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Introduction

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by
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The Report of the Commission on the Future of the California Courts (*Justice in the Balance 2020*), and the preceding Introduction by the Chief Justice, describe a Master Plan, masterfully organized, with a built-in implementation and continuing maintenance mechanism. Its most significant aspect is that all the distinct reform projects of the past and present will become integral parts of the Commission's overall program. In the letter of transmittal of *Justice in the Balance* to the Chief Justice, the Chairman of the Commission made it clear that the forty-three Commission members accepted the Chief Justice's challenge to "be bold" in creating their vision of a judicial system for the twenty-first century.

My Introduction will consist of observations on essential elements of the Reform Program, some of which have not been covered in depth in either *Justice in the Balance* or Professor Kelso's *Report on the California Appellate System.*

I. Public Understanding of the Law

A. For Individual Representation and Counselling

The *Neary* opinion of the California Supreme Court restates the underlying principle that the judicial system exists for the benefit of the public. But few of its beneficiaries know enough about the system to make effective use of its benefits. Knowledge of how the system works is not enough; the person with a grievance or a counselling problem has to know where to get assistance in understanding his problem and its solution.

High on the list of responses to this need is the modern concept of Preventive Law, which in the past has had little attention from lawyers steeped in the traditions of the adversary system. Today we have a National Center for Preventive Law, with a large accumulation of resource materials; and its organization and growth are largely the result of the efforts of our own Louis M. Brown, Professor of Law at the University of Southern California Law Center. The mission of the

Center for Preventive Law was succinctly stated in its *Preventive Law Reporter*, as follows:

> The basic premise of preventive law is that the legal profession can better serve clients by focusing on appropriate consultation and planning rather than looking to litigation as the solution to all legal problems. By giving appropriate thought to possible problems and potential disputes, the lawyer can prevent many of those problems and disputes. In many ways, preventive law is the opposite of the traditional thrust of legal education and law practice. It requires taking a new look at the way lawyers serve their clients and deliver legal services.

Equally important is the innovative proposal of the Commission that we establish "assessment officers" to receive and refer disputes to the most appropriate dispute resolution process.

B. For Reform of the Legal and Judicial Systems

The typical public relations programs have extolled the virtues of the independent Bench and Bar in order to convince a troubled community that the legal system and its institutions are essentially sound; that the delay and prohibitive expense in civil proceedings are nothing to worry about; and that the seemingly irrational aspects of criminal justice are mandated by our Constitutions and are essential to the preservation of our Civil Rights.

But the legal system is not in good shape. It is in need of wholesale reforms; and these will never succeed until we have an informed public opinion that will support proposals for reform. We must therefore make the law and its institutions a part of the curriculum of secondary schools and colleges; and we must offer in the communication media—press, radio, and television—constant and expert commentary on significant developments in and major proposals for reform of substantive law and procedure, as well as major proposals for reform.

II. Professional Research Attorneys for All Courts

First, the Reviewing Courts. Many years ago permanent law clerks became an integral part of the operations of our supreme court and courts of appeal; and the career professionals recently received full approval in the Report of the Chief Justice's Select Committee on the Internal Procedure of the California Supreme Court.

Professor Dan Meador, in his Report on the Study of the National Center for State Courts (*Appellate Courts—Staff and Process in the Crisis of Volume*), describes a staff organized into areas of expertise, covering every field of the court's adjudications, and available on

call by the judges whenever an issue arises that falls within the staff member's area. And he adds an inspired vision of a staff that could do research on legal problems "looming in the distance, unresolved issues which will sooner or later be presented. . . . The staff in that role would be the court's radar, identifying issues and beginning to work up relevant material."

Second, the Trial Courts. Staff assistance for Trial Courts has been largely neglected, despite the fact that trial judges handle Law and Motion Calendars, decide motions in limine, and rule on difficult procedural issues arising in trials. They need the assistance of staff lawyers, initially trained for these tasks, and gradually accumulating experience in making this aspect of a trial judge's performance as error-free as possible.

III. Law School "Clinical" Education in Procedure and Practice

A conventional "clinical" program is designed to give a small group of students a picture of a functioning courtroom and a random sampling of some legal acts. But these activities merely emphasize the problem: They carry the message that a law school does not train students to practice law, and that they must obtain this essential training elsewhere.

The New Look—making procedure and practice a part of the courses in major areas of substantive law—had some distinguished vocal advocates. And in the next few years we may witness the establishment of such programs in all of our law schools.

IV. Judicial Education

It is now generally recognized that the judicial system cannot materially improve or even survive until judicial officers are equipped with something more than a robe, a clerk, a bailiff, and a courtroom. Judicial education today is available throughout the country, and California is a leader in every aspect: facilities, staff, teaching materials, teachers, and students. Our Center for Judicial Education and Research (CJER) has produced a Judicial College, an orientation program, an advanced study program, a series of institutes, and publications concerning many areas of judicial activity.

These are admirable achievements, but they do not meet our needs in any substantial way. The programs reach a handful of judges in sessions that seldom occur more than once in a judicial lifetime.

But we have some 1,500 judges and 300 commissioners (soon to reach close to 2,000 judges and 500 commissioners); they need both initial and continuing education in all aspects of the complicated art and craft of judging, and on the constantly expanding list of new issues in every major area of substantive law and procedure. Thus, our current system, despite the high quality of its product and its nationwide reputation for innovative teaching, cannot be considered an adequate statewide system of judicial education.

What steps do we have to take to reach our goal of a professionally trained judiciary?

