

LASCHER AT LARGE
October 1976

If any of the 63,416 special interest groups currently reforming life in the Golden State is taking up a collection to support repeal of 1976, *nunc pro tunc*, count me in. It has been a year of great professional gratification, sure, but it's also gone far beyond my SSQ (sadness and shock quotient). If you're wondering where the humor went – it just when bad. Not surprisingly, the Fresno Convention (about which better in a moment) provided a couple more instances.

September 18

For openers, the day we got there, we ate an early dinner and headed back for a good night's sleep. The last 10 blocks to the hotel were the real doozers -- since it took almost three hours to make it.

We encountered the motorist's worst nightmare. One second, driving along in the midst of slow-moving, city traffic and the next split second a tan autobody hurtling at the front of our car and, in less time than it takes to say, the crash. Somehow, out on the street and off on the side of the road the road, sloshing through gasoline, although we didn't know it. Everybody walking, blood on faces, and even then realizing it's a miracle. Permeating all, disbelief.

Right in the middle of a city it happened. The divider-jumping car hit and delivered a sudden lesson in human vulnerability for an ego-ridden lawyer. There are some things about which you cannot do *anything*; you're helpless, a target and it's up to luck or whatever power you deem to be the luckmaker to decide just how bad it will be. The State Bar, on the verge of installing 11 new Board members, almost got two more vacancies.

You know those ads that show safety engineered cars crumpling the way they're supposed to, and the passenger compartment staying intact? They are true. The lovely little white BMW I used to own – and anybody who says it wasn't the greatest car ever built is in trouble – really did its act. It's gone, except for where we were sitting. It looked like they had built four seats and a cocoon and forgotten the hood and trunk.

Plaintiffized

Some random reactions to a sudden and violent introduction to plaintiffhood. The firemen and paramedics were beautiful. Equally so were the ordinary citizens on the scene; if I'd been a little more possessed of my faculties I'd have wept at the solicitude and neighborliness we were shown. . . . We waited for the ambulance, on the steps of one of Fresno's biggest porn shops. The symbolism escapes me. . . it took unbelievably long for ambulances to get there; we literally could have walked to the hospital faster. . . the emergency room ward was full of Saturday night stabbings and the like, but the attendants were amazingly polite and humane.

The hour-long wait for an intern to take a peek was not quite so reassuring, nor was the fact he never got within six feet of me, the "examination" consisting of asking me to rotate my arm and discussing the crash-proof properties of various cars. It would have been nice at least to have had somebody look in my eyes. True, there is a lot of overdiagnosis and excessive preventive medicine nowadays, but I was given a little peek at why maybe some of the agitation got started. (And can anyone explain why in the name of sanity – which may be assuming matters not in evidence – I was required to strip and put on a paper sack so that somebody could sit in a chair on the other side of the room and watch me compare how high I could raise my hand with how high I used to be able to?)

Ah, well, at least something was efficient: the ambulance bills beat us home. Literally. \$75 per wife in the back of the bus, and \$50 a pop for each of us scrunched in next to the driver. For a mile run and 20 minutes of their time. What the hell, the insurance company will pay – and everybody knows that isn't real money. . . They almost didn't let me out of the hospital because I didn't have a plastic band on my wrist . . . Got back to the hotel and asked for a couple of extra pillows to prop a sprained ankle. The answer was almost disgust. "I am the only employee in the hotel now and I can't leave the desk. Besides, it is impossible to get any kind of supply after eight in the evening.) Uh, Mr. Hilton, you might just be leaving yourself open to some liabilities along the way there – to say nothing of the business ethics of purporting to lodge five or six hundred people without any supplies accessible and one – count 'em, one – employee.

Vale Bailee

And then, the evening topped itself off with the news our dear German Shepherd, Bailee, had died suddenly. Our faithful friend, dauntless, ever-listening ear, sister, nana, playmate, entertainer, company-keeper and (often) dictator. She was a true epitome of animal beauty and love, and this loss, too, is bitter. The car was expensive, but worth it and replaceable. The dog was expensive, irreplaceable and beyond price.

Ed Revere's Ride

To arms! To arms! The Los Angeles Superior Court is coming! Again!

If you missed the article by Judge Schifferman in the last *Journal* titled "The Not-So-Impossible Dream" about "reforming" California practice, go back and take a look. If you're one of the handful who doesn't read the *Glendale Law Review* (honest!) and therefore missed Judge Leetham's "Current Problems and Catalog of Suggested Solutions" regarding the way we handle disputes in court, head for your nearest newsstand, quick. Welcome to The Animal Farm.

