Loyola University Chicago Law Journal

Volume 20
Issue 4 *Summer 1989 Illinois Judicial Conference Symposium*

Article 2

1989

Address to the 1988 Illinois Judicial Conference

Thomas J. Moran Honorable
Chief Justice of the Illinois Supreme Court

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Honorable Thomas J. Moran, Chief Justice of the Illinois Supreme Court *

I welcome all of you to the 1988 annual Illinois Judicial Conference. Once again we come "to consider the work of the courts and to suggest improvements in the administration of justice," as mandated by our Illinois Constitution.[1] The importance of this conference is reflected by the constitutional status conferred upon it in 1964 and again in 1970.[2] Through its Executive Committee and subcommittees, the conference carries on continuous study of judicial practice and procedure and provides an important forum for discussion and recommendations. Past achievements of the judicial conference clearly demonstrate its effectiveness.

This conference can be more effective with everyone's participation. Each day Illinois judges hear matters that require the interpretation of the laws that govern this state. Each day the judges interpret and apply the procedural rules promulgated by the Illinois Supreme Court. Each of us has frequent occasion to reflect upon the need for statutory change or change in the rules. Suggestions and recommendations from a group as knowledgeable in this area as are the members of this conference would be quite helpful to the members of the general assembly when made through the Executive Committee, as well as to the members of the supreme court. Of course, this beneficial effect was the purpose of the constitutional provision requiring this conference.

I suspect that there are many judges who, from time to time,

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1. ILL. CONST. art. VI., § 17. Supreme Court Rule 41 implements section 17 by establishing membership in the conference, creating an Executive Committee, and appointing the Administrative Office of the Illinois Courts as secretary of the conference. ILL. REV. STAT. ch. 110A, para. 41 (1987).

2. On November 6, 1962, the Illinois voters amended article VI of the Illinois Constitution to include section 19 which provided as follows: "The Supreme Court shall provide by rule for and shall convene an annual judicial conference to consider the business of the several courts and to suggest improvements in the administration of justice, and shall report thereon in writing to the General Assembly." ILL. CONST. of 1870, art. VI, § 19 (1962). The Judiciary Committee of the 1970 Constitutional Convention found that the past accomplishments of the judicial conference warranted retention of the constitutional provision. ILL. ANN. STAT., ILL. CONST. art. VI, § 17 (Smith-Hurd 1971) (committee comments).

have useful ideas regarding legislative change, but who do not communicate those ideas to the Executive Committee of the conference. I suggest that you not hesitate to do so. Any recommendations, legislative or otherwise, that you believe may benefit the operation of the judicial system as a whole are welcome. Each of us is a member of this conference, and each of us shares responsibility for the operation of the judicial system of this state. One of the functions of the conference is to act as a sort of clearing house for the judiciary, to analyze problems and evaluate proposals for their solution. Your active participation in that process will assist in the performance of that function.

Having said that, our court wishes to express deep appreciation to the members of the Executive Committee and to those judges who, through committee service and otherwise, have participated actively and worked to arrange this conference. We express gratitude also to those members of law school faculties who contribute to each judicial conference. A great deal of time and effort is required to carry on this work.

Now it is my turn to participate actively in this conference. I would like to comment on the relationship between judges and the public. It has been observed by some that judges are not, as a class, popular. That is understandable. Lawsuits, which are the affairs of judges, bring anxiety, expense, and sorrow. When a judge makes a decision, he or she must necessarily rule against somebody. Therefore, it is to be expected that judges are not particularly popular.

Nevertheless, that is as it should be. Certainly there are more important and appropriate goals for judges than popularity. A judge should not expect popular acclaim, but rather should seek to attain the respect of the public for his learning, judgment, courage and, most of all, integrity.

Nationwide, judges seem to be losing public respect. There are many reasons for this loss of respect. The first reason is official corruption. Even today it is not uncommon to open the newspaper and read about the latest scandal involving a judge somewhere in the nation. Although there have been eleven judges convicted recently as a result of the Greylord investigation,[3] there are a total of 857 judges in Illinois. The ordinary person on the street does not

3. As of September 1, 1988, eleven judges had been convicted of Greylord-related offenses. Two defendants had been acquitted and two judges died before trial. The Special Commission on the Administration of Justice in Cook County, Final Report 55-56 (1988).

care that these scandals involve events which, for the most part, took place years before reform measures were implemented to prevent such corruption.

Similarly, the public does not care about the judges throughout this state and nation who are working hard each day and who are excellent jurists. That kind of news does not sell newspapers. Each one of you should be commended for a job well done and for displaying the highest of integrity and honesty. Nevertheless, it takes only one scandal to ruin the reputation of many. Corruption is a virulent and pernicious cancer upon the judiciary. We must continue to build up our immune system, by rules of procedure and administration and through personal integrity. This will prevent forevermore another onset of such a disease.

