MODERN COURTS - WHERE DO WE GO FROM HERE? †

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This is intended as an open letter to the bench and bar from one who has proudly played a part in what I hope will be in retrospect one of the Arizona legal profession's finest hours. It is often lamented that lawyers as a group are seemingly unable to effectively organize and work together in attaining professional objectives. In most states judicial reform has come slowly and only after years or decades of bitter struggle among groups within and without the profession.

On our first try, however, we have achieved passage of basic, significant and far-reaching judicial reform. This happy result cannot be attributed to any one person or group, though there are certainly a few who could be singled out for special credit and heroic efforts. Yet the job would not have been done without the time and money of dozens of Arizona judges and lawyers and their wives. This has been a really inspiring and encouraging experience to me. It demonstrates that the Arizona legal profession can pull together toward worthwhile professional goals.

But while we are still flushed with victory, may I urge that the job is not yet done. I would respectfully suggest that all we have really accomplished to this point is to fashion and obtain the tools by which a modern judicial house can be built. The hard and detailed job of building the structure must now be undertaken.

Throughout the past six months "Modern Courts" orators (including the writer) have assured the public that passage of 101 would mean within a reasonable time the end of undue delay and inefficiency in our courts. We cannot afford to disillusion, or incur the wrath, of those who have supported and voted for the proposal.

It is a sad lesson of judicial experience that legislative or constitutional reform—however well conceived and drafted—will fail in its intended results unless lawyers and judges accept the obligation of placing the new procedure into effect in the full and intended spirit. Our sister state to the east adopted the Federal Rules of Civil Procedure in 1942, and those who had sought pleading reform retired to their quarters believing that technical pleading rules had been vanquished, and that cases would thereafter be decided on merits with a minimum

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* See Contributors' Section, p. 269, for biographical data.

of pleading problems. Yet the New Mexico court, under the misguided urging of lawyers opposed to any change from traditional concepts has effectively stifled the new and liberal concept of pleading which was intended.

In a plaintive article,[1] Professor Jerrold L. Walden traces the substantial failure of New Mexico procedural reform. We might heed his words:

> . . . [A]s procedural reformers since the day of Field have learned to their dismay, it takes more than mere codification of reform to attain it. . . .
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> . . . [I]t would be rash to conclude that procedural reform in the State of New Mexico has been a complete failure. Yet one can with some justification suggest that it has been something less than an absolute success. . . .
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> Realistically, seldom does any reform movement fully live up to the exaggerated expectations of those responsible for its conception. Particularly is this true in the field of adjective law where the emasculation of the Field Code by the courts stands out as an everlasting monument to the fate of reform movements. . . .
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> Certain lacklustre characteristics of the local reform may also be attributed to the rather begrudging acceptance of the Rules by many of the senior practitioners of the State who have been thoroughly schooled in an earlier jurisprudence. However much one may wish to criticize their judgment in this respect, with their sincerity there is certainly no quarrel. Traditional concepts are not easily discarded, and particularly is this true in such a field as law which derives so much of its impetus from . . . forces intent upon preserving established orders. . . . Like old soldiers, old precepts do not die; they merely fade away.

As lawyers, few of us relish change—the known is more comfortable than the unknown. In many respects there will be every tendency to revert to the old familiar patterns of court administration. Yet it must be obvious that the new Article VI contemplates *some change in judicial organization and administration*—otherwise it was futile to make all the effort.

In the past there has been no administrative head of our statewide court system; now we will have one. In the multiple judge counties there has been no one judge vested with *authority* and *responsibility* for effective functioning of the various divisions. Now those counties will have a presiding judge.

If the new system is to be *new*—if it is to accomplish anything—those who are given administrative authority and leadership must exercise authority and lead. The remainder of the bench and bar must accept

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[1] Walden, *The "New Rules" in New Mexico—Some Disenchantment in the Land of Enchantment*, 25 F.R.D. 107 (1960).

that leadership graciously and in the same cooperative spirit with which the amendment was passed.

If the leaders will lead and the followers will follow, something will be accomplished. Otherwise we must surely face the wrath of those who were promised reform. Otherwise we must accept the jeers of those cynics who said that 101 would not meet the problems of inefficiency and delay.

Few readers will disagree with the generalities above. Problems are bound to arise, however, when we seek to spell out specifics in the numerous areas where action will be needed to implement the Modern Courts Amendment. At the risk of creating controversy, I should like in the following paragraphs to suggest effective methods by which the new Article VI can be put into action and its objectives achieved. These suggestions, offered as a basis of discussion, are mine alone; they come from one who has no personal experience in judicial administration. Some of them may be ill-advised. They are offered respectfully and with full deference toward the views of other lawyers and the feelings of those judges who will have the authority and responsibility for day to day action. But now that the new Article VI is in effect, we must move forward.

