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Volume 30 | Number 3

Article 8

4-1-1997

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Recommended Citation

Ellis J. Horvitz, *Otto Kaus Remembered*, 30 Loy. L.A. L. Rev. 961 (1997).

Available at: <https://digitalcommons.lmu.edu/llr/vol30/iss3/8>

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OTTO KAUS REMEMBERED

*Ellis J. Horvitz**

Otto Kaus served for sixteen years on the court of appeal and for five years on the California Supreme Court. During those years, I was one of his best customers. I briefed and argued more cases before him than I can remember. As a consumer of judicial services and a friend, I would like to comment about Otto as a judge.

California has been blessed with outstanding appellate justices. Otto was one of the best. To an extraordinary degree, he possessed all of the important judicial virtues.

First, Otto was a scholar. His opinions represent a major contribution to California law. To this day, a Kaus opinion, whether from the court of appeal or supreme court, carries special weight. His intellectual brilliance, rigorous analysis, and common sense are universally recognized and respected. Lawyers are more likely to identify the author when citing a Kaus opinion. Only a handful of California jurists merit this respect. In our shop, when we find a supporting Kaus opinion, we are reassured; if it supports our opponent's position, we reassess our own.

Otto's opinions also reflect his relentless integrity. I never knew him to duck or finesse a tough issue or an important but inconvenient fact. He met them head on. Whether existing authority supported his position or made it more difficult, his analysis was meticulous, accurate, and even-handed. When he was on the court of appeal, if the losing party had a legitimate supreme court issue, Otto preserved it.

Simply stated, he was a profoundly fair judge. I never saw the slightest predisposition or prejudgment on his part concerning issues or litigants. So far as I am aware, his only agenda was to decide his cases fairly and write good law in the process. He gave life to the biblical prescription in *Leviticus*, "You shall not be partial to

* Ellis Horvitz started the firm of Horvitz & Levy in 1957. He has appeared and presented oral argument in the California Supreme Court and California Court of Appeal as lead counsel or amicus curiae more often than any attorney engaged in civil practice.

the poor man nor favor the person of the mighty, but in righteousness shall you judge your neighbor."¹

Otto was also a superb teacher. He had a gift for stimulating our best efforts. If my case was in Otto's court, I drew on all my resources. Friends and colleagues who sat with him or who worked on his staff tell the same story. He also had a knack for capsulizing important messages. On writ petitions: "A good petition must emit a scream of anguish—the sooner the better." On depublication: "When we [the Supreme Court] are faced with two conflicting opinions, and we decertify one of them, you don't have to be a genius to figure out what we're thinking."

Finally, Otto made the practice of law a joy. Whether on the bench or off, his charm, wit, and decency permeated the relationship. He was entirely unpretentious. His questions and comments from the bench could be withering, but were never mean-spirited. I once heard him demolish an attorney's argument, fortunately my opponent's, with a single word. It was a glorious moment. At the same time I was probably on the receiving end of Otto's humorous barbs at least as often as I was their beneficiary. His humor was always on point, always good-natured, and often reduced the recipient to laughter. When Otto was in top form, oral argument was an experience to be remembered. Yet I never heard him utter a demeaning word or embarrass an attorney in his courtroom—or elsewhere for that matter. It wasn't in his nature. His sense of judicial obligation was to provide not only a fair hearing but a courteous one as well.

Have I exaggerated? Have I been too extravagant in recalling Otto's qualities? For everyone who knew him, the answer is no. I have tried only to do justice to his memory, as he did for the lawyers and litigants who appeared before him.

1. *Leviticus* 19:15.