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Editor-in-Chief

An interview with Paul Turner

Paul Turner is the presiding justice of Division 5 of the California Court of Appeal. He was appointed to the California Municipal Court in 1983 and was elevated to the Superior Court in 1985. He joined the Court of Appeal as an associate justice in 1989, becoming the Presiding Justice of Division 5 in 1991. He was kind enough to sit for an interview with Advocate Editor-in-Chief Jeffrey I. Ehrlich.

JE: What was your practice like before you took the bench?

PT: Approximately 70 percent of what I did involved the representation of persons convicted of crimes, accused of crimes or who were the subject of criminal investigations. The other 30 percent generally involved civil cases arising out of FHA financing of large construction projects.

JE: So you had done a mix of civil work and criminal defense work.

PT: Right. When I was interviewed for the municipal court, the chairman of the Commission for Judicial Nominee Evaluation, who interviewed me, said to the other commissioners, "Paul is a renaissance man," because I did both civil and criminal work.

JE: Being a renaissance man, why did you seek an appointment to the bench?

PT: (Laughing.) Like many people my age, and I'm 60, they were affected by President Kennedy's inaugural address in 1961. And the line that most people remember from that is, "Ask not what your country can do for you, but ask what can you do for your country." I think many people were affected by that. It shows you the effects of oratory. It changes people's perspectives, or gives them perspectives. That oratory was backed up by real conduct. President Kennedy sponsored the bill which created the Peace Corps. His family's conduct has been one of public service, and they paid a heavy price for that.

JE: In the time that you've been on the Court of Appeal, I've seen many of your colleagues retire and go into the ADR system. I'm wondering what keeps you on the bench?

PT: Well, I was drawn here by public service. I was in the military. I was in the Army National Guard. But I got a pass on combat. I was in the infantry, but never had to go into combat. I had to practice all those things you practice for that. But I never had to do it. And there are 58,000 names on a wall in Washington, D. C. at the Vietnam Veteran's Memorial – 58,000 names. I just haven't done my share.

I'm not saying that a retired judge that goes into ADR is not doing something that is important. It is important. I'm not one of these people who decries the existence of alternative dispute reso-

See Ehrlich, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
December 2007 Issue

lution. I don't agree with that all. Some of the work they do is just fabulous. That being said, I just haven't done much here.

JE: As a justice on the California Court of Appeal you have to rule on criminal law issues, general civil issues, taxation, environmental law, probate law, election law and more. Every area of law has its own code, and each one of these areas of law has a specialized bar, or people who do nothing but work in that area. How do the justices and your staff deal with that kind of variety of legal issues?

PT: Well first of all, don't forget, as you said, there is a specialized bar that knows how to address these issues. So the attorneys tell us a lot. And don't forget the experience level. I've been a lawyer since July 5, 1973. And my knowledge of law based on accumulated experiences is much more than it was when I became an associate justice, or when I became a municipal court judge.

Another thing is, and most lawyers don't know about this, is the Center for Judicial Education and Research, an organization which is administered by the Judicial Council. They provide education programs on these subjects. In addition, they put out books. There are books on discovery, civil procedures before trial, and many other topics. And then we have wonderful books that are put out by the legal publishers. So it's a combination of all those things that put you in a position to hopefully get it right.

JE: During the time you sat either in municipal court, or in the superior court, what is the strangest thing that ever happened in your courtroom?

PT: This is like one of those David Letterman Top 10 lists. I don't know what the strangest is.

Once, when I was sitting in Law and Motion in Department 83 [in the days before "Fast Track" when all law and motion matters were handled by two judges on the 8th Floor], I had a judgment debtor in pro se [who] was refusing to answer the post-judgment interrogatories, in violation of earlier orders to answer. I had to hold him in contempt.

So I call his case first, and he's wearing a suit, so the people in the studio audience here in the courtroom – I'd say in Department 83 back then, there'd be 100, 150 lawyers – they're all sitting there, and they take him for a lawyer. I call the case, and I let him make his record, and I laid out my findings for contempt, and I said, "You are ordered to serve five days in the county jail, and pay $1,000 fine. You're remanded." Well, suddenly these five deputy sheriffs show up around this guy in a suit, and they put him in chains and handcuffs, and they escort him out of the courtroom. So then I go to the rest of the calendar. "Ok, call case number four," whatever it is. I call the case; the lawyers get up there. All they know is that somebody just went to jail for not answering interrogatories.

