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The Courts of Appeal Reach 100

- Attorney General Bill Lockyer [1]

An Attorney General's special interest in the Courts of Appeal is that his office appears before it more than any other law office in the State. Out of the first ten cases heard by the newly created Court of Appeal in 1905, my predecessor, Attorney General Ulysses S. Webb, appeared in six. They were criminal cases, involving issues eerily similar to those raised today, such as prosecutorial misconduct, adequacy of complaints and sufficiency of the evidence.

The Attorney General's office continues its faithful attendance in the Courts of Appeal today. During fiscal year 2002-2003, the Judicial Council reports the Courts of Appeal decided 11,719 cases. Lexis tells us that the Attorney General appeared in 3,518 of them.

The reasons we are so inextricably bound are multiple. Virtually all criminal appeals are heard by the Courts of Appeal. Appellate proceedings involving state agencies almost invariably go to those courts in the first, if not the last, instance. Election questions, and public controversies of all kinds are usually resolved in these courts.

This experience together has taught my office that there are two simple accomplishments of the court we must recognize on its centennial: action and innovation.

The Courts of Appeal Are Where to Find the Action

As a practical matter, these courts are the courts of last resort for the overwhelming majority of litigants. The lion's share of California appellate work is handled here: probate matters, real property title disputes, and writ petitions. In the same year the Courts of Appeal issued 11,719 written opinions, the California Supreme Court issued 123 written opinions while denying 4,378 petitions for review. Furthermore, remarkably few Courts of Appeal opinions were depublished – only 17.

Maybe the Supreme Court does not grant hearing because the Court of Appeal decided correctly. Or maybe the parties do not seek hearing because they are either satisfied with the results or afraid of the unknown. In any event, the Courts of Appeal are, to paraphrase Justice Jackson, functionally infallible because as a practical matter they are final.

Additionally, the Courts of Appeal identify recurrent trends and problems for solution by the Legislature or Supreme Court. In a very real sense, these courts monitor the trial courts. When problems develop, they can be highlighted, and the need for legislative or appellate solution

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identified. One recent example arises from the recent U.S. Supreme Court decisions in *Blakely v. Washington* (2004) 124 S.Ct. 253 and *Booker v. United States* (2005) 125 S. Ct. 738. These decisions imposed significant limitations on the power of a sentencing court in a criminal case to impose enhancements to sentences based on facts not found beyond a reasonable doubt by a jury. The Courts of Appeal issued orders and established procedures for the orderly presentation of these claims, thus avoiding potentially haphazard ad hoc rulings by 119 justices. In an earlier example, the First District through Justice Peters laid the groundwork for the landmark change in trespasser law that occurred 18 years later in the Supreme Court's decision in *Rowland v. Christian* (1968) 69 Cal.2d 108. In *Fernandez v. Consolidated Fisheries* (1950) 98 Cal.App.2d. 91, Justice Peters noted the "absurd"distinctions governing the duty of care owed a guest, invitee and trespasser under existing rules, and declared that irrespective of the tenuous and technical distinctions urged, a truck driver owed a duty of reasonable care to a street sweeper who had grabbed the door handle in an attempt to warn the driver about a box that had fallen off the truck.

Moreover, Court of Appeal opinions interpret ambiguous statutes and implement Supreme Court opinions that may need fuller explanations. They fill in the interstices left by legislators and high court justices in their enactments and opinions. Often their reasoning is adopted by the Supreme Court in its opinions. Thus, as a practical matter, their interpretations are the ones that have the most influence.

Here are a few examples, composing a possible "top twenty" cases from the Courts of Appeal over the last hundred years:

Safeguarding the public fisc. The Third District invalidated an arbitration award of over $88 million for fees and expenses in settlement of a case holding a smog impact fee was unconstitutional. The court recognized the limited scope of judicial review of an arbitration award, but held that the award violated public policy and constituted an unconstitutional gift of public funds by setting such a high fee for an $18 million case. *Jordan v. Department of Motor Vehicles* (2002) 100 Cal.App.4th 431.

California's open meeting laws. In an opinion authored by Presiding Justice Robert Puglia, the Third District held that the Brown Act prohibited a series of telephone conversations conducted by members of a redevelopment agency for the purpose of obtaining a collective agreement. *Stockton Newspapers, Inc. v. Redevelopment Agency* (1985) 171 Cal.App.3d 95.

