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CHARLES HOROWITZ: A Memoir

James M. Dolliver*

To James A. Garfield's aphorism that the best education would be found with the student on one end of a bench and Mark Hopkins at the other I would add that the best education for a new member of the Washington Supreme Court is to have had Charles Horowitz at one end of the bench and the new member on the other. During the 4½ years I have been a member of the court, through the implacable rules of seniority, he occupied one end of the bench and I the other. In the conference room, however, I always sat directly across from him. To have seen Charlie Horowitz in action from either perspective was one of those experiences which transforms one's life.

I did not really know Justice Horowitz before coming to the court. My recollection is that while I was assistant to Governor Evans I called him to see if he would accept appointment to the court of appeals in 1969. Although his outstanding qualities had filtered even into the office of the Governor, I cannot claim to have had any real acquaintance with Charlie until I became a member of the court in 1976.

Probably anyone who comes to the supreme court does so with considerable apprehension. You are cast into the midst of persons whose public life is guarded, whose decisionmaking tends toward secrecy and whose method of operation is mysterious even to veterans at the bar. The rituals which accompany the black robe, the dealing with the members of the court as your intellectual and personal peers, the understanding that your words printed in the Washington Reports will receive the unblinking scrutiny of litigants and the bar, not to mention irreverent law students, and the doubts and fears as to your capacity to do a good job make for a fairly high level of both excitement and anxiety. So you seek a mentor. Mine was Charles Horowitz.

My first lessons were on the bench. A new judge is diffident, at least initially, about asking questions. That soon disappears and the challenge then becomes not to ask questions but to ask the right questions in such a way as to get useful answers from counsel. The style of questioning from the members of the court tends to differ. I will leave it to the practicing bar as to which current member is most effective. The skill of Justice Horowitz in asking questions became legendary. In any case which appeared to have an intellectual puzzle or a question on public policy somewhat beyond the ordinary, at some time during the argument counsel

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would hear the soft but persistent voice of Justice Horowitz. His voice was never loud; it was sometimes difficult for those of us at the other end of the bench to hear. The tone was kindly. The inflection sounded helpful, even confiding, and to the uninitiated the question sounded innocent enough. I have seen counsel answer the first inquiry with what seemed to be a certain inner smile of triumph and then confidently turn to the other members of the court to continue argument.

But the first question would be followed by a second—still in the soft voice, the kindly tone—but now a certain suggestion that all was not well with the argument had crept into the question. “Counsel, I want to make sure I understand your position.” Counsel would betray a slight, nearly unnoticeable flicker of apprehension. Then a third question. In a typical case at this juncture all but the dullest advocate could look behind and see nothing but a corner; ahead and see nothing but a rapidly approaching floor of wet paint. Sometimes the questions would lead to a reluctant admission. Sometimes to a worried pause, an anxious glance to the rest of the court, and an unspoken prayer that no questions would emanate from that end of the bench. Sometimes argument would continue on, outwardly unbroken, but counsel would appear to be laboring under some great burden which, though invisible, was palpable to those of us who sat on the bench. Secret smiles would be exchanged among the justices, a new perspective would have appeared in the case and a flash of light would come to the decisionmaking process.

But it was in the conference room where the lesson really took place. As I mentioned, the iron law of seniority placed Justice Horowitz directly across from me at the conference table during our entire tenure together. Cases which are heard by the court are preassigned to a justice who has the responsibility for reporting on that case at the conference. A report on a case by Charlie Horowitz was a magisterial performance. What preparation! While I have always tried to be prepared on my own cases and those of other judges, when I compare my degree and quality of preparation to that of Charlie I am as the Grasshopper to the Ant. Notebooks bulging with information: the full text of cases, observations of textbook and law review writers, an ominous stack of reports and a step-by-step analysis of the matter before us.

There are a variety of styles of reporting in conference, but one particular characteristic should be noted. Some members stand to recite, some sit. Charlie always stood (so do I). So he would stand, sometimes in back of his chair, grasping the top of its high back, sometimes in front, taking his glasses off and putting them on as he read a passage or made a point. These recitations were neither cursory nor brief. They were extended, detailed, scholarly—and simply marvelous. Whatever the subject, whatever

the case, there was always the same careful preparation, the same measured, articulate recitation. A scrupulously fair presentation was given in the same low, unhurried voice as had asked the questions from the bench. To savor a recitation of Justice Horowitz was to understand what continuing judicial education is all about.

I have deliberately chosen not to review his opinions. They will serve the bar for as long as the Washington Reports are written and need no explication from me. But I would make two comments on opinions. First, to have Charles Horowitz on the opposite side on either a majority or dissent was a singularly exhilarating intellectual experience. You were up against the best and it called for every resource you had. Second, early in my judicial career I was told by Charlie not to get mad or upset if a judge disagreed with you, and most particularly not to doubt that judge's intellectual capacity or integrity. This has been good advice. Not only do I follow it, I believe it is followed by all of us on the court. We can and do grab each other around the throat intellectually, but always maintain respect and regard for each other on both the personal and professional level.

Finally, Charlie taught me the importance of values for anyone who wanted to be a good judge. He helped me to understand not only the need for and necessity of values in decisionmaking, but also that a judge should not be ashamed of or try to hide the importance of values. I shall always treasure what now seem like the too few occasions when I would sit with Charlie and listen to him talk about what it meant to be a judge and the art of decisionmaking. I shall miss his presence on the far end of the bench, across the conference table and as a colleague, but I and every other member of the bar and the judiciary will continue to be served by the work of this remarkable man, my friend Charles Horowitz.