

Lascher at Large
By Edward L. Lascher
March / April 1979

This stanza is written immediately after a gall bladder X-ray, a fact which may: (1) explain some dyspepsia (if that's not too physiologically garbled); and (2) generate widespread belief that it's high time. Whatever, I can't help observing there's plenty else abroad to rile the innards of the steeliest among us – among whom your humble correspondent does not number himself.

In a moment, I'll turn to the subject of this special issue: jurisprudence. (Here I thought every issue of the mag had something to do with that subject. Funny old me.) First, though, I'd like to consider an alarming trend in the management of our (but see infra) State Bar.

Distressing Decree

There recently issued forth from the Caesar Augustus a writ to the effect that, henceforth, all State Bar sections and committees will (repeat, will) operate without (repeat, without) assistance from the bar's staff. That is to say, bar employees will no longer: attend committee¹ meetings; advise committee members as to what's being done regarding their field by the Board, the Legislature, the Conference of Delegates, other committees, or anybody else; convey back to the Board, Conference or other committees what the committees are doing; take minutes of meetings; prepare reports or other documentation; or assist in any way except to "duplicate and distribute the minutes".

That seems a mite cavalier. When you ask busy lawyers to give days of free time to the service of their profession and the public, it's pretty insulting (to say nothing of a practical burden) to add that, as a penalty for being public-spirited, they must also do their own clerical work – because the State Bar is just too busy to participate in any such frou-frou.

Besides which, it is passing mysterious to comprehend exactly how these bodies are going to accomplish anything, if they have no method of telling anyone else in the profession what they may have done or what may be troubling them. Neatly and totally severing lines of communica-

¹ I'm going to use the word "committee" interchangeably with sections and subcommittees – sort of in the spirit of Proposition 13 and forest conservation.

tion among constituent bodies hardly seems an effective method of promoting their function (if, of course, one really wants them to function, but see infra). If, for example, a committee is to study a Conference resolution, I am not all that clear on how it does so, if it has no way to find out what the Conference resolved (to say nothing of underlying reasoning) and, for that matter, no way to tell the Conference what the committee may turn up.

Impractical, or Worse?

It isn't the blatant impracticality of this proposal to seal off committees from contact with one another and the outside world that troubles me most, however. Rather, my scant remaining marrow is chilled by the staff's "explanation" of this move, which seems all too tangible. (We have now arrived at infra, folks.)

The story is that this change is required to enable the lawyer employees of the State Bar, "to take the initiative with respect to the creative development of procedural and substantive law together with the comparative analysis of state and federal law". This is amplified by pointing out that the bar has comparatively few such staff lawyers, so they are under heavy pressure to perform "extensive research and drafting before [they] can present an appropriate recommendation to the Board of Governors [and] it is to these latter type proposals that staff attorney [sic] will be expected to devote his or her time and efforts" rather than wasting them on unwashed outsiders.

Given that premise it was probably inevitable that one of the department heads would annotate this by saying it is the staff lawyers' function to "screen " and "critique" every action of a Bar committee before it is communicated to the Board of Governors (and, by unmistakable implication) to decide whether committee work product will be disclosed to the Board.

Dissenting Opinion

I think we have a classic cart and horse problem here. If it is, indeed, the role of the employed attorneys to concentrate on initiating substantive and procedural law proposals – and conversely the role of the State Bar committees to engage in harmless minuets among themselves – then somebody's out of step with somebody, and I'm afraid one of 'em is I.

Somehow or other, it had always seemed that the principal source of expertise and initiative regarding improvement of justice lay in the 69,000 lawyer members of this club, acting as volunteer consultants on

whatever particular interest might be theirs, rather than something in the bailiwick of dewy-eyed bureaucrats recruited out of the National Center for State Courts, the ABA staff, or other grantsperson-hatcheries. (You thought I'd forgotten about grantspeople, didn't you?)

The idea that theoreticians two years out of Hastings or veterans of the Stanislaus Legal Services Association are going to be "criticizing" the proposals of firing-line lawyers on improvement of the Probate Code, reform of civil discovery practices, or modernization of juvenile court laws, grabs me as extravagantly antic. That feeling was not terribly allayed when, recently, one of these staff "experts" explained his failure to transmit recommended changes in certain of the California Rules of Court, hammered out over more than a year by people deeply into the subject, because the particular staffer didn't know the set of rules to which the changes were addressed existed!

Seen, But Not Heard?