First, and basic to the new approach, are statewide programs for all of our judges, in the location of their courts. The educational materials used in the Judicial College, the institutes, and the orientation sessions must be made available without the time-consuming effort and expense of assembling at some central place for classroom instruction.

Second, all modern methods of professional instruction, including audiotapes, videotapes, and multimedia systems, together with the equipment necessary for their use, must be provided.

Third, a Task Force, composed of Judicial College teachers of the past and present, must assist the local courts in setting up the facilities and equipment, and demonstrate the most efficient methods for use of the new materials and equipment. In a very short time the Task Force will accumulate experience in sufficient volume to produce a guidebook for local use, both in print and in electronic format, and regularly updated.

Fourth, we must make the essential change from classroom to benchbooks. The College sessions and the Institute programs have developed written materials and produced valuable information; but the total product must be made available in permanent form to all judges. The original Trials Benchbook—unique in concept and preparation—is our model. We engaged expert lawyer-interviewers, with elaborate outlines of the procedural topics, to consult knowledgeable judges in every part of the state, and to extract from them their memoranda, checklists, forms, and oral recollections of the problems encountered in trial practice and various ways of resolving them. The resulting raw materials were organized, classified, and synthesized by CJER editors.

This was only the first of the benchbooks; CJER is currently engaged in the production of others. And the California Bar, realizing the value of these works in developing the ability to anticipate and

prepare for foreseeable rulings, has purchased thousands of the Trials Benchbooks, and may be expected to do the same with the others.

V. The Efficient Appellate Court

In nearly every aspect of the appellate process, major reforms are needed, and some, already begun or contemplated, offer much promise for the future. The following are particularly noteworthy.

(1) Appealability will become a rational process. The illusory One Final Judgment Rule, with its painfully contrived statutory exceptions and capricious judicial emasculations, will be replaced by a realistic and practical restatement of appealability of judgments and orders reflecting the actual needs of review.

(2) Review by extraordinary writ will lose its archaic prerogative character and its whimsical and unpredictable conditions for issuance, and will become available in clearly defined situations as a matter of right.

(3) The advisory opinion, now produced in friendly cases and moot appeals, will be legitimated. No longer will the courts have to wait for an adversary proceeding between litigants to produce a great jurisprudential precedent for the benefit of a large class: The class itself will have access to the reviewing court, in a nonadversary proceeding seeking a declaration of law on a matter of great and immediate public importance, under carefully devised rules providing the fullest notice to interested persons and assuring adequate informational resources to the court.

(4) Records on appeal will be revised both in content and form. Agreed statements can eliminate the need for huge transcripts, and electronic recording of trials will eventually replace the typed transcripts.

(5) Briefs will be subject to high standards of quality and brevity, and electronic substitutes for printing will be acceptable.

(6) Oral argument will be eliminated when it adds nothing of value to the briefs, and, when it does serve a useful purpose, may be conducted by telephone conference calls.

(7) The Appellate Settlement Conference, successfully tried in some courts, will be made statewide, with experienced settlement justices—sitting or retired—available to move into every appellate district to assist in the training of justices by the use of videotapes, guidebooks, and multimedia programs. This is an essential reform:

There will always be too many civil appeals to process in the traditional manner of calendar hearings and full-scale opinions.

(8) The Opinion Writing Process.

(a) The most consistent and sustained of all the critics' complaints is that opinions are much too long, and methods of producing full-scale opinions in shorter form, by eliminating unnecessary matter and repetitious statements, have been developed by able justices.

(b) Memorandum opinions offer another means of cutting down the volume of published opinions. The Memorandum Opinion is a simple, brief, often stereotyped statement, which does not recite the operative facts and does not discuss the law; it is used to dispose of matters that do not require the elements of a full-scale opinion—long or short. It is an obvious time-saver that can be initiated, and to a considerable extent implemented, by staff research attorneys, and it readily lends itself to prepared forms or models.

Some justices who favor shorter opinions take a dim view of Memorandum Opinions, viewing them as a kind of judicial boilerplate entirely under the control of staff attorneys. But there is no cause for alarm: Just as in the initial screening procedures and in the preparation of pre-decision memoranda, the court will have to rely on staff to disclose the absence of significant issues requiring a full-scale opinion. The standardized form for recurrent types of cases will be the end result of the same deliberate consideration given to cases that do require full-scale opinions. Only the tedious process of preparing a legal essay on established law will be eliminated. The message of the standard form will come through to the appellate bar: The emancipated appellate courts will no longer spend substantial time explaining in detail why an absolutely meritless appeal has absolutely no merit.

(9) All of the above comments on the efficient appellate court apply to the California Court of Appeal. The fact that it is bound by Supreme Court decisions has led some observers to conclude that it is only a halfway house for the tentative consideration of problems not yet tackled by the Supreme Court. But nothing could be further from the truth. The Supreme Court has little time for the maintenance and repair of the foundations of our substantive civil law in such areas as Contracts, Property, Commercial Law, Business Associations, Family Law, and Torts. The Court of Appeal, however, has the time and the duty to perform these tasks of maintenance and repair of the substantive law, and also to interpret and implement the weird and wonderful constructs that emanate from statutes, rules, and decisions in the jungle of procedural law. Without its innumerable opinions on every ma-

jor subject, the legal system of this state would suffer a complete breakdown.

A final word: Never before has the Bench and Bar had so great an opportunity, and so clear a responsibility, to remake the creaking nineteenth- and twentieth-century legal system into a durable institution that will survive in the twenty-first.