

NOVEMBER 1984  
LASCHER AT LARGE  
By Edward . Lascher

A problem for you, folks: What's the Latin word for "yes"? Somehow or other, the question came up at the dinner table recently in a lull between a discussion of the Pythagorean theorem and a debate on the pros and cons of the periodic table of the elements and we were surprised to find nobody had the answer.

#### IN HOC SIGNO

No sweat, I told the troops; I paid I don't know how much (I stay uninformed about things like that on purpose truth would set me atremble) for a Latin dictionary and I'd just consult that. Foiled again; it only goes one way: Latin into English. That struck me as somewhat odd. We have, around the premises, materials to take us from English into French, German, Dutch and Spanish, but Latin only goes one way. Of course, I suppose there isn't too much that's written in English being translated into Latin these days, but still . . . How do you make up a new motto, for instance?

Can anybody explain? Can anybody say "yes" in Latin? (Knowing the Romans, they probably didn't say it very often.)

All this got me to thinking. Latin's a pretty groovy thing, and its impact on the law is certainly not de minimis. You don't have to be a fellow or gal of the International Fraternity of Zillion Dollar Verdictsmiths to know that a jury is far more likely to find in favor of your client on a theory of *res ipsa loquitur* than it would be if you had to stand there and babble "thing itself speaks". And how about *pari delicto*? I have never heard any two words that quite so copiously oozed chicanery as those do.

On the other hand, the real fun with Latin is when it becomes Law Latin, which is half Latin, half French, and half Chaucerian. ( yes, Doris, I know that's three halves; that's exactly the point. *Ne exeat, coram vobis* or something of the sort.)

By the way, don't anybody write and tell me just to look in the Webster's Unabridged to find the derivation of "yes". That part, which is usually in a half-line parenthesis, is six lines long and translates, essentially, to "How the hell do we know; it comes from everywhere, including 'a multiplicity of other variants'". That sounds more like an attorney general's opinion than an answer.

All of which gets me to thinking. Why am I going on about this? When I was young, I wrote a column that was full of zeal and courage and directness, that exposed wrongdoing in low places (I was never admitted to high ones) in the finest muckraking tradition. I noticed that older and wiser columnists kept writing about razor blades, airedales, and stuff like that. Nowadays, I find my own self writing about Latin dictionaries. Maybe I'm getting older.

Expressio unius est exclusio alterius.

HEY, WAIT A MINUTE, JUSTICE!

There's a distressing trend afoot in the appellate decisions which requires me to suggest to our judicial emperors that their clothing may be awry, and warn the profession about the resultant risks.

I refer to cases tinkering with the previously scrupulous treatment of notices of entry of judgment, and their function of triggering jurisdictional time for (1) moving for and acting upon new trial motions, and (2) filing notices of appeal. None of the three decisions I've noticed National Advertising Co. v. City of Rohnert Park, Cal.App.3d (1st Dist. Div. 3, 10/1/84) 84 Daily Journal D.A.R. 3427, Bay City Bank v. Los Caballeros, etc. (1983) 148 Cal.App.3d 223, and Tri-County Elevator Co. v. Superior Court (1982) 135 Ca1.App.3d 271 is world-shaking in itself, and at least two may be defensible on their specific facts but not in their wider implications. We can live with these, possibly, but we can't live with many more or even the combined message of the three. Please bear with an explanation; it's important enough.

There are two sacrosanct, ironclad, unwaivable, unestoppelable, untollable, unsubstantially complianceable time periods known to California law: the new trial and appeal times following entry of judgment (CCP §659 and 660, Rules 2 and 3). This is as it should be; even one who makes his livelihood taking or defending appeals (and frequently moving for or resisting new trial motions) sees the compelling need for some definite time of finality.

In patent recognition of this fatal effect of blowing the time limits, California law has historically been ultra specific about what starts that time running. It is not the judgment, but notice of entry thereof and until recently that meant a document which the clerk was required to send out or one sent by a party, whichever came first.

Aye, there's the rub. A few years ago, responding to lobbying by the county clerks' club (honest!), the Legislature replaced the simple clarity of that requirement (Does the Legislature ever do anything else, nowadays?) with an unwary trapping machine. But things were still comprehensible, if unclear; somebody who wanted to run could read, if not effortlessly. The replacement was dumb and caused sacroiliac pain, but no substantial damage to any non cretin.