Legislation

Proposition 101 was a constitutional amendment designed to establish basic structures; details were left to be covered by existing or supplemental legislation. While many of the beneficial provisions of the new Article VI are self-executing, it is obvious that a small legislative package is immediately needed to place the new system into full effect. The State Board of Bar Governors has already obtained the services of Howard Thompson and Ford Dodd who gave yeoman service in the drafting of 101. These able attorneys have been requested to draft proposed legislation along the following lines:

1. Section 7 of the new Article VI authorizes an "administrative director" to assist the chief justice in his supervision of the integrated judicial department. However, an act will be required to establish this office and to appropriate funds for salaries, equipment and staff. If a salary in the $12-15,000 range can be fixed, it would seem to me that we might attract a lawyer of real talent who would want to make a career in this field.

2. Section 9 of the old Article VI limits civil jurisdiction in justice courts to $200. The new section 32 gives justice courts such civil jurisdiction "as may be provided by law." We urgently need a new statute fixing the justice court's civil jurisdiction at $500. This

will remove hundreds of cases per year from the superior court docket. This legislation should permit transfer of pending superior court cases to justice courts where the amount involved is between $200 and $499.

3. Under Arizona Revised Statutes Section 12-211 and Civil Rule 53, the powers of commissioners and masters are quite limited; masters and referees may now be compensated only by assessing their fees against the parties. Legislation should be drafted and passed permitting general and effective use of court commissioners and masters paid a salary and compensation from public funds. These officials could relieve superior judges of much time-consuming quasi-judicial work, freeing more time for the essential and non-delegable job of deciding contested legal matters.

4. Several attorneys have suggested that legislation should be immediately sought creating "municipal" courts in the larger counties. The courts would be intermediate between justice and superior court and would have perhaps $2500 civil jurisdiction. I personally feel that we should postpone consideration of such action until the new system can be observed in operation for at least a year.

The Supreme Court

Passage of Proposition 101 imposes new and important responsibilities and tasks on the members of the supreme court. The justices, and especially the new chief justice, will need the sympathy and assistance of every other judge and lawyer. In my judgment, these are the fields of action which the chief justice and supreme court should consider:

1. The court will need to meet formally and elect a chief justice and a vice-chief justice. On these two officials will fall the principal burden of leadership in putting into effect the integrated judicial system contemplated by 101. All the energy, tact, and administrative skills of the chief justice and vice-chief justice are bound to be called upon in the initial organization and early years of the new system.

2. The court will need to recruit and appoint an administrative director for the court system. If an adequate salary can be obtained, it may be possible to attract some outstanding member of the bar for this vitally important post. The new profession of court administrator has become an exciting and challenging field for lawyers who have administrative interest and talents.

3. The court will need to select and appoint a presiding judge for the superior courts of Maricopa, Pima, Pinal and Yuma counties. No doubt the justices will consider administrative skills, ability

to work with fellow judges, vigor, tact, and decisiveness among the criteria by which these four very important selections will be made.

4. As noted under "Legislation" above, our court system could grind out a larger volume of litigation if masters and commissioners were more widely used for ministerial and less important judicial functions. Under the new section 24, the supreme court may, by rule, fix the powers and duties of masters and commissioners. In the large counties, the presiding and/or assignment judge might well be assigned one or more masters with broad and general powers to assist him with his duties. I believe the supreme court should supplement the legislation contemplated above by amending Rule 53 to give masters and commissioners rather broad general powers. This is discussed below in some further detail.

5. For some years the supreme court and the state bar have considered various proposed revisions of the Rules of Civil and Criminal Procedure. Many of these changes are designed to simplify and expedite civil and criminal actions. The new chief justice, working with the state bar, might well give prompt consideration to changes in the Civil and Criminal Rules, where indicated. I contemplate no wholesale revision of the Rules of Civil or Criminal Procedure. I believe the federal rules are sound and have proven generally excellent, and we should not deviate from them. There are a few areas of local practice covered by the rules where improvements can be made. Arizona Revised Statutes Section 12-101 provides for an advisory board appointed by the state bar to assist the supreme court in the review and promulgation of rules of procedure. The assistance of an active committee during the next busy months might well be appreciated by the supreme court.

6. One of our most serious problems—affecting every county, large and small—is the calendar delay in the supreme court's disposition of ordinary non-priority civil matters. The supreme court will undoubtedly be able to make some kind of an effective attack in this direction though the increased rate of filings does not augur well for the future. In 1959 the supreme court disposed of 183 matters, yet 251 new filings occurred. Of the 183 cases handled, 111 matters were disposed of by written opinions and 72 without written opinion. The supreme court can, and doubtless will, want to immediately place into effect the use of three judge panels to hear routine appellate matters. I feel confident this factor alone could increase the output of written opinions from 1959's 111 to perhaps something in the range of 150. This might prevent any addition to the backlog and might be a start in the direction of reducing the time lag.

