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## Anecdotes About Gideon

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*Ellis J. Horvitz\**

#### ANECDOTES ABOUT GIDEON

The assignment to write about Gideon on the occasion of his retirement from the faculty of Loyola Law School calls for a short and light response for three reasons: First, Martindale & Hubbell is better equipped to catalog the milestones of his career. Second, when eulogizing the living, particularly someone as vigorous and young at heart as Gideon, caution is required lest he become discouraged that there is nothing further to accomplish. Instead, I will take the easy out and share with you a few anecdotes spanning twenty years in which I have known Gideon as professional colleague, co-counsel, opposing counsel and friend.

First, let's consider Gideon as appellate attorney: wit in the cause of advocacy. In the mid 1970s, he and I represented the City of Cosa Mesa in a dispute with the State Agricultural Board. At issue was the control and development of the State Fair Grounds and access routes, which in turn hinged on the interpretation of two irreconcilable sections of the Government Code, each enacted without the slightest consideration of the other. While the case was one of importance, the legal issues could not have been more dull. Try reading the Government Code to relieve insomnia. Gideon drafted the opening brief. He brought the issues to life, reduced the other side's argument to seeming absurdity, and several times had me howling with laughter at his legal barbs, every one on target. Shortly after the brief was filed, the case settled on terms not previously available to our pleased client.

Some years later, we collaborated in another case in which we represented the appellant. The respondent's brief took exception to our presentation of the facts and case law, was sharply accusatory, but otherwise not badly written. Unfortunately for the respondent, his most forceful arguments lacked support in the record. I mentioned to Gideon that respondent's brief reminded me of a reply Dr. Samuel Johnson had given to a young author who had asked Johnson to critique his manuscript. Dr. Johnson wrote:

Sir: your manuscript is both good and original. Unfortunately, those parts which are good are not original, the parts which are original are not good.

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\* The author is a partner at Horvitz & Levy and has practiced in civil appellate law for over thirty years. The author met Professor Kanner when both were founding members of the California Academy of Appellate Lawyers.

"That's it," said Gideon. "That's the theme for my reply brief." Our reply brief began with Dr. Johnson's letter and continued as follows:

So it is with respondent's brief. It is both persuasive and supported by the record. Unfortunately, the parts which are persuasive are not supported by the record. Those parts which are supported by the record are not persuasive.

Wit in the service of advocacy is characteristic of Gideon's writing and oral argument. Barbed, to be sure, but never mean-spirited or angry, designed more to nick than to skewer his opponent and to highlight legal argument, not substitute for it.

Another quality Gideon brings to advocacy is his ability to persuade people who should know better that he is the West Coast representative for the Oracle of Delphi and in line for elevation to the top spot. What is frustrating, if you are on the other side, is how frequently he gets away with it. Two incidents come to mind:

When Gideon and I were on opposite sides of a discovery shoot out, we fought with points and authorities in the law and motion department and writ petitions and responses in the Court of Appeal. One morning a young colleague came into my office, obviously upset, and handed me a memorandum of points and authorities Gideon had prepared with the comment, "Look what your friend Kanner has done now. Inexcusable." I read the offending argument, evidently missed the point and asked what was wrong. "What's wrong?" came the reply, "What's wrong is that this is an issue of first impression, there is no law on point, yet Gideon makes it sound as if it is an open and shut case and the law is in his favor." In a less-than-memorable opinion, the Court of Appeal agreed.

On another occasion, he and I served on a committee appointed by the Chief Justice to examine the non-publication rule (not to be confused with the decertification rule). The committee had approximately twenty members, at least half of whom were appellate court justices. I attended the first meeting in expectation of listening to the combined wisdom of nearly two hundred years of judicial experience. To my surprise, Gideon carried virtually the entire discussion on the first morning. At the lunch break, three jurists told him how much *they* had gleaned from *his* remarks. Thus are myths of judicial omniscience shattered.

Finally, friendship shows a different side of Gideon's personality. Gideon is good company. He has an astonishingly broad range of interests, which he is willing to share at the drop of a hat. Moreover, for someone who has spent so many years on the lectern and is so aggressively generous in sharing what he knows, Gideon can be a surprisingly good listener, although he sometimes needs a nudge when it is his turn to

listen. These qualities make for a continually refreshing and entertaining exchange. Beyond that, friendship brings out both the gentleman and the mensch. The advocate's armor and the professor's perks are set aside and underneath is a good natured, considerate, gentle and caring friend.