The problem with the three cases I mention is their engraftment of uncertainties, qualifications and rooms for argument on what was already a desimplified and declarified system. Up until now, we always thought that a Notice of Entry began with capital letters, that it was a document whose clear and readable message is: "This is notice that there is a judgment." Please note: not the judgment itself, not something to put you on inquiry, not a letter from one lawyer to another, not an item in the press, not even a minute order. A capital letter Notice is something well known to practice; it is different from that of which notice is taken, and it is different from knowledge or information. ("Noticing a motion" is not happening to run across it.)

Notice of Entry used to be something you could go down to the clerk's office and find in the file. Now, we are told that dropping a copy of the judgment itself on a receptionist's desk may constitute service of a notice of entry thereof. (In other words, the judgment proclaims itself; that ipso loquits a bit too much say) We also are told that the fact the losing party knows the judgment exists is notice which it may be in a lexicographic sense, but hardly in a legal one. We even find that, in the span of short two years from Tri-County to National Advertising, entering and filing a judgment have stopped being two entirely different things and become one and the same.

The upshot, of course, is that there are going to be a lot of late appeals and new trial motions, meaning that deserving litigants' rights will be forfeited. This will result from the booby trap planted by congruence of legislative obtuseness and judicial myopia. The result, in turn, will be a lot of recoiling in horror, meaning that late notices of appeal will start to be upheld on one pretext or another when the courts feel like doing so and the prevailing party's interest in having a precise time of finality will be lost, too. And we can all have a merry spiral of totally unnecessary additional litigation over the cases thus engendered.

The old ways are not always necessarily wrong. Don't say we didn't warn you.

#### IT'S ABOUT TIME DEPARTMENT

Every now and then something interesting arrives in the law book ads. Not often, needless to say, but once in a while.

A recent case in point is the announcement of Dombroff on *Unfair Tactics*. This annually supplemented work, we are told, offers "a full range of effective litigating tactics and strategies that consistently give you a legal and psychological edge over your opponents" and explains "the rewards and risks of various courses of action". I will certainly just bet.

My already abundant admiration for this work is only enhanced by the fact that it boasts an introduction by none other than Flee Bailey, who announces that he has "found myself constantly learning new twists and nuances as I read through this book". Obviously a coals to Newcastle proposition. It gives me a warm feeling all over to be a part of such a principled personhood.

#### DEADLY DILEMMA

This may be a good juncture for one of my threatened periodical returns to the criminal scene, this time a specific problem of death penalty appellate counsel.

When Jane Doe hires us to appeal from an adverse judgment for that matter, when Megabucks Unlimited does we rarely, if ever, make every argument that can be made or challenge every error made. We rarely even include every point we originally think we're going to make, and almost as rarely file in the briefs all the contentions we actually have

researched and written about. That's not because we're lazy (although indeed we are) or can't discern every possible error (although, to be sure, we miss some). Nor is it because clients won't pay for more than we argue.

We leave points unmade and challenges unraised because, in our professional judgment, omitting them increases our client's chance of success. That simple. There may be subdivisions of that reasoning the point is unpopular and likely to antagonize the court, it may be something that would fascinate attention away from more subtle but favorable aspects, but it just lacks appellate sex appeal, whatever but the essence of it is always the same. We are always trying for just enough to convince; admittedly, we don't want to protesteth too little, but we even more surely don't want to say too much. Our judgment may be good or bad in a particular case, but it's one of the main things clients pay us to exercise.

When you're doing an "automatic", however, you face a strange dilemma. You're supposed to give your indigent client exactly the degree of skill i.e., the best you've got as you give to Megabucks' case. But there are enormous pressures on you not to leave out a single, ruddy thing. These come from both inside and out: inwardly, from your own "can't take a chance" fears, ones that would never stop you in a case involving mere millions; externally from the professional folklore which has grown up around such cases so that 20-issue briefs are considered models of brevity.

In other words, you are almost afraid and sometimes more than almost to use the very complex of experiences, talents, insights and hunches that are your chief stock in trade. In still other words, the demand to do the best may, itself, prevent doing your best. We see the problem clearly. Oh, boy, do we! It's the solution that hasn't yet come along.

## POTPOURRI

Seems to me there's a big outbreak of people allegedly "flaunting the court's order". Perhaps some orders do get flaunted now and then, but ,I don't see many that justify such treatment. At least not quite as often as we're told they get it. Flaunting an order flouts my sense of propriety.

Barrister magazine, published by the Young Lawyers' Division of the ABA (I hasten to add that my partner showed me the copy; I don't get one) recently featured the oldest surviving chairperson of the Young Lawyers. Sort of like honoring the youngest member of the Grey Panthers.

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