

HEADLINE: JUDICIAL CHARITY AND BLUE BUGS

LASCHER AT LARGE

By Edward L. Lascher

There are those of us who, swimming personfully against the tide, believe the Legislature is still in good standing as a branch of a tripartite government. The trouble is, every time I say something to that effect, along comes the Legislature, itself, to attack the credibility of all my benign thoughts.

I give you such recent gems as CCP §128.5. Talk about handing out live, unexploded bombs! From now on, his Honor can make your client – or you – pay the other side's attorneys' fees and costs if he thinks you have plaintiffed frivolously or defended with "unnecessary delay." Lest you think this provision requires bad faith – a not entirely unwarranted assumption – the draftspeople explain that the power to redress actions "not based on good faith" extends to activities which "include but are not limited" to those done "without good faith." In other words, good faith means something significantly (but unexplainedly) different from good faith. Abandon hope for charity, friend.

COURTS FOR ALL CORNERS

But my favorite legislative misadventure of all is the Great Appellate Court Expansion-Contraction Act of 1981-1982. That, as you will recall, is the one which sought to add 18, or 180, or something like that, new justices and adopted the policy of locating an appellate court on every major intersection – a la the Bank of America, not to mention the Golden Arches. We would have a Court of Appeal which knew its way to San Jose (reversing a recent trend, as it were), one to add to the attraction of the Mission and the bankrupt Sambo's headquarters in Santa Barbara, and a third in Santa Ana with territorial jurisdiction over the length and breadth of Orange County (making it the only part of the state to have appellate departments on two levels). It would also have created some hemi divisions in the already nicely Balkanized precincts of San Francisco and Los Angeles, and mailed various counties around the state, perhaps in search of a warm water port.

But that's not all. Our elected representatives allegedly failed to handle the appropriation of funds for these courts as an appropriation bill (an understandable form of legislative oversight), apparently forgot to provide any funding for the salaries of three of the justices, giving a new twist to pro bono, and quite certainly and deliberately decided that the court in Santa Ana was not to rely on the fisc for its facilities. In one of the more imaginative bits of legislation since Solon, it was enacted that the new court would get its rations and quarters (though mercifully not its salaries) from private donation.

JUDICIAL UNITED WAY?

In other words, the justices there would look to the estate of Walter Knott, the Irvine Foundation and Gene Autry (Query: Georgia Frontiere) for their desks, chairs, coat racks, bathrooms, hearing rooms, benches, typewriters, library space, law books (perhaps the first thing to go), parking spaces, Xerox machines (the last to go), ball point pens, erasers (or is that wishful thinking?), wastebaskets (ditto) and similar impedimenta of a modern major appellate court. I get visions of a big billboard in the middle of the Civic Center Plaza with a thermometer painted on it to keep track of how the appellate court relief drive is going.

A cottage industry of determining what was above the line and what below in the show biz, private/public context (hmm, there is some similarity) might well have flourished. For instance, robes: Does the state buy them, the judges, or the proceeds of selling poppies on Law Day? Law Clerks: Are they furniture and equipment, library, or public charges? How about paper to print the opinions on? I've heard some reference, right in Orange County, to the effect that some of them may not be worth it.

Alas, the brouhaha suggested by all this is postponed, if not scratched. A judge from Placer County came down off the hills to the Sacramento Super Court and said the latter part was unconstitutional, so the whole kaboodle was invalid. We will now see some hurry-up appeals going through the hierarchy with more-than-deliberate speed, conducted with one eye on the budget and t'other on who may be doing the appointing, and a third (yes, I know) on what the role of the judiciary¹ should be in such a case.

As Voltaire² said: "Quelquefois la machine ne marche pas."

WHAT'S DEMEANING?

Seriously, folks (Do you think for a minute the foregoing wasn't serious?), it has come to my attention that Rule 46 of the Federal Rules of Appellate Procedure has been amended so that a would-be attorney, counselor, solicitor, advocate and proctor need no longer swear "at the foot of the application" that "I will demean myself." Odd that should be changed; I thought it said exactly what they meant.

