

LASCHER AT LARGE
By Edward L. Lascher
November 1982

These words will hit the street (so to speak) on the Morning After when we're all learning exactly how democracy treated itself election day. Neither as a member of the legal profession, nor as a citizen of California and the United States, nor even (necessarily) as a member of the human race am I particularly sanguine about the prospects – although my stomach keeps telling me the worst calamities will not befall, at least this year. When you read these words, and I reread them, we'll know how good at prognostication my viscera turn out to be.

A Flicker of Light

At the gloomy juncture of this writing (Odd how many such junctures come along lately, isn't it?), flickers of hope are gratefully received, with no questions asked about candle power. Lately I got one such, of the "all is not lost in the profession" variety.

It has come to my attention that there exists a group of some six or eight lawyers in Santa Barbara and Montecito, each of whom owns a pinball machine. No, not a Pac Man or a Donkey Kong or even one of those electronic imitation pinballs so afflicted by point inflation that anything under a million isn't close to a replay. I mean the real, old-fashioned, silver ball and flippers machine with rubberbands and good, honest bells.

That's neat as far as it goes, but it goes farther. These stalwarts have also made a deal whereby, every couple of months, they rotate the machines. Time-sharing gone benign. Like owning six or eight pinballs. It's enough to make a body move north, if they just weren't on General Tel, and some other things – which are quite another story. Anyway, as long as the bar has an enclave of brothers and sisters like these, we ain't done yet.

Free Law Reform Advice

Every once in a while, I grumble about how the organized bar should do more in the way of aiding law reform, or (more accurately) should kick the habit of holding retreats, writing magazine articles and otherwise navel-contemplating, and get down to matters vaguely related to what actually goes on in courtrooms. (I hope that sentence parses, but I won't go back and find out.)

Since I despair of ever achieving that state of nirvana, I think I'll cut out the middlepersons at least once and simply tell the Supreme Court, flat-out, about one way to shape up its act. If you're going to do a thing, you might as well do it right, and therefore I figure the Supremes are the best place to start.

The subject is, perhaps predictably, petitions for rehearing. Not how to discourage them or reduce their number (sorry, Justice/Professor Newman) nor even, for that matter, how to get more of them granted (sorry, fellow losers). Rather, I put it to you that one detailed change in the rules would notably rationalize current practice.

My recommendation is in alternative forms. The better (to my mind) step would be for the Big Court to eliminate the right of litigants who win in the Court of Appeal to answer petitions for hearing. Instead, response should be allowed only on invitation of the court, in which event the petitioning party would also be allowed a short time to rebut.

I strongly suspect that in the significant majority of cases the petition is the only thing the court looks at anyway. In some 90% of the cases, the justice or clerks must know right off the bat that no reason for hearing exists, so why read more? My proposal would save a lot of paperwork which, by that thesis, does no earthly good (except, of course, to drum up fees, as O'Heller and McCrutcher, et al, would instantly recognize). If, however, the court on reading a petition gets a glimmer, they should simply extend time, give the party who prevailed below 14 days to file a 10-page-maximum answer and the petitioner 7 days to file a 5-page retort, following which the case would go on conference calendar a month later than otherwise.

If That Won't Work . . .

If that proposal smacks too much of rationality, my fallback position is just to allow an extra week for a prescribedly short rejoinder to the answer to a petition for hearing. This would cut out one major example of draftsman's oversight in the appellate rules: the fact that a party answering a Supreme Court petition can say anything he damn well pleases, restrained only by the tissue-thin bounds of intellectual honesty, with total impunity. (I've often wondered if it may not be the duty of effective counsel to exaggerate, insinuate and obfuscate in an answer to a petition, since otherwise he is denying his client the right to one free cheapshot – not a redundancy under the circumstances.)

If one needs an example, we recently filed a petition and were treated to page after page of factual asseveration totally unrelated to anything in the record – which ain't all that unusual – topped off by a

substantial allegation of fact which was reasonably accurate but which (1) dealt with a totally different controversy and (2) (brace yourself, if you've got any illusions) consisted of matter not only subject to strict statutory confidentiality but also sealed by express court order. Would it make you feel any better to know this came from a public law office I have always found in the forefront of honor and decency? Apparently, the chance to avail oneself of this kind of blindsider lies beyond the resistance of the best among us.