About 10 seconds into the argument, I realized what had gone on from their perspectives. So I went off the record and explained what happened, and in the courtroom everyone was laughing! I don't know if it was a sadistic pleasure of lawyers of seeing somebody going to jail for not answering an interrogatory. But there's an example of an odd thing that happened.

JE: As an appellate justice, are the proceedings in oral arguments so sedate that there are no good war stories?

PT: Appellate arguments are very sedate, and nothing odd happens. I'm sorry. You know, we did have a litigant two months ago stand up and yell, "Lies, lies, those are all lies!" and she's in the back of the courtroom. And I immediately took a recess, and she saw the rest of the oral argument from our lobby where there is a television set. But that was the first time I'd ever seen that happen.

JE: I suspect that not many of our readers fully appreciate the volume of work that the Court of Appeal handles, so I'd like to give them some perspective. How many appeals per year does Division 5 handle?

PT: Let me tell you how many opinions we file because that is where the bulk of our work is. In fiscal year 2006/2007, Division 5 filed 392 opinions. That's four justices doing the work. In 2005/2006, Division 5 filed 414 opinions. Now let me go back to fiscal year 1991 to 1992, my first year as the presiding justice. That year we filed 602 opinions.

Those numbers do not include appeals that are dismissed pursuant to an order. For example, if someone does not file a notice of appeal within 60 days of the service of the notice of entry of a judgment, that appeal is going to be dismissed in a brief dismissal order. It does not show up as an opinion. Further, every time a notice of appeal is assigned to Division 5, I look at it to see if it is an appealable order, and based upon what is in the case information statement, [if] the notice of appeal was timely filed. So we probably have 20 or 30 cases per year which, in other divisions, might be listed as an opinion, which are not listed as an opinion because they are dismissed pursuant to an order before the opening brief is filed.

JE: What accounts for the reduction in the number of opinions from your first year as presiding justice?

PT: A couple of things. Number one is, we now dispose of cases without opinions. They're done with orders when we have no jurisdiction over the case. Second: 1991 to 1992, Division 5 had one of the biggest backlogs in the state. When I became the presiding justice, I discovered that there was a criminal case that was seven years old, and we did not have the complete record yet. I remember in one case here where it was two years after the briefing was done before somebody got around to writing an opinion: Two years that the parties are sitting there without justice because we could not get to it because we just had too many cases. So in one year, I filed 222 opinions. That's one opinion a day. And I did that with only two research attorneys. And some of those opinions were three pages, others were 95 pages. So what happened is, in Division 5 in the early '90s, there were a lot of cases that had to be decided and so we decided them.

Now, you mentioned some other things there which are a slice of the pie. One is, that we have more justices. When I became an associate justice here, there were seven divisions, but there were only 26 justices. And now we have eight divisions and 32 justices. And having that number of justices brings down the number of cases you have to decide.

JE: I want to discuss with you a bit about your decision-making process. What is the first point in the process on civil appeals where all three justices who are going to be deciding an appeal actually discuss it collectively?

See Ehrlich, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
December 2007 Issue

PT: We do not have a structured format for that. Sometimes that will happen when a justice looks at the opening brief and goes, "Yikes," and we'll have a discussion about that. It may be discussing it individually; it may be discussing it collectively. Sometimes, if there's a draft that, for example, I may feel differently about it, I will put together (this is my own practice); I will put together an explanation in written format of why I disagree.

Other divisions have structured conferences that are held before oral argument, after oral argument. We've had cases where there have been innumerable discussions after oral argument, in terms of how the case should come out. We just don't have the organized structure format that is used in other divisions.

JE: How is the decision made? Do you make the decision about which justice is going to be taking the lead in writing an opinion on a particular case?

PT: No. We have a random selection process. And what happens is, when a case is ready, the clerk will randomly assign it to a panel of three of the justices in our division. Once the clerk has assigned a case to a panel, we try as desperately as we can to keep it within that panel.

JE: When you decide a civil appeal in Division 5, how collegial is the decision-making process?

PT: It depends on the case. As you know, there are cases that are easy. There are cases where there is no doubt about the fact that this must be affirmed or reversed. We may never say a word to one another about those cases. But a lot of cases are not like that, and there is a lot of give and take. Sometimes you will see things pulled out on opinion; other times you'll see things placed in an opinion. Again, we don't have the structured environment you have in other divisions, or the California Supreme Court.

JE: I want to talk about publication decisions for a moment. What stage of the process does the panel decide on whether a decision it's going to issue is going to be for publication or not for publication.

PT: Generally at the initial draft. Most cases with the initial draft. I'd say two-thirds of the cases at the initial draft, the justice says, "I want it published".

