

Lascher at Large  
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Much of this installment is going to be a bit on the introspective side. Not about the smiling tiger personally (or at least not consciously so), but rather about the California legal profession, or more accurately about its integrated-bar machinery, which is in a state of crisis.

The State of the State Bar Message is not an entirely cheerful one by a long shot, and certainly it's not very funny. But it nevertheless needs to be said – and read.

### **WHY SHOULD LAWYERS BE DIFFERENT?**

Before getting down to specifics, I'd like to canvas one philosophical point on which I seem to be out of step with everybody: the frequently asked question about why the legal profession should be regarded or treated any differently from any other professional society or governmental body. That question is by no means posed exclusively in one quarter or by persons of one frame of mind.

In an article explaining to us what is the nature of the State Bar which will appear in the next, anniversary issue of this publication, one of the nonlawyer members of the Board of Governors asserts powerfully that the regulatory body of our profession has some unique, conflicting and even schizophrenic functions, but that in the long run the State Bar "is a public institution . . . created by the people of the state of California." Thus, when it has come to wide-open advertising and solicitation, opening up lawyers' files of client's confidential information to state investigators and other such bizarre concepts as requiring attorneys to endorse at the bottom of their "invoices" the address and telephone numbers of what one of the lay members of the Board describes as "the complaint agency for lawyers," protests are regularly met with: "Plumbing contractors, dry cleaners and used car dealers have to do it, so why shouldn't you; what's different about lawyers?"

From the other flank, any time a proposal that the bar undertake some special burden to protect its clients and the public rather than nest-feathering is being considered, the protests arises that we are attempting to "put on a hair shirt." A client security system to indemnify collectively the defalcations of the errant few among us? A statewide plan for a client protection fund which in a year will be the only way victims of the mortal errors of mortal lawyers can be compensated? Not on your tintype. "The structural pest control operators don't do it, the cosmetologists don't, the doctors don't, so why should we? Why should lawyers be different?"

### **LONG LIVE THE DIFFERENCE**

I told you that everybody was out of step with me, and now I'll prove it. Lawyers should be treated differently because lawyers are different. My nonlawyer Board colleague is as all wet as she can get when she says the Legislature created the bar of this state. The State Bar Act produced a particular mechanism for operating the legal profession, but there is far less to that mechanism than there is to that profession. Our calling antedates not only all of the others you see listed in the Business and Professional Code (which does not purport to regulate the one senior profession), but also that code itself – and the Legislature that enacted it – and the time when the government of this state became part of this nation's body politic and the government of this nation – and the landing of Western Europeans on this continent – and so forth.

Our profession is different. Name any other in which ethics does not just constitute a set of restraints, but is central to the very existence of the calling; identify another which starts from the role of the fiduciary as its very core and then elaborates on the duties of that relationship. (And, by the way, when I say "ethics" I don't mean what's written out in those almost unreadable Rules of Professional Conduct, not the self revealing airy ABA Canons, but rather the dictionary sense of "discipline dealing with what is good and bad or right and wrong.")

When barbers were pulling teeth, Sir Thomas Moore was defying the world's most powerful sovereign with only the common law for his strength; when the forebearers of today's supercilious surgeons were bleeding citizen to cure tuberculosis, the legal profession was leading Western man out of the clutches of ignorance and clericalism into a rule of law and self-determination. Even today, what ethics – in the lower-case, non-competition-oriented sense – is really involved in the other learned professions? What problem of right and wrong (as distinct from skillful and unskillful) is there in deciding whether a pair of discs should be fused or one antibiotic prescribed instead of another? What fiduciary dilemma is confronted in determining whether to fill a cavity with gold or silver? What moral self-discipline is involved in testing a particular soil area for compaction?

My colleagues who say we are no different when difference means responsibility or unpleasant duty are just as wrong as the outsiders who say we are no different when denied of the intolerable different is necessary to their particular social-engineering goals. Indeed, I have less sympathy for the lawyers who deny that difference, because they should know better and because they are denying their own heritage and their own role.

Lawyers are different. Where the difference dictates different treatment that should be the result – most certainly including differences which impose an added burden, as well as those that confer a benefit. I for one am proud of the difference, but I suppose you already know how odd I am.

A Few Failings

A little plagiarism never hurt anybody. I didn't much like the film "Network," but it did feed me a good line: I'm mad as hell and I am not going to take this any more." Reference? The performance of my own much loved Board of Governors. I think the time has come to lean my head out the window and yell a bit.

