

Depositions v. Trials Going Hence II: The Aftermath

By Judge Jerry Buchmeyer



The *Going Hence Without Day* "et cetera" (January 1992)¹ resulted in a Veritable Flood: 17 chuckles, 23 guffaws, 2 1/2 thigh-slappers, and a new generation² of explanations of The True Meaning (If Any) of the stock general denial ending: "go hence without day."

The Typo Theory: "...without delay"

The "typo theory" — that an early-day legal secretary "caused the whole thing" with a Classic Typographical Error — was first proposed to me in 1982 by **Lyman Hughes** of Dallas (Carrington, Coleman). His explanation:

...Since I have become a partner, I have had several occasions to explain to associates the meaning of the phrase "go hence without day." My explanation is that the phrase is an obvious typographical error which has been perpetuated through the use of form books and the common practice of associates adopting without change the phraseology used in the last pleading prepared by the partner to whom the associate reports.

The phrase originally used and written prior to the perpetuation of the typographical error was "go hence without delay." For fear of suffering default or reprimand (or even disciplinary action) I always used the phrase as mutated by the

typographical error. Nevertheless, my explanation of the phrase has always satisfied every associate to whom the explanation has been proffered, except one associate who suggested that the word "delay" would seem to make some logical sense and, accordingly, *would be entirely inconsistent with the balance of the general denial pleading*. I recognized an obvious brilliant future for that associate and have promoted him to practice in federal district court or above.³

This "delay typo theory" was also advanced by January 1992 letters from **Donald T. Fulton** of Fort Worth — who also added the Chicago Conjecture in footnote four⁴ — and from **Ann G. Young** of Austin (a legal assistant with Ausley & Slaikeu). Ann ("Give Me A Form & I Can Draft Anything") Young explains that she "knew absolutely nothing about the practice of law" when she started to work for Tom Ausley more than 13 years ago and soon found herself preparing an Original Answer:

In reviewing a similar answer, I found the standard boilerplate "go hence without day." That making absolutely no logical or grammatical sense (I was formerly an English major), I assumed that my predecessor (the idiot, no wonder she left) had made a gross typographical error. My pleading, when completed and filed, asked that the court allow our defendant (the innocent person) to "go hence without delay."

As you can see, that makes much better sense. I have since tried to get it to catch on, but it never has. Perhaps with your wide readership, you may persuade the legal community to adopt it.

Typo Theory II: "...without pay"

In his January 1992 letter, **Marcus W. Norris** of San Antonio (Dibrell, Dotson, etc.) suspects that:

The expression "going hence without day" probably originated as typographical error in the days of hand-set type. The phrase was probably originally intended to read "going hence *without pay*" (which seems like a perfectly reasonable thing for a defendant to wish upon a plaintiff.) However, once the misprint occurred, other attorneys saw it and decided that they must have missed something in an advance sheet, so rather than risk showing their ignorance at the new expression "going hence without day," they simply got on the bandwagon to keep up with this wonderful evolution of law!

The Anti-Verbiage Assumption

In 1983, **Millie Kensinger** of Dallas — "although not an attorney, I have worked with and for them long enough to have absorbed some of the more aesthetic bombast" — submitted this poetic postulation:

The letter from Bryan J. McGinnis emphasizes the "precise, poetic fruits of our vast labors," and points out that *simplicity* is only achieved with great effort. Such precision, such simplicity should be applauded — and, of course, emulated. It surely was in the throes of such inspiration that the phrase "go hence without day" was conceived, cutting verbiage to the bare bone, omitting the obvious and unnecessary phraseology; so that rather than reading "go hence without the passage of another day," the lovely purity of the simple wording "go hence without day" stands as a beacon highlighting the remainder of the similarly structured clear and precise language of the pleading.

Professorial Possibilities

In 1983, Prof. **Colin K. Kaufman** (then⁵ at St. Mary's School of Law) made his contribution to the **Going Hence Quest**:

[Prof. Kaufman's letter] begins (rather directly for a law professor, I thought) with these definitions from his first edition of *Black's Law Dictionary* (1891): "day" as used in pleadings and practice, was short for "day in bank" (from the Latin "dies en banco") — and "days in bank," according to *3 Blackstone's Commentaries* 277, means "certain stated days in term appointed for the appearance of parties, the return of process, etc., originally peculiar to the court of the common bench, or bench, (bank) as it was anciently called."

(For the rest of Prof. Kaufman's fascinating — and witty — analysis, see the October 1983 "et cetera.")

Prof. **Rufus McKnight**, who also contributed in 1983, sent a note in Jan. 1992 — see *Black's Law Dictionary*: "without day" is the Anglicized version of "sine die" — with these definitions:

Without day — A term used to signify that an adjournment or continuance is indefinite or final or that no subsequent time is fixed for another meeting, or for further proceedings. See *Sine Die*.