The second reason judges have lost public respect is a case of misunderstanding. The public views the judiciary as being lax on crime. At the beginning of the year, I was a guest on a radio talk show where listeners were invited to call in to ask questions. Almost every one of the callers expressed disdain, in no uncertain terms, for judges who "let criminals go." Centuries ago, it was noted that "the judge is condemned when the criminal is absolved."[4] A common complaint among the callers was that judges let criminals out on parole after serving only a few years of a prison sentence.

The public's disdain for criminal justice is based on a mistaken conception of the judge's role. In 1978, the legislature amended the Unified Code of Corrections.[5] As a result of this amendment, prisoners sentenced after the effective date are not eligible for parole, but must serve a determinate sentence of imprisonment combined with a period of mandatory supervision.[6] For prisoners sentenced prior to 1978, judges played no role whatsoever in the decision to allow parole.[7] That function was and is performed by the Prisoner Review Board, an executive branch agency.

The public's misconception extends to the practical realities of the criminal justice system. There is no evidence to support the

4. T. FULLER, GNOMOLOGIA no. 4610 (1732).

5. ILL. REV. STAT. ch. 38, paras. 1001-1-1 to 1008-6-1 (1987).

6. ILL. REV. STAT. ch. 38, para. 1003-3-3 (1987). The Unified Code of Corrections provides that: "No person sentenced under this amendatory Act of 1977 . . . shall be eligible for parole . . . [and] every person sentenced . . . shall serve the full term of a determinate sentence less time credit for good behavior and shall then be released under the mandatory supervised release provisions." ILL. REV. STAT. ch. 38, paras. 1003-3-3(b), 1003-3-3(c) (1987).

7. ILL. REV. STAT. ch. 38, para. 1003-3-1 (1987). Section 1003-3-1 prohibits a member of the Prisoner Review Board from holding any other salaried public office. *Id.*

assertion that Illinois judges are easy on crime — quite the contrary, and yet the perception persists. The solution is not to pervert justice and condemn innocent people merely to satisfy the public, but rather to educate the public as to the realities of the criminal justice system. The judges of Illinois have been vigilant in upholding the criminal law as established by the legislature and our Constitution, and there should be no harm in so telling the public.

Perhaps one reason for the lack of public respect is delay in the adjudicative process. Cases take too long to work through the system. Delay in the trial of law jury cases, especially in some of the more populous counties, has been one of the most serious and highly publicized problems in the operation of the Illinois courts.[8] Delay in the administration of justice conveys to the public the impression that judges do not care. As in Dickens' BLEAK HOUSE,[9] with its infamous case of *Jarndyce v. Jarndyce*, delay in the administration of justice demonstrates a lack of respect for the public, as well as an indifferent attitude on the part of the judiciary. In the face of excessive delay, it is appropriate for the public to view the judiciary with less respect.

When the Judicial Article became effective on January 1, 1964,[10] the Circuit Court of Cook County inherited from the former superior and circuit courts a massive backlog of nearly 50,000 law jury cases with an average delay of a little more than sixty-two months in the disposition of cases going to verdict.[11] Despite the newly streamlined and unified trial court system, the amount of delay remained fairly constant until the end of 1970.[12] The amount of delay decreased to approximately thirty-four months in 1974.[13] As

8. *See Backlog Stalls Scores of Cases in Law Division*, Chicago Daily L. Bull., Nov. 2, 1987, at 1, col. 2. *See also C.B.A. Chief Critical of Delay in Courts*, Chicago Daily L. Bull., Oct. 7, 1988, at 1, col. 2.

9. CHARLES DICKENS, BLEAK HOUSE (1853).

10. ILL. CONST. art. VI, §§ 1-19. The Judicial Article was proposed in House Joint Resolution number 39 during the 72nd General Assembly as an amendment to the Illinois Constitution, article VI. 1961 Ill. Laws 3917. The voters of the State of Illinois approved the new Judicial Article of the Constitution in November 1962. Marshall, Report of Illinois Judicial Advisory Council 151, Annual Report of the Illinois Judicial Conference (1964).

11. Annual Report from the Administrative Office of the Illinois Court to the Supreme Court of Illinois, 69, 76, 89 (1963) [hereinafter "Report to the Supreme Court"].

12. The average time lapse between the date of filing and the date of verdict in the Law Division was reported as follows: 62.2 months in 1963; 60.2 months in 1964; 69.5 months in 1965; 60.2 months in 1967; 59.6 months in 1968; and 60.7 months in 1969. Report to the Supreme Court, at 49 (1968). *See also* Report to the Supreme Court, at 47 (1969).