Basically, what's bugging me is how much we have been letting you down. Not, goodness knows, out of any wrongful intent or lack of desire to do right. As I have said before, and still think, there are few bodies as honorable and devoted to doing right as the Board, and none that work any harder at it.

But hard work and good intentions won't do the job if your priorities are pranged and your meditations are muddled. And there is something about the governors that makes them almost unbelievably susceptible to going off on dumb tangents, mostly because of what they think is glamorous or fashionable at the moment. The result, disastrously, is a lot of pin-head angel-counting and a great dearth of achievement in some important spheres. Two points come inescapably to mind at the moment (but I'm sure there are others that could be filled in).

### **SITTING THE WRONG ONE OUT**

One thing your State Bar isn't doing for you: Anything about what the Big Thinkers bill as "Tort Reform." (I'm going to run for office some day on a platform with only one plank, stamping out the use of the word "reform." If only thinking people could vote, I'd be swept into office. But if there were more thinking people, I wouldn't need to run.)

Let's see, now, where were we? Oh, yes, revamping the tort system. There has been a lot of agitation for it lately, and the Legislature, ever ready to spring, has sprung. They have created a joint commission which will revamp and restructure the entire reparations systems – not just auto accidents but the whole field of tort law – or at least it will try. Maybe.

One not-so-easy problem about the idea, or more accurately its execution, is the fact that it is totally and completely sanitized against any input from, or participation by, the legal profession. I suppose that makes good sense, at least from the Sacramentorian viewpoint; at the very least, it's consistent. If one were to try and reshape the health care system, one would naturally exclude doctors and hospital managers from the process, drawing instead heavily on the views of ambulance drivers and pharmaceutical manufacturers, wouldn't one? So it shows equally good judgment to make sure that neither lawyers nor judges participate in a brass-tacks reexamination of the way our legal system compensates for civil wrongs.

Let's not dump overmuch on the solons, though. We tolleth this particular bell for ourselves. The Board had ample warning of the imminence of this project and acted with virtually one voice to make sure it kept hands completely off. Reasons for opposition were basically twofold, and almost equally divided. Half of the Board felt we should resist even thinking about the slightest change, for fear it might affect lawyers' rice bowls; the other half felt that thinking about things like torts distracted us from the real business of the State Bar – such as legalizing pot, making sure pool halls don't discriminate on the basis of age or sex or creed, and inventing systems of involuntary servitude to lead lawyers to rectitude.

Since we made it clear we weren't interested in the party, nobody coaxed us to attend; come to think of it, the popularity of lawyers is such that we aren't all that often begged to get in on any act.  
Predictable

"Twas all predictable. It's also a ruddy shame. Our tort system needs rethinking. At present it resembles nothing quite as much as it does the Watts Towers: full of bits and pieces, some strong, some weak, and almost none matching; with a certain raw beauty from afar but a little garish up close; lacking in symmetry; and conspicuously brittle and precarious.

I haven't completely departed my senses. I don't assume that any group can produce at one sitting a comprehensive and lasting answer to what is essentially an ever-changing, polycentric and very dynamic area of the human condition. (After all, I'm not a judge of the L.A. Superior Court at all, let alone one of its special thinkers.) That's been tried all the way from Hammurabi to Song – which is quite a trip when one thinks about it – and the panacea never appears.

But the fact that one sitting won't produce the millennium is no reason to keep from devoting time and effort to attempting to harmonize, at least for now, at least what we've got. It's something that cries out for doing so irresistibly that it is going to be achieved, the only questions (which are not without interrelationship) being who's going to do it and what achievement will look like.

Aye, there's the rub. I suggest that, because the legal profession (which, if I may make so bold as to suggest it, does have certain information and resources concerning the legal system) has elected to stay out of the kitchen while the baking is going on, the pie is going to taste a lot different. I suggest also that the State Bar's decision along that line represents a betrayal of its obligation to both the membership and the public of almost incalculable magnitude. Reexamination of the tort system may not be very glamorous, and therefore it doesn't seem to have been on anybody's private agenda. It's a bother, an axe nobody wants to grind. But somebody may grind it, and use it to behead an awful lot of fools who weren't interested or for whom the word flexibility had too many syllables. Tragically, its whisper will also be heard by a lot of innocent and worthy lawyers and their clients.

### **PUBLIC NONRELATIONS**

The second big area in which we have let you down is public relations. (Indeed, I am not supposed to use that term it is suppose to be "Public Affairs," which indicates a shift of emphasis toward prodding lawyers to do good deeds, said to be a more "worthy" end than merely improving the relationships between lawyers and nonlawyers. And, for once, the shift in terminology followed a shift in substance; a switch away from what is described as "mere" improvement of the way lawyers are perceived is precisely what is intended by the changed nonculture.

