

LASCHER AT LARGE
By Edward L. Lascher

Last winter, I did a lot more than just toy with the idea of renting our house and spending the summer in Green Bay, Wisconsin, to avoid the Olympics. I'm glad I didn't; I was wrong about it. While I wish the press (electronic and print) had displayed at least the maturity to mute their jingoism, the experience was both pleasurable and – dare I use the expression? – uplifting. I think most of us felt a little better about each other and ourselves because of it. And, baby, there aren't many such experiences around.

Without detracting at all from the more important reaction just expressed, I'd like to add that the practical level was impressive, too. Apparently, Yankee ingenuity isn't dead, just packed in dry ice. For two weeks it seemed like we were in Switzerland – not just using their timers – the way everything clicked. Can't get away from one bittersweet query, however: Why can't things work like that, at least somewhat, the rest of the time?

On the other hand, there is that DeLorean case . . .

UNAGONIZED APPRAISAL

A lawyer I hold in great regard, but don't know well enough to get really relaxed with, inquired the other day about a justice of the appellate court. Since the question couldn't be ducked, and since I know the justice to be far from the most popular around, I chose my words very carefully, and was interested in my own answer.

"Not the greatest legal scholar we've ever had on the bench, but hardly the worst either," I began. "She's got guts." A moment's pause. "Another thing: She seems to care." A pause while I noticed a funny expression. "Not in the sense of 'compassion', which is getting a little suspect. "I mean she seems to ascribe significance to what she does. Thinks the work is important, so it deserves respect."

Made me think, that did. There are a lot worse evaluations of judicial quality than that one. Too many people consider judicial demeanor synonymous with judicial insipidity. Give me a Believer over a Time Server any day. You're doing okay, your Honor.

PUBLIC FOOTNOTERY

I rise to the defense of an unjustly abused aspect of legal writing. (That isn't true. I am just as sedentary while writing this as ever. Why do we say things like that? I may never know. Okay, where was I?) Namely, footnotes.

Everybody hates them. Bernie Witkin casts thunderbolts against them from his Valhalla (nee Berkeley), while David Mellinkoff deftly and elegantly deplures. Editors forbid. (Anybody notice that this column used to have footnotes? Please note tense. The substitute, as the eagle-eyed may note, is the parenthesis.) I say it is errant pedantry

and I say to hell with it. For great and small reasons.

Predictably, I choose to address the small first. Most, of the best writing done by lawyers and judges is in footnotes. Not, I stay seated to add, those which confide that "except as noted, statutory references will be to the Military and Veterans Code hereafter", but those which say something. Most legal writers allow themselves to be a little more liberal in the margins, as a result of which there is much legal literature which I attack only by reading the footnotes – to see if they tempt me to read the text.

The master of the footnote, of course, always was Otto Kaus. A collection of his Court of Appeal marginalia would probably be a modest best seller. I fear it tells us something I really don't want to hear that his footnotery has declined precipitously since his elevation. Rank and collegiality hath deleterious impacts, one supposes. When he can sneak one out to the printers in the diplomatic pouch, however, it's still something to be prized. (See *Kisbey v. State of California* (1984) 36 Cal.3d 415, 417, fn. 1; and cf., p. 425, fn. 2 [dissenting op. of Bird, C.J.]).

At the less sublime level, there is the question of how we word butchers handle footnotes. Listen up and I'll tell you my briefing secret. First time through, every ruddy footnote that suggests itself goes down on paper. Then begins the painful process of taking them out followed by the much more painful process of having somebody else take them out. If Justice Kaus ever does a book of his published footnotes, I think I'll put out a companion volume of my deleted ones.

