LASCHER AT LARGE
By Edward L. Lascher
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As might be expected, a couple decades of legal controversy – at work, where I earn my bread (not always daily) by telling higher courts that lower ones blundered and trying to take away victories colleagues have won, and also at "play" writing columns meant to be lambs but which come out like tigers – has introduced me to an abundance of criticism. Not all unjust, I hasten to add, but, perhaps surprisingly, it still tends to sting whether falling justly or unjustly. Even if saddened, however, I've just enough wit to realize that criticism comes with the territory.

A Bum Rap

Recently, though, I got one rap that I deem too bum to bear: a charge of discourtesy to courts and other lawyers. I say it ain't so, Joe.

First, the critic and I define "courtesy" differently. It means to me: doing things according to the accepted usage of the most honored and most honorable among us; recognizing that this is a small planet and our profession a small enclave, where elbows rub better when lubricated by decency; giving the other lawyer the benefit of doubt at the outset; and, above all, doing toward colleagues as I wish colleagues would do toward me. (You may want to write that last one down, though I do seem to have heard something similar elsewhere.)

On the other hand, I've never regarded courtesy as synonymous with pusillanimity, or even doormatism. If I had a nickel for every time some Sweet Old Barrister who has objected to every move I make and rejected every attempt at accommodation then calls to ask for a stipulation, saying (at least in close paraphrase) "C'mon, Ed, you know how it is", I could operate a free coffee stand outside Department One at least on weekdays. Even then, I'll usually go along with the gag once. But when it happens a second time – and it does disappointingly often – it's entirely true my response is "make your motion", with very little cordiality.

Neither do I think any definition of "courtesy" embraces hypocrisy or winking at patent fraud or sharp practice. If the time comes when I don't bridle at misfeasance by lawyers, then it will be time to hang up my Witkins. But even professional dis-esteem should, I believe, be expressed with punctilious politesse; if nothing else, it's classier that way.

The Uses of Couth

Second (and this is what justifies these ramblings), I constantly wonder if I'm the last person who does believe in courtroom courtesy. If there is one thing trial and appellate judges always tell me, when jawboning about their work, it's that professional decorum among lawyers and toward the court appears to have been outlawed (probably on the last day of some legislative session). Just look around sometime and see how many lawyers address courts while perched on the rail with their feet crossed, leaning on a lectern and chewing gum, calling the judge "you" or "look here", interrupting court and counsel, noisily talking to their clients, and performing a whole repertoire of simian impersonations.

It's not just kids, either, although one of the hundreds of things the law schools are failing to imbue is courtesy. (Gideon Kanner tells his students that when they argue their first appeal, they're suddenly going to be confronted with a panel consisting of a lady of conspicuous dignity who wouldn't be found dead at a rock concert, plus two guys with gray crew-cuts. It isn't very success-producing to address such a group as though one were passing a joint around. But I digress.)

A couple of months ago I watched two senior litigators from one of the largest factories west of the Rockies make perfect donkeys of themselves in a Court of Appeal. Barging up beyond the rail while other people were arguing, piling stacks of salesman's cases in front of other counsel, jabbering loudly while argument was in progress, and then charging up to the counsel table and starting to speak before the case had been called – notwithstanding that the court happened to want a recess right then. If such behavior were committed in my home, the people would not be asked back. I wonder why they think it's any more popular in the judges' house?

Doing a Road Show

A sort of footnote. One law department judge says he is particularly amazed at the antics of out-of-towners and even out-of-staters. Apparently, they are the most frequent offenders in terms of undisguised arrogance and just plain boorish behavior toward the bench. It's good to know that the banzai/kamikaze spirit lives. Discourtesy is hazardous enough on one's home court; it's downright awesome when practiced by the visiting team.

It has been my good fortune to practice all around California (I counted up 20 counties where I've tried matters) and even some other states. I will not deny there may be a certain chill from the bench at the outset, but it's the easiest thing in the world to dispel. One merely refrains

from announcing how it's done – stands up even to clear his throat in the judge's direction (at least until told not to; they'd all rather you'd err on that side), speaks pleasantly but not condescendingly. In short, acts like a decent guest. And, voila, before you're back in the car Mr. Hertz let you borrow, you've got another court it's fun to visit. This is particularly so because the local opponent will usually make a fool of himself by acting self-embarrassingly churlish.