Execution of the mentally retarded. When the United States Supreme Court prohibited execution of the mentally retarded, it left to the states the task of defining that condition and setting procedures for identifying it. The Fifth District stepped in to establish definitions and implement legislation carrying out the high Court's mandate. *People v. Superior Court (Vidal)* (2004) 124 Cal.App.4th 806.

Water for the Owens Valley. Since the early 1900's, the City of Los Angeles had been draining water from the high Sierras for its domestic use. Popularized in the movie "Chinatown," this project was unchallenged for years while Owens Lake was drained and trees and crops

diminished. Then the Third District Court of Appeal, in a series of ground-breaking opinions, held that L.A.'s diversions had not received adequate environmental review. The Third District retained jurisdiction for over 10 years, issuing six separate opinions, until a universally satisfactory program was agreed on. See *County of Inyo v. City of Los Angeles* (1984) 160 Cal.App.3d 1178.

Help for the homeless. The Fourth District clarified the rules for homeless persons without access to a bed, holding a necessity defense might justify their sleeping in the civic center. *In re Eichorn* (1998) 69 Cal.App.4th 382.

Newsperson's shield. The Sixth District clarified California's constitutional protection for newspersons, holding it protected against disclosure unless a court found a substantial likelihood that without disclosure the accused would be deprived of a fair trial. *In re Willon* (1996) 47 Cal.App.4th 1080.

A water law for California's Bay Delta. In the justly-famous "Racanelli" opinion, the First District reconciled water quality and water rights law with the public trust in which all California's waters are held. This opinion formed the basis for the ongoing efforts of state, federal and local governments to provide water for our burgeoning population without sacrificing water quality and environmental protections. *United States v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82.

The nature of the State's interest in water. Although the Water Code states that all water is the property of the people of the State, interests in water may be acquired by appropriation, or may exist as riparian rights. It was unclear whether the people's "ownership" of water was such as to exclude contaminated groundwater from the "owned property" exclusion of an insurance policy. Potentially enormous cleanup fees were at stake. The Fourth District held that although the State owns groundwater in a regulatory, supervisory sense, it does not own it in a possessory, proprietary sense. *State v. Superior Court of Riverside County* (2000) 78 Cal.App.4th 1019.

Giving meaning to the California Environmental Quality Act. In this case, a seminal opinion from the Second District written by Justice Otto Kaus, setting forth the broad scope of environmental review encompassed by the California Environmental Quality Act (CEQA), was adopted by the California Supreme Court as its own. This opinion gave meaning to CEQA, defining projects to which the act was applicable as "an irrevocable step" that "may culminate in physical change to the environment, examining what makes a potential environmental effect "significant," and cautioning that "[t]he purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind." These eloquent phrases have been quoted or relied upon in nearly every major CEQA case since that time. *Bozung v. Local Agency Formation Commission of Ventura County* (1974) 112 Cal.Rptr 668, *hearing granted*, adopted by California Supreme Court (1975) 13 Cal.3d 263.

Relationships of states and counties. In *Board of Supervisors of Butte County v. Linda McMahon* (1990) 219 Cal.App.3d 286, *review denied*, the Third District upheld the power of the State to require a county to fund an entire state-mandated welfare program.

Upholding the three strikes law. The Fifth District provided one of the most cited opinions upholding California's three-strikes law, holding that punishment is not imposed just for current offenses, but for recidivism as well. *People v. Cooper* (1996) 43 Cal.App.4th 815.

Good faith toward insureds. The Fourth District contributed substantially to the development of the insurer's duty of good faith and fair dealing toward its insured in *Fletcher v. Western National Life Ins. Co.* (1970) 10 Cal.App.3d 376 and *California Shoppers v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1.

The right to a fair jury. In a case of first impression, the Fourth District held that exclusion of lesbians and gay men from juries on the basis of group bias violates the State Constitution. Jurors should not be excluded because of their sexual orientation, the court held. *People v. Garcia* (2000) 77 Cal.App.4th 1269.

