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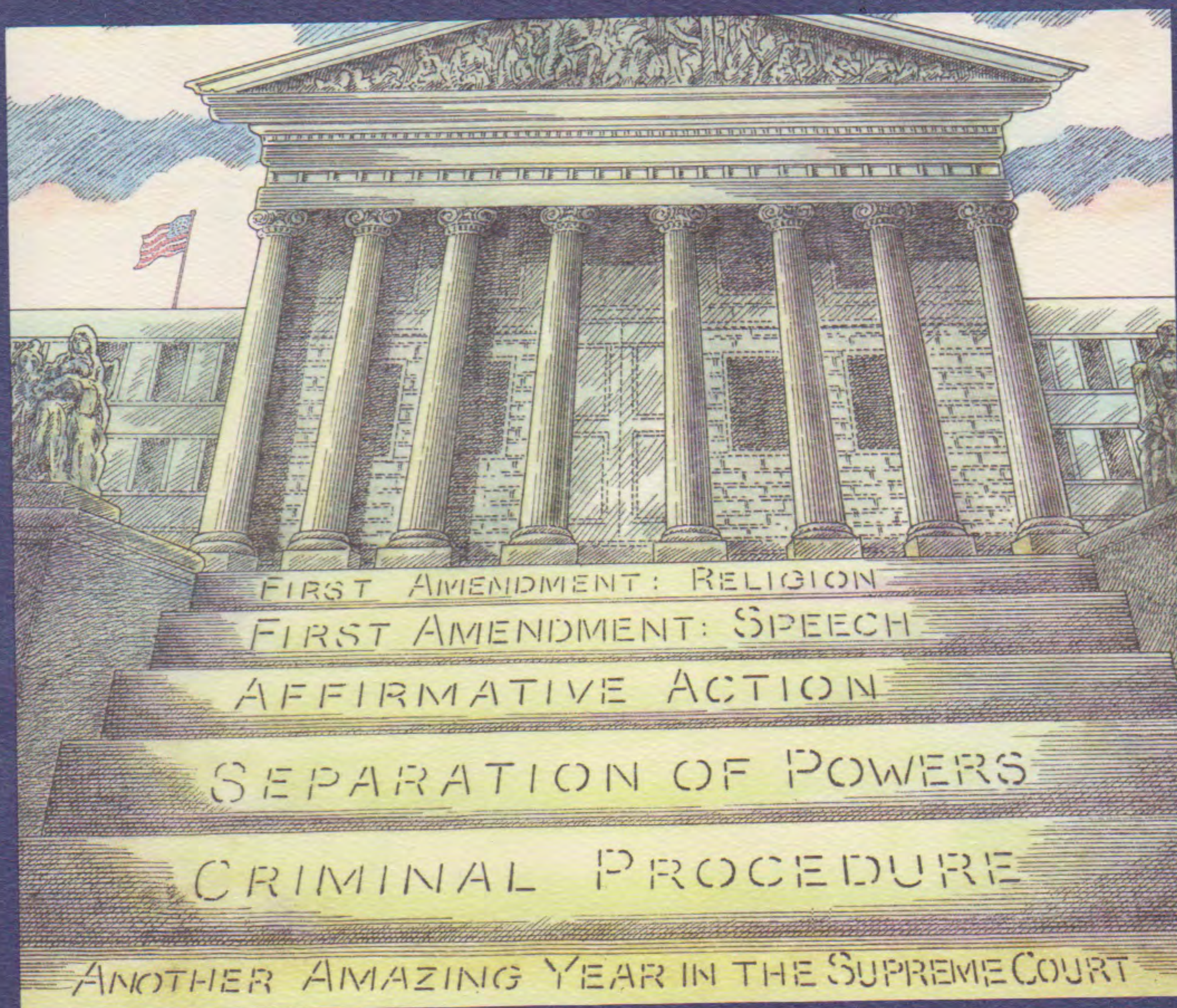

# "I Learned About Litigating from That"

*In Memory of Joel A. Cohen*

By Howard S. Shernoff

Howard S. Shernoff

BECAUSE OF HIS CANCER, Joel was working from home by the time I began practicing at the Shernoff law firm. He was our Los Angeles office's head law-and-motion writer, on whom we relied to beat demurrers, get past summary judgments, craft motions in limine. But owing to his illness and harsh treatment regimen, Joel himself began to rely on others, including me, to research and draft the steady stream of motions we faced as we waded through the unchartered litigation waters involving Holocaust-era life-insurance claims and health-insurance rescissions.

