Shifting Baselines

By: Catherine W. Smith

"Always Appealing" is a column addressing current issues in appellate practice and recent appellate cases written by the lawyers of Smith Goodfriend, P.S., a Seattle law firm that limits its practice to civil appeals and related trial court motions practice.

I'm writing this on the afternoon of Friday, October 7. The Bar Bulletin's deadline for next month's edition is the 10th of each month, so this column is due on Monday. As is sometimes the case, the muse has not descended, and this thing is not writing itself. . . .

I was going to write about legal issues being the *sine qua non* of appellate practice. Briefing and arguing statutes and case law, so that the appellate court can reach a decision that will apply not just in the matter before it, but that may help others resolve or avoid disputes, is pretty heady stuff. But given these lofty aspirations, it is surprising how much of the practice must sometimes be devoted to addressing the many ways in which appellate courts avoid making substantive decisions.

But it is Friday afternoon. And soon, my reverie about the reasons an appellate court may decline to address substantive legal issues, and my earnest suggestion of ways to "avoid decision avoidance," is interrupted by the incessant "ding" of incoming emails. The Friday afternoon crazies have begun.

The three pleadings filed by appellant's counsel in his eighth appeal after the parties' divorce, each more vituperative than the last, "amending" (for the second time) post-decision pleadings filed weeks ago. The motion to modify the Supreme Court commissioner's order denying an extension of time to file a motion for discretionary review from the denial of a motion to modify a decision of a Division One Commissioner that, among other things, denied a stay of enforcement of all orders entered by the King

County “kangaroo” Court—along with the appellant’s 166-page “affidavit” to the motion, which was certified not to contain more than 500 words. The renewed motion for a substitute receiver in a business dispute attaching a 27-year-old article from the business pages of a local paper (found, of course, on the internet) as proof of the opposing party’s nefarious conduct. I could go on, but you get the idea.

My husband is an ornithologist; he has studied a small seabird colony off the Arctic coast since discovering the colony in 1972. The colony has experienced dramatic change in the last half century—first thriving, and now headed toward total collapse, because of decreasing sea ice. He introduced me to the concept of shifting baselines, which Wikipedia (found, of course, on the internet!) defines as “a type of change to how a system is measured, usually against previous reference points (baselines), which themselves may represent significant changes from an even earlier state of the system.”

In biology, “[a]reas that swarmed with a particular species hundreds of years ago, may have experienced long term decline, but it is the level of decades previously that is considered the appropriate reference point for current populations. In this way large declines in ecosystems or species over long periods of time were, and are, masked. There is a loss of perception of change that occurs when each generation redefines what is ‘natural.’"

I’ve found the shifting baseline concept useful in considering changes in both substantive and procedural law in my 40 years of practice as well. As an example, the *Dobbs* and EPA decisions seem less like outliers if *Bush v. Gore* is your “baseline.”

Back in the day before electronic filing and automatic service through the appellate courts’ portal, we used to joke about the “dreaded date stamp” on Friday afternoons—the “ka-ching” of the receptionist stamping the service copy, delivered by messenger shortly

before the office closed at 5 p.m. But it was a lot of trouble to engage in this sort of motions practice back when you had to physically file with the court, and serve by messenger or mail, killing innumerable trees in the process.

If you've only practiced in this century, the Friday afternoon crazies might seem like business as usual. And the appellate process has always attracted more than its share of litigants who always need to have the last word, and never take "no" for an answer. I'm all for transparency and open access to the courts, but my perception is that the sheer ease of electronic filing and service has exacerbated the Friday afternoon crazies. And that, my friends, is not necessarily a good thing.

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