item being a description of the columnist as "given a license to be rude, reckless, silly and prejudiced", all characteristics totally unsuspected until this time, right? Mr. Meyer did note and document a fact that seems somewhat paradoxical, in that the print column has flourished with the rise of electronic journalism. I accept his representation as to the fact, but I wish he had explained why, which I still find hard to fathom.

Case and Comment

Predictably, I have spent a lot of time in medical waiting rooms over the past year or so. Under no circumstance is that a particularly enjoyable experience, but I did learn something surprising. The collection of reading matter one finds in doctors' offices makes reading advance sheets seem like fun, a sensation I had not previously deemed possible.