Judges And Judiciary,
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Invisible Justice

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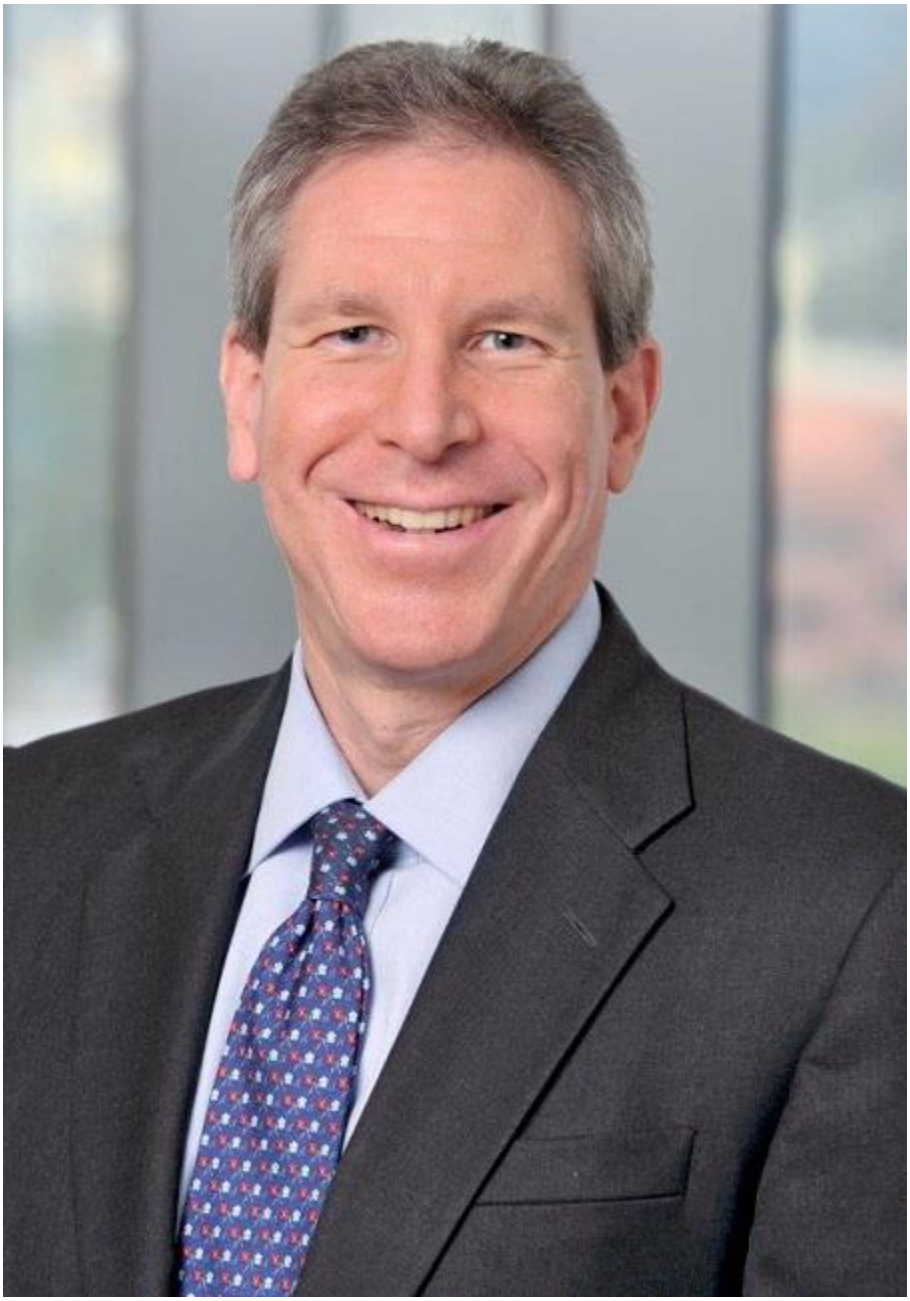