Fortunately there are a number of cures available for court congestion, and these jurists have been good enough to disclose them to us. Indeed, their views can be synthesized and we get a picture of what courts will be like any day now.

First of all, we'll do away with "home-made pleadings." The Judicial Council will supply sets of forms with "spaces provided to fill in necessary information such as dates, parties, damages, etc." Which will even be "color-coded by a line printed along the bottom," presumably so we can take them through the checkout counter at the supermarket. That way, we won't have any embarrassing new judicial remedies or requests for relief because, if there ain't a form for it or a box to check, there ain't no such animal. I coulda sworn they had something exactly like that in medieval England – no form of action, no dice – but I must be wrong.

Once you're in court, with the right Judicial Council form, you of course won't go to trial. Instead, your case will be reviewed by "experienced case evaluators" who will simply send out another form proclaiming what should happen to the lawsuit. None of that pointy-headed, time-wasting jazz like witnesses, facts, or that kind of dross. If you don't like the "evaluation," you address a complaint to the "claims department of the Superior Court." (That's funny, I thought the whole thing was a claims department.) That department will either (1) tell you to stuff it, (2) revise the "evaluation" and tell you to like or lump that, or (3) in a really desperate case, order a matter to trial. Only in the third category of cases will anybody bother with evidence.

The plan is so beautiful I can't understand how it's taken so long to evolve. Why, it's almost as simple as going to the Lord Chancellor and asked him if the King's conscience happens to feel like granting you a writ that day. But again I am caught in some *deja vu* hallucinations.

Then, just so we don't "sink under the weight of litigation," we'll take care of the folks who sweep through the detection process and actually get themselves heard, but don't win. We'll fine them. That, Judge Schifferman says, will make them "hesitate before filing groundless litigation." Just so. Any litigation that isn't a sure winner, for that matter – but, of course, that's the object, isn't it?

Let us note well the peroration: "The combination of baseless and exaggerated claims, incompetent lawyers," (are you ready for a little change of pace?) "and judges who, *through not fault of their own*, are required to preside over matters of their own ken, will soon cause the judicial ship to founder." Ah, yes, everybody's out of step but the judges. If we would just turn society over to them, they would eliminate the need for judges – since the "evaluators" and the "Claim Department" would take care of all that mess – and then we could on to the real business of judging which, as I get it, is making sure that there is no judging. It should be good for the golf course business, at least, when this millennium arrives.

One of the articles closes with the observation: "Considering what his view consists of, he's absolutely right. But whose hour, for what? Send not to know for whom the bell tolls. . . You're ringing it yourself, boys, and for judicial system that deserves far better.

With appropriate respect and hesitancy, let one small voice advance the thought that it is the role of the courts to be open to the citizenry and to decide their disputes – not to build barriers and reject. Else why have them?

Panelling the Press

The judge who sprung the Fresno Bee for the day before we convened took a certain amount of zing out of the hastily assembled panel on the subject, but the part of that discussion I was able to catch was excellent. (For reasons already mentioned, I found it a little hard to hold still Sunday morning.) Whether or not there is an inevitable clash between the First Amendment guarantees of free speech and press and the Sixth Amendment one of fair trial – an assumed conflict I don't quite buy – there is no getting around the fact a clash of *ideas* on the subject, as distinguished from sloganeering and emotionalism, can only help all concerned.

Judge Harry Low of San Francisco eloquently and persuasively articulated his version of the judicial perspective some of which, on reflection, I found absolutely terrifying. For example, he posed the question as being one of whether the courts should have "broad discretion" in fashioning limitations on the press's right to report judicial proceedings, urging that the courts be furnished new guidelines (that hated term) but that judges be allowed within those channels, to "shape the protection the necessary to free speech."

The brilliance with which this view was expounded makes me hesitant to say how intolerable I deem that, but it is an unacceptable thesis. Just take a look, if you will, at the meaning appellate courts have given to the phrase "trial court discretion" and you'll see what I mean: Anything the judge does is going to be affirmed, because it occurred in an area we call "discretionary."

One Boot-Lace Hoists the Other

Not to put to fine a point on the matter, the power to exercise discretion over free speech is the power to destroy it. In the wrong hands only, of course, but it's only the wrong hands we have to worry about. We don't need protection against the Judge Lows; we need it against the "I am the law" nuts who are precisely the ones most enamored of their own discretion – and you better believe they exist. Giving one small group of our public employees (Yes, your Honor, that is exactly what you are), the power to "shape" what we may say, and consequently what we may know and think, and you have armed that group with the power to shape what we will be.

