LASCHER AT LARGE
By Edward L. Lascher
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While I don't want to cause grown lawyers to cry (efforts of that sort are aimed only at those vested with authority to grant or deny continuances, extensions, et al), work has been something horrible during the last quarter of '83, and the modicum of energy that's left is saved for quaking about the schedule prospects for the Year of the Orwell. Plus which, the holiday/yearend period is just inherently a time when deadlines loom more than usually terrifying, and ideas fluctuate between chimerical and nonexistent. So, up to a few minutes ago, the content of this column was primarily a source of (1) wonder and (2) desperation. But then, like the 7th Cavalry at its finest – i.e., before Little Big Horn – rescue came galloping, from just the place I should have expected it: a law review.

Epistolary Evidence?

I give you, hot off the pages of the October Georgetown Law Journal, this zinger-titled item: "A Modern Management Technique for Trial Courts to Improve the Quality of Justice: Requiring Direct Testimony to be Submitted in Written Form Prior to Trial". (You could look it up; Volume 72, No. 1, p. 73, et what I think they call seq.)

Regular readers of this column (A possible contradiction in terms. How can someone who does that be "regular"? But I digress.) will be underwhelmed to learn this was written by one of the peerless prides of the judiciary, one Honorable Charles R. Richey, a federal district judge in the District of Columbia (which I suspect means redoubled and vulnerable), adjunct professor of trial advocacy, recipient of an annual award of merit from the Administrative Law Judges Association and one-time elected member of the council of an ABA section. Not to mention, ominously, an instructor in continuing education for federal judges. I dare not say more; I perhaps have said overmuch already, but (as mentioned) you could look it up.

Lord Richey discloses that he has "devised a management tool" which is "designed to streamline the presentation of evidence by eliminating from trial procedure repetitious direct testimony and unfair surprise as well as inarticulate and confusing questions and answers". (Please bear in mind for a moment that "inarticulate and confusing" business.) As he says, his "method is quite simple". The judge simply orders parties, before trial, to "submit all direct testimony in written narrative or question and answer form", verified by the witnesses and

served on the opposition. The latter worthies have two days in which to file written objections to any of that cr_ _ oops, stuff – but "with the expectation that they have conferred in good faith to resolve any dispute prior to filing such objections".

May I digress for a moment? Sure. Does anybody else see anything odd about an advocate of clarity and modernity who cannot use the word "before" any time "prior to" is available? I thought not. Let's see, where was I?

Asif Hudani, yes, it is said that this technique "brings issues into sharp focus for the factfinder". Right! Just like interrogatories and answers do. It is said that this eliminates techniques "whose time has past [sic] in the modern-day quest for the highest quality of justice", since cross examining a sheet of paper "provides the judge and/or jury with a better opportunity to make thoughtful, carefully-measured, and intelligent credibility judgments". It also "precludes the possibility that counsel will utilize trial techniques". Well, finally, somebody has identified the evil to be stamped out!

So self-evident is all this that his Lordship simply assumes that it's a great improvement on that business of having sweaty, nervous, twitchy-eyed witnesses come in and talk to you, that its value is established ipse dixit. The problem he does address is whether it is permissible under the federal rules (the constitution being, needless to say, unmentioned). He points out, triumphantly, that: "To date, there is no case directly on point either in support of the proposal discussed herein or finding it improper." Can you beat that? There aren't many cases on using the ducking stool to aid the trier of fact, either. However, since I assume that everything is permissible under the federal rules, I'll concede the point that it could be done.

Ban The Boon

Should seems a more likely battleground. Perhaps predictably, his Worship makes no mention of a few potential problems. Like, for instance, what about adverse witnesses? I somehow have trouble focusing the technique by which the plaintiff's lawyer brings the defendant into his office and motivates that worthy to write out his testimony in advance. And also, do you suppose the judge gave any thought to the position of the defendant, who supposedly introduces testimony on the basis of what the plaintiff shows first? Or how about the polestar of our practice by which we give overwhelming weight to the decisions of the trier of fact because that trier perceived the live witnesses, not just the "dehydrated peach" of words on paper? Well, hell, progress would never be made if people messed around with quibbles like that.

I also have this lingering concern about what lawyer-written testimony would look like. That fear was not tremendously allayed by reading sentences such as this: "The suggestion herein, as seen from the appendices attached hereto, will not only increase the quality of justice and be of convenience to the factfinders whether they be judge or jury, but also save valuable time and resources of the public, the bar, the courts, and all those involved in the resolution of disputes through the trial process." (Remember that business about "inarticulate and confusing"?)