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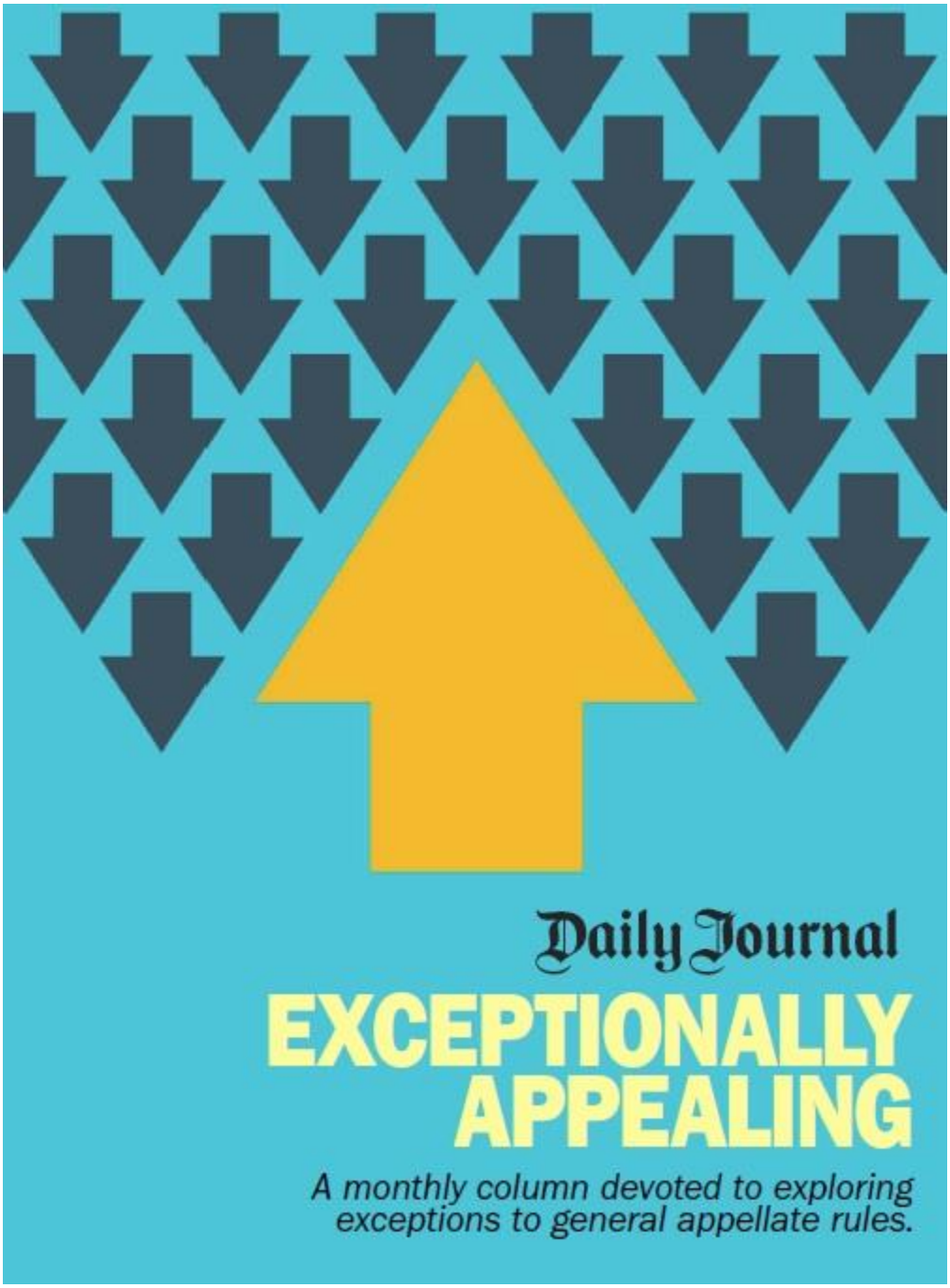

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EXCEPTIONALLY APPEALING

The ordinary appellate path is well-worn: First comes paper pushing (i.e., filing the notice of appeal, record designations, and otherwise "perfecting" the appeal), followed by paper production (i.e., brief writing), then oral argument, and finally the big payoff, the written decision. At oral argument, the justices deciding the case are publicly seen and heard. And in the written decision, the justices are again identified and "heard." The typical decision names the judges who decided the case and specifies which is the author and which two are merely signing-on. But there are exceptions.

One big exception is the federal appellate memorandum disposition. Most federal appeals are decided by such mem-dispos, which are unpublished, nonprecedential decisions. They are usually very short and do not indicate which judge is the author. In the 9th Circuit, only about 6 percent of decisions are "signed," making decisions that identify the author the statistical exception. *See* Fed. Jud. Statistics, Table B-12.

If an appellate court does not inform counsel in advance which judge will be "the lead" (and few do), the oral argument may provide clues about which judge will write (or, more accurately, has already written) the decision. It's a decent bet that the first judge to ask a question, or the judge who asks the most questions, is likely the one most invested in the case and thus the author.

There are unusual cases, however, that have no disclosed author at all. The fancy Latin name for such decisions is "per curiam," meaning the decision comes from the court as a whole, rather than a particular judge. California eschews Latin, and so cases "by the court" are authored by "The Court," with a footnote naming the participating justices.

Such decisions are pretty rare. Between 1969 and 1979, the California Courts of Appeal issued roughly 250 such decisions. For the next decade, 1979 to 1989, the figure was about the same. From 1989 to 1999, the number dropped below 200. But in the following decade, 1999 to 2009, the number skyrocketed to nearly 6,000. This was driven by a spike in the 5th District, which accounted for about 5,000 of these, of which two-thirds were in criminal cases. It appears that the 5th District began to issue these opinions in bulk starting in 2001, and the practice took off in 2002, apparently as a means to address a substantial backlog that accrued in 1990s. *See* Appellate Task Force Report. The 2009 to 2019 span saw over 5,500 per curiams, of which the 5th District contributed about 5,000, roughly 3,000 of which were in criminal appeals.

Not identifying a ruling's author is kosher under the Rules of Court. Although Rule 8.264(a)(2) says that "A decision by opinion must identify the participating justices, including the author of the majority opinion and of any concurring or dissenting opinion," the rule further says "or" an opinion may merely identify "the justices participating in a 'by the court' opinion."