But, let's see, now, where was I? Oh, yes, de-emphasis on public relations. No, that is not quite it, since nobody can remember when there ever was any emphasis; failure to start any emphasis is what I was rambling about.

Once again, your Board's rejection of any improvement in this area was almost unanimous, and once again it came from an almost equal division between opposite poles. At one recent meeting, those antipodal views were so beautifully articulated by a couple of governors, when the subject of our public relations shortcomings came up, that I shrink from trying to improve in straight reportage.

### **EMULATING THE EGG BOARD**

"Wait, a minute," said one, "the question of how the public thinks about lawyers is none of our business. The State Bar is exclusively a regulatory agency that examines lawyers for licensing and then disciplines them, so that's the only thing we should tell the public about – how to make complaints against lawyers and such." Stating that there must be something known as the "Egg Board" which establishes and polices standards for hen raisers, the members went on to note: "That board's public affairs program wouldn't be designed to sell eggs or to teach you about eggs, but rather tell you what to do if you get a bad one." Sure, it would.

From off at the other end of the spectrum came the response: "Oh, deleted, why are we deleting around with this? Why don't we just let the few members of the Board who are interested in public relations play with this deleted deletion on their own time, and not waste the Board's time?" "Yeah," chimed in a neighbor, "let's postpone this subject – for three years." Sure the State Bar's public relations are that unimportant – or maybe they're that successful already. Sure.

So, what the hell, kids. Who needs it? What difference does it make what kind of public acceptance we've got? Don't we already conduct "Law Day" once a year? What more could you ask? Who loves ya, baby?

## INSIDE DOPE OUT

Departing from introspective let it be noted that I got some interesting responses to the March/April segment dealing with the Auditor general (Matter of fact, the response to that whole installment was most gratifying, and surprising, too. Normally, when I really work at a column that I think has a real message, nobody knows I've written it. When I run into some old friend – the only kind I've got – down at the courthouse, he says, "Gee, how come your column wasn't in last issue?" On the other hand, if I rip one off at the last minute, simply because it's easier than making another excuse to Rick or Darlene, that's the time everybody flips. In fact, the one I am talking about is the only one I can remember that I liked and so did my audience, or at least the two-thirds of them who wrote. (The other one was on vacation.)

Now, let me see, where was I? Oh, yes, the Auditor General. Seems that some of the women on his professional staff think I got the inside dope – particularly about anti-female and other discriminatory attitudes. I'd get a call and wince at the chewing out I was about to undergo and instead get an earful about how glad they were that somebody finally blew the whistle on this bunch. It is respectfully submitted (well, at least half that) that our Legislature – deep as it is into as populist, egalitarian, libertarian fervor – ought to take a more gimlet-eyed look at this particular one of its creatures. If, that is, they mean to practice what they preach. Or is my observation entirely hypothetical?

## DAVIS ON JUDICIAL SELECTION

Interesting report on the political scene in a recent issue of the PSA seatback magazine. (Doesn't everybody regard that as a prime, inside source on matters of state?) They say that Los Angeles' beloved commandant der polizei, Ed Davis, is on the banquet circuit in the furtherance of his campaign to unseat Governor Brown, un-nominate Evil Younger and Pistol Pete Wilson, and unhinge the rest of us.

That's not news, of course; everybody already knew it. What caught my attention – and in my craw – was el Jefe's stock, off-the-record ad lib which apparently brings the house uniformly down: "Let me appoint your judges!" Well, whatever you think of the man – as stand-up comic, bush league demagogue or major league threat – you've got to admit he doesn't dissemble; I suspect appointing judges would be his biggest reason for running; or, far more accurately, disappointing judges would be the spur that drives him wild. ("Drought, who cares? What do I know from a business recession? Why don't they finance their own schools?, etc.)

What I think the key keystone has in mind is remaking the California judiciary in his own image. Nixon already tried that, you say? True, and the Minnesota Twins are already taken, mores the pity. (After all, if it weren't for Harry Blackmun – the one among that sorry lot for whom I had some hopes, which were obviously misplaced – we might never have had "Casey at the Bat" enshrined in a Supreme Court opinion. But I digress.