Subsequent to reading that and as a proximate result itof, I felt nauseated. Not, I hasten to add, primarily at the poor judge. It gets awfully boring on the bench, and a lot of them have to invent things to occupy their minds. There used to be a municipal judge in San Bernardino County, John Lawrence, who wrote Haiku on the bench – an ineffably more useful pastime than law-review spinning, but similarly motivated, I suppose.

What lit my fuse is the fact that the legal education system of this country abets, even encourages, this kind of flapdoodle. Somebody should have tut-tutted it, bought the judge a beer, and traded anecdotes about the dear old dean everyone knew and loved, and forgotten the whole thing. What terrifies me is the possibility – I hope it's only possible – that the failures of this type are not ones of conscience but of information. That those who are molding the scores of thousands of new lawyers who enter our profession every couple of months don't know that Judge Richey's comments are utter, certifiable nonsense.

By the way, I hope none of our clients have any difficulties in the D.C. District in the near future. Isn't life in the practice of law fun?

Repudiated Anticipations

As long as I'm already being dyspeptic about legal publications, it may be time to mention the American Lawyer. It's been around long enough, and has established enough of a personality of its own – or, more accurately, has become completely the embodiment of Steve Brill's personality – that its niche is secure. I think, then, it should have some well-earned recognition.

Like, twin trophies for Greatest Waste of Opportunity and Disappointment of the Decade. Its niche should be plastered shut (which sometimes seems not far off the existing state).

When Steve Brill wrote a column for Esquire, it was brash, unprecedented, iconoclastic, informative, and fun. When his new sheet came out at first, well, maybe it wasn't all one hoped for, but it was a

breath of fresh air in the fetid world of legal journalism. It's all turned to halitosis.

When it doesn't offend, it bores. My secretary used to grab my copy, take it home and read it front to back and then let the rest of us at it; nowadays, I can't get her to look at the one thing in 90 worth reading. I find myself putting the publication on that overcrowded space at the back of my table where things I'm going to read "when I get a minute" reside for 90 days before entering the custodian's custody.

The fault may lie in my stance, not the American Lawyer's. I'm such a prole I don't even want to know how the kids in the upper half of the sophomore class at Yale Law evaluate the recruiting teams from Cravath, Jenner and Jaworsky. If I had any class, I'd be just slathering to know where O'Melveny's takes its summer clerks for their weekly bacchanal, or what kind of champagne the new associates at Pillsbury favor for lunch. If I were even a halfway prudent person, I'd want to know who just slipped out of what 90-lawyer firm to start a new punk record department in which other Century City high rise.

But I don't. I've got a sneaking hunch that one could easily ascertain the paid circulation of that publication by totalling certain numbers: the second and third year class enrollment at law schools whose reviews are cited in Shepard's, plus the aggregate number of lawyers in American law firms with more than 75 partners, plus the number of law libraries in the contiguous 48 states, plus two. And I wonder who the other subscriber is. Obviously, the world needs a cross between Vanity Fair, the National Enquirer, and the Harvard Lampoon. But I don't.

Oops And Downs

Then, to wipe this particular slate clean, there's the California Lawyer. For reasons that might be apparent, I have pulled my punches concerning that venture, and have even muttered a few words of relief as its early sophomorics – in which every article started with a sychophantic description of some hot shot standing in his (or her) shirt sleeves and looking out an office window at (a) the lower San Francisco Bay, (b) San Pablo Bay, (c) the Golden Gate, or (d) downtown El Centro – were gradually folded off into the night. About a year ago, the thing really showed impressive signs of improvement.

Today, it's significantly more polished than in its earlier years. The layout is good, the editing discloses professionalism, and one would not for a minute think it to be published by lapsed high school journalists.

It just has this one, teeny, thing wrong with it: There's nothing in it anybody wants to read. No matter what the graphics and how good the editing and writing, a magazine you don't want to read just doesn't do the trick. Actually, every issue lately seems identical in content. So, as of this moment, I'm afraid it's good form, poor substance; one's wasted, the other worries. I realize it's an old wheeze for me, but I have a horrible feeling that one explanation could be the paucity of practicing lawyers in the management of the publication. I'd also like to hear how much it's currently costing us.

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