

Lascher at Large
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When it comes to organized bar activities, everything I like tends to be abolished. (Do you suppose somebody's trying to tell me something?) This Journal that you're reading is a good example. Sure, it's still here, but there's a move very much afoot either to do away with it or to take control away from the lawyers – and if that ain't abolition you don't understand the game, friend. What it boils down to is whether the organized bar's organ is going to convey the messages its members want to hear, or the ones our employees think we ought to hear. Those aren't quite the same. “All the news we think is good for you” is not the most ringing journalistic motto.

COMMENDING THE COMMISSION

The other venture I have thoroughly enjoyed has been service on the California Judicial Nominees Evaluation Commission. (Enjoyed everything but its name, I must admit the State Bar's communications staff invented it. Anything focusing a bit?) There is considerable likelihood that body will be disbanded by the time you read this. Not by the Governor, not by the Legislature, and not by outside pressures, but by the management of the State Bar – which set it up – for reasons that are not even clear enough to elude me. If it occurs, it will be a real damn shame.

The Commission is the most truly delightful group of people I've worked with in any aspect of public affairs (even noses out the Journal Committee, if just barely, and that's fast competition). That is true in no small part because it is a body which really accomplishes things in a serious, diligent and conscience-shaped fashion, but without pomposity or self-importance en route. And the amazing part is the manner in which the body was comprised would seem sort of a blueprint of disaster, but instead turned out a work of art. There's an old saying that the gods take special care of children, drunks and the Supreme Court, to which for a while I might have added the State Bar. But I think the deities are tiring of that organization – to say nothing of the U.S. Supremes and their dandy little leader – though they seem to have given us this winner for the road.

If you were going to form a group to serve as the last guarantee against incompetents or zanies on the California trial courts you'd choose it by: letting each member of the outgoing Board of Governors pick one clone; adding the appointee of the appointed young lawyer on the Board, and then throwing in three “affirmative action” lawyers. Sure, you would! The miracle is that this stew turned into a finely blended ragout. With an amazing diversity of interests, backgrounds, and what-have-you,

everybody somehow and amazingly seems to have a notion that the important thing is the common good, i.e., getting the best judges. And some of the ways they choose to go about it are astonishing for a public body. Like, good manners, listening to the other guy, lowered voices, tolerance, little speechifying, patience, respect for differences – oh, all kinds of nutty stuff. What a way to run a railroad.

APPLYING A LESSON

I am reminded of all this by some public-print squabbling over the Board of Governors between Bill Haight and Bill Wenke. Los Angeles Bill says the Board is about seven-eighths of the way to hell in a handbasket, with too much politicking, too little concern for interests of lawyers, and too much posturing. His namesake from Orange County, speaking from the vantage point of a few months on the Board, says Haight is full of it, that everything is perfect with the State Bar and getting even better by the moment. I fear the truth, as so often, lies somewhere between the two.

But it does recall one thing on the platform for State Bar reform I floated in these pages about a year and half ago, to some very warm response from the working members of this club. The linchpin reform, if you ask me, is getting the election of the State Bar president out of the condition it's in. I already mentioned the waste of talent involved in requiring that we pick our leaders from one out of five members of a particular class on the Board and consigning the remaining 80% to eternal also-ranism. It would make about as much sense to choose the President from those born between January 1 of the 52nd year before the election and December 31 of the 48th year.

But the problem isn't just wasted person power; it is also the disruptive effect of thus defining the source of president material. Whether he or she admits it or not, practically every person elected to the Board of Governors campaigns from the moment of swearing in until the time the presidential election results are announced, and spends the remainder of his or her service as an alienated loser. And the few who are really not in the running (which is a vastly smaller number than those who say they're not interested) spend three years as power brokers. That one really isn't any way to run a railroad.