The right to oral argument. In two holdings, the Fourth District held respectively that the parties could not be denied oral argument in a summary judgment proceeding ("Cold words on a printed page are not the same as a live presentation") and a contested proceeding over attorney-client and work product privilege. ("We do not subscribe to the obscurantist notion that justice, like wild mushrooms, thrives on manure in the dark.") *Mediterranean Construction Co. v. State Farm Fire & Casualty Co.* (1998) 66 Cal.App.4th 257, 266-267, n. 11; *Titmas v. Superior Court* (2001) 87 Cal.App.4th 738, 741.

Patients' rights. In an opinion by Justice Bray, the First District established the concept of informed consent as a patient's right and a doctor's duty. *Salgo v. Leland Stanford Jr. Univ. Bd. of Trustees* (1957) 154 Cal.App.2d 560.

Attorney's fees for pro bono counsel. The court reversed an order denying monetary discovery sanctions on the ground that the indigent borrower's attorney was providing free legal services through a nonprofit association sponsored by a county bar association and therefore was not charging his client for attorney's fees. *Do v. Superior Court* (2003) 109 Cal.App.4th 1210.

Fairness in administrative hearings. The Fourth District invalidated a personnel board order upholding the firing of a police officer in which the same deputy city attorney who prosecuted the action also acted as the board's counsel, creating a clear appearance of bias. *Quintero v. City of Santa Ana* (2003) 114 Cal.App.4th 810.

Employees' rights. A 1981 opinion from the First District authored by Justice Joseph Grodin, *Pugh v. See's Candies*, Inc. (1981) 116 Cal.App.3d 311, dramatically changed the boundaries of employment law by holding that a 32-year employee had the right to prove an implied-in-fact contract that he could not be terminated without good cause.

Warrantless searches and the expectation of privacy. The Fourth District ruled that an auto thief, like a second story man apprehended in the victimized premises, has no standing to assert a reasonable expectation of privacy in the stolen car. *People v. Melnyk* (1992) 4 Cal.App.4th 1532, 1533.

Timely environmental reviews. The Fifth District rejected an effort to defer identification of significant environmental impacts–in this case, the need to supply water to a new community with no on-site supplies–until after approval of a project. *Stanislaus Natural Heritage Project v. Diablo Grande* (1996) 48 Cal.App.4th 182.

The Courts of Appeal Are Where to Find Innovation

The Courts of Appeal have been leaders in their imaginative approach to the administration of justice and community outreach. Telephonic oral argument, pioneered by the Fifth District, has shown great promise. Tentative decisions, now utilized in the Fourth, provide chances for better input into the analysis of cases.

Additionally, the Courts of Appeal in California have been blessed with wise and experienced judges. Even though upon graduating from Boalt Hall in 1904 she could not find a law firm that hired women, Annette Abbott Adams was the first female to serve as a United States Attorney, to be appointed U.S. Assistant Attorney General, to be appointed an appellate justice in California, to serve as a Presiding Justice (of the Third District) and to sit pro tempore on the Supreme Court of California. Even with her distinguished accomplishments, some found her nothing more than a curiosity. Justice Adams remarked that a party once came to her chambers just to see the unusual "lady justice." The curious onlooker expected to find someone "large, dark and foreboding." Needless to say, this was not the case.

The first Presiding Justice of the Third District, Norton Chipman, was another noteworthy figure. Chipman served in the Civil War under General Ulysses S. Grant, and became General Grant's close friend and confidant. President Lincoln used him as a personal emissary to commanding officers in the field, and Chipman was with Lincoln at Gettysburg when the President delivered his historic speech. Justice Chipman was instrumental in persuading Congress to establish Memorial Day following the Civil War.

Justice A.F. Bray of the First District was another remarkable character in the State's judicial history. Presiding justice of District One until 1964, he rode the Greyhound bus daily from Martinez to San Francisco, and continued to serve on the court part time until he was 93 years old. He fought for the preservation of historic sites in Contra Costa County such as the John Muir home, worked for building the Carquinez toll bridge, and holds the record for attendance at the Stanford-Cal Big Game, missing only one between 1906 and 1982.

These justices are part of a court that often reaches its conclusion with a seemingly innovative directness that is elusive in legal circles. In a memorable Third District opinion dealing with the time and manner in which Los Angeles would be required to rewater certain streams in the Mono Lake basin so as to restore their fisheries, Justice Blease noted:

> "Starvation is hardly justified by a delayed feeding; however nutritious. No water means no compliance with (Fish and Game Code) section 5946; imprecise compliance is immeasurably superior to no compliance." *California Trout, Inc. v State Water Resources Control Board* (1990) 218 Cal.App.3d 187, 207.