Assuming Chiefie wins, an assumption which to my mortal terror I am unable to reject out of hand, he's going to find out it's a lot easier to say he's going to rebuild a judiciary that to do it. After all, there aren't as many judicial prospects as you might think to be found who are (1) far enough to the right of Senator Bilbo (welcome to the generation gap) and (2) willing to take a cut in pay. Guys anxious to set up a gallows at Los Angeles International Airport to execute hijackers on the spot don't grow on trees, you know. People who have held licenses to practice in California for ten years and who believe that "queer liberal" could be found as a single entry in the dictionary, if it weren't for those commies named Webster, can't be ordered up out of Central Casting. And even if you find what looks like a good one, you never know what might happen. Look at Lewis Powell and John Paul Stevens, men of impeccably reactionary credentials who have turned out to have a mean streak of closet reasonableness. I tell you, a governor's lot is not a happy one. Policemen ought to remember that.

## AND IN THIS CORNER

By the bye, let him who is without sin speak up. Is our current Guv, who has on occasion (and no, dammit, I do not mean the case of our Chief) shown himself amenable to the suspicion that he thinks "Screw judicial ability, does the appointee have my agenda and fit one of my categories?", completely innocent of the charge of equal but opposite doctrinal zealotry? I hope so, but my confidence is shaky.

I think Candidate Younger (one of my occasional targets) pretty well got it in shape when he acknowledged that a governor has the right to seek judges of his own political orientation and the like, in making his selections. (I hasten to add that this is not to be deemed blanket approval of the overall thinking of “General Younger,” as he prefers to be addressed, but only a specific observation.) There is a difference, though, between considering political orientations and philosophical agendas as a sort of preferential factor or tie breaker, on the one hand, and appointing to achieve certain preordained forms of judicial decision, on the other. The distinction, alas, like hard core pornography – back in the days when there used to be such a thing (and it didn’t appear on TV) – is a lot easier to recognize than to state.

My point, if you have stuck with me thus far, is that Mister Ed clearly wants to take the low road on that and – bless him for that at least – makes no bones about it. Conversely, I think our present appointing power is still clinging to the benevolent side of the distraction although not more than a millimeter away from the brink. And I find my stomach tightening every time a significant judicial vacancy arises nowadays.

What I think maybe we ought to look for in the future is a governor who will seek judicial appointees who agree with his general philosophy, true, but only within the ranks of those clearly suited to serve as California judges. Ronald Reagan could have tapped plenty of people who were top-notch judge material but still every bit as conservative as anybody’s little heart could desire. The present incumbent need not eliminate all skilled professionals from his search for people of humanity and compassion, since there are plenty of really good lawyers with those qualities. There is no dichotomy in our profession between competence and any philosophy.

### TOPIC A

You’re gonna find this hard to believe, but I have had a number of letters asking me to revisit (re-re-re?) the topic of nonpublication, depublication and the like. Okay, leggo my arm!

What’s new? Well, there’s the report of an “exhaustive study” of nonpub conducted by my old pals, the Western Center for the State Courts. You may find this hard to believe, too, but they concluded that everything is just hunky peachy on the nonpub scene – that they had read a whole bunch of unpublished opinions and found there wasn’t anything worth a tinker’s drat in any of them. Well, I swan.

There was one little thing different about this “study,” though. I was on it. In a sense. Maybe in a non-sense. The study had an advisory committee, consisting of a couple of judges, two practicing lawyers (including your humble) and a law school dean. And we were assembled to advise, oh, maybe, shall we say, like, two times? For a total of, gee whiz, maybe as much as 80 or 90 minute in the aggregate. On any given Sunday in the fall, I give Chuck Knox a lot more advice than that on how to run the Rams. Heck, I think he pays more attention.

### UNCOVER TO COVER COVERAGE

Ultimately, “we” produced a report. I know, because somebody phoned and said she’d read my name in the press release. Now, I don’t like to quibble, but that’s not quite cricket. Even the other lawyer-“advisor,” a staunch advocate of the “publish nothing, cite nothing” (and you’ll have to guess at Bob’s identity) didn’t cotton to that. It was eventually explained that we didn’t get an advance peek at the report we were billed as inspiring because the center ran short of covers! (Gad, sir, even a grantsman ought to be able to come up with a better story than that.) Why we didn’t get to see it before anybody got the notion it was ready for putting inside covers, is a matter not certified for publication.

Of course, the Center was just doing what it was supposed to do. It was an open secret they got their LEAA grant for the purpose of making a “study” to prove outset assumption that what the courts were already doing was being done picture perfectly. But I thought we would at least be accorded an opportunity to file a dissenting or concurring or something opinion – or at the very least a caveat as to what questions were not pursued. The information-squelching which surrounded the nonpub study just feeds my paranoia about nonpub itself, but at least it’s in character.

