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Introduction

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INTRODUCTION

THE HONORABLE CARLOS T. BEA

When asked to write this introduction to this year's *Golden Gate University Law Review Ninth Circuit Survey*, I asked what aspect of the court would be most interesting. Rather than a disquisition on the en banc process, the Law Review opted for my recollections of how the circuit and district court functioned in our magnificent courthouse at Seventh and Mission Streets in San Francisco.

I was lucky to argue my first case in the Ninth Circuit, right out of law school and after passing the Bar exam, in 1959. Years later, I was lucky to be appointed to join the Ninth Circuit when Judge James Browning was still with us, and before the courthouse was named for him. It is a beautiful and storied courthouse, saved from the wrecking ball of "urban renewal" advocates of the early 1960s who wanted to level the courthouse to build a parking garage. It was saved from demolishment by the advocacy of Chief Judge Matthews and a one-vote margin among the sitting circuit court judges. I have also been lucky to live through some of its history as a circuit and district court.

Shortly after getting a job, the senior partner called me in. "The clerk of the Ninth Circuit called me up and asked if we had any young associates who could handle pro bono appeals. I volunteered you. Go down to the courthouse and talk to him." That is how it was done in 1959. No Criminal Justice Act attorneys, no public defenders, no programs, and no paperwork. The clerk of the court, a kindly man, handed me a file with a filed form notice of appeal. Period.

After I had received the Clerk's Transcript, I learned I was defending Vernon Burke, convicted of assault with a deadly weapon for shooting up a bar in Anchorage, Alaska. The reason it was a federal case was that Alaska was a territory, not yet a State. I figured I needed a transcript of the testimony and asked the Clerk how to go about getting one. He pointed me to the U.S. Code Annotated and shrugged his shoulders. So I put together an in forma pauperis motion for a transcript. When the motion was granted, the Clerk asked if I would mind his using my papers as

forms to be handed out to other pro bono counsel. I was flattered. He smiled and gave me a desk next to a fireplace that still worked.

What did not work so well was my appeal. I spent many hours trying to research precedent for the idea that assault with a deadly weapon was a specific intent crime, and that it was plain error not to have so instructed. I got to argue the case in Courtroom Two, then the only courtroom used by the Ninth Circuit. You can see the results in *Burke v. United States*, 282 F.2d 763 (9th Cir. 1960).

The remaining courtrooms 1-5 were all trial departments, and getting to trial in the District Court was a somewhat clubby affair. Once a month the Clerk or his deputy would convene a group of trial attorneys by listing a group of cases that were perhaps ready for trial. I was sent by a partner to make an appearance; he had handed me several convenient trial dates for some upcoming railroad cases. The deputy clerk asked if any of the plaintiffs' attorneys were ready for trial on the list of cases. When one answered up, the clerk would turn to me and ask: "When would it be convenient for Mr. Phelps to try this case?" I would suggest a date and that would be the trial date.

The District Court was organized on a Master Calendar system, with Law & Motion assigned to Judge George Harris, in Courtroom Five. There were no Magistrate Judges, nor Discovery Commissioners. As a young trial lawyer, I spent a lot of time in Courtroom Five trying to keep my opponents from seeing the statements of witnesses taken by the claims agents for the railroads I represented. That did not work too well either. Judge Harris would look down at his desk and grumble: "Give him the statements."

This was the same judge who had held James Martin MacInnis in contempt during the trial of Longshoremen's President Harry Bridges on Smith Act charges (membership in the Communist Party). At the end of the examination of a government witness, Judge Harris had spontaneously commented to the jury that in his experience he had not seen a more credible witness. MacInnis exploded: "George Harris, step down from that Bench and join the prosecutor's table!" Bridges was acquitted, but MacInnis was sent to McNeil's Island to serve six weeks for contempt. One did not argue with Judge Harris after he made a ruling.

These earlier days were different, but the courthouse was perhaps even more exciting. The trial courtrooms were beautiful, redolent in mahogany, marble, and encrusted mosaics. I finally got out of Law & Motion and got to try a case before Judge Wollenberg. The plaintiff was a distinguished looking gentleman who bore a striking resemblance to David McDonald, then head of the Steelworkers' Union. He claimed to have badly injured his knee, when necessarily alighting from a too-fast

train, onto uneven ground, to throw a critical switch. The railroad had a confidential investigative department darkly named "Section II." Two of their operatives were a couple who would do what we called then "rope jobs," by reeling in phony claimants. The operatives rented a house next to the plaintiff's retirement home in Arizona. The lady operative was very attractive, and she inveigled the claimant to sand and paint her front porch.

The railroad supplied some devastating surveillance movies. In those days, discovery did not reach them; they were considered "work product." When the lights went on after showing the movies, the jury refused to look at the plaintiff whose "stiff knee" seemed to work perfectly well on 2000 feet of black and white film, as he knelt to sand and paint the front porch and smiled at the lady operative.

The courthouse was a busy place; the Post Office was still operating on the ground floor in those days, and so was the Greyhound depot across Seventh Street. The Greyhound depot came in handy for the court one day. Judge Ritter, from Utah, was sitting as visiting judge. He was empaneling a jury, but ran out of veniremen. Not one to be deterred, he ordered the marshal-bailiff to go across the street and press into service some of the homeless — then called "hoboes" — who panhandled at Greyhound. Of course, when told they would get jury fees (then about $10.00 a day, with Muscatel at $1.00 a bottle), the new veniremen felt not at all put upon. I don't know whether this system of jury assemblage was ever tested on appeal. But it probably had a better chance than the one used in our courthouse in the Depression and that was dismantled in *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946). The District Court was short of veniremen in Thiel's case also, but rather than go to the Greyhound station, the deputy clerk went up to the Bohemian Club, the Pacific Union Club, and the Olympic Club to see if any of the gentlemen taking their ease there would be willing to sit as jurors. Understandably, the Court found the venire was not representative of the community.

Cases were tried on an iron schedule. Start at 10:00 a.m., recess at 11:00 a.m.; adjourn at Noon till 2:00 p.m. In the afternoon, a break at 3:00 p.m. and court adjourned at 4:00 p.m. until the next day. This allowed for leisurely and liquid lunches, but not extended trials, since there was very little discovery done. For instance, opposing medical witnesses were not deposed; their written reports were exchanged and used for cross-examination. Of course, more civil cases actually went to trial since the enormous costs of pre-trial discovery were still a thing of the future.

The Bar was smaller then, and a judge would know a local attorney's circumstances. I remember a kindly judge of Irish descent before

whom I made a motion to dismiss for lack of diversity of citizenship, which if granted would have resulted in the case being refiled back in Kansas or Arizona, where I wasn't admitted to practice. He enquired whether he had heard correctly that I had recently started my own firm and not only that, but had just got married. I told him he was correct. "Well then counsel, this is not a time to scare away business. Motion granted with leave to amend to find another plaintiff — perhaps the Government? Let's keep the case here for you."

I handled many more cases in this courthouse over the years, eventually as a judge. I am also lucky to have stuck around long enough as a Ninth Circuit judge to see a new generation of lawyers rise through the ranks right here in San Francisco — where they are guaranteed oral argument before us when they accept Immigration cases *pro bono*. The *Golden Gate University Law Review Ninth Circuit Survey* is a great place to get a start on what is going on here today.