With such respect as may be appropriate, I cannot agree that, in terms of either principle or practicality, the notion that the staff should propose and the Board dispose (while the membership watches in awe) is a sound one. Conceptually, I believe the volunteer-committee representatives of the mass of the California legal profession should be the ones to initiate proposed policy changes and reforms, not our bureaucratic employees. From a brass-tacks standpoint, I just think we lawyers number among us a lot more brainpower than the collective resources headquartered at Franklin and McAllister.

Further, it seems from my perspective that the wrong horse (in its entirety) is in the lead harness. I always thought we elected a Board of Governors, composed of lawyers (insofar as the elected as distinct from the appointed increment is concerned) to govern the profession and make its policy. The staff, I understood, carried it out, if sometimes fitfully. Selection of more professional staff management to improve the administration of policy and get the Board out of operational trivia seemed a fine idea, but I am not that hot for turning our representatives into a sort of ceremonial House of Lords, fit to make speeches to local bars, pose for pictures at legal Secretaries Association meetings, and little else. As readers of this column know, I happen to believe the Board has its off days – way off – but it's still, on balance, a fine and dedicated bunch and it is, after all, our chosen, statutory representative. Then, dammit, govern!

On top of all that, I find a terribly ominous ring to this whole "lawyers are to be seen and not heard" and "staff knows best" philosophy. We have too many career government employees telling us what's good for us already; all you have to do is look back to Howard of Jarvis and his

buddy to get confirmation that I am not alone in that belief. I had cherished the hope that the legal profession was too maverick and ungovernable in its nature to accept such a yoke. Was I right?

And So to Jurisprudence

There's a lot wrong with our jurisprudential machinery these days, but there also are some good things being done. Some of the other authors in this issue will mention a few, but I'd like to ruminate, too.

One of the most interesting items is an experiment being pursued in the First Appellate District, by which selected cases are set for extended oral argument. After the briefs are in, the court tells the parties to come in and argue at length, and then the court confers and decides the case on the spot, without the central staff pre-pablumizing the case. A transcription of its oral decision becomes the constitutionally required written decision stating reasons. It is sort of a variant of the English system, in which briefs form no more than the springboard for an appellate hearing and the decision is generated essentially by the oral presentations.

On the merits of the proposal, I've got some reservations. It seems to me there are many cases which simply don't lend themselves to this kind of give and take, and certainly not to a quickly rendered decision. Also (and dare I mention it?), it takes two good lawyers who can stick to the point and eschew jury argumentation, and who know the case and some law in general. Plus which (and dare I mention this?), it takes a court that doesn't think lawyers are a pain in the after and which is willing to work at a job which the judges essentially enjoy; that doesn't describe many – lawyers or courts. Justices Caldecott, Christian and Rattigan (the ones who are doing the experiment) comprise a happy example of what I mean, but I suppose it wouldn't necessarily work everywhere.

The Good Try

_____ The point, though, isn't so much whether the particular experiment works universally, or at all, or whether it should be encouraged or discouraged. The significance, rather, is that they tried it. And, for once, the State Bar looked a little bit rational in egging the court on and supporting the project.² Moreover, it's an experiment which neither

² Sad to say, the bar soon slipped back into character. Asked to appoint skilled and experienced appellate practitioners and other sophisticated observers to evaluate the program, the management instead chose to appoint the half-dozen volunteers whose offices were closest to the courtroom – to save cost, yet! Thus, we got, for example, one folk who's on the staff on a telephone company, which is a perfectly honorable

embraces the idea that we've got to tear everything down and invent a new structure, rather than improving the one we've got, nor does it depend upon the so-chic theory that the first thing we've got to do is get the lawyers out of the picture; instead, it is designed to take advantage of lawyering resources. One of the most exciting things about it was that the first time the court tried this system, a half-dozen or so judges of the other courts showed up to watch and see how it worked. There's a warm glow there somewhere, and it's not too hard to find, either. The tragedy is it's so rare.

Speaking of which, my partner and I argued before a new (actually, a drastically reconstituted) court a few months ago and came away practically giddy with pleasure. All of the judges spoke, and asked questions; all of them were obviously well acquainted with all of the cases; it was manifest they were all interested in what they were doing and (you'll find this hard to believe) enjoying themselves doing it! It was a thrilling experience, and not just for the theater of the process, but also in the quality of judging and lawyering that resulted.

Then, suddenly, a great gloom came over me. Not – certainly – any reflection on the experience that I had just had, but rather the sudden realization that it was a rare and precious jewel. A one in a thousand experience. And that, you'd better believe, is saddening. In any sort of decent legal world, it would be the norm, not something that makes a lawyer ecstatic. But I digress. Or do I?