The one thing that still intrigues me is what’s in it for people to make them so passionately devoted to suppression of public access to appellate decisions. Sure, intellectual conviction I can understand, but not the deep, visceral fervor which characterizes the defense of nonpub-gag orders. I just can’t comprehend how anyone can work himself up into a frenzy to suppress. Isn’t all human nature normally vectored in the other direction, with toleration of secrecy the minor exception? I guess not.

## ARIZONA NAIVETE

Some of those involved are only naive. John Frank of Arizona, one of the real biggies in our professions (see, I do have heroes), writes one of the most convincing defenses of nonpub I've seen in the Judges Journal (Vol. 16, No. 1, p. 10 et seq; Winter, 1977). It was persuasive despite a couple of amusing aspects, such as his pointing out that the Advisory Council on Appellate Justice (one of the myriad anti-publication groups, which come and go almost with the frequency and velocity of rock groups) has spokesmen from the world of ordinary, working California lawyers, to wit: Seth Hufstедler, Bernie Witkin, David Louisell and Murray Schwartz. (One out of four ain't something, and even Seth is hardly run of the mill.) Most of it, though, made more sense than the usual defensive drivel on the subject.

But there was one point he misses that invalidates his whole premise and particularly invalidated the Western Center whitewash. This was pointed out to me best by one of the lawyers in the new and exciting State Public Defender's Office, in the course of a "Say it ain't so, Joe"<sup>1</sup> letter about my "participation" in the study. Of course there were "few gems among the unpublished opinions" as the Center catchily concludes.

## WHY NO GEMS

There weren't any gems there, usually because the opinions were unpublished. If a court simply fails to respond to the issues presented, overrides existing authority without admitting it, or pulls any one of a number of stunts that would produce "gems," and then doesn't publish what it does emit, you sure aren't going to find any attention-arresting material thus buried. To examine the unpublished opinions and say they are blah is merely to fulfill the self-fulfilling prophecy. No study can possibly be of empirical value assessing the nonpub system until it goes beyond reading the face of the opinions to the point of finding out what was involved in the case. The two often don't match.

In our office, we have had a case lately in which the Court of Appeal quite blandly overruled the Supreme Court. But fortunately there was a simple solution: the Big Court simply ordered the opinion depublished. The nice thing about a Supreme Court decision is that it's binding on lower courts under Auto Equity and they must follow it on pain of being depublished. Litigants get the benefit of the rules established by the highest court of our state – but only in published opinions. All clear?

## DEMENTIA DEPUBLICATIONS

Speaking of depubbing, some law student has come up with a list of the cases ordered depublished by the Supreme Court. Would you believe it is plus or minus 90? Whoooooee! It is readily apparent that there are now two ways of dealing with an erroneous and improper decision of a court of appeal: take it up or lock it up. Nobody is harmed but the litigants. (Oh, yes, there is the business about the integrity of the law, but that's old-fashioned nonsense.)

In closing let me mention that the other day, I argued a case, knowing full well that another court had just decided one completely antithetical to the position I was arguing. Absent Rule 977, I would have been absolutely bound to disclose that case and then try and distinguish it (no mean feat). But the first one was nonpubbed, so it was a non-decision. And, owing my allegiance to my client, I was free to argue the direct opposite and ignore the first case; it would have been improper to do otherwise. So it isn't always the other guy who gets the advantage – but it was an advantage which did little to reinforce my deep respect for the legal method. (Please see my opening remarks for this month, re ethics and the like.)

Folks, the problem isn't going to go away. This is an era of sunshine laws, and we're either going to have the light back in the appellate courts or good reasons why. Right now, we've got neither.

## TEMPUS FUDGES

In a restaurant the other day, a waiter asked the brains of my outfit, in a skeptical tone, if she was having wine and I suggested that he check her driver's license. I thought it was pretty funny, but she got mad. (She'll be mad about my writing this, too.) That illustrated a basic difference between the attitudes of Michigan law classes '53 and '73. There is no way anybody can offend me by taking me for younger than I am! At least, I don't think there is. Nobody tries it, so I'm only guessing.

Now, as you have heard me say before, it is unforgivably bigoted and professionally intolerable to look down your nose at any lawyer because that lawyer happens to be female, black, Latvian, or whatever, and I'll defend against it to my last ballpoint pen. But if you think you're going to enlist me in any crusades to protect young people from being called young, forget it. I want in on that discrimination; that's one kind of affirmative action I favor – the impossible kind.

<sup>1</sup>See Sox, Chicago, Black, Scandal, Aftermath of (1919), which will explain why you don't know what I am talking about. Do you ever get these days when you feel older than Mr. Whitney? But I digress.