13. Report to the Supreme Court, at 143 (1974).

late as 1984, the average elapsed time between the date of filing and the date of verdict in the law division of Cook County remained, on average, less than forty months.[14] While this figure is far from the aspirational amount of twenty-four months, it is not totally unacceptable.

I do not intend to single out Cook County as the only circuit where delay is a problem. At the end of 1987, seven other circuits had average delays of approximately thirty months.[15] Only the Fourth, Ninth, Twelfth, and Eighteenth Circuits had average delays of less than twenty-four months.[16]

The circuit courts are not the only source of delay. Neither the appellate court nor the supreme court is immune from criticism. In 1976, the year after Supreme Court Rule 23 was liberalized,[17] seven cases in the appellate court took over two to three years between the date briefs were filed and the date an opinion was rendered or the case disposed.[18] That figure remained fairly constant until 1987, when sixty-four cases took between two to three years to decide.[19] Five cases took over three years to decide.[20]

There are two possible sources of delay: the people in front of the bench and the people behind the bench. As for the people behind the bench, the courts must endeavor to increase the efficient use of judicial resources and to encourage the use of alternative means of dispute resolution. Although many efforts have been made in this regard, I wish to highlight two programs.

The first program, euphemistically called "Sweeps Week," is taking place currently in the Circuit Court of Cook County during the judicial conference.[21] The Circuit Court of Cook County in

14. Report to the Supreme Court, at 144 (1984). The maximum time elapsed between the date of filing and the date of verdict was 97 months. The minimum time elapsed was 1 month for an average of 38.6 months.

15. Report to the Supreme Court (1987).

16. *Id.*

17. ILL. REV. STAT. ch. 110A, para. 23 (1987). In 1975, the Illinois Supreme Court amended rule 23 to broaden the power of the appellate court to dispose of cases without opinion. The order disposing of the case was required to include the court's reasons for the decision, however brief. ILL. ANN. STAT. ch. 110A, para. 23 (Smith-Hurd 1971) (Historical and Practice Notes).

18. Report to the Supreme Court, at 99 (1976).

19. Report to the Supreme Court (1987). In the First District, forty-one civil cases and twenty-one criminal cases were delayed. The Second and Third Districts each reported one criminal case that was delayed for two to three years. *Id.*

20. *Id.* These cases were decided in the First District. Two cases were civil and three were criminal.

21. *See Lawyers Volunteer to Mediate Cases*, Chicago Tribune, Aug. 16, 1988, § 2, at 2, col. 5. *See also C.B.A. Planning More Circuit Court Mediation Sessions*, Chicago Daily L. Bull., Sept. 12, 1988, at 1, col. 2.

conjunction with the Chicago Bar Association is conducting the program. They have chosen approximately seventy lawyers to act as mediators in almost 500 lawsuits. The insurers involved in the cases have suggested that the cases may be ripe for settlement. The mediation will take place in the courtrooms that are not being used this week because judges are here in conference. If the program is successful, the mediators will have disposed of several hundred cases by the end of this week.[22] Future possibilities include extending the program to other counties, as well as to other times of the year — for example, during the week when the associate judges are in conference.

The second program I wish to highlight is actually due to Justice Ryan's persistence: mandatory arbitration. As many of you know, a pilot program of mandatory arbitration is being conducted in the Seventeenth Circuit's Winnebago County. All cases for the recovery of $15,000 or less are submitted mandatorily to a panel of three arbitrators who are assigned from a pool.[23] The arbitrations take place one week a month. As of August 10, 1988, 321 cases had been scheduled for arbitration. Thirty-one of those cases actually went to hearings before the arbitration panel. The rest were disposed of by settlement, default, or otherwise. A notice of rejection of the award has been filed in only eight of those thirty-one cases.[24] Those eight cases will now proceed to trial. That averages to approximately one arbitrable case going to trial; the equivalent of twelve a year. My guess is that at most two or three of those cases will actually go all the way to verdict. It should be clear that mandatory arbitration substantially reduces the number of cases which a judge must handle.

Now, I turn to the people in front of the bench. There has been

22. As of September 12, 1988, 106 cases were settled, with 20 cases close to settling. *Court Experiment Dents Case Backlog*, Chicago Tribune, Sept. 12, 1988, § 2, at 2, col. 5.

23. Statutory authority for mandatory arbitration is found in ILL. REV. STAT. ch. 110, para. 2-1001A (1987). Section 2-1001A provides:

> The Supreme Court of Illinois, by rule, may provide for mandatory arbitration of such civil actions as the Court deems appropriate in order to expedite in a less costly manner any litigation wherein a party asserts a claim not exceeding $15,000, or a judge of the circuit court, at a pretrial conference, determines that no greater amount appears to be genuinely in controversy.