7. Another aspect of the serious delay in ordinary civil appeals deserves comment. As the backlog has grown in recent years,

there has developed a vicious circle. More and more attorneys devise grounds for and seek review of civil matters by the route of the extraordinary writ. This means more delay in the ordinary civil case, and so we find even more attempts at "calendar crashing" via the original writ. The problem was ably and frankly stated by William Rehnquist in his article, "Extraordinary Writs and Appellate Delay."[2] Civil appeals constitute roughly 70% of the work of the supreme court. Yet in the first two and one-half months of 1960 (to use an illustrative period for which I have statistics) the supreme court decided or took under submission a total of sixty-eight cases. Of these, forty-six were priority cases (including many original writ matters); and only twenty-two (33%) were ordinary civil appeals. Yet the filing rate of civil appeals has been about twelve per month —or a total of thirty in the two and one-half month period in question. The supreme court from early times has had an announced policy of refusing to issue original writs unless special or compelling reasons were shown:

> In cases in which the superior courts have concurrent jurisdiction with this court, we shall decline to take original jurisdiction, unless the complaint shows special reasons why we should do so, and the complaint may be filed only after first obtaining leave of this court. Aside from other considerations, the volume of appellate business in this court would seem to require such a rule.[3]

This policy should be affirmed and followed so that a real effort to reduce the backlog of civil appeals can be made. However, supreme court filings are increasing at a steady rate; and the chief justice, under the new system, will necessarily devote a substantial amount of his time to administrative duties. It seems to me that immediately or very soon it will be necessary to create an intermediate court *or* enlarge the supreme court by several justices. Personally, I favor enlarging the court as the simpler expedient since all its decisions are final, and a seven man court could probably preclude the necessity of an intermediate court for a few years at least.

8. To effectively use the three man panel, the court should, under section 2 of the new article, adopt a rule or policy with regard to the assignment of cases to panels and to en banc hearings. In most states, as I understand it, the chief justice initially determines whether a case will be heard by panel, or en banc, and he names the justices to constitute the panel if the former is decided upon. However, there is usually a rule or practice requiring en banc hearing if any three justices so request.

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[2] Arizona Weekly Gazette, April 7, 1960, p. 1, col. 1.
[3] State v. Jones, 15 Ariz. 215, 223, 137 Pac. 544, 547 (1914).

9. Statistics are not merely casual arithmetic in court administration. They are the basic facts from which a problem can be recognized and attacked. In his masterful manual, *Improving the Adiministration of Justice,* Justice Vanderbilt says:

> There are those, of course, who always look askance at all statistics and at judicial statistics in particular. Yet how can an administrative judge intelligently and effectively exercise his assignment powers unless he has accurate and up-to-date information as to where judges are needed and from where they can be spared? How can anyone intelligently determine what courts are needed, what the jurisdiction of those courts should be, and how many judges are actually required if detailed information with respect to the work of the courts is not available?[4]

The new court administrator will want to devise a simple and efficient way of providing the chief justice, and the presiding judges, with accurate current statistics on the judicial system.

Superior Courts

Many matters applicable to the superior courts have been discussed above. The new presiding judges in the multi-judge counties will need the full cooperation and good faith of bench and bar in putting the new system into effect. He will need to co-ordinate with the chief justice and with the court administrator on mutual problems. He will now be able to have the backing, prestige, and help of the chief justice in meeting local problems involving creation of new divisions, budgetary and personnel matters, and promulgation of local administrative policies.

Without trying to be presumptuous, I should like to make the following suggestions relative to superior court procedures:

1. It is thought by some that the presiding judge will simply perform the same functions as the "assignment judge," but with a new title. I disagree. Indeed the system I think might work far better if the presiding judge appoints another judge as assignment judge from time to time to handle those functions now performed under the assignment system. The presiding judge must be free to survey major problems and policies. We must not lose the big picture in a mass of detail.

2. The new presiding judges in Pima and Maricopa may wish to consider whether increased efficiency would result from some degree of specialization among the various divisions—with assignments rotated from year to year or time to time to avoid undue boredom or restlessness among the judges. This suggestion has been

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[4] VANDERBILT, IMPROVING THE ADMINISTRATION OF JUSTICE 74 (1957).

made previously and should be given a try in my opinion. It works effectively in Los Angeles and elsewhere. A judge working constantly with criminal cases can try a particular action more quickly and efficiently, and with less chance of error, than one shifted constantly from one field to another.

3. There are many areas where an immediate use can be made of full time commissioners or masters, providing the enabling legislation mentioned above can be obtained. Certainly we would obtain hundreds of hours of additional judge time if commissioners could be delegated such things as making routine trial settings, assigning motions to particular divisions and times for argument, assigning cases for trial or pre-trial, approving and exonerating bonds, dismissing cases on stipulation, taking of evidence in default matters, fixing times for hearing on probate matters, injunctions, and the like; issuing orders to show cause in domestic relations and reciprocal non-support cases; conducting debtor examinations.

