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Benchmark

The judiciary's slings and arrows and how to support our changing bench


Cooper

By Miles B. Cooper

The lawyer walked into the mediation practice's gleaming offices. Along the wall were posters highlighting the newest neutrals. They read like the local bench's who's who. On the way to a conference room, the lawyer checked in with one of the mediators, an old-time former trial judge. "That's quite a new addition of judges," the lawyer noted, "Who's left to judge?" The mediator grinned wryly and commented on just how difficult the bench had been of late, and that everyone was leaving…

Back in my day

There was a not-so-distant time when courthouses bustled – even the civil departments. Case management conferences and motion calendars brought a human tidal flow beyond the adrenaline infused trial call. Then came optional CourtCall. Then mandated CourtCall for holdout (and typically far flung) counties. The remote appearances saved time, client money, and carbon emissions, and weren't all bad. Yet they reduced that communal experience. Sitting on hold isn't the same as sitting in the gallery.

Then came the pandemic. The technological shift forced upon a Luddite profession could not have been more profound. The courts are now far more efficient and far more vacant. There's been a significant human cost.

Layer on budget cuts. While there are three theoretically co-equal governmental branches, the legislature and the executive control the money. In the fallout from the 2008 recession, the California court system took it on the chin. While the Judicial Council of California advocates its position, it needs a Lorax (head nod to Dr. Seuss). Nor are the courts warmly received in budget fights. When budgets get tight people don't instinctually protect the courts. Folks remember the intrusion and cattle-call experience induced by mandatory jury service. Not coincidentally, the Judicial Council has 2.1 stars out of a possible 5 on Google Reviews (don't forget to like and subscribe!).

Citizens recognize the court's importance only when they need their day. Then they get fearful and angry.

Who speaks for these?

Meanwhile, the judiciary and the rule of law are under vicious attack. The populist and bombastic President Andrew Jackson, responding to a Supreme Court ruling, is reported to have said, "[Justice] John Marshall has made his decision; now let him enforce it." Today, that sentiment has been dialed up to 11, and not just in Washington D.C. A California District Attorney has come just shy of doxxing judges over rulings, resulting in judges receiving death threats.

Why don't judges and justices punch back? It isn't a commitment to nonviolent protest. Instead, the judiciary's ethical rules and commitments run deep. These, along with a sense of propriety, prevent the judiciary from coming out swinging. The closest we might see is a terse comment from the Chief Justice. It falls to organizations like the American Board of Trial Advocates, American Association for Justice, and American Bar Association and others to speak out when the judiciary comes under attack. And while important and helpful, lawyers generally don't garner the same respect as those robed in black. Is it time to reexamine how the judiciary interacts with its critics within the government? Time will tell. As challenging as times are it is not the first time that our branches have battled overtly and covertly, nor will it be the last. Pendulums swing.

What color is your parachute?

While these battles rage and courthouses Zoom along, the state court benches are experiencing a sea change. Whether due to the political climate, exhaustion from pandemic-induced changes, or simply coincidence, our benches are seeing departures in waves. This is a boon to the mediation practice, and something to be aware of on the civil side. It has created opportunities. A few notable civil practitioners have volunteered for service. At the same time there tend to be more criminal practitioners, disproportionately former assistant district attorneys, who become bench officers. These fine folks all want to do their best. They get shipped off to a week's worth of judicial college and then are plopped onto benches to call balls and strikes, typically in a practice area distant from their historic experience.

And here's where we must do our part. We cannot presume our judges are experts in everything. That includes evidence. Without bruising egos, we must educate. This means baby stepping what might seem rote. We know the summary judgment standard in ways career prosecutors may not. Doing our part also means politely, but sometimes forcefully, advocating one's position, while remembering Hon. Lynn Duryee's (Ret.) admonition – that "with all due respect," means anything but. In short, we must lawyer as best we can – clearly, concisely, and persuasively, assuming nothing. It's an exciting time to see a new generation of judges and the mark they'll make on the profession.

Outro

Back to our lawyer about to begin mediation. The lawyer sat for a moment and gave thanks. The bench can be challenging. Heaven knows the positions are undercompensated for their required devotion. The lawyer gave thanks to those willing to take on the challenge and acknowledged the bar's duty: to fight for the rule of law and protect those who cannot protect themselves.

Miles B. Cooper is a partner at Coopers LLP, *where they help the seriously injured, people grieving the loss of loved ones, preventable disaster victims, and all bicyclists. Miles also consults on trial matters and associates in as trial counsel. He has served as lead counsel, co-counsel, second seat, and schlepper over his career. He is an American Board of Trial Advocates member.*

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