JE: I read an article some years back by Judges Kozinski and Reinhardt of the Ninth Circuit about that Circuit's publication practices. They explained that when they know they will be issuing an unpublished memorandum disposition, they do not have to state the facts with the same degree of caution or care with a view to how this will look in future cases. And so their concern was that if everything gets published, it will really slow down the business of the court.

PT: I think that's correct. I think that's the right thing.

JE: Now the Ninth Circuit rule 36-3(B) permits the citation of unpublished Ninth Circuit opinions that have been issued after January 1, 2007. What would you think of a similar rule in the California system?

PT: It would be a terrible rule. It would destroy the ability of lawyers to practice law. Last year, The California Courts of Appeal issued 10,982 opinions – 10,982 opinions. How would you like to have the responsibility, as an advocate for the protection of clients' rights, to go through 10,000 per year? You wouldn't want to have to do that. It wouldn't work.

JE: Let's switch to some advice for our readers: As a practical matter, when does it make sense to file a preliminary opposition when the other side has filed a writ petition?

PT: I would say always file it. That's your job. Now, there are cost factors. The client may not be able to afford it. But in a perfect world you would always file an opposition. You must be in the petitioner's face from the very beginning. Let me give you a tip for our sports fans at home here: If you're going to file it, immediately fax a letter to the clerk saying that, "We intend to file an opposition." If you're going to do it, I'd say do it immediately.

JE: The common perception is that 90 percent of all civil writ petitions are summarily denied. Is this accurate?

PT: I would say for petitions in civil cases filed by serious civil lawyers who are your readers, one out of five is granted. In other words, there's an alternative writ of mandate issued in one out of five writ petitions in Division 5.

JE: What are the judicial norms with respect to the trial judge's response when the alternative writ has been issued? What is the expectation about what the trial court is going to do?

PT: In virtually all cases, the trial court changes its ruling. But I tell the trial judges, "Stand your ground if you think we're wrong, because the California Supreme Court may very well agree that we were wrong." Also, when we issue an Alternative Writ of Mandate, we may have it wrong. Now, that hasn't happened in years, but we may have it wrong. And when we get to oral argument we realize, "No, we had it wrong."

JE: With respect to the briefing you see in civil appeals, is there a mistake that you see over and over again, that you wish you could get lawyers to stop making?

PT: Yes, in civil appeals they don't give us the facts of the case. I know you're shocked, but that's the case. For example, we get a criminal appeal[s]. The Attorney General, and also the California Appellate Project Los Angeles, which supervises criminal appeals, pound in to their lawyers – you've got to set forth the facts. What are the facts?

And invariably in civil cases, we have appeals where we can't figure out what the facts were. You cannot, by reading the brief, follow what occurred in the trial; what dates things occurred. So I would say that the biggest mistake I've seen in civil cases, which I do not see on the criminal side, is a failure to set forth the facts.

JE: So the lawyers do a poor job of giving you the information you need to decide the case?

PT: No, they don't give us the facts of the case. They do a very good job of telling us what the legal issues are. Great work. A justice in Los Angeles is blessed to be a justice in Los Angeles, because the lawyers that appear in front of us do a great job. The problem is that they don't give us the facts in the way it's done in the criminal side. I'm just saying that that is a consistent mistake that is made by sometimes very good lawyers.

JE: Let's move to a law and motion question, because you've touched here on something that I have had difficulty with

See Ehrlich, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
December 2007 Issue

in summary judgment. You start out with a separate statement, then you have a response, which sort of details, "No we don't agree with this. We dispute that." Then, at least my practice is, then the bottom half of that is, "Here are the additional facts."

PT: Absolutely. That's the way to do it. Sometimes you'll repeat some of the facts you've referred to earlier, so it's clear to the judge [what is] the timeline.

Incidentally, in civil cases, the key to all of this is always to sit down and do a timeline. "On this date a statement critical of the plaintiff's age was made by the supervisor. On this date the supervisor said this. On this date the supervisor reassigned the plaintiff to a position with less prestige." If you do it that way, looking at it in a sort of linear way, then it's easier to put together the steps. I think a key for lawyers is dates. Make sure you've always given us the dates on which something happened.

JE: What would you think of an appendix to a brief that had a timeline?

PT: An appendix in attempt to weasel your way out of a page limit? (Laughs.) Absolutely not! But if you can get away with it, then I would think so. I think that would be helpful to judges. But you know what? The same would be true in a brief. I think you could stick that in a brief. I think that's very helpful to judges.