Coming from that environment to the Commission, where nobody's running for anything, is like going from darkness to light. Since the Legislature is busy looking into the structure of the State Bar already – and there are those of us who think it deserves some looking into – I strongly suggest consideration be given to altering the manner of selection of the State Bar president to provided that he or she be elected by the Board of Governors from the membership excluding those serving

on the Board at the time. A tradition of selecting former board members would very probably arise and be a good thing, but I think it unconscionable to embody it in the statutes. Such a change at least would mean that those who are on the board could concentrate on compiling a good record if they want to be president sometime in the future, instead of maneuvering now for votes. We're too big a business for that kind of thing and there's too much at stake.

PEJORATING PERJURY

I'm sometimes accused of being a bleeding heart liberal (according to some, there isn't any other kind) on the subject of due process in criminal cases. Or at least I was before I started mentioning that I always thought the Constitution was a vital, dynamic, substantive set of governing principles, not a set of details for a board game called "Exclusionary Rule." Once you get away from the matter of how many angels can permissibly peek through a needle's eye (if I may mix many metaphors, and you'd better believe I may) – a pastime which many confuse with the protection of individual rights – I suppose I am, it is not soft on crime, at least what Stanley Mosk calls "hard on the Bill of Rights."¹

But there is one crime on which, given the power, I would become Draconian. And it's one (concededly a state of affairs not without precedent) in which everybody else is totally out of step with me, the one offense the most laworder judge, right along with the ACLU, deems a victimless crime never to be prosecuted. That is the offense of perjury.

Anybody who thinks our courtrooms are not full of false testimony on material issues has probably won his wings in the Flying Alligator Club while picking up eggs that he knows a rabbit laid at Easter time. It's a way of courtroom life, a part of the intellectual wallpaper. I was at trial recently in which one of the parties was recalled to the stand by his own counsel (after a couple of days' recess) to explain the difference between his earlier testimony and what he was about to give; the justification was that he had a bad night's sleep before the first time, so that's why the facts changed. (That, of course, and matriculation at witness school.) Nobody but your humble correspondent seemed to bat an eye.

And thereby hangs a tale. Can anybody explain to me just why judges, prosecutors, opposing counsel and who-not are so uniform in the belief that lying on the stand is a harmless eccentricity? So much so that

¹ If you would like to win a three-day holiday in Eagle Rock, just state in 25 words or less: "The sentence I just read is unintelligible because . . ." Duplicate prizes will not be awarded in case of ties; all entries become the property of the management. If there is a management.

anybody who protests is considered a dangerous crank, some kind of uncontrollable malcontent?

Were I a judge (heaven forbid!) they wouldn't call me Maximum John, but maybe Excessive Ed, when it came to that kind of thing. I don't suppose I'd go along with cutting off the hand of anyone caught lying in court, but I sure as hell wouldn't stop with probations or even weekend sentences, either. I think courts owe it to themselves, and, more importantly, to those who trust them, to deal ruthlessly with anyone who perverts their process. Any other approach amounts to obtaining money (whether in the form of filing fees or appropriations) under false pretenses.

The judicial machine expects us to honor its product, whether we agree with it or not, and the wonder is that we do. In return, it owes us, among other things, as purified and antiseptic a production line as human resources can provide. When a judge says, as many have (to me and in my presence), "Oh, a little perjury slips into every trial," he is really saying: "Trust your liberty, estate and happiness to me, but I could care less about raw material I employ to discharge that trust." That my friends, is disgraceful cynicism.

And don't tell me that perjury is a hard crime to prove. I apply the common law demurrer: So what? It's not only that the same thing could be said about lots of crimes, although that is certainly significant. It is also true that we set up a judiciary to adjudicate all adjudicable matters, not just easy ones. And if we could only choose one tough nut to crack, I should think it would be one that goes to the heart of how everything else is decided. Perjury, in essence, is either attempted or successful assassination – of the truth, of justice, and of due process. Ask any layperson what he or she thinks is the biggest problem about courtroom reality today, and I'll bet 8 out of 10 will say perjury, whether they use the artistic word or not; they may see the forest better than we woodpersons do.

