

CONVENTION ISSUE 9/82

LASCHER AT LARGE

By Edward L. Lascher

These are the thoughts I left behind me, since, for the first time in a decade or so, I'm missing a State Bar Convention, passing up the fleshly delights of Sacramento in September and settling instead for Normandy, Paris, the Ardennes, et al, as consolation. I'm off to follow the World War II battlegrounds from Ste. Mere Eglise to Arnhem. But my thoughts will, of course, be in Sacto – if not my palate.

THINKING THE THINKABLE?

Since it will be a safe distance, I'd like to raise a question concerning our club that will doubtless have everybody from Tony Murray to the second vice president of the Cambria Bar Association after my scalp. Is it, perhaps, time to think about splitting the State Bar into two organizations, one an integrated arm of the Supreme Court to handle admissions and discipline, period, and the other a voluntary body dealing with legislation, continuing education, other steps in what the bar perceives as improvement of justice, and advancing the collective interests of lawyers?

I realize there's nothing novel about the suggestion. But, as you will note, I didn't say "let's do it," rather "let's think about it." Thinking has not been exactly plentiful on the subject, which in the past has been characterized by a 1-427 ratio of thought to rhetoric.

Initially, this idea was a spasmodic reaction by Joe Cummins, Clarence Hunt and a bunch of other veteran stalwarts to what they accurately perceived as the demise of a way of professional life, of which public members of the Board of Governors were the most obvious manifestation (although the hysterians involved failed to recognize that they were symptom) not disease or cause.

Neither was much cool thinking evident in the equal but opposite reaction of what might be termed the left wing of the profession (a socio-demographic group which, to my eternal bemusement, has its population center located in a 93rd floor penthouse suite midway between Montgomery Street and the Embarcadero Center in San Francisco). This group, also accurately, perceived that any revisions of the legal profession's structure would threaten the remarkably progressive role of the State Bar during the past ten years or so, in favor of a return to the yesteryears of Old Boydom.

MULLING MERITS

With feelings like those, who needed thought? But coals and tempers may have cooled enough now to make it possible to examine the subject as an idea rather than ideology.

There is something to be said for the claim that the two types of activity are

conceptually distinct, and functionally have quite different relationships with the dues-paying membership. I find it difficult to hypothesize any legitimate argument that the admission/discipline/competence (and, perhaps, specialization) functions do not belong in the hands of a body (1) to which every lawyer must, by definition, belong; (2) supported by lawyers' license fees; (3) having an organic, constitutional relationship with the judicial branch; (4) answerable to all branches of government and, through them, to the public; and (5) with public participation in its governance.

On the other hand, I see little relationship between those functions and such activities as (1) giving Sacramento (and even Washington) the "lawyers' view" of existing or proposed legislation; (2) lobbying the profession's own legislation, not only on matters directly affecting the practice of law and our clients, but also on matters deemed likely to improve society in general and the administration of justice in particular; (3) expanding and bettering delivery of legal services (or contracting them, for that matter, if such be the profession's belief); (4) insuring against professional calamity; (5) improving the economic lot and other advantage of lawyers; and (6) continuing our mutual tutelage. Not only is there scant relationship between the two, but also they are by nature antithetical, and properly so, a fact with abundant causal relationship to the State Bar's chronic schizophrenia.

TAXATION AND REPRESENTATION

The problem isn't just lack of subject matter similarity, however; there are some affirmative evils growing out of combining them. First, it is grossly unfair to compel a lawyer who may disagree with 99% of the State Bar's policies in the second type of area to pay -- as a condition of his continued right to ply his trade -- to propagate those very policies; what it amounts to is like establishing a state religion for lawyers, complete with compulsory tithing. I have not heard even a mildly convincing apologia for such a practice and, indeed there are some broad hints around the country that it violates the United States Constitution.

On the other hand, I don't see any legitimate reason for the same lawyer to gripe about paying for an admission and discipline system as part of the quid pro quo for his monopoly somebody doesn't believe in the bar leadership's legislative policies, social improvement proposals, or what-have-you, I think he has the right to be free from governmentally imposed taxes to support the ideas he opposes. However, if he doesn't believe in having requirements for admission to our profession, or doesn't think we should have discipline, he should be encouraged to turn in his ticket. One is a natural, inherent burden of our calling, while the other is a matter of state mandated thought control.