The whole process can get pretty exciting sometimes. I once got charged with contempt for leaving a reference to "hometowning" in an appellate brief. (The Court of Appeal said yes, that's right, you did get hometowned, but that's harmless error. Speaking of ivory towers . . .) There's a landmark Supreme Court decision on product liability that turned out to be all about a footnote. Justice/Judge/Secretary Hufstedler threw away a footnote in a Court of Appeal opinion, and every one of the numerous parties responded with a footnote in the Supreme Court, in the course of briefing what they assumed the case to involve. At argument, the Supremes said all they wanted to hear about was the footnote and, *mirabile dictu*, produced an opinion untouched by human briefing above the margins.

The greater reason for having a society to preserve footnotes (You thought I'd forgotten that, didn't you?) is that they reflect life and thought. We neither live nor think in straight lines, so where do we get off pretending we can decide or persuade or explain in them? Heaven help any of us who would ever have our ordinary conversations transcribed. Tangents and qualifications and hesitations and digressions are every bit as much of ratiocination as is steely eyed, don't confuse me directness. More so, for my vote.

Consequently, I may disagree with your footnote, but I will defend to the death your right to use it.

ADVERBIAL INADVERTENCE

It being August as this is written, the creative urge is pretty well baked out. I'd be inclined to refer to dog days, but refuse to malign man's best friend. Given that condition, the reasonably prudent columnist falls back on somebody else's material. In this instance, the somebody is Janice Maslow, of North Hollywood, once the lexicographic conscience of a suite occupied way back in my Van Nuys incarnation. Her point is self-explanatory.

"I am concerned that you have apparently fallen victim to today's sloppy and imprecise use of adverbs. I enclose your most recent column, with the offending adverbs outlined in red." You'd better believe it "I must say that I think you have just not thought out the usage carefully and have accepted what you have heard.

"You wrote: 'Perhaps even more importantly, they inspired, guided, etc. Did you mean they importantly inspired, guided etc. or did you mean 'Perhaps what is more important'? An adverb, by definition modifies a verb, an adjective, a preposition, another adverb. As used in the above sentence, it is unclear what importantly refers to, or modifies; it just hangs there dangling in the sentence. (The worst common usage of the dangling adverb is 'hopefully'.)

"The misuse of adverbs is endemic, and I realize that I am trying to hold back the sea, but please don't lend your authority to this situation."

Nolo Contendere. She was right about every one of them, several of which I am sheepishly unwilling to quote. Regrettably, I can't guarantee against recidivism. Contritely, I am leaving in the morning for a ten-day vacation from writing. Expectantly, I'll tale up the cudgels next month.

FLUSHED WITH SUCCESS

Among the avalanche of book ads (How many do you get weekly with the words "Witkin on the cover?) there recently was a graphically formidable one for an item called "The California Supreme Court Service". Inside, it had one of those sample pages with little red notations along the side to explain how self-explanatory the product is. It annotated the topics of "Procedure" and "Facts" thus: "Issues flushed (sic, or is it I sick?) out with perspective & context." We find that Drano works better.

REALLY ZEALY

UCLA law prof Murray Schwartz has contributed an article entitled "The Zeal of the Civil Advocate" to Volume 1983 of the American Bar Foundation Research Journal (p. 543, et seq.), contending that lawyers should not render services in connection with conduct which is legally permissible but which they deem immoral. In other words, he rejects the "cab rank" principle by which we are forbidden to pick and choose clients on the basis of personal considerations. Having rejected any duty of lawyers to represent (Cf., Business and Professions Code §6068(h)), the good professor announces, with a true

academic's touch, an exception: If all lawyers reject a client, the courts should then just appoint one, Yarbrough style, and to hell with morality. I think I'll let that one just lie there.

However, Milner S. Ball of the University of Georgia dissects that thesis in a piece (op. cit., p. 565, et seq.) entitled "Wrong Experiment, Wrong Result". Professor Ball, who admittedly is burdened by theological training, gets off to a good start: "Perhaps if we keep adding to the literature on lawyers' responsibility for the consequences of their professional actions a critical mass will one day be achieved and something will actually happen – an explosive reaction of ethics in the practice of law." Perhaps, but I plan to go on breathing normally while we wait.

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