"Lasching" out loud

Legal writing can best be described as persuasive legal and factual storytelling, and Edward Lascher's writing was genius


Kelly

By Dan Kelly

"This is not a brief to be tossed aside lightly, rather, it should be thrown with great force."
– paraphrasing a Dorothy Parker book review

The late Edward L. Lascher was a great appellate lawyer. In 1968, when I was in law school, I contacted him to write a law review article and, boy, did he deliver.

To put it in context, beginning in 1929, California Vehicle Code section 17158 (the Guest Statute) altered the common law duty of care which the automobile host owed to his guest. Unless the rider in the vehicle paid compensation for the ride, there could only be recovery where the auto accident resulted from the driver's intoxication or willful misconduct.

Ed Lascher, in 1968, penned "Hard Laws Make Bad Cases – Lots of Them (The California Guest Statute)" 9 Santa Clara Law Review 1 (1968). He described his article as an unabashed lawyer's brief favoring invalidation of the statute. His article concluded as follows (at pg. 31):

> Three and a half decades of confusion, illogic, solecism, gamesmanship – and unconstitutionality – are enough. Every segment of the legal community knows the true nature and state of the guest statute; it is time for some court to play the role of the proverbial small boy and point out the truth to the sovereign – that the legislation is unclothed by constitutionality.
>
> One tends to suspect that somewhere in this great state the right court is just waiting to be asked in the right way in the right case.

Bingo! That court proved to be the California Supreme Court in *Brown v. Merlo* (1973) 8 Cal.3d 855. *Brown* held the statute denied equal protection under the state and federal constitutions. In so holding it cited and quoted from Mr. Lascher's article.

Ed Lascher also wrote a monthly column in the State Bar Journal entitled "Lascher at Large." For me and most lawyers it was the first (and, maybe the only) article to be read in the Journal.[1] Some of us even collected the articles. He could really write. I also collected some of his appellate briefs and I even made the trek to his office in Ventura to personally meet him and thank him for his law review article, his monthly columns and the great body of his legal work I so enjoyed reading.

It got to the point where I collected "Lascherisms" such as:

- A strident argument was "hubristic pooh-poohing."
- A weak argument was "a discredited wheeze."
- Arguing by analogy was "tailoring a strawman of epithet."
- Overly praised characterizations were "self-serving epithets."
- A misleading argument was "an exercise in sophistry."
- A shotgun type argument was a "crazy quilt."
- A forced or one-way only argument was "being subjected to a Procrustean Bed."

Once in an amicus brief to the California Supreme Court he likened the opposition's fear of his proposal to that of "Henny Penny running around saying the sky is falling, the sky is falling."

Six months out as a lawyer and armed with "Lascherisms" (and not much else), off I went to my first trial. Venued in Oakland, it was an insurance coverage case where I was appearing on behalf of our two clients as well as two clients of the Boccardo office. I was opposing the insurance carrier's action seeking a declaratory relief holding of no coverage for a serious truck versus car collision.

While I knew next to nothing about insurance law, the two attorneys really squaring off were highly experienced insurance counsel, Jerry Martin and Bob Cresswell. Plus, the judge, Frederick Van Sicklen, did some insurance defense work as an attorney.

When you know little about a subject it is best to quickly learn it, as in cram. I hit the books, knowing at the conclusion of the case I had to submit a brief to the court. My initial and lasting conclusion was that insurance law is rather boring. So, I thought the best way to liven it up was by adding "Lascherisms" to my brief. Maybe I livened it up too much.

Stan Ibler and Gary Moore of the Boccardo office, upon reading my brief, combined to write me a letter as follows:

> Just wanted to let you know that your brief has withstood judicial scrutiny – at least as far as we're concerned. As always, we were catatonically impressed with the familiar, trenchant haecceity of your style. You have indubitably imparted a transcendent quality to your brief-writing and made it into what Lord Coke always advocated it should be: a literary free-for-all.
>
> Although your liberal (but hardly excessive) use of sesquipedalia frequently leaves us – albeit only temporarily – in a state of incomprehensionabilificationalism, we feel that while what you are saying appears to be vague, it is, in reality, meaningless.

> At the very least, it must be conceded that you have inextricably trapped the insurance carrier spread-eagled on its Procustean bed, with its self-serving epithets at half-mast (a redoubtable triumph for us sophistical strawmen!).

Stan and Gary concluded with this salutation: "Very hubristically yours" and out of a small measure of kindness added a P.S.: "Your brief is excellent." In response I wrote: "Gentlemen –
I don't know which of your secretaries composed your July 14th letter, but please give her my thanks for the kind words." My salutation was: "Succinctly yours."

Probably having nothing to do with my brief, the judge declared there was insurance coverage for the subject accident. Undaunted by the letter from Stan and Gary, I took a deep bow claiming full attribution. I also took a deep bow of respect to Ed Lascher as well as a vow not to think that I was in any way going to be the next Ed Lascher and to stop trying to do so.

In the April issue of *Plaintiff* I gave the following caution to trial lawyers: "Be yourself because everyone else is taken." The same advice applies to one's writing style. Legal writing can best be described as persuasive legal and factual storytelling.

In John Steinbeck's "Sweet Thursday" a character says the following:

> Sometimes I want a book to break loose with a bunch of hooptedoodle… Spin up some pretty words maybe or sing a little song with language. That's nice. But I wish it was set aside so I don't have to read it. I don't want hooptedoodle to get mixed up with the story.[2]

Ed Lascher was a true wordsmith whose style kept you riveted to his writing.[3] When I try to emulate his or anyone else's writing style I tend to perpetuate the hooptedoodle – as you may have noticed in a few of my articles, including, perhaps, this one. I'll keep trying to avoid such flights of fancy – I promise. If you spot them, treat them as you do most of the stuff you receive in your messages or emails: fast-forward and/or delete. If that doesn't work, I suggest you write a complaint to the editor of *Plaintiff*, Maryanne B. Cooper, Esq. If you do write her, please watch your punctuation and grammar. Thankfully, she has a real thingy when it comes to that stuff.

Endnotes

[1] The other Bar Journal section I usually read was the listing of attorney disbarments and suspensions. Perhaps that is also why newspaper obituaries are frequently called "the Irish sports page."

[2] In 2001, my favorite crime novelist, Elmore Leonard, wrote an essay in the New York Times entitled: "Easy on the Adverbs, Exclamation Points and Especially Hooptedoodle."

[3] On Ed Lascher's death in 1991, Presiding Justice Steven J. Stone of the 2nd District Court of Appeal stated: "He was a fine, fine writer. We rarely see his style of craftsmanship anymore." He was also described by local and state bar leaders as "the most revered attorney in Ventura County" who "had a marvelous ability to turn a phrase."