4. There are many other areas where masters and commissioners could be of help. There is some question whether a master should conduct a pre-trial, though I believe it might be successful. However, where there is long calendar delay, many courts have used such officials for a "pre" pre-trial in the early stages of the litigation. Such a hearing could operate as a screening process to separate those cases requiring full scale jury trials from those which could be placed on the short-cause or non-jury calendar. Such an early hearing might also clarify the issues, and result in stipulations which would shorten and simplify the pre-trial and trial.

5. The new section 15 permits waiver of trial by jury in all criminal cases. The presiding judge will want to encourage defense counsel and the county attorney to utilize this important provision wherever possible.

6. Obtaining current and suitable statistics at the superior court level is of extreme importance as discussed above. The clerk of the court, court administrator, and other officials can aid the presiding judge in devising and obtaining these.

7. The presiding judge in consultation with the chief justice will undoubtedly wish to work out a regular and orderly plan for use of non-resident and retired judges.

8. While the new organization and procedures outlined above will in themselves enable the Maricopa County judges to process a larger number of cases, I think we must frankly face the fact that the present calendar backlog will only be reduced when we obtain a sufficient number of judges. Regardless of the efficiency of the

system, eleven judges cannot do the work for which twenty are needed. The 1959 study of the Maricopa Bar Association clearly shows that the number of dispositions per judge in Maricopa is equal to or better than that of Tucson, San Diego and other comparable metropolitan areas. San Diego County with a population comparable to that of Maricopa now has nineteen superior judges. Under the one judge per 30,000 population formula, Maricopa is entitled right today to eleven more judges, or a total of twenty-two.

I would urge the chief justice, and the presiding justice of Maricopa to immediately prepare a program for obtaining and housing the twenty to twenty-five superior courts which this growing metropolitan area will require in the next decade. Certainly four to six new divisions should be established within the next two years.

This list is not exclusive; but perhaps it will stimulate discussion and thought.

The tasks and responsibilities which will devolve upon the Maricopa presiding judge are truly awesome. It will not be enough that he halt further *increases* in calendar backlogs. He must have the leadership and ingenuity to start bringing superior court calendars up to date. Whether legislation authorizing appointment of judges pro tem is desirable in this effort can be considered after the new system has been tested in actual operation.

Justice and Police Courts

In many respects the justice of the peace and police magistrate are the forgotten men in our judicial system. The new chief justice and court administrator can do much to help the magistrates upgrade the performance of these "inferior" courts. The legislature has long been concerned about helping solve problems of the ninety-five justice of the peace courts, and appropriated funds for an excellent and detailed study.[5] The state bar has a special committee on justice and police courts which can aid the chief justice, court administrator, and the legislature in improvements in this area.

In other states the chief justice with the help of his court administrator, the attorney general, and the local college of law have sponsored annual or periodic seminars for justices of the peace, featuring practical lectures and demonstrations on dignified, efficient procedure in lower courts. No doubt the magistrates would welcome such attention.

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[5] See 1958 *Report on Justice of the Peace Courts in Arizona* prepared by the research staff of the Arizona Legislative Council, containing many conclusions and recommendations.

At these meetings the chief justice could discuss problems of the magistrates and obtain their recommendations regarding needed legislation and rules of court. The prestige of the chief justice can be a real help to the magistrates in presenting their legislative, budgetary, and housing problems to the legislature and boards of supervisors.

Utah University recently published a magnificent *Manual for Justices of the Peace.*[6] Couched in plain and simple language it summarizes important principles of criminal and civil law and shows the layman judge exactly how to conduct a preliminary hearing, inquest, civil trial, or marriage ceremony, etc. I am delighted to report that Dean John D. Lyons of the University of Arizona College of Law has been trying to obtain funds and personnel to draft a similar manual for Arizona. This is a most important project which all of us should encourage and assist.

Conclusion

The problems which led to passage of Propostion 101 were not solved on November 8. They can be met and solved in the months and years ahead, but they will not go away if they are ignored. We will need vigorous, active, far-sighted, tactful, judicial leadership.

And just as important we will need some real cooperation, restraint and "followership" on the part of every lawyer. Able lawyers must be willing to serve as judges, court administrators, commissioners and masters. We must be willing to try new procedures and devices. We must avoid undue criticism of judges who have the courage and initiative to devise and experiment with new methods of administration.

If the end of 1963 finds us still with unreasonable delay in the supreme and superior courts, we will all be at fault; and we will have justly earned the censure of the thousands of voters who followed our recommendations.

[6] University of Utah Press ($3.00).