JE: Going back to our summary-judgment motion. I don't know if this is necessary, but in an abundance of caution, I essentially incorporate my entire statement of facts from my memorandum and points of authorities into my statement to avoid any "Golden Rule" issue. But do you actually have to do that? Do you have to put every fact that's in your opposition to correspond to a separate statement?

PT: A separate statement of undisputed facts is the most important document in summary-judgment litigation. It is the heart and soul of summary-judgment litigation. There are lawyers who argue that you need to spend a lot of time on your points and authorities. And yes, you do. But it is the separate statement that determines how the case comes out.

JE: What is the moving party supposed to do when the opposing party has filed a responsive separate statement that has all these new facts? Now, it seems to put the moving party in somewhat of a bind if they deny or somehow dispute any of those facts.

PT: Well, then there's a triable controversy.

JE: That's true, so I've always wondered, what are you supposed to say? Anything you say seems to hurt you.

PT: Well, first of all, the statute doesn't provide for reply separate statements. The California Rules of Court don't provide for it. Let's assume that you are the responding party, and they file one. I'd object – it's not provided for in the rules. And incidentally, there'll be no consistency in how that objection is ruled upon. Some judges are going to say, "Now wait a minute. You've filed your statement of disputed facts, they're entitled to say they're really not disputed facts." But you're right, once the moving party starts complaining in its reply that these facts are disputed, that makes it very hard for them to say the facts in the motion are not disputed. We're speaking in generalities here. Obviously there are going to be cases here where these facts are disputed, and it will ultimately be the key to victory for the moving defendant. But in most cases, I think your analysis is right.

JE: Back to briefing in your court. Are you familiar with Bryan Garner?

PT: I am familiar with Bryan Garner. Bryan Garner is a great American. That would do it. Now we're going to talk about footnotes? Bryan Garner should be detained and held until he gives up this fantasy about how footnotes facilitate the decision-making process. Other than that, Bryan Garner is a great American!

JE: So you're not a big fan of his suggestion that the citations should belong in the footnotes, and there should be no substantive footnotes?

PT: No. He should be taken into custody until this matter can be resolved. Seriously, seriously, I do disagree with him about that. It is appellate-court decisions and statutory law that provides the heart and soul of the litigation process. And when that is in the sentence, or at the conclusion of the sentence, and you see it is a California Supreme Court opinion, as a Court of Appeal justice, your antennae will go up immediately. That's why I disagree with Mr. Garner. Although he has helped many lawyers and judges with writing. I've stolen some of his tips shamelessly.

Simple example: Beginning a sentence with the word, *And*. I was sitting in a class he was teaching in Monterey. And he said, "What's wrong with beginning a sentence with the word, *And*"? And you know what? I do that now. And it is a way to increase the readability and clarity of your writing. Also, the systems he comes up with about how to get yourself in a position to organize your material are brilliant. But I certainly don't agree with him on the footnotes. I forgive him and I hope I can write as well as he does. He's a fine, fine teacher. Even though I've just called for his arrest without due process on that, but that's another matter.

JE: Let's talk for a moment about oral argument. How important, in your view, is oral argument in the appellate decision-making process?

PT: There was an interview done for the California Supreme Court Historical Society of Chief Justice Gibson, who was the Chief Justice before Roger Traynor. And in that interview he was asked, "What's the role of oral argument?"

And he said "Well, you never know." And I think that's true. That's the best observation I've heard on it. You never know. In most cases its role does not change a thing.

Of course a lot of it has to do with the mode and manner in which the Court of Appeal and Supreme Court opinions are prepared. The California Supreme Court does not put a case on a calendar until there are four justices who have agreed to an outcome. Here we have opinions when we hear oral argument; we have an opinion in front of us. It says at the top, in the Court of Appeals, there are signature lines at the bottom. We may have already agreed in writing with one another that [in] this case we're going to agree with the opinion. But it's the duty of the justice to listen to the oral argument and see if it changes their mind. And I would say that in virtually all cases, to use an unpleasant metaphor, it puts the last nail in the coffin of the losing party.

See Ehrlich, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
December 2007 Issue

Now that's looking at it from how the court decides it. That's entirely different from what the role of the lawyer is. The lawyer's duty is to advance the client's interest. To protect the client's rights. And that means that there are going to be cases where oral argument is not something you want to do because you cannot advance your client's rights. That seems to me to be the key issue.

JE: I've also heard it said that if you're the appellant, and you think that the trial judge has done something wrong, you should be willing to stand up in front of the court and explain why.