WHO SHOULD GOVERN?

There is exactly as much reason for excluding nonlawyers from governance of the second type of bar activity as there is for including them in the first. When we speak of our profession's intake procedures and regulation of those already initiated, we are

talking about selection and performance of officers who perform a specialized, narrow but vital portion of our governmental activity. By the very nature of that function, it must be subject to institutional scrutiny by noninitiates to guarantee that the public interest is heeded by the insiders.

When, however, lawyers are banded together to express the lawyer's viewpoint and the lawyer's interest, it again is merely the nature of the animal to speak for itself. What business, in the name of sanity, does a nonlawyer have in determining what the bar thinks about some issue? By definition the lawyer's perspective comes from the lawyer, not from a mixture of lawyers and others. It makes exactly as much sense to have nonlawyers telling the world what lawyers believe as it would to require the Book-of-the-Month Club to have illiterates on its board. Or the Eminent Domain Raiders to employ two linebackers who are opposed to violence. Or the Symphony to maintain tone-deaf chairs.

Some fine tuning would be necessary, and a lot of details would have to be worked out. (As Bob Gardner would put it, I'm an idea man; don't trouble me with implementation.) For example, the composition of the body which would take over the voluntary function would need a lot of attention if it is to embrace at least a semblance of democratic input, rather than cronyism as characterizes some local bars, or the incumbency which renders the Conference of Delegates (as presently formed) such a disappointment.

But I suspect that, once the principle were defined and embraced, implementation would be less of a trick than one might think. After all, it's the way the ABA operates (although, gracious knows, I don't advance that body as any paragon, particularly in terms of democracy or responsiveness), the way other professions operate (e.g., BMQA versus CMA) and the way about half of the other states -- with their number constantly growing -- organize their bars.

Obviously, some may not agree with me. (Can you bring yourself to believe that?) But it seems time, now that we have all sobered up from emotional binges, to give the matter serious consideration. (And, I hasten to add, I don't refer to any "You're a Communist/Fascist if you suggest anything's less than perfect diatribe.") Neither, for Pete's sake, should we set up a study commission of insiders whose axes are so honed they can slice a hair lengthwise. Instead, it's time for the great silent mass of the bar to realize there may be something fairly ludicrous, and unjust, about the way they have organized themselves.

FREE LEGAL-REFORM ADVICE

As long as we're improving the mechanism for improving the administration of justice, how about cutting out the middleman for a while and letting me advance a couple of suggestions? First of all, a tip for the Supreme Court. (I prefer to start at the top and work down. Actually, that really isn't true; in fact, I prefer to start at the top and work up.)

Not how to discourage them or reduce their number (sorry, Justice-Professor Newman) nor even, for that matter, how to get more of them granted (sorry, fellow losers). Rather, I put it to you that one detailed change in the rules would notably rationalize current practice.

My recommendation is in alternative forms. The better (to my mind) step would be for the Big Court to eliminate the right of litigants who won in the Court of Appeal to answer a petition for hearing. Instead, answers should be allowed only on invitation of the court, in which event the petitioning party would also be allowed a short time to reply.

I strongly suspect that in the significant majority of cases the petition is the only thing the court looks at anyway. In some-90% of the cases, the justice or clerks must know right off the bat that no reason for hearing exists, so why read more? My proposal would save a lot of unnecessary paperwork which, by hypothesis, does no earthly good (except, of course, to drum up fees, as O'Heller, Von Latham and McGrutcher would instantly recognize). If, however, the court on reading a petition gets a glimmer, they should just extend time, and give the party who prevailed below 14 days to file a 10-page answer and the petitioner 7 days to file a 5-page response, following which the case would go on conference calendar a month later than otherwise

IF THAT WON'T WORK . . .

If that, proposal smacks too much of rationality, my fallback position is just to allow an extra week for a prescribedly short rejoinder to the answer to a petition for hearing. This would cut out one major example of draftsman's oversight in the appellate rules: the fact that a party answering a Supreme Court petition can say anything he damn well pleases, restrained only by the tissue-thin, bounds of intellectual honesty, with total impunity. (I've often wondered if it isn't an effective counsel's professional duty to exaggerate, insinuate and obfuscate in an answer to a petition, since otherwise he is denying his client the right to one free cheapshot – not a redundancy under the circumstances.)