However workmanlike the product of the Courts of Appeal may be, their work is not without humor and elegance. Notable examples include the late lamented Presiding Justice Robert Puglia's memorable remarks about prosecutorial misconduct: "To the list of serious felonies...should be added the following: 'prosecutorial sloth.' " And his conclusion that an errant trial court "suffered a momentary bout of dyslexia."

Equally notable are Justice Gardner's reluctant concurrence in *People v. Musante* (1980) 102 Cal.App.3d 156, 160, in which the court held that Supreme Court precedent compelled reversal of a conviction based on a search of a box found in a stolen car: "I fully recognize that under the doctrine of stare decisis, I must follow the rulings of the Supreme Court, and if that court wishes to jump off a figurative Pali, I, lemming-like, must leap right after it. However, I reserve my First Amendment right to kick and scream on my way down to the rocks below."

That same justice deplored the escalation of challenges to competency of counsel on appeal by characterizing such efforts as akin to picking out fly specks from black pepper. *People v. Eckstrom* (1974) 43 Cal.App.3d 996, 1006.

The versatility of the courts was also shown in the remarkable judicial juggling act performed by Justice Sims in *Lodi v. Lodi* (1985) 173 Cal.App.3d 628, dealing with a party who sued himself, possibly for tax reasons, in an action styled "Action to Quiet Title Equity" seeking to terminate a charitable trust allegedly created by his birth certificate. Characterizing the pleading as a "slam-dunk frivolous complaint," Justice Sims sustained the lower court's dismissal, stating:

> "In the circumstances, the result cannot be unfair to Mr. Lodi. Although it is true that, as plaintiff and appellant, he loses, it is equally true that as defendant and respondent, he wins! It is hard to imagine a more even handed application of justice. Truly, it would appear that Oreste Lodi is that rare litigant who is assured of both victory and defeat regardless of which side triumphs."

He went on to require each party to bear his own costs.

Sometimes the attorneys before the court were as remarkable as the justices. *People v. Balthazar* (1961) 197 Cal.App.2d 227, the first reported case from Division three of the First District, is remarkable not so much because of its law, but because of the attorneys who represented the

people: Attorney General Stanley Mosk, later an Associate Justice of the California Supreme Court, Arlo E. Smith, who became San Francisco's District Attorney, and John L. Burton, a member of Congress from 1974 to 1982 and more recently President Pro Tempore of the California State Senate.

Much to their credit, the Courts of Appeal have not been content to write opinions from on high. They have played a major role in bringing the law to the people, holding sessions in high schools, and playing key roles in commemorating *Brown v. Board of Education*, and establishing rule of law exhibits in fairs and other public places.

In short, the Courts of Appeal over the last hundred years have played an invaluable role in shaping California's law, and in doing so, shaping our society. My office hopes to join the court's work in bringing the law to the people and making it an understandable, accessible institution.

We are reminded, more than ever today, of the words of Sir Matthew Hale in his History of the Common Law of England, once again conjured up by Roger Traynor: In those times, Hale said, there were "Multitudes of Attorneys...who are ready at every Market to gratify the Spleen, Spite or Pride, of every Plaintiff," and "A great Increase of People in this Kingdom above what they were anciently, which must needs multiply Suits." Adding to the chaos were "Multitudes of new Laws, both Penal and others, all of which breed new Questions."

In 1956, Chief Justice Traynor suggested that there was a danger the appellate courts would submerge themselves and the profession in "wild seas of paper." He raised the possibility of stating "tentative norms for decisions that affirm or reverse without opinions,"and the adoption of memorandum opinions in cases controlled by settled law. And he suggested sharpening the distinction between prejudicial and harmless error.

"How will the common law survive amid a medley of primitive and sophisticated sorcerers skilled in sinister uses of magic words or technology?" he mused. "The explosion of knowledge need not culminate in strongholds of lawless force or folly if there are enough people determined to live by rational laws. At least the appellate courts can set an example of reasoned judgments so lucid as to command the respect even of savages."

It is an honor and a pleasure to join in commemorating the hundredth anniversary of California's Courts of Appeal.