I came to the law from a writing background, with aspirations of handling motions and appeals. Having read that most court rulings turn on the papers submitted rather than the accompanying arguments (which

generally are invited only after the court has formulated its tentative position), I convinced myself that writing was what the law was all about. It was where the glory lies. So I began working gratefully under Joel's guidance.

Although Joel had always argued his own motions and appeals, and he wanted to continue to do so very badly, he just couldn't. And so while I had contemplated working in the law as a writer only, perhaps even from a remote location rather than in the office, I soon found myself facing a full calendar of court appearances. That was not at all what I had envisioned for my career, as I had never enjoyed speaking in public (let alone across from an adverse party in front of a judge at 8:30 in the morning with a tie around my neck) and felt that I lacked the legal grasp and the spontaneity to perform as a courtroom orator. But before each appearance, Joel and I would go over our main points and prepare me for argument. I still remember Joel's voice sounding from my speakerphone as I paced my office. Reviewing the legal issues with Joel imbued me with the confidence I needed before the hearings and taught me valuable lesson number one: preparation not only wins arguments, it soothes nerves.

Joel occupied pole position on my speed-dial list, and the button that connected me to him became well worn over time. Like a lot of plaintiff's lawyers, I bypassed the "associate" stage of the lawyer's career trajectory and started handling my own cases from day one. So having Joel on the other end of that phone connection felt like a true lifeline. We had somewhat different writing styles, but he taught me the virtues of relentless attention to detail, of knowing cited authority cold, of favoring an even-handed tone over bombast, of structuring a coherent argument and presenting it with due pith.

Joel and I got crosswise only once. We were briefing what appeared to be an issue of first impression regarding the statute of limitations in certain health-insurance policies. I thought I understood the issue with crystal clarity, and I believed that I had discovered the right authority to cement our stand. I was bullish about the case and my ability to brief the issue, and I uncharacteristically deviated from

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the approach that Joel wanted to take. When Joel later read the brief, he was upset that I had, as he put it, blown him off. A somewhat heated squabble ensued. It turned out that I didn't know the issue so well and had misunderstood and misapplied my prime piece of

authority. Joel too had missed some of the angles. So we were both being too headstrong.

> ‘I learned to never take anything for granted when briefing a court on a potentially fatal issue, and I never have since.’

We buried the hatchet when Joel sent me an email titled, "All You Need Is Love." You see, he was a huge Beatles fan. He was the bigger man and taught me that lawyers' warring in litigation over matters of ego, whether infighting or scrapping with the other side, creates nothing but a needless distraction from the real issues — the ones that are important to our clients and our jurisprudence. As a bonus, we ultimately won on our issue and created new law after beating summary judgment, working on appellate briefing together and my arguing the case in the Court of Appeal.

Joel was on the losing side of a few motions and appeals, and he made his share of errors. But even here, he managed to teach me through his mistakes. On one case, the appellate court made us pay when we failed to dispute a critical fact in the separate statement of defendant's summary judgment. (It was something like fact number 167 out of 339.) We made some bad law there. Another time, Joel thought that the points-and-authorities I had drafted in opposition to a summary judgment were solid enough to carry the day without declarations from our clients on several key facts. The court didn't think so, and we lost. I learned to never take anything for granted when briefing a court on a potentially fatal issue, and I never have since.

When Joel's cancer began to spread, he was compelled to increase the dosages of his drugs and the frequency of his chemotherapy. It pained me to admit it, but these things took their toll on his mind and his spirit. His voice grew wobbly, and he had to spend more time sleeping than poring over cases on Westlaw to support our motions. Not wishing to disturb him and steal his dwindling energy, I cut myself off from the reflex of pressing his speed-dial button. It felt strange at first, kind of lonely. But by turning to Joel less and less, I relied on myself more and more. It was the vital last lesson of Joel's legal tutelage: self-dependence.

It was merciful when Joel finally passed away, because cancer causes so much pain in the final stages. And I took comfort by keeping him on my speed-dial. When faced with a new legal challenge, I can, in my mind at least, still push the well-worn button that connects me to him.

*Howard S. Shernoff is managing attorney of the Los Angeles office of Shernoff Bidart Echeverria Bentley LLP.*