_____ Doing in Delay

Meanwhile, there is the matter of delay in the judicial process. For a long time I felt this was overdone. A certain amount of delay is, actually, benign; tempers cool, perspective returns, and all kinds of things happen for the better if you don't rush directly from controversy to court without catching a breath.

But the problem is that phrase "certain amount". It has become preposterous. No, that's too kind a word; it has become a downright scandal. And in most areas, the bench is cynically tolerant of the fact and the bar incredibly compliant. (I strongly suspect an "As long as I'm getting my fees, who cares?" attitude in too many cases. If I suspect it in too many, just think if the layman suspects it in all.)

occupation, but not much of a perspective from which to evaluate an experiment in litigation. The whole selection was apparently and understandably regarded by the court as a slap in the face, but I doubt it was meant as such; it was just the State Bar mentality in full blossom.

I heard the other day about a trial in which the court clerk hounded the parties for weeks in advance to promise they'd be ready to go on D-Day, causing one lawyer to cancel a family vacation and the other to bring a principal witness from the Midwest. I am even told that, when the court was called the day before, the clerk was almost insulting and said "Of course you'll go; we send all our cases out to trial". The day of the big case dawned crisp and clear, and his honor simply said with a smile: "Sorry, we don't have any courts and won't this week; we'll reset it in a few months". And we wonder why people are voting "no" on judges?

In another case I know of, a couple has been trying for five months to get a hearing on temporary child custody, and they still haven't succeeded as of this writing, despite about half a dozen appearances begging for a date. (My friends in the domestic litigation field think it's funny I got worked up about this one; apparently it's standard operating procedure. Stay tuned to this column for some generalized observations on the functioning of these courts – if the words "functioning" and "courts" are quite proper.) There is, quite simply, a point where delay becomes oppression and I very much fear we are at or past it, to the extent that our courts may be accepting their tax revenues under false pretenses of supplying a forum to the citizenry.

It Ain't Necessarily So

There is evidence it need not be so. I am told that Reg Watt (who must surely represent one of the most popular judicial appointments any governor has made in any generation) and his colleagues up in Butte County have demonstrated that a court can master delay. Their normal interval from answer to trial (including jury trial) is seven months; in short cause matters, they are at the point of the statutory minimums (i.e., if you comply with the 30 days notice of trial, 15 days notice of this and that, 30 days for discovery and the like, you're in trial). Sure, I know it's a small county, but it's not that small. And if it's got a smaller population, it's also got fewer judges to handle the cases; its per capita doesn't seem out of line with the rest of the state. Moreover, there are plenty of other counties the same size that don't come close.

How does the Butte band do it? I don't know the details, but two principal ingredients are sophisticated settlement procedures and firm trial settings. As to the former, they send out a list of questions that you'd damn well better be ready to answer for the settlement judge, which makes you think about and prepare your case while simultaneously giving him ammunition to settle it if possible. As to the firm dates, you know that if you've got a confirmed trial on Monday, you're going out then, or by Wednesday, come hell or the Oroville Dam breaking. So you don't start to prepare only if it turns out there's an open courtroom, and if you're going

to settle the case anyway, you don't spend an unnecessary weekend interviewing witnesses. As for more detail, I suspect we could induce Reg – an old bar journal editor himself – to divulge the secrets. I don't suppose anybody'll bite, though. Not dramatic enough, not inkworthy; they just work.

Goring the Wrong Oxen

One thing that worries me about these fixed-date programs, though. Too often the court says it will have a court for you and then, if you show up ready, it never does; the court administrators think the thing to do then is take your case off calendar. That's always seemed bassackwards to me. If both sides are ready to go, they should get the next slot, whenever it is; it just isn't fair to punish them while you let the slovens profit from the system. (Of course, I think there should also be some sending cases out to trial when only one side is ready, letting the other side take it in the chops. I suspect that's the fastest cure known to courtkind.) What's always discouraged me about these calendar panaceas is that the bark is better than the bite and the wrong people get dumped on.

Anyway, delay is our major court administration scandal, and it needs some doing, not more articles printed in Judicature magazine.

Segueing from that into trivia, I think it's interesting to note recent remarks of Judge Hufstедler to the effect that there are cases pending before the Ninth Circuit which, because of constitutionally mandated priorities afforded to other cases, will continually be preempted and cannot ever be heard or decided. Honest! A court which confesses there are cases before it which it can never decide is in the judicial equivalency of insolvency. It is nothing short of a disaster, except for the fact that nobody cares enough.