HIGH QUALITY MATERIAL

Back to the commission for a moment. The material we get is confidential, but I think there is enough elasticity in that to allow me to report on the way one fellow answered the \$64 question in the PDQ²: Why do you think

² The PDQ is the Personal Data Questionnaire that the Governor's Office has every would-be judge fill out. It is a gold mine of information vital to energizing the evaluation process. Although it's only a starter on the path for information about perspective appointees, it sometimes tells some pretty useful things about the prospect in the sense of what he or she writes down. Fairly often more than the candidate really means to tell.

you want to be a judge and think you would be a good one? What this fellow said was that he thinks he's enjoyed some success in practice because he never takes a position toward or on behalf of a client until he stops to research whether there are any questions and also what might the alternative answers be. He added that this seemed to stand him in good stead with opposing counsel and even led to a high proportion of settlements, and that he thought maybe this wouldn't be too bad a way to approach things on the bench.

We were evaluating the guy for Superior Court. In my opinion, we were looking too low; I wanted to put him somewhere above the Supremes. I don't know if he's really one of a kind, but he certainly is part of a species that should be protected. If a person has that quality, I wouldn't care if he didn't know any law (although I think that is inherently impossible), suffered from a weak bladder and tended to fall asleep after lunch. He's got the main ingredient of good judging: a healthy sense of his own mortal limitations and a desire to avoid being embarrassed by them.

How would you like to have a judiciary filled with people like that? My problem is, if we did, I'd be torn apart by conflicting desires: to spend all of my time appearing before them, or to have the opportunity of working with them. Fortunately (I guess) that's a dilemma that doesn't seem to threaten any of us. But what a refreshment it is to discover there are a few people like that, and ones who want to be judges.

Of course, I have probably just irretrievably quashed any chance he had. Not to worry, I'll be glad to litigate against him any old time. Speaking of which, does anybody remember when it used to be fun to find out you were going to have an able and professional adversary? And how much that made you look forward to the case? Not all the flowers that have gone blowing in the wind are poppies, pal.

EVALUATING ORALITY

A couple of issues back (Has anyone else noticed that it sometimes seems like my most favored author is a columnist in this Journal and most of my inspiration comes from two issues earlier? Probably not. But I digress), I mentioned the First District expanded oral argument experiment (Hm. An expanded experiment? Looks like it's one of those days.) After writing that, I dropped in to see how the project worked. De rigeur, I wrote first and found out later. (Not the first time, you say? But I digress.) The returns were mixed.

The overwhelming prevailing lesson was a reminder about how nice it is not to be a judge. (But see above – hypothetically.) Listening to a few lawyers – many of them marginally competent, to extend a lot of doubt benefits – drone on for 30 to 45 minutes the copy seems like the pluperfect cruel and inhuman punishment. I sometimes feel like getting up to scream and/or grab lawyers by the lapel, shake them, and ask whether they ever give an iota of thought to the fact they're supposedly attempting to communicate – and that you can hardly communicate by preventing attention. But I always think better of it; better persons than I have tried personally to get that message across, with the results that are all around us. But I digress – and out-side parentheses, at that.

No, not really. Maybe the fault is not so much that the lawyers mumble into their lecterns about “hereinaboves” and “page 4736 of the reporter's transcript” and “If you remember my motion for continuance made six years ago” or the like. Maybe it's more that of the court which sits there and “listens” to lawyers who clearly have nothing to say. It sometimes occurs to me that the worst imaginable contempt of court is addressing the body as though it were somehow subhuman and unperceptive. On behalf of their Honors, I find that more insulting and contemptuous than I would an occasional angry remark directed to a jurist; at least the latter assumes the judge's humanity, whereas bomfogging in a drone at him doesn't.