PT: I think that's true. There are different views on this. Some justices believe every case should be orally argued. And as somebody who represented indigent defendants in Criminal Appeals, I can tell you that there are a lot of cases where you cannot argue, you simply cannot do it and be true to your oath. You've made an analysis in writing, in terms of something that is a reasonably argued contention, but their obligations are different than those of us on the civil side. And you simply are not going to be able to stand up in front of an appellate justice and be involved in give-and-take on these issues. It does not advance the client's interests.

But, I would say that if you're a winner, if you know you've got them by the throat, it's wise to show up to drive it home. Now, obviously there are cases where you've got them. There's nothing the other side can do to change or do anything, so why show up? Because if you show up, something can go wrong.

When you go to court, two things can happen: Good things and bad things. So suddenly you've taken a situation where you think you've got them, and you've put in[to] play a human-driven dynamic where one of two things can happen: A good thing or a bad thing. So you've gone from certitude to a lack of certitude. Those are the sorts of decisions that lawyers have to make. But the lawyers obligation is to say, "How do I best advance my client's rights? Do I do it by not appearing for oral argument, or do I do it by showing up?"

JE: What advice do you have to the people appearing before you on how to do a better job?

PT: The Texan is walking 56th St. in New York City. And somebody walks up to him and says, "Pardon me. How do you get to Carnegie Hall?"

And the Texan, who's not from New York, says, "Practice, practice, practice." I think that's correct. It's a correct assessment. It's preparation. I think that all of the things we learned about in those college speech classes about having an introduction, about telling them what you told them, I think all those things apply to the oral arguments. I have found that the most effective arguments tend to be the shorter ones. Not short arguments, I don't mean that. But they tend to be shorter arguments. That is to say, the lawyer knows exactly what he or she is going to say and says it and gets off the stage.

Peggy Noonan wrote a book on public speaking, and in that book she was asked, "Why should no speech be longer than 20 minutes?"

And she said, "Because Ronald Reagan said so." It's hard to keep your intensity and to keep the attention of your audience once you start going beyond 10 or 15 minutes. But time is not the factor. Preparation is the factor.

JE: You'd said earlier that by the time you have an oral argument, there's a memo, essentially a draft opinion . . .

PT: It is not a memo. In most cases it is a draft opinion. It has the names of counsel on it, it's got the heading, it says "Reversed," [and] it's got signature lines on it. And invariably, in most of those cases, we have to sign off where you indicate if you will concur on the opinion, assign the opinion, if you want to do a dissent, whatever it is. We have all that done. There are some days, where after oral argument, when I've signed seven or eight opinions on the day of oral argument.

JE: Now, Division 2 in the 4th Appellate district takes those opinions and circulates them before argument. I think they're the only court in the state that does that.

PT: That's correct.

JE: If the opinion's already drafted, what do you think of the process? Obviously you don't do it, but why?

PT: We don't do it because, number one: it takes more time. Because what happens is you prepare the opinion. It gets cite-checked. All of that goes on. You send it out, and you have to send it out. It has to be ready essentially a month before oral argument. You then have oral argument which may be continued or whatever. And now it's time to cite-check it again. You may have to make changes to it, which alters the tenor of what was said before. We take too long to decide too many of our cases. I didn't say we take too long [to decide] most of our cases. We take too long to decide too many of our cases. And I think that just adds a layer of delay into the process.

Now let me say something else that I think is important, is of real value in terms of what my colleagues in Division 2 of the 4th Appellate District have done. I think that they made it clear that we ought to put our cards on the table. And we do that at oral argument. I think in Division 5, generally you leave the oral argument knowing where at least one or two of the justices are coming from. There's no hiding the ball. We say, "Look, this is what we think."

And I think that you should always put your cards on the table and say, when the lawyers are arguing, "Look, here's your problem," and lay out what the problem is. Tell us why that isn't controlling.

And I'm probably more candid than most justices. I'll tell them, "That's where my thinking is right now. Tell me why I'm wrong." And also, sometimes at the end of oral argument I'll beg the parties, I'll grovel if need be, to get the parties to make a last effort at settlement in light of the fact that they now know which way the wind is blowing.

That being said, there was a case about eight years ago which involved a third-party beneficiary issue, and at the end of oral arguments, I said, "Look, this case is going to have to be reversed. You're just going to have to sit down

See Ehrlich, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
December 2007 Issue

and make a deal." There was a newspaper article that quoted me: "Presiding Justice Turner said the case was going to have to be reversed." A few months later we came out with an opinion affirming it. And I was the only one who felt that way.

JE: Did you dissent?

PT: Well of course! (Laughs.)