

Keynote Introduction
to
Love with a Proper Stranger:
Collegiality on an Appellate Court

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At this point in our effort to profile "The Compleat Appellate Judge," the presentation you are about to see is something of a time warp in an otherwise forward-looking program. In thinking about "The Role of the Courts in a Changing Society" or "Where Will Science and Technology Take Us . . . in the Brave, New World?", you have worn the helmets of dauntless futurists. We now are asking you to don the mantles of antiquarians to preserve something precious from our past. . . something that today is in jeopardy, something we call collegiality.

Let us examine this "something." How important is it? The shorthand for the core concept of an appellate court is that several heads are better than one. But the idea is not that it is just a device to achieve a numerical majority behind a decision. After all, a legislature does that job far more convincingly with more significant numbers. No, the higher aspiration of the appellate idea is that a different and richer kind of wisdom emerges from a collegial approach to making decisions.

We differ from other collegial groupings, such as law firms, group medical practices, and colleges themselves. Each of these institutions combines the pursuit of individual specialties within a framework of common governance; in our case we are all generalists and not only governance but all our activities are fashioned by our own joint action. I have searched for a metaphor to describe our situation. A flower, a rose, sounds great, but it is made up of specialties- stamen, pistil, and petals. My daughter gave me a better idea. She is very proud of the garlic she grows, and has long sung its praises. Our kind of collegiality is like a head of garlic, composed of a cluster of cloves, nesting comfortably together . . . with an unmistakable scent and flavor. It may lack the surface beauty of a rose, but it helps prevent viruses, fungi, and hardening of the arteries, is great for the heart and blood, and strengthens the immune system. What more can we ask?.

I propose this definition of appellate collegiality:

The "Who" -- The deliberately cultivated attitude among judges of equal status and sometimes widely differing views,

The "What" -- working in intimate, open, and noncompetitive relationship with each other,

The "How" -- combining awareness of the sensitivities and respect for the strengths of colleagues, with a willingness to compromise, short of sacrificing one's convictions,

The "Why" -- in the effort to achieve as excellent a decision and opinion of the court as the combined experience, learning, and

insight of the judges permit.

This kind of collegiality is assaulted today on many fronts. The numbers of judges alone are ominous. They vary widely among our courts. In the federal system, the Ninth Circuit alone has 27 active and 20 senior judges, compared to the First, with six active positions and five seniors. State courts of last resort show a moderate range, from 9 justices down to 5. The individual court units of the Intermediate Courts of Appeal range from 5 to 33, with 31 units having more than 10 judges and 13 having more than 15 judges.

If a court has ten judges, the best any judge can hope for is that they will sit with the same colleague no more than twice a year. This creates a problem. How can they replicate the conditions that enable judges to know and therefore value the varied strengths of colleagues? For on this foundation of genuine respect the edifice of collegiality is built. One judge shines in keen analysis and acute questioning at oral argument. Another's research is prodigious, often spotting issues not raised by counsel. One is more earthy, possessed of a reliable reservoir of common sense. One shines in commenting on opinion drafts. One is a deal maker, having a capacity to suggest gracefully ways to compose differences. Each such quality adds to the brew. Each should be valued.

Another threat is posed by increasing caseloads and the concomitant increase in number of law clerks and staff attorneys in proportion to judges. This varies in state courts from a one-to-one ratio to ten-to-one in the largest courts. In federal courts of appeal the ratio varies from 4 to 7 clerks and staff attorneys per judge. This increase poses two subtle threats to collegiality. First, the judge may find himself distanced from some drafting decisions that, while minor, would benefit from a sensitive collegial hand. And, second, there exists the human temptation for a chambers community of any size to be concerned about protecting turf, claiming credit, and scoring points.

When we add to these factors the burdens accompanying the benefits of technology - for example, the temptation to give shoot-from-the-hip responses to an e-mail draft opinion or comment, the demands of ever more sophisticated and expansive committee work and administration, and, for 80 percent of our state judges, the pressures of judicial election campaigns, it does not require brilliance to conclude that collegiality might well be reduced in many courts to a weak and flickering flame.

It is our purpose this morning to probe ways of fanning this flame. We all share the same basic function, traditions, and aspirations. But we bring the perspectives of three quite different kinds of appellate tribunal: 51 state courts of last resort, 39 state intermediate appellate courts, and 13 federal courts of appeal. We differ not only in sheer numbers and staff, but in whether we sit in panels or as a full court, in the frequency with which we sit with each colleague, in how we gained and how we retain our office, in the way we conduct oral argument, confer on cases, and communicate with each other. One model of collegiality will not fit all of our courts.

Indeed, "model" is not a word that fits our exercise this morning. Under the leadership of my colleague, Judge Lipez, your panel has devoted much thought to thinking and talking together about our subject. What emerges, as you will see, is not doctrine, not black letter, not dominantly intellectual. The collegiality we shall be illustrating, is a mixture of rationality, emotion, will, humor, even sentiment - and discipline. Unlike its converse mode of operating, the bureaucratic, it does not rely on inflexible rules, forms, and routines of operation. To take the mirror image of the familiar saying, the angel is in the details.

The panelists have deliberated how best they can pique your interest and add to your

insights. What they have done is to devise specific scenarios describing actual tension points that occur in interactions between judges as springboards for discussion. They are grouped in four larger categories: the problem judge, diversity, responsive collegiality, and lobbying, socializing, and rites of passage. These touch all of the garden plots to be cultivated on our farm - bench collegiality, opinion collegiality, and the court social community.