Sine Die — Without day; without assigning a day for a further meeting or hearing. Hence, a final adjournment; final dismissal of a cause.

...and with this **Query**: "If the legislature adjourns 'sine die' — without a day to come

back — shouldn't it have the same rights as an ordinary defendant, *not to ever come back?*"

In his January 1992 letter, **Bruce K. Packard** of Dallas (Locke Purnell) submits "the lowest form of hearsay — recollections from law school:"

Prof. Daniel Poolsby, visiting the University of Michigan Law School in 1982, explained that the phrase is a remnant from English common law pleading. In the mid-18th century, English judges rode from town to town on their horse holding court proceedings. They were known as "circuit riders." Court proceedings were scheduled in advance and were required to be completed in one day, so that the court could keep its schedule. The term "go hence, without day," meant the claim was not meritorious and the plaintiff should not have his one day in court.

The Troll Hypothesis

In May 1982, **Steven S. Maris** of Dallas (Fulbright & Jaworski) first revealed his possible breakthrough on the **Going Hence Question**:

My favorite theory (primarily because it was espoused by myself) is that the phrase is not properly written "go hence without day," but "go hence without Day." Day, you see, is a small gnome-like creature with unruly orange hair and a somewhat frog-like body that, from time Medieval, has lurked about the basement of the Dallas County Courthouse. In times past, if a defendant were somehow found to have committed the atrocious acts alleged by the plaintiff, part of his penalty, in addition to recompense of plaintiff's damages, was that the ne'er-do-well defendant must take, feed, and maintain Day until some other defendant was found guilty of acts of an equally heinous nature, in which event the subsequent wrong-doer must take over the maintenance of Day.

Then, in January 1992, **Gregory R. Jacobs** of Dallas (who is with the FDIC) offered a controversial refinement of the Maris Theorem:

It is indeed incredible that columns of "et cetera" should remain in my memory when More Important Things have been forgotten. Your recent [Going Hence Without Day] column is specifically one of those memories that will not go away. In the case of "Day" however, I believe that it is the fantastic dread into which you put me by the explanation that "Day" is a troll, or similar gnome, who resides in the basement of the courthouse and with whom no attorney wants to leave? No plaintiff or defendant wants to leave with Day either? Further, for years I avoided going down into the bowels of the Dallas County Courthouse, for fear of encountering Day

and being dismembered or, worse, having to take him home. Finally, I did happen to have to make that long, lonely, and very gloomy journey, and I encountered Mr. Day. He turned out to be a likable chap, *who did not ever want to go home with an attorney because the very thought of that terrified him completely.* He did allow, however, that he had a cousin, also named Day, residing in the basement of the federal courthouse. This particular Day is, apparently, a rather loathsome fellow and would probably love to go hence with each and ever, all and singular, the lawyers, plaintiffs, defendants, and other parties in interest who happen to frequent the federal courthouse. *Federal Day* does have a preference, however, for savings and loan executives and federal judges. Just thought that I would let you know.

The Final Word...

...may well be the entire letter I received in January 1992 from **Kay Fulgham** of Fort Worth:

I always thought "go hence without day" meant GET OUT OF TOWN BEFORE SUNDOWN!

Which one is correct? Go hence without delay...without pay...without the passage of another day...*State Court Day* or *Federal Day*...or Get Out of Town Before Sundown Day? Who really knows? So, one thing is perfectly clear: it's time for **State Bar President Bob Dunn** to meet this challenge — and appoint the "Going Hence" Task Force, without delay. Or without day. Or whatever.

1. Reprinted from the May 1983 "et cetera" in the *Texas Bar Journal* and the April 1982 "et cetera" in *Dallas Bar Headnotes*.
2. Portions of this column are reprinted from the September 1983 and October 1983 "et cetera" in the *Texas Bar Journal*.
3. **Lyman Hughes** has, since a Truly Unfortunate Incident in the state courts when his very first case was Called to Trial, limited his practice "to federal district courts and above."
4. **Donald Fulton's** "Chicago Conjecture:" In spite of the logic of the "go hence without delay" analysis, it is also possible that some old-time Chicago lawyer, after proofreading a secretary's typed answer saying "hence with his casts," announced to her that it should read "hence with his costs, without da aye" (ala "Da Bears"). This is the so-called northern or "Ditka" rule as to the derivation and meaning of the phrase. However, Donald candidly admits that "the idea that a defense lawyer read, much less proofread, a pleading he signed, casts grave doubts on this theory."
5. The word "then" is used out of an Abundance of Caution, because the January 1992 Going Hence reprint placed **Frank Elliot** at the Southwestern Legal Foundation. Frank, of course, is dean of the Dallas-Fort Worth Law School.

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