KLEPTOMANIA

¹ Yes, Virginia, there are ethics in journalism, and they include disclosure. It is true that I expressed interest in appointment to one of those courts. Not, I hasten to add, the one which required working for free, nor the other which required conducting a fund drive. Nevertheless, I believe that further fragmenting of the appellate apparatus is bad public policy, but as I mention from time to time, public policy of the type involved is the province of the Legislature, subject to executive restraint.

² That's Fred Voltaire, leading contender for the aftershave lotion concession in the new O'Melveny & Myers building.

Ralph Kleps writes monthly in these pages on the subject of court administration. His writings are probably not read as widely as they should be. The man didn't exactly invent the subject, but he certainly knows more about it than all the other practitioners of the art (or whatever it is) put together.

He was the vessel through which the last three, giant, Chief Justices implemented their genius for judicial excellence, and he built an organization of pride and professionalism rarely if ever encountered in the bureaucracy. He is not always right (please see infra), but he has a viewpoint and can back it with realistic data so that his points demand consideration, if not necessarily acceptance.

Unfortunately, however, Ralph's credibility suffers from two flaws.

First, most of us find it hard to accept his invariably advanced thesis that everything done during the stewardships of Justices Gibson, Traynor and Wright (for which read "Ralph Kleps") was absolutely perfect, infallible and a nonpareil success. Anybody remember mandatory pretrial? (For those too young, that was when the average size of California insurance defense firms went from 11.3 lawyers per office to 47.6, and the median income of senior partners trebled. It was an era marked by the founding and flourishing of the American College of Pretrial Lawyers. Disastrous unemployment would have afflicted the profession upon the abandonment of the program, were it not for the nick-of-time discovery that discovery was available to keep the tads from writing on the walls. But I digress.)

Nor is it possible for all of us to accept on faith Ralph's equally invariable edicts that absolutely everything done since Chief Justice Bird was sworn in has been unmitigated, irretrievable, malevolently inspired disaster. Sure, there have been mistakes, more than we'd like to see, but it's a tough job and sometimes the fault lies in the banana peel, not the person who steps on it.

There have been moves for the good, too. Systemizing the release of opinions is a minor but heartwarming one, there has been an unprecedented willingness to take a look at how things are being done and how they might be done otherwise, and most of all there has been an opening up of the process by which some of us who are in the trenches are asked for our views on how the judicial wars are being conducted. The all-black/all-white school of analysis is not only lacking in perspective and humor; it's just plain unpersuasive. Ralph knows better, and it's a shame he thus deprives his valuable observations of a lot of currency.

THE WAY WE WERE

The second flaw stems from the fact there are still some of us around who remember the Administrative Office of the Courts principally for Blue Bug Letters. I think that calls for some explanation.

Professor Gideon Kanner (Loyola Law School's answer to complacency) tells the story of the fellow on the 20th Century Limited back in the thirties. (The 20th Century Limited was a train, a very deluxe one. A train was something which a locomotive pulled with cars that people – not cows or boxes – rode in. The thirties was an age of sparse enlightenment which came between Pocahontas and Bob Dylan.)

The man was eating dinner in the diner, where nothing could be finer, when a cockroach walked across the floor. Upon reaching home, he wrote a complaining letter to the president of the New York Central Railroad. (A railroad is what trains ran on; the New York Central had yet to become half of a famous bankruptcy.)

He received in return a letter of abject apology, advising him that this was the first time anything of the sort had occurred on the 20th Century, that it was the worst thing that ever afflicted the writer's presidency, and that wholesale sanctions, possibly including executions, had already been set in motion to guarantee against recurrence of the atrocity. Unfortunately, the prexy's secretary had goofed (which was rare in those days) and there was clipped to the letter a handwritten note: "Send the SOB the bug letter."

In the golden sixties and early seventies, when a lawyer got some inspiration on how the functioning of the courts could be improved, or some complaint about how they were already functioning, or the like, and dashed off a letter to Ralph, he got a bug letter in return. (A bunch of us got together once and compared them; they invariably said precisely the same thing except for name and address – and all this before the days of word processing machines.) They had a distinguishing characteristic, however; all were done on typewriters with blue ribbons. Hence, the Blue Bug Letter.

Upon receiving one, no more was ever heard of the matter. Sometimes a machine can run too well.

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