Now let's see, where was I? Another interesting thing about that orality program is that all the cases it utilized were ones that otherwise the central staff would have decided. Veeerrry interesting? Particularly when you consider that a number of these humdrum, shadow-decided cases produced reversals. Even more particularly when you consider that in a couple of them the court found issues that had never been briefed and sent the cases back for further workup by the lawyers. Particularist of all when you consider that in almost all of these cases counsel would have waived oral argument – and that the court would have come close to bullying them into doing so.

Now you and I know that, even if there hadn't been oral argument, the central staff would have sent the cases back for further briefing and would

have reversed a lot of the judgments, and so on. Suuurrre, we do!

But does the Administrative Office of the Courts? Do the grantsmen? Does everyone else who thinks that lawyers are just some sort of wart on the body of jurisprudence, best ignored so that they can get on with the business of processing cases, weighting case loads, and the like?

And, I am told, the experiment is likely to be declared a failure and the program deep-sixed, precisely because it's stirring up all this kind of funny thinking on the part of the natives. Ye shall know the truth over our dead rule-making bodies, lest it free something we don't want to hear noised about.

Aw, nuts. Almost nobody came out of that experiment looking any good, but if you can't believe in something, what have you got? And I believe there is at least salvageable goodness in a system that will just try something like this, even though it eventually winds up striving with might and main to put the genie back in the bottle.

HOWCUM?

This seems to be a stanza in which I am being reminded a lot. Some information that crossed the desk (as we pompous pedants pithlessly put it) recalled the fact that, in one of the federal districts of this state, there sits a judge who is not just substandard or eccentric or warped or any of those things – but a real, dangerous, obvious nut. There is nothing secret about it; anybody who knows anything about the federal court knows who I mean. The guy's condition has been the subject of all sorts of commentary, mentioned in several books of national circulation, the whole shot. Everybody knows about him.

Everybody, I submit (not all that respectfully in this instance), including his colleagues on the district court, the Ninth Circuit, the Washington Supremes, the Federal Judicial Center and the Congress. Howcum we never seem to hear anything from those quarters? At the very least, the Circuit – which has to put up with him – ought to be in a position to draw and quarter him in print manner suitable for framing. Their incredible silence lends unhappy credence to the hollow wisdom among our profession that all judges regard themselves as lodge brothers. The unseemly bickering which has emanated from our Supreme Court lately and done wonders to mar its image is one thing, but this cronyism that's gone on so long is the opposite and extreme evil.

Speaking of which, what kind of human do you suppose it is who has to know that he is universally regarded as a legend in his own time and yet keeps it up? What kind of person can go to bed at night knowing that he

is the paradigmatic horrible example for federal judges and life tenure, and can get up the next morning and keep up the good work? I suppose that, down deep, that's the most frightening aspect of the thing.

POTPOURRI

Attention-piquing item in a recent issue of the London Daily Telegraph. (I know, with the mails the way they are, your copy probably didn't reach you that day.) It seems that an ad agency in London is suing the Law Society – the bar association/governing body/whatever for the solicitors' end of the profession – for 63,429 pounds on the claim that the Society had retained the ad men to do a campaign “to promote a better image of solicitors” and the welched on the deal. That's interesting enough in itself, but let me recount the factual zinger of the story:

“Their earlier campaign, whose slogan was ‘Don't trust Mr. Whatshisname,’ aimed at unqualified lawyers, ran into trouble when a Birmingham law lecturer, Mr. Francis Reynolds, changed his name by deed poll to ‘Whatshisname’.”

I don't know exactly what to do with that one, but it must have some cosmic significance.

By the bye, has anyone else been getting new telephone books lately? Great jumping Bates-O'Steen! (Which reminds me, how would you like to have his name go down in history as the guy who made lawyer billboards possible? Sorta like the poor man's Vidkun Quisling, I guess. “What did you do in the great ethical war, Daddy?”) I never thought advertising would amount to much in substantive impact, and it hasn't. But it still makes me crawl to see what a handful of creeps are doing – to the rest of us, while demolishing themselves. Whatever became of social ostracism? A healthy dollop might be in order.