To return to the main theme, I strongly doubt there exists a single weapon in the advocate's arsenal as effective as courteous, formal, professional decorum. It utterly astonishes me why so many colleagues disdain its use. It pains me too – except when the boor's on the other side.

Overinvolving Courts

Apparently the news media, like the appellate courts, have passing fads. The current vogue – among the journalists, not the jurists, for reasons that may become apparent – seems to be wondering if the courts are handling a lot of cases they shouldn't be.

It's a legitimate, topic; there is, to say the least, reason to be edgy about whether the bench may be involving itself too deeply in everyone's everyday life. It is not necessarily good in the long run for the body politic to have judicial determinations of whether some kid got cheated out of the prize in a Cracker Jack box, whether someone who plagiarizes a school theme should get a passing grade nonetheless, whether a school district should be liable for punitive damages for selling oaftmeal cookies whose aerodynamics permit them to be used as Frisbees, or, perhaps, even whether the Raiders should've stayed in Oakland.

Over the years, society has resolved most abrasions to the fabric of life by means other than invoking the Code of Civil Procedure – and has done so pretty well. We have had institutions like the home, the family, the school, the church and the neighborhood. The peace-making and resolution-fabricating abilities of those parts of our life are no better honed by atrophy or usurpation than is any other organism, and judges who convince themselves to be super-surrogates for all of those operative forces are (1) deceiving themselves and others, and (2) doing nobody any favor. A few years ago, Tony Kline tried to tell us all this and got pompously "censured" by the State Bar (and practically everybody else with a law degree) for his troubles. We shoulda listened.

But it is not all the courts' fault. A great deal of the blame also lies, not unpredictably, with our dear Legislature. That gang has recently

evolved a technique of handling anything that is (a) difficult, (b) a hot potato, or (c) especially both, by legislating a "concept" and then leaving it up to the Judicial Council or the Supreme Court or the BAJI Committee or whoever to "adopt rules" to implement said concept. That technique does have one advantage: it leaves more time available at legislative committee hearings for bitching about why the courts stick their noses into law-making. (In the past five years or so, I've attended a fair number of such hearings and have never – count 'em, never – failed to hear at least one such reference from the pols. And I don't digress.)

Judicial Unelections

As of this writing, though, the real cat's meow has just been passed out of both houses and will be on the 1984 ballot as a proposed constitutional amendment. I refer to ACA 74, which would empower the courts to remove elected legislators if they find that the candidate's improper tactics contributed to winning office.

Gad, sir, has the world gone mad? (See answers supplied in previous editions of this column, virtually any month.) I have tried and tried to think of something more violative of the doctrine of separation of powers, but I'm not up to the task. The notion of the courts' unelecting people is not exactly the straw that breaks the back of sane government; it's more like the load of I-beams.

The most revealing aspect of this sanctimonious gambit is the appraisal vouchsafed by our elected representatives. Apparently, they believe a lot of their selfs are getting elected crookedly (a point on which I shall not dwell – at least now), but they are also totally convinced of their own lack of brainpower and backbone to deal with that assumed fact. Historically, a legislative body is vested with the power – <u>and the duty</u> – to determine the qualifications of its members and to impose discipline on them. Apparently, however, all our Legislature can do is hand up a self-indictment and then change venue of the prosecution.

This sorry spectacle is not only inherent foolishness, but also vivid evidence that those who represent us have forgotten all about any "heal thyself" injunction.

Justice Wood

Anent the subject of courtesy (see above) I note the passing of Parker Wood, who was presiding justice of the Court of Appeal in the first case I ever handled and, it seemed, 90% of those that followed. Justice Wood and I did not agree very much on substantive law, and even less on the unmistakable justice of my clients' causes. I don't believe I ever won a

case in which he wrote the opinion and, if I did, it was of such little consequence that I've long forgotten.

Nonetheless, I never left his courtroom feeling I had been treated with anything but utmost courtesy or that the proceedings had been conducted otherwise than with appropriate dignity and gravity. If I were a judge, I wouldn't in the least mind having those words written as an epitaph, even by a lawyer with whom I seldom agreed – perhaps especially by such a lawyer.

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