Why the "invisible justice"?

In some courts, certain appeals are handled by central staff. The 5th District's internal operating procedures discuss "Routine Dispositions" in appeals that raise "no new or novel questions of law," are not "of wide public interest," and "can be disposed of by the application of settled principles of law to the facts." In such matters, the "draft opinion is written by an experienced attorney assigned to the central staff or by a justice." Being "sensitive to the concern that the judicial input into this type of case may be diluted," the court "carefully supervises these cases" through four steps. First, the presiding justice oversees the initial selection of a case for this treatment; second, a panel of three randomly selected justices participates in the case; third, a lead justice will review the briefs (and record) and approve or disapprove the draft opinion; fourth, if any justice so requests, a conference will be held among the justices and the author of the draft opinion, and if any justice believes that routine disposition is inappropriate, the case will be processed as a "regular appeal." The opinion may issue as a "signed opinion" or an "unsigned per curiam opinion," with the participating justices' names appearing at the bottom of the first page.

Similarly, in the 4th District, Division 1, the court's internal operating procedures provide "Criminal appeals involving issues that can be resolved with little difficulty based upon well-established law and that do not present a likelihood of dispute as to how the law applies to the facts are designated as 'by the court' ('BC') cases."

"By the Court" orders are also common for decisions on peremptory writs in the first instance, which are typically just a few short paragraphs. *E.g.*, *Hoover v. SFSC (Grundfos Pumps Corp.)*, A156168 (Jan. 22, 2019).

The more interesting scenarios occur when a high court issues a per curiam. For a discussion about unsigned U.S. Supreme Court opinions, and how they can be used to give a controversial decision a "sense of institutional strength," *see* Michelle Friedland et al., "Opinions of the Court by ... Anonymous," S.F. Attorney 38 (Summer 2008). *See also* Ira Robbins, "Hiding Behind the Cloak of Invisibility: The Supreme Court and Per Curiam Opinions," 86 TULANE L. REV. 1197 (2012).

The California Supreme Court can use (and historically did use) per curiams. The court's Internal Operating Practices and Procedures (Section VIII.D) provides that unless otherwise ordered by the chief, certain types of cases (e.g., attorney or judicial disciplinary cases) will be decided by "By the Court" opinions, but: "All other opinions identify the author and the concurring justices unless a majority of the court conclude that because substantial portions of the opinion have been drafted by a number of justices, or for other compelling reasons, the opinion should be issued 'By the Court.'"

The kicker is the last bit allowing per curiams for "other compelling reasons." Witkin suggests that sometimes "the difficulty of reaching agreement on the final draft of an opinion may make anonymity the only way to achieve unanimity." Other times per curiam decisions are used in cases involving "intense public and partisan interest in the outcome," i.e., the court does not want to identify a specific author for political reasons. *See* 9 Witkin, Cal. Procedure, Appeal Section 783(b)(1), (2) (5th ed. 2008); see also Witkin, Manual on Appellate Court Opinions (1977) Section 130 (noting "mild criticism" against per curiams).

The Supreme Court's use of per curiams prompted the following reaction from Chief Justice Rose Bird in her dissenting opinion in *Stanton v. Parish*, 28 Cal. 3d 107, 120 (1980): "I dissent as well to the form of this opinion. In *In re Perrone C.* (1979) 26 Cal.3d 49 ... I stated my views on the undesirable results, due to lack of accountability, that the use of 'By the Court' opinions breeds. It is sound policy for this court to keep the use of 'By the Court' opinions to a minimum." She went on to explain: "The important issues that come before us should not be decided anonymously. The litigants, their counsel, and the public have a right to know whose words they are reading. 'By the Court' opinions frustrate the exercise of that right. Further, they run counter to the respected principles of openness in government and personal accountability of public officials."

Stanton was an unusual case in that the Supreme Court asked the parties to waive oral argument. This provoked Chief Justice Bird to further comment: "I question whether the parties have been accorded procedural due process when they were not informed prior to their waiver that the opinion would be issued as a per curiam. Ordinarily, I would not raise this issue out of deference to the court, but I firmly believe this procedure to be of questionable fairness. For all of these reasons, I respectfully, but strongly disagree." Our current Supreme Court has not been using per curiams in seemingly objectionable ways, so Bernie and Rose can rest in peace. Indeed, they have been very rare over the past couple decades. For some interesting recent examples, see *In re Glass*, 58 Cal. 4th 500 (2014), and *In re Chang*, 60 Cal. 4th 1169 (2015).

As for the Courts of Appeal, of last year's over 9,000 opinions, only about 5 percent were per curiams. That figure jumps to over 50 percent, in the 5th District, however (for both civil and criminal appeals). Thus, the odds are extremely high that your typical California appellate decision will identify its author. But the possibility exists for a "By the Court" decision, particularly in the 5th District. You can't see it, but those exceptional appeals put a smile on the face of Dr. Jack Griffin (Claude Rains). "The Invisible Man" (Universal Pictures 1933).

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