There are few laboring oars harder to pull than the one involved in trying to get the Supreme Court to hear. The burden is ample without skewing the odds even further by licensing the other side to throw risk-free rabbit punches. I think the first solution is the better, since it kills a couple of evils with one boon, but, one way or the other, we ought to get rid of this whole practice.

Uh Huh Department

I give you – please take it! – the following extract from the opinion in Lloyd v. Superior Court (133 Cal.App.3d 896), which is a pretty good case in lots of ways:

"There is no authority for the county's suggestion here that Lloyd should be found in contempt because he was from out of town and not a member of any local bar association."

Way to go, County Counsel! But don't you think that's pressing the home court advantage a bit? Some of us oldsters may recall the time when the San Diego division of the then-Los Angeles headquartered Southern District Federal Court adopted a rule that a member of the bar of that court could not appear in San Diego unless accompanied by (i.e., featherbedding) a lawyer whose office lay within the territorial boundaries of that branch. Eventually, some nonsense like the concept of a federal union prevailed over that adventure in jurisprudence, but it's reassuring to learn the spirit still lives.

Switch Hitting

I loyally thumb through Case and Comment, mostly out of fond recollection of the great cartoons they used to carry. Although it nowadays runs little of interest to an old war horse, a recent piece on law office searches sent shudders down my spine. I'm amazed at the equanimity with which most of the bar – and its designated leading hitters – face the concept that muni court judges who happen to be in the mood can authorize any cop or deputy to have a nice riffle through our files.

While I certainly regard many of the gyrations courts go through to create picky, picky details of search and seizure as an obnoxious trivializing of due process, the recent discovery that there's nothing confidential about a lawyer's client files seems to strike at the very heart of what we're all about. So, also, thought the author of the piece I just mention. But what seemed significant was his occupation: He's with a think tank for Illinois prosecutors!

My congratulations to Robert C. Cook, Esq., and to the organization lucky to have his service – and, it would seem, that he is lucky to serve. It has always appeared to me that one-sidedness (mostly in the criminal field, but also in the plaintiff/defendant/insurance company context) is one of our system's chief weaknesses. Prosecutors like Cook who can see that, on occasion, there is something to be said for the defense position are (1) pearls of great price and (2) as rare. Even more so, prosecutorial organizations rational enough to allow their minions to think multi-dimensionally are phenomena to be treasured and respected. Such attitudes are normally regarded as traitorous perversions.

I am reminded of a time I dropped in on a murder trial at the Old Bailey. It was jolly good sport on both sides but, when they took a recess, our group of American lawyers asked the prosecuting QC what, exactly, was happening. He explained they were having a “trial within a trial” to determine the validity of a confession – what amounted to a 1538.5 hearing in mid-trial – adding: “If his Lordship throws the confession out, I think our case goes out the window.”

A lot of Yankee jaws dropped. Can you imagine a California DA admitting his case was hopeless no matter what happened to it? John Van de Kamp did it once and caught ten kinds of hell for it; so did Evelle Younger some years back. In both instances it was deemed headline news.

Then the barrister put a capper on it: “And if that happens, so be it. The defendant seems quite a decent chap.” In the current Kristallnacht mood of our populace – not to mention our profession – I assume that any California deputy who said that in court would be (1) disbarred, (2) tarred, (3) feathered, (4) banished.

Oddly enough, our British cousins get more convictions faster with trial lawyers who defend one day and prosecute the next. Of course, it's possible they send felons to the glasshouse in spite of this ability to perceive both sides, but I can't help suspecting the results occur because of it.

Matter of fact, if I were accused of a felony, I actually think I'd prefer being prosecuted by a tunnel-visioned, doctrinaire zealot. And the odds are darned good I'd get the chance. (Not as good as they used to be, though. All those types are being elected to the bench nowadays.)

Abroadening Travel

Don't say I didn't bring back any news for you from my 12 days in Europe. I discovered that direct international dialing is all the rage on the Continent, with every phone booth and hotel room posted on how to do it. Including the area codes for the four important cities in the United States: New York, Washington, Chicago and Los Angeles. So much for Ost Oakland, Bas Novato or Haut Colma. Apparently, the way a good Euromart citizen reaches San Narcissisco is to dial LA and ask for information.

© 1982 Edward L. Lascher