The "Hot Line"

Judge Low disclosed with some pride the existence of a "hotline" by which a judge faced with some pretrial publicity or trial publicity problem can get on the phone and sound out other judges around the state for their advice on how to handle it, or – are you ready for this? – some staff experts. By this, I presume is meant that the judicial function will be exercised (or at least manipulated) by remote control on the part of persons who, by definition, are not conversant with the Administrative Office of the Courts or some similar nonresponsive bureaucracy which will give the judge the party line. That is just plain spooky – dispensing justice by underground telegraph, yet!

One thing is for sure about the procedure: its vector will be entirely in the direction of maximizing the muzzling. It's no fun telling somebody to do nothing, it's much more self-gratifying to come up with some ingenious "solution." A staff expert doesn't get to be an expert by telling a judge to keep his hands clean off a matter, but rather by demonstrating his macho by egging the muddled magistrate on.

These comments, singling out two particular aspects of the judge's comments, are in a sense unfair to a concerned, reasoned discussion by a thoughtful and sensitive jurist. Nevertheless, I think some focusing on them is necessary if only to expose them to debate.

My Slant

From this, my own starting point will be readily apparent. (I refuse to employ the phrase "where I'm coming from," without which no conversation can be carried on at this point in time.) For all the boorishness, excesses, mischief and misinformation that free speech and free press cause, I still think that freedom is first, best and most, the *sine qua non*. The truth may not set us free, but the lack of it will enslave us for a certainty.

Therefore, no surprise that I was particularly impressed with the thoughts expressed by attorney Robert Warren of Los Angeles, notwithstanding I sprinkled some salt derived from the fact he frequently represents the *L.A. Times*. Pointing out the interdependence of the two institutions – traditionally the press has looked chiefly to the courts for protection against censorship all too eagerly applied by finger-to-the-wind legislators and executives, whereas the chief source of the courts' only real power, acquiescence, has been the persuasive power of responsible media – he concluded unarguably that both suffer when they come into conflict. He also discussed something unfashionable, but still of moment: the history and traditions of American free speech and free press. I won't recap his points; you could look them up at 45 Southern California Law Review 51, et seq. (an article written in conjunction with attorney Jeffrey Abells). It would be an effort well spent.

Advertising Aftermath

Tuck in the toes, folks, because I am going to be stepping on a few. Maybe it's just because I think I'm granted an extra overtime (see above), but I'm going to mention a bit of unmentionable, prodded somewhat by the aftermath of the Great Advertising Riots of 1976.

It is not my purpose to revisit the substance of that overblown controversy. Indeed, about the only thing I'd less rather do is take a dip in a pool full of piranhas. Seldom in the history of mankind have so many expended so much fervor and generated so much heat over so little; it was not our finest hour. (Churchill scholars may know that I am not above the wee spot of plagiarism.) While we've been horsing around with all that, the legal malpractice crisis, specialization, decertification, lawyer unemployment, delivery of legal services, one or two other equally trivial concerns have gone totally unattended.

What's got me a bit of on my ear is the reaction of a few (but a fervent few) local bar officers who are free with such descriptions as "unresponsive," "uncommunicative" and the like regarding the State Bar. Which translates: The Board should not act without consulting the weather vane, checking with every neighborhood nabob, and then submitting every action to a referendum before it's taken. That makes good copy and gets a lot of cheers on the conference floor, but in actuality it falls somewhere between bull-bleep and demagoguery.

It's not limited to the fringe, either. In the September issue of the Los Angeles Bar Bulletin, Jack Quinn, the most articulate president that club's had in memory (maybe he's often wrong, but he's seldom apathetic), wrote an open letter to a newly-elected governor, telling him how to govern. His chief thesis was that the members of the Board elected from L.A. should damn well regard themselves as ambassadors from that megalopolis and quit thinking for themselves. They should "remain in close contact with their constituents and the organizations to which their constituents belong." Let's get that on the table.

Local bars are wonderful; I belong to a half-dozen (including Jack's). But their role is vastly different from that of the State Bar – and their own democracy and constituent-responsibility is far more open to question than the Board's.

Representing Who?

Let's look at the latter part. First, despite the noise they make, the local bars do not represent a significant proportion of the members of the State Bar of California – even on paper. I am astonished to learn that less than 40 percent of the lawyers in California belong to any local bar associations. (Whether or not that figure is even lower because of the prevalence of multiple memberships like my own, I haven't been able to ascertain.) That means that, if the local bars were to arise and speak as the representatives of all of their members, with one voice, it would be the voice of somewhat less than two out of every five lawyers to whom this publication goes.