It is a condition which will not be cured – Jimmy, Alan and S.I. – by selecting judges on the basis of their politics, ethnicity, gender, social connections, or anything of the sort. It is obvious our benches need to be populated entirely by Arthur Vanderbilts and elder Harlans. They are there to be found, and just this once they must be found – however much the finding may be politically uncomfortable. But I wax disturbed. Only because I am. Terribly.

C'mon. I said I was going to switch to humor. How about the District Attorney of Ventura County showing up in court to explain some lapses on the ground that "our office doesn't get copies of minute orders any more; it's an economy measure for Prop 13". Beautiful. . . . Or how about Bob Gardner (I know, I sound like his flack, but he's such a good

source) concurring in In re Gatts (79 Cal.App.3d 1023, 1036). It seems the Supreme Court had directed the CA to hear a habeas matter after the latter had sent out the postcard. Gardner, PJ, points out there is a certain amount of real work involved in the determination of appellate business and adds: "When this matter was originally presented, we determined, properly I submit, that the decision as to whether Mr. Gatts sits in a single cell or a four-man cell in defense of his beard while he served his five weekends in jail did not involve a fundamental constitutional right nor did it present any important question of law. It was and is a piddling case, its importance resting comfortably somewhere between insignificant and inconsequential." Why do we do this to ourselves?

More Juris Than Prudence?

Which takes me back to another dissenting vote on jurisprudence. There's too much of it. It's trying to accomplish too much. Besides worrying about bearded-prisoner segregation, leisure suits in restaurants, and the exquisite intricacies of what kind of hubcaps can be searched with what notice of what sort of contraband, the judicial branch has gone on a giddy Messiah-complex trip that is dangerous to no one as much as to itself.

Tell me about the day you pick up the paper and don't read about judges who are stopping freeways, mandating the repair of the Watts Towers, relocating nuclear energy plants, decreeing how many yards of beachfront a community should make into parks, deciding whether the Governor of Alaska was really elected or not, formulating standards for mental health care, administering prisons, turning out the Christmas lights in the City Hall, or the like.

All of these are worthy endeavors – arguendo at the very least. But the question is whether they are court endeavors. And the problem is not only one of should or shouldn't; it is one of sheer practicality. As noted above, the court as a forum for resolving citizen rights, claims and disputes has become an endangered species. A "mere" litigant, with a "mere" lawsuit to prosecute or defend simply cannot be accommodated any longer. There's no room for him at the bar. The court is too busy remaking society.

Now I, for one, am inclined to think that society can use some remaking, but it also can use courts. And I am pretty distressed at the fact that John Q. Taxpayer has to go to the American Arbitration Association or Steve Weisman's rent-a-judge project if he wants to have a judicial-type resolution, because the judiciary is too busy with the exciting tasks of substituting for the legislative and executive. T'aint fair. And fairness, I had thought, was not entirely ultra vires to a consideration of

jurisprudence.

There Are Reasons for Restraint

Not that the should or shouldn't is all that unimportant, either. There are reasons for separation of powers and checks and balances, reasons that are pretty valid – except, of course, when they get in the way of one's own petition reform project. The experience of mankind has been that whenever one branch of a government goes on a wild tear of its own, it winds up more dented than the windmills. The reaction to Reconstruction Era legislative hegemony was slow in coming, but Congress has never really recovered from it. (Compare Parliament after Pym and Cromwell or the Chamber of Deputies since Robespierre and Danton.) We are right now watching from the sidelines the ruin of the Imperial Presidency. Although Lord Jeffreys and the Bloody Assizes, or Taney and Dred Scott v. The Missouri Compromise, were intimations of danger, there never has been a time that the judicial branch has ridden as high, wide and mighty as now – and if the ride continues, the fall will be inevitable. And horrible.

Perhaps the best word for jurisprudence today is the wish that it would come back into vogue. Particularly the prudence part. Maybe we need a return to the currently unfashionable concept of substantive due process – applied to the court instead of the Legislature. I'd like to see black-robed big brother let us do it our ownelves. Sure, we'll screw up. But that may be better in the long run. I think so. So do those who wish there were still courts for folks.

Paranoid Parting

In closing, perhaps I can disclose at least a peek at how gloomy I have become. Does it occur to anyone else that the seemingly-disjointed nature of his column may actually have a thread running through it? Is it just barely possible that there is some connection among State Bar staffers who tell the lawyers of California to keep their noses out of the running of the state's legal profession and do as they're told, courts which feel it their obligation to dictate the entirety of society's functioning, and attache bureaucrats who pre-masticate the decisional process because the courts are too busy administering society? Is it all that quantum a jump from a black robe running things under the influence of faceless mechanics to a black box tinkered by technicians telling us what to do? I are not amused.