Id. The statute mandates that arbitration hearings be conducted by panels of three unless the parties agree to a lesser number. ILL. REV. STAT. ch. 110, para. 2-1003A (1987). The supreme court governs the mandatory arbitration procedure through rules 86-95. ILL. REV. STAT. ch. 110A, paras. 86-95 (1989).

24. As of January 4, 1989, sixty-five cases have had arbitration hearings. *Panel of Three Lawyers to Hear Small Suits*, Chicago Tribune, Jan. 4, 1989 (DuPage), at 8. The parties have rejected sixteen of the settlements.

a disturbing and increasing trend for the bar to engage in what has been called "Rambo-style" litigation.[25] Practitioners of this style of litigation engage in "hardball" dilatory tactics, such as abuse of discovery procedures and requests for unnecessary continuances to grind an adversary into submission. They speak of "scorched earth" or "taking no prisoners." To them, litigation is war. This result makes cases more expensive, more unpleasant, and move much slower. This style of litigation goes beyond acceptable advocacy and can only be described as abuse of the judicial process and a perversion of the quest for justice.

"Rambo-style" litigation has become such a problem that the American Bar Association felt compelled to recommend the adoption of a "Lawyers' Creed of Professionalism."[26] Among the specific credos contained in the ABA proposal are lawyer pledges to advise clients that meritless litigation should not be pursued, that alternative methods of resolving disputes may be appropriate, and that settlement discussions are consistent with effective representation.[27] Other pledges are directed to fairness in litigation tactics, including refraining from the use of delay tactics and excessive or abusive discovery.[28]

Other courts have noticed the unfavorable effect of this problem on the administration of justice. The United States District Court for the Northern District of Texas recently sat en banc to adopt standards of litigation conduct for attorneys appearing in civil actions before the court.[29] The district court used this unusual procedure to address a problem that it thought threatened to delay the administration of justice and to place litigation beyond the financial reach of litigants.[30] The court found that with alarming frequency, valuable judicial and attorney time is consumed in resolving unnecessary contention and sharp practices between lawyers. The court cited as an example the substantial attention judges and magistrates must devote to refereeing abusive litigation

25. For a general discussion of this phenomenon, see Sayler, *Rambo Litigation: Why Hardball Tactics Don't Work*, 74 A.B.A. J. 79 (1988). *See also* Goldberg, *Playing Hardball*, 73 A.B.A. J. 48 (1987).

26. *See* American Bar Association Committee on Professionalism, *In the Spirit of Public Service: A Reprint for the Rekindling of Lawyer Professionalism* (1986).

27. *Id.*

28. *Id.*

29. Dondi Properties Corp. v. Commerce Sav. & Loan Ass'n., 121 F.R.D. 284, 285 (N.D. Tex. 1988). While recognizing the power of the district court to adopt standards of attorney conduct, the court suggested that courts sanction attorneys who fail to comply with the standards of conduct proposed in the decision.

30. *Id.* at 286.

tactics that range from benign incivility to outright obstruction. Accordingly, the court set forth several standards to which it expects litigation counsel to adhere.[31] Violations of the standards will result in an appropriate sanction, ranging from a reprimand to monetary sanctions.[32] The judges of this state have the same responsibility and authority. We may take steps necessary to ensure that justice is not removed from the reach of litigants because improper litigation tactics interpose unnecessary delay.

In closing, I would only like to add that I will have been on the bench thirty years in December 1988, and in that time I have become acquainted with a great many judges from Illinois and elsewhere. I know that the vast majority of our judges are conscientious, hard-working individuals who perform their difficult duties well. I believe that the structure of our judicial system is one of the best in the country, but there are areas in which its operation can be improved. I am sure that each of you is just as interested as are the members of the Illinois Supreme Court in making those improvements. With your cooperation I have complete faith in our ability to do what needs to be done.

31. *Id.* at 287-88. Among other things, the standards provide that a lawyer owes candor, diligence and respect to the judiciary. A lawyer owes opposing counsel courtesy and cooperation, and must not allow ill feeling between clients influence the lawyer's conduct. The lawyer must treat adverse witnesses with fairness and due consideration. The lawyer must not use discovery to harass the opposing counsel or counsel's client, and the lawyer must be punctual. *Id.*

32. *Id.* at 288. The sanctions include those suggested in the context of rule 11. The court stated that the following sanctions are appropriate: "[A] warm friendly discussion on the record, a hard nosed reprimand in open court, compulsory legal education, monetary sanctions, or other measures appropriate to the circumstances." *Id.* (quoting Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 878 (5th Cir. 1988)).