Commentary

No Substitution for Quality

Speeding Up Decision Making Is Poor Solution for Court Congestion

We are all well aware that the California Supreme Court and courts of appeal are struggling under the weight of record caseloads. Many of us have experienced the resulting backlog or delay, a condition as inevitable for a congested court as a congested highway.

Delay is only the surface problem, however. A much more serious problem is decay, an erosion of the quality of appellate decision making under the pressures of caseloads. Of this we hear surprisingly little.

Appellate delay is certainly undesirable, and all reasonable measures should be taken to reduce it. But, in most instances, delay is at least tolerable. If an appeal is especially time-sensitive, as with a juvenile custody matter, the proceeding can be expedited.

In contrast, decay of an appellate system is intolerable. It poses a threat to the entire legal system, and the society which it serves. Appellate justices simply cannot fulfill their role in monitoring and developing the law if they are hurried, harried and forced to cut quality in order to crank out decisions. Those decisions will hardly be worth the trouble.

While there are legitimate concerns over problems of delay, a one-dimensional solution aimed at increasing speed may cut not just time, but quality as well. The choice should not be between ending delay and increasing the decay of quality of decision making.

The primary focus on delay reduction is in the trial courts, but attention is broadening to include the appellate courts. There, suprisingly, the goal is not merely speeding cases to the hearing, but also reducing the time it takes the appellate courts to make a decision.

Even our Supreme Court is struggling with a growing volume of cases and is faced with choosing between solutions, some of which are false economies.

Chief Justice Malcolm M. Lucas formed a blue ribbon committee in February to study ways in which the Supreme Court could improve its internal operations. The committee, chaired by retired Supreme Court Justice Frank K. Richardson, proposed a number of ways to decrease delay and substantially increase productivity, including proposals for efficient word processing and data processing facilities, better space utilization and better communication among the justices as opinions are drafted.

DEPUBLICATIONS

BY ELLIOT L. BIEN

But several of the proposals would simply cut back on the quality of the decision-making process in the interests of speed, and they come at a time when the court seems wed to still another harmful "efficiency" measure — the depublication of appellate court opinions instead of reviewing them. There has been a marked escalation of such depublications [Uelmen, "The Lucas Court," California Lawyer, June 1988], and there is reason to fear the introduction of similar shortcuts.

True efficiency measures enhance the justices' ability to perform their vital work at an optimal level of quality, with the least amount of unnecessary effort. But it is hardly efficiency to pressure Supreme Court justices [or court of appeal justices] to decide cases in a limited period of time. Or to prevent them from making editorial changes in opinions. Or to impose time limits on them for filing a dissenting opinion. These kinds of efficiencies are antithetical to the quality of the decision-making process. The cure, in these cases, is worse than the disease.

Depublication has become such a cure. It has become a shortcut for controlling the law, a quick and dirty disapproval of a lower court's opinion. And its principal defense is the supposed necessity of shortcuts in times of congestion.

Depublication didn't start out that way. It began with selective publication in the 1960s, a common practice today in American federal and state jurisdictions. The idea was to save costs by publishing only those opinions that have value as precedent. In all other jurisdictions, courts follow stated policies in deciding whether an opinion should be published. Even the U.S. Supreme Court must do any disapproving of lower courts' opinions by words of its own. It has no censorship power.

In California, however, the Supreme Court was given general power over the publication of intermediate court opinions. It was meant only to be used to enforce the criteria for selective publication — in other words, if the courts of appeal published opinions in cases of little or no legal consequence. That kind of control is fundamentally different from the use of the depublication power to express substantive disapproval of the lower court's opinion.

Unless the Supreme Court finds an issue important enough to be addressed in its own opinion — either on a review of the case in question or in a subsequent case — the sound administration of justice calls for the intermediate court's opinion to be left intact.

The Supreme Court need not and should not take a stand on every issue that comes along. Until such time as future legal developments or social conditions persuade the Supreme Court to address the issue in an opinion, with reasoning fully set forth, the intermediate courts must be allowed to handle the issue themselves. If a conflict among them develops, that will properly hasten a Supreme Court pronouncement. California's selective publication system was never intended to give the Supreme Court a substantive veto power over court of appeal opinions.

This philosophy is already reflected in our official standards for the Supreme Court's selective review. Rule 29(a) of the California Rules of Court states that the high court is not primarily concerned with error as such, but to address issues of social or legal importance, whether the opinion below happens to have errors or not. Unless the issue is important — one

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***Elliot L. Bien** is chairman of the appellate department of San Francisco's Bronson, Bronson & McKinnon and chairman of the Committee on Appellate Courts of the Bar Association of San Francisco.*

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that merits a high court opinion — any error in the intermediate court's opinion simply does not warrant a review and correction. Selective review preserves the Supreme Court's dignity and reserves its energies for the important issues on which it chooses to speak.

The same reasoning applies even more strongly to depublication used as a method of error correction. By definition, the denial of a review means the Supreme Court did not believe the case deserved its full attention. When the court depublishes in that situation, it is squandering its dignity on a case concededly not important enough for Supreme Court action. The whole rationale of selective review is contradicted.

Moreover, like any other shortcut, depublication is a most unreliable method for correcting error. The basic defense for it is that the Supreme Court doesn't have time to give the case its ordinary attention. But why should the court — or any court — be making assessments of error under hurried circumstances? Appellate review is supposed to require considerably more time and care before conclusions are reached about the commission of error by a lower court.

There is much wisdom in the American abhorrence of censorship. The views of the majority, or of the officials in power at any given time, are not held to be infallible. To the contrary, we believe that the free expression of dissenting views, erroneous views and even horribly repugnant views will ultimately best serve the interests of the nation. In good part, we abhor censorship in the belief that today's error might help us find tomorrow's truth. We abhor censorship not just as a matter of taste, but as a fundamental strategy for the health and survival of our democracy.

Censorship is equally abhorrent and shortsighted when practiced within the legal system itself. The cleanliness it purportedly brings to the law is equally stifling. Ironically, the appellate courts of this nation, and certainly California's among them, have been the most important and steadfast defenders of the freedom of expression — the right to be wrong, but to say it anyway.

It is regrettable that California's legal system is still marred by the Supreme Court's power to censor. The adoption of Proposition 32 and the implementing Rules of Court in 1984 bestowed on the California Supreme Court all the flexibility that has so long and so well served the U.S. Supreme Court.

As Justice Richardson aptly stated in the introduction to his committee's report: "[T]he days of small case volume and leisurely consideration of cases have passed forever." That is true for both the Supreme Court and the courts of appeal.

But what kind of days will take their place? Will our appellate court system maintain a significant commitment to quality, and simply move more slowly until caseloads are brought into better control? Or are we going to transform our appellate courts into fast-moving conveyors of decisions?

Quality can be undermined by a variety of corner-cutting and quality-cutting devices, all under the rubric of greater speed and efficiency in our overloaded appellate courts. Neither the law nor the public is well served by the quick judgment implicit in a depublication order.

An informed public would doubtlessly choose a sound appellate system and demand meaningful steps to reduce the current court congestion at its sources. But that will not come about unless bench and bar leaders start focusing on the dangers of decay in quality, not just on the problems of delay. Without this shift in focus, the direction is toward speedier, but shallower, appellate review.