

LASCHER AT LARGE  
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The last installment – January, for reasons I'll mention in a moment – inspired (if that's quite the word) the largest volume of responsive mail since this department first appeared in the Journal almost ten years ago. I mention this, not in a spirit of columnar self laudation, but to share the important news that the bar's concern over declining civility and fraternity seems stronger and more widespread than feared, though not a bit more so than is appropriate.

One judge of a nearby county – a truly superior judge, at that, and one most Southern California lawyers old enough to vote know from his days at the bar – wrote that increasing hostility levels and loss of his old experience of forming so many friendships among opposing lawyers were major motivations toward his departure from practice. The observations of other judges and lawyers were widespread, geographically and in terms of experience and nature of involvement, but uniformly poignant in their recounting of sense of loss of something very vital to the love most of us feel, and want to feel, for our profession.

I only wish I had a good editor's wit to share many of them with my readership, but wit has been in a little short supply since that January issue of the column. The final reckoning, though, is that the lessening of our professionalism is serious, even critical, but it is neither total nor final; too many of you are passionately and articulately determined that it must not be lost. Thank you for the help supplied to an older, injured colleague's repair of his beliefs and faith in lawyerdom, and may the reillumination be widely shared.

### Sarge Strikes

The reason for nonappearance of a February column, and for the veiled references above, is a story in itself. A couple of days after the January number, a mishap which was hardly necessary after a year of recovery put me back in Community Memorial Hospital and out of commission for a month even beyond the hospitalization.

What happened? Only a few facts are known or knowable. After dinner, Sarge, the Lascher family's noncommissioned, amiable, flaky Akita/German Shepherd mix, announced from outside the front door that he was having some sort of disputatious encounter with an itinerant band of other dogs, apparently engaged in a belated wassail tour from another

neighborhood. Out into the misty, slippery night went our protagonist, but my memory of what transpired is pretty blank beyond an effort to keep the mutt from running down the sloping yard into the street.

Next thing I really knew, I was in the emergency room, having a number of breaks, cracks, gashes and other signs of a bad if inexplicable fall ministered to and patched. About the least injury was a broken shoulder, but, as one sage colleague commented, I don't practice law with my shoulder. (The proposition may be debatable, by the way. You should hear the parts of my anatomy which have been cited as a source of my antics by opponents and observers over the years although, no, never the shoulder.)

All that was certainly an adequate deterrent to column output, not to mention practically every other kind, but the trouble didn't stop there. A couple of days before my canine-inspired impersonation of Jack (without Jill), Hilda Barker, who has been amanuensis, sometime inspiration, often censor of my various kinds of writings since September 2, 1958 (that's not a misprint!), came down with a respiratory attack which leaves our firm still deprived of her service and counsel.

So the legal world had to fend for itself for a month or so. How did it fare? Dare I say?

### Stage(!) Fright

Some recent developments were rather antic. Notable among them was the announcement that one recently retired San Diego judge was put on a lifetime pension because his brief stay on the bench engendered a disabling case of stage fright.

There was a lot of brouhaha over whether this constituted an appropriate reason for conferring public reparation on his ex-Honor, but that somehow seemed wide of the point to me. What I found fascinating was the trend-bucking nature of this illness: fear of the spotlight's attention has not exactly been endemic to the judiciary over the years. Now, the real news would have been if some federal lordship had registered the same dire complaint, but don't anyone hold breath until that occurs.

### Off-Putting in Writing

I see that the California federal courts, or at least some of them (it isn't quite clear) are going over to a new system whereby the plaintiff/ petitioner/or whatever side has the laboring oar in a non-jury case is required to put on its case in chief entirely or mostly (again unclear) in written form, subject to cross examination and rebuttal by the opposing side. The the-

ory, apparently, is that this will save all kinds of time – surprise! – without adverse consequence to the fairness and effectiveness of the trial process.

Will readers forgive my being just that faintest bit skeptical about the overall time saving assumed to occur? It's possible such will be the effect, but I'll believe it when I see it. Instead, I think it's going to go a long way to discourage jury waivers, a prospect not exactly calculated to save time.