But it's worse than that. There is a lot of room to question whether the officers and trustees (or executive committee, directors, or whatever the local club chooses to call them) speak accurately and representatively even for their own paper membership. Just exactly how are the governing bodies and governing persons of local bars chosen? Out in the boonies where I and a disdained handful of the rest of us come from, we know the answer: They're chosen by a mixture of default and acclamation – anybody who's willing to do the job gets it (and sometimes even the first qualification is waived). In the big clubs like L.A., the officers and governing body are appointed by a nominating committee. Doesn't every representative democracy operate that way? Of course, in L.A., it's even a little worse, since the nominating committee is composed mostly of judges who therefore appoint the officers who speak so confidently for the lawyers who have no role in selecting them.

And just how often does your local bar association have an open meeting to which everybody comes and engages in no-holds-barred cross examination of the officers and directors? How many of your local bar governing bodies hold open meetings? Or even tell the membership where and when they meet?

And when we get to the conference, how does this structure or representation work itself out? In the great majority of instances, the delegates to the conference are appointed by the president of the constituent bar associations. In other words, the appointed do the appointing. The president of the Los Angeles Bar Association – selected primarily by a panel of judges and elected in a one-name ballot – appoints *one quarter* of the delegates to that conference. Democracy in action.

Love Ya, But . . .

I love the local bars. I must, I joined so many. But I have just had it up to here with people throwing stones from high horses in glass stables.

There is also the difference in role. The local bar is properly, unabashedly and single-mindedly operated for the benefit of the members who join it, in all its functions – social, societal and whatnot. Of course, its members' interests and those of the public will often coincide, but whenever those loyalties conflict, if the local bar association doesn't opt in favor of its membership, it violates its fiduciary obligation. In the adversary system which characterizes life as well as the courtroom, the local bar associations are our advocates.

But the State Bar can't be. We are forbidden by law – even by the Constitution – to be a trade union. Our "constituency" is not exclusively the lawyers of California – let alone the clubs those lawyers join – but rather the body politic of the state. We are not a craft guild or a self-interest group. In the rare instances where conflict arises, we must subordinate the parochial interests of the bar to the common good. And believe you me, it's painful to do it, since I am a lawyer too, but I do recall raising my hand and swearing that I would support and obey the Constitution and laws and that did not contain a proviso "except when it's painful to do so."

That is not to say that the interests of the profession are sacrificed or denigrated. I happen to be old-fashioned enough to believe that a strong and healthy legal profession is vital to the public interest, so service to one is almost invariably service to the other. Certainly, that is true in almost all of the issues, with only the details sometimes raising problems. And it certainly does not mean that members of the Board should not listen more to lawyers; indeed, most of us are desperate to *hear* from the lawyers we represent – primarily in our districts, but also elsewhere. This column gives me an edge in communication over other governors, but even I feel poignantly a lack of interchange. Every time I meet with a local bar, bunch of lawyers or whoever to get some exchange of ideas, I feel almost physically refreshed and certainly mentally augmented. I'd like to say to my whole readership in person: write me, bother me, tell me! I know everybody else on the Board feels that way. Bug us!

All I ask is that, in communicating, you understand the nature of our job and the very real qualitative difference between us and the dear old West Shelbyville Bar Association.

Potpourri

Life has its little disappointments. A couple months ago I did a column on one dull, insensitive male's dawning perception of the burdens that female members of the legal profession unnecessarily carry. Apparently nobody, not a soul, got beyond the parenthesis in which I said "but I still don't like the title 'Ms.'). The message seems to be that the substance of how a lawyer is treated is less important than the buzz-word title she is given. Form over substance, friends. I wasn't necessarily looking for praise for discovering something I should have known long since, but I didn't expect opposition either. At least not from anybody other than the MCPs . . . the 50th anniversary of this club comes up next year. Some groups are hard and well at work on commemorating it, but how about some suggestions from the audience?

At the Spit & Growl session the Board held, by annual custom (where were you, Jack?), at Fresno somebody suggested forming a State Bar Credit Union. The idea kind of appeals to me. Audience? . . . Somebody else complained loudly about the practice of many law libraries around the state, which are closed evenings and weekends. He had a point. It would seem to me that those are exactly the times when the libraries most need to be open – when the courts aren't. I found it almost impossible to believe that, in metropolitan, enlightened, well-read San Francisco, the law library closes at five daily and all Saturdays, Sundays and holidays. Somebody – maybe even the local bars? – ought to do something about this.

Speaking of law libraries, I am intrigued by the practice in some of them of differentiating the services available to lawyers who maintain their offices within the county from those available to out-of-county lawyers. Since the law libraries are financed by a portion of the filing fees paid to the courts, I presume in all those counties clients represented by out-of-county lawyers are charged less to file a complaint than in-county lawyers do. Surely they are! Now, let's see – where can I file a class action against the Los Angeles Law Library?