Let me, by way of background, sketch these several terrains. The bench offers a highly visible forum for the exercise of collegial sensitivity. Conduct to be avoided includes direct or implied criticism of a colleague, monopolizing argument time, or badgering counsel. On the positive side, there are opportunities to commend a point made by a colleague or to surface gently your own concern so that it paves the way for later discussion.

The most familiar opportunity to build or erode collegiality is probably in the field of opinions - conferencing after argument, assigning cases, writing, critiquing, and responding to comments. A judge's real opportunity to open the door to collegiality begins with his or her own opinion draft. Here the writer can either raise hackles or ease concerns depending on the sensitivity of the writer to the known idiosyncrasies and the nuances of views advanced in the post-argument conference. A candid and tactful covering letter, explaining why some idea suggested in conference was not finally incorporated, can save needless debate. For example, why an issue not strictly necessary for decision was or was not dealt with.

The most active part of the opinion playing field is that where colleagues critique and writers react -- where vitriolic pens and thin skins are out of place. This is the area of tough love, as will be demonstrated in the responsive collegiality segment of our panel. Here there may well be a big difference between the larger full bench and the three judge panel bench, with more room for give-and-take in the latter. Our panel judges represent both varieties. In all, however, a collegial conscious judgment must be exercised. Does a stylistic or even a substantive point really matter? Premature judgments, expressed with portentous finality can be lethal for collegiality. I bridle if a colleague says he is dissenting on an issue, when it is obvious that I can take care of the problem with a slight change. Clothing one's skepticism in a softly worded question is likely to accomplish more. If a thought needs to be reworded, should you suggest precise wording which would satisfy you or merely indicate your concept and let the writer work out the wording? And avoid corrosive language like the plague. On the other hand, we are human and like to be told when we have done a particularly good job of searching the record, finding new precedent, developing an ingenious solution. So, without cheapening the currency of appreciation, generosity in praise can nourish the collegial spirit.

A third area for the practice of collegiality is the court social community. A relatively new dimension has been added by the welcome addition of women and minorities to the judiciary. This introduces the subject of diversity and how to deal with it, both by those who want to create a welcoming atmosphere and by those who seek it. The panel has created several realistic problems under the categories of Diversity, and Lobbying and Socializing. They all present challenges to developing a real sense of community in the court.

What do we expect to get from all this? I hope we come away from this session with an increased awareness of the opportunities we have to make appellate judging more effective, more credible, and more pleasant. Our realistic goal is not to arrive at anything as fixed and immutable as a code. It is rather to build, as our panelists today are beginning to do, a gathering consensus — a consensus achieved through exposure of judges to specific situations eliciting thoughtful discussion and, hopefully, commitment to a style of thinking of and dealing with others. Our aspiration is to act with respect to each colleague just as if we were destined to sit with that judge

on every case every month in the judicial year. This is a challenge to our creativity.

What we have discussed so far have been an overview of the pressures against collegiality, and a preview of the panel's efforts to demonstrate situations testing our sensitivity to collegiality concerns in real life scenarios. All this is reactive collegiality - our response to situations where fate has put us. I would like to leave you with a few thoughts about what we may call proactive collegiality, deliberately creating situations which stand to enhance collegiality.

The first thing that occurs to me is that we take away from our panel's presentation the notion that events similar to today's discussion should periodically become a part of state and federal circuit judicial conferences. Just as today the sponsors of this conference have been willing to season the cutting edge futurist panels with a program aimed at preserving a precious value of our past, so may planners of future conferences help, in a dramatic and non-preachy way, sustain one of our highest traditions and the source of much of the joy in being an appellate judge.

A second kind of activity could take place in a smaller arena. I'm thinking of court retreats, those occasions when members of a court gather for a couple of days or a relaxed weekend of fellowship and reflection on significant issues. Here, the very holding of such get-togethers in an informal setting is an occasion of cementing bonds, increasing understanding, and fostering collegiality.

Finally, I want to suggest something that is as easy to do as it is important. We have a window of opportunity and it concerns the treatment we give a brand new judge in his or her first days and weeks on duty. This comes to me from one who, within the recent past, has gone through the typical following scenario. At long last, a Senate or other approving body has confirmed a judge. There is no way of predicting when this happens. So the new judge reports for duty at any season of the year and finds himself in a maelstrom of activity. Everyone is going about his business. And the new judge is more than busy, learning his trade, going to seminars, reading reams of material, trying to recruit law clerks, and preparing for his first oral arguments.

But the new judge, for all this busyness, is left to his own devices to find out who his colleagues are, what are their strengths, what have been their successes and triumphs and what their defeats and tragedies, their idiosyncrasies, their touchy points, themes to avoid, the nuances that seldom find their way into print, the unexpressed expectations, traditions, legends, and rituals of the court. Eventually, of course, the new judge becomes a seasoned judge, but a priceless opportunity has been missed to recruit early on someone to the ranks of collegiality-enhancers.

There is a need for a way to pass on this kind of information from those whose wisdom can be invaluable. This is where you come in and see what you can do to advance the ball in your court. The chief judge or justice or trusted delegate should see to it that the new judge's sitting schedule gives maximum early opportunity to sit with a variety of colleagues, young and old. Luncheons should be arranged for the new judge, not only with those in the same community, but with non-resident judges when they come to town. And you yourself may be just the one to drop in occasionally for a friendly chat.

As my friend, the recently new judge, told me, "It's the little things that could be done that can make all the difference." So, while real collegiality is a very big thing, it seems to be made up of a lot of little things. . . just like a successful marriage. After all, isn't that what "Love With a Proper Stranger" should lead to?