On the other hand, I have no doubt at all that the concept will play hell with effective fact-finding, and with appellate review, for that matter.

As to the first aspect, it's not just that reading a piece of paper to the judge may not convey quite the same thing as question and answer processes with real, live, ordinary-people witnesses trying to shed light on what happened and didn't and what it all means. Not that this is some unimportant peccadillo, mind you. We might as well skip the whole process of writing out a fictional case in chief and just hand over the depositions, a means of truth ascertainment I'm sure we all agree to be vastly superior to the way it's always been done before.

A bit more subtly, this concept just furthers the tendency, which has always bemused me, to emphasize the negative over the affirmative in trials. I've felt out of step in considering direct proof and direct examination as both more important and harder to do really well than is the response to it. But out of step I've been: How often do you hear about a great cross examination or a master of producing it, compared to a great direct examination or examiner?

One's a lot more glamorous, true, but more important? I'm not so sure. As long as we cling to a rule that the proponent of a fact bears the burden of establishing it, the process of doing so is going to be a lot more significant, and a lot harder to master, than the process of doubt casting. This new approach not only seems to deny, but also to contravene that immutable and inescapable central fact of the adversary system.

As to review, what happens to the substantial evidence rule when such a major part of the factfinding process is confined to words on paper? The entire keystone of our system of review is that trial judge and jury are better at factfinding because they watch and hear the way the witness delivers his words – the voice, the gestures; the body language; the perspiration, the timing – while the appellate court can only read the dry, dull, cold record, the classic “dehydrated peach” or “pressed flower” (see Meiner v. Ford Motor Co. (1971) 17 Cal.App.3d 127, 140).

When the trial level takes over those same less-effective forms of truth-ascertainment, however, is there any reason why the appellate court shouldn't just redetermine the facts, since it can read a writing just as well as anybody else? Is that a good thing? Not as far as I'm concerned, in terms of either stability of trial-level decisionmaking or of distinction between the functions of the two levels of courts. I think a box of unknown and potentially dangerous contents is being pried open.

### Perplexing Products

Meanwhile, one of the stacks of incoming promotional mail contains a bulletin from the Continuing Education of the Bar folks, touting us on their catalog of "Wrongful Employment Termination Products" available on order. Isn't that maybe just a touch ultra vires, not to mention inexplicable?

On the other hand, a fellow named Berne Rolston from Santa Monica (interestingly, he appears to practice in a post office box with a suite number, but then nothing involving the postal service really surprises) regularly runs tasteful professional announcements in the legal press to the effect that he specializes in "solving the legal problems that exist in the formation, reorganization, merger and dissolution of law firms and practices" and also "mediation and arbitration of disputes between lawyers".

The guy must be an absolute trencherman for punishment. I thought that people who handled firm breakups and inter-lawyer disputes relaxed by trying disputed child custody cases or throwing their bodies on live hand grenades. My powers of imagination are admittedly weak, but I have a hard time convincing myself that anything could match, for sheer nastiness, a bunch of law partners in the midst of dissolution dealing with one another. That somebody goes out and encourages people to get him into the act is awesome.

According to my Martindale-Hubbell, the guy is 67 years old, so he must thrive on controversy.

### Memory Lane

It is not widely known these days (not that it ever was), but much of my early professional life was spent as a Los Angeles lawyer. From 1955 to 1967, I practiced there in various ways and locations, the last nine years in scenic downtown Van Nuys.

What brings this up? Well you might ask. I was mulling over reported changes in that sub-municipality since those days. It's not just that

Armand Arabian, Harry Pregerson and so many others have gone on to different and greater things and are lost from the local picture, though such is conspicuously the case. It's just that, if the legal press has it right, life is a whole lot different there today.

When I was a Valley boy, judges didn't send out a couple of cops to drag in a tardy public defender or some of his body parts. And one judge didn't have a contempt proceeding over what another judge had already done along that line. We didn't know what fun we were missing. We thought life was hairy enough just keeping away from the bad graces of Al Paonessa out in San Fernando or V. P. Lucas in Burbank. Tempus fugit, and maybe it's a good thing, too.