Tuesday, August 11, 1992

Los Angeles Daily Journal

Rift Continues On Reforming Civil System

By Terry Carter
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SAN FRANCISCO — As panels of some of the best legal minds in the country gathered again this week to look at the fast-moving target that is civil justice reform, the best they could come up with was a collective "Damn!"

Everyone is excited that suddenly the three branches of government "are all doing handstands to reform civil justice," in the words of the dapper itinerant moderator, Arthur R. Miller of Harvard Law School. But the problem still seems to be that after a year of rhetorical back-and-forth, they can't define the problem.

And this is while committees of lawyers, judges and laypeople have been percolating ideas for change from the bottom up in 94 federal districts, as required under the so-called Biden Bill, the Civil Justice Reform Act; while the U.S. Judicial Conference has been changing rules the old-fashioned way, ultimately through the Supreme Court; and while the Quayle proposals by the president's Council on Competitiveness are being considered by Congress.

Of all these initiatives, the Biden Bill committees are having the greatest impact because of the legislation's call for mandatory, sweeping changes. While the concept is democratic, with the committees coming up with suggestions for sometimes radical rule changes in the federal districts, panelists expressed fear of chaos.

Too Much Diversity?

"It's not just Balkanization of the federal judicial system," Miller said in an interview, "it's the Yugoslavianization."

After the Biden Bill requirements for reductions in cost and delay have been carried out over the next several years, providing "more diversity and difference than we'd like, hopefully we will learn from the experiments and be prepared to come back to a greater uniformity knowing what works and what doesn't," Chief U.S. District Judge Sam C. Pointer of the Northern District of Alabama said at a panel titled "Civil Justice Reform: A Mirage or Reality?" Pointer heads a Judicial Conference advisory committee on civil justice reform.

The panel met Sunday at the Fairmont Hotel and was one of several looking at different aspects of civil justice reform during the American Bar Association's annual meeting here.

Placing the Blame

Such panels invariably and quickly get to placing blame, even if they can't agree upon the nature of the problem. That happened in two discussions moderated by Miller on Saturday and Sunday.

"Now I'm hearing the oldest continuous shell game in recorded history," Miller said at one point Sunday when blame for gridlocked dockets gets tossed around among lawyers, judges and, though not represented on the panel, the Congress.

One typical example — and it shows the forthrightness that has energized the debate — came Saturday during a discussion on President Bush's executive order of last year. It required government lawyers to immediately adhere to some of the

See Page 10 — RIF

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Continued from Page 1

cost and delay reduction proposals by the Council on Competitiveness, even before they were sent to Congress for possible legislation. This slice of Saturday's repartee concerned the difficulty of pretrial settlement in cases involving the government.

What's missing in those negotiations, said William W. Schwarzer, director of the Federal Judicial Center, is the identity of the government official with settlement authority.

"That seems to be the heart of the problem of settling cases with the government," Schwarzer said.

And just a few seats down on the panel, Assistant Attorney General Stuart Gerson shot back that he agrees with the need to dispense with many cases in the early stages, but that the problem is a need for "a return to judging" — having judges get involved for summary judgments.

Professor Miller's shell game was on.

Mandatory Disclosure

Probably the greatest revolution in civil justice coming out of the federal district experiments will be in disclosure. U.S. District Judge Robert F. Peckham of San Francisco said on Sunday's panel.

One of the key elements of the experiments is mandatory disclosure of core information at the outset of litigation. For now, the questions are how much, how soon and how enforced.

The answers will occur over "a period of transition," said panelist Brad D. Brian, of Los Angeles' Munger, Tolles & Olson. "It's an attitudinal issue, and there will be collateral litigation on it."

But someone pointed out quickly that the Judicial Conference is likely to soon tinker with Rule 11 of the Federal Rules of Civil Procedure to prevent such litigation over the litigation.

Judge Peckham kept the spirit of revolution on the table, pointing out to the Sunday panel that probably the greatest changes on the horizon in civil litigation will come through increasing use of binding arbitration agreements, which likely will lessen the dockets.

Abandoning Adjudication

"We're not going to see many of those cases," Peckham said.

But that leads back to what many see as the problem: the end of adjudication.

It has gotten to the point, said Professor Judith Resnik of the University of Southern California Law Center, that "the trial is the weird event in the system."

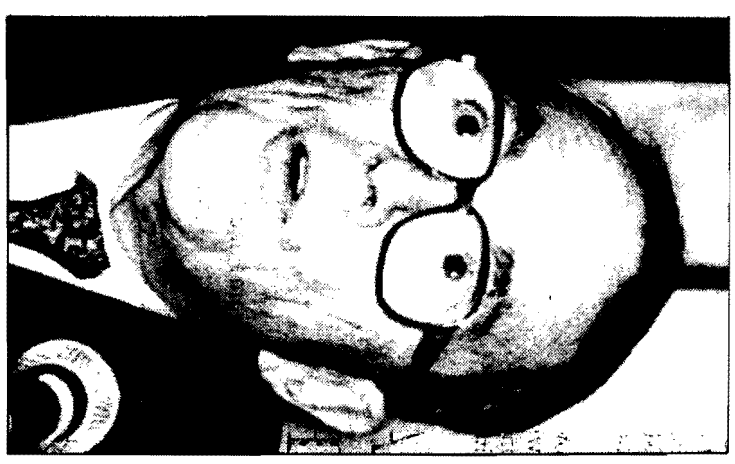
"Judy is dead on," said Miller in an interview. "We're abandoning adjudication."

Miller pointed out that greatly increasing numbers of summary judgments "is one of the major phenomena of the decade. What does that tell you? That people are fed up with cost and delay? That we don't trust juries? Does it reflect the fact that in major law firms nobody knows how to try a case anymore? And yes, the devil theory: Do the judges achieve an agenda with it?"

Whatever the reason, there are going to be more possibilities in the recipe. Judge Peckham told the panel that pretrial settlements are going to be helped along in the Northern District of California, where three judges will require that clients be present in the first case management meeting with the judge and the lawyers.

"The client is sophisticated and hears the discussion, and hears the lawyer and client on the other side, maybe," Peckham said.

Which is how the whole civil justice reform movement is being conducted. "There's a sweet involvement by a whole range of people, many of whom were never involved before," said Resnik.



CRISTINA TACCONE / Daily Journal

WILLIAM W. SCHWARZER — The former federal judge said the problem with settling cases with the government is identifying the official with authority to make a settlement.