

The Real Rules

Gerald Bowden #42530

Get your facts first, and then you can
distort them as much as you please

Mark Twain

I labor in twilight when it comes to knowing how the law really functions. I missed the course in law school where they revealed the Real Rules. The Real Rules don't even appear in the Maxims of Jurisprudence where terse and marvelously amusing profundities molder in quiet undisturbed repose.¹ There is, however, a secret cannon of legal rules known only to judges. These secret rules are handed down from one judge to another by something like apostolic succession. I know this because I have seen these secret rules leak out unbidden when judges lose concentration or I pretend not to listen.

The font of all revealed legal truth was a judge named Harry Brauer. He was always willing to spill the apostolic beans for the benefit of those of us who were uninitiated into the judicial priesthood. I once found myself in Judge Brauer's court summing up after a trial. Brauer, J. interrupted me: "Bowden," he said in his customary scolding tone, "your problem is you are in love with legal theories. I used to be in love with legal theories, and then I got appointed to the bench. I found out that judges want to do justice, and there is usually enough law and fact around to do it."

¹ My favorite: Civil Code §3537 "Superfluity does not vitiate"

That was perhaps the biggest news of my career. "You mean the only thing that matters to judges is getting the right result?" If everybody knew this about the way cases get decided, a lot fewer cases would go to trial. Lest you be misled, however, for all his confessional candor, Brauer never let the law escape his boney grasp. He was not among the vast majority of judges who are happy to abandon any inconvenient legal principle to reach a desired result. An eager willingness to jettison the anchor is the sovereign test for Black Robe Disease.

True Rule #1: The law is just something for lawyers to argue about.

Many years ago I was in Brauer's chambers for a hearing about the City Council's plan to mail an anti-nuclear war pamphlet with water bills at rate-payers' expense. The lawyer who wanted to prevent the mailing relied on a case that was wide of the mark but had some nice sounding chatter. I argued that his authority was *obiter dictum*. Judge Brauer's response: "The California Supreme Court has abolished the distinction between holding and dicta."

This revelation shined a laser-light on *stare decisis*.

True Rule #2: Stating a proposition in an opinion makes it the law, whether the issue was litigated or not.

A judge once set a case management conference (CMC) for a date close to the trial. Don't ask me why, but I appeared. When I got to court I found out the Clerk had cancelled the CMC without notice. In response to my contrite query, the Clerk told me she cancelled the CMC hearing because the court already knew the status of the case, i.e. it was going to trial the following week. She let me know in that patronizing "you dumb oaf" tone favored by officious clerks, that it is "foolish to do things that make no sense." In that case the thing that made no sense was holding the stupid CMC. Of course, silly me, I should have known.

This wonderful rule does not appear in the Rules of Court, but it should. I like this rule. I have never used it, but for the courageous it would make practicing law a lot easier. So, be my guest.

True Rule #3: Do only what makes sense, regardless of what the judge says.

True Rule #4: Courts are run for the convenience of their clerks

I once tried a statutory duty case. The Statement of Decision said: "... the Court believes the statute to be unrealistic." So did the Court of Appeal.

I practiced law for almost forty years before I even knew this nifty rule existed.

True Rule #5: If a statute is dumb enough the court gets to ignore it.

See True Rule #1.

I defended a public agency in a development fee case. Plaintiff relied on an exaction statute that applied only to local agencies. The agency's organic statute said it was "...a corporation of the state of California." I demurred. In overruling my demurrer, the court said:

"whether [the agency] has a dual designation, both as a state agency and a local agency...is a matter to be determined by the trier of fact."

That ruling went down like provender because:

1. An agency's legal status is a legal not a factual issue;
2. It is impossible to be both a state and a local agency; and
3. The judge's "dual status" theory, while deserving "extra credit" points for imagination, had not been pleaded or argued;

True Rule #6: The distinction between issues of law and issues of fact is an archaic academic construct without a practical difference in this modern world of situational relativity, nuance and subtlety.

See True Rule #1.

True Rule #7: Judges speak with divine infallibility (*ex cathedra*), even if they are stupid or demented.