If you need an example, we recently filed a petition and were treated to page after page of factual asseveration totally unrelated to anything in the record -- which ain't all that unusual -- topped off by a substantial allegation of fact which was reasonably accurate but which (1) dealt with a totally different controversy and (2) (brace yourself, if you've got any illusions) consisted of matter subject not only to strict statutory confidentiality but also under a specific court order, in the self-same case against disclosure. Would it make you feel any better to know this came not only from a public law office but also from one which I have always found in the forefront of honor and decency? Apparently, the chance to avail oneself of this kind of free throw lies beyond the best of us to resist.

There are few laboring oars harder to pull than the one involved in seeking a Supreme Court hearing. The burden is ample without skewing the odds even-further by

licensing the other side to throw risk-free rabbit punches. I think the first solution is the better, since it kills a couple of evils with one boon but one way or the other, we ought to get rid of this whole practice.

I confess, be a tad controversial. I purpose (gulp!) that we rewrite our constitutions and statutes to allow the prosecution to appeal from an adverse judgment in a criminal case. No, I haven't been out in the hot coastal fog too long nor has H. L. Richardson or Allister McAllister gotten to me. This idea is one of the few presently printable conclusions derived from my year-plus in the criminal lists.

Why? Well, to begin with, it seems only fair. I know we don't think it as important to convict the guilty as to insure that the innocent not be convicted, but this shouldn't compel us to make believe all trials are perfect -- which (goodness knows) we don't when there is a conviction -- if they, wind up in acquittal. The People, too, have a right to justice and a fair trial and a system which denies that fact, is both unreasonable and self-deluding.

Aye, there's the reverse rub. Lest you think I have suddenly become Ventura's answer to John Briggs or Orrin Hatch, let it be acknowledged that my principal reason for thinking this should be done is because I think it would improve the administration of criminal justice all around. Exactly because of the potential for self-delusion just mentioned.

THE JUDGE'S GEOMETRY

What nobody talks about is the psychological and what might be called positional effect of the onesidedness of the present rule. Trial judges, knowing that if they err in favor of the prosecution the appellate courts are almost certainly going to step in to put things aright, but knowing equally well that if they err in favor of the accused nobody can ever fix it, are under enormous pressure to lean toward the prosecution. After all, most people have a fairly well formed sense of innate fairness, a trait (or at least so one hopes) not entirely foreign to judges. Given the imbalance of the present approach, there is an almost irresistible, if varyingly subtle, incentive to equalize things by warping one's rulings toward the prosecution's side.

Of course, I do not suggest this is done consciously, by premeditation however short, nor even that it's always recognized in retrospect. But I am totally certain it exists can even -- are you ready for this? -- cite authority: Messrs. Wrightland Miller, in their treatise on federal practice, point out that when orders granting motions to acquit were nonappealable in the federal practice, they were much less frequently granted, because the judges knew that if they took that step erroneously it could never be rectified.

At the very least, I am convinced that judges will never take any chances, will never question a CALJIC instruction, will never attempt to predict which way the law is moving, or do any of the things that may not be everyday but are far from unknown in civil practice, as long as they know their decisions will produce a final and unreviewable

result. For one thing, they -- the best of them, at least -- need merely look around in the civil field to find plenty of appellate reminders about just how fallible they are.

NOT SO IMPRACTICAL

Assuming you agree with me on theory (a bald assumption, that), please don't assume it's impractical. I know how crowded the courts are now, and that they hardly need extra appeals. But I doubt if there would be any great increase. Prosecutors, too, only have 24-hour days and have to sleep part of them: I can't envision the AG taking up many appeals on top of his already-inescapable burden of all those responses. Both practical limitation of resources and the professionalism of a people who deal with the field all the time would militate in favor of eschewing apart from all except the precedent-making, the bizarre or the totally unjustifiable acquittal; the debatable ones would just be allowed to fade away. And, when you think about it, it is the former group that ought to have another look.

Anyway, it seems worth thinking about. If nothing else, it would give Quin Denvir, Chuck Sevilla, Don Kerson, Mike Millman, et al, the thrill of filing a brief with a yellow cover once in a while.

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