JUDICIAL BEHAVIORAL STANDARDS FROM THE PERSPECTIVE OF LOWER COURT JUDGES

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Ever since the Fortas and Haynsworth nominations captured the interest of the country, attention has been focused on revising the Canons of Judicial Ethics. These canons were, in the main, formulated in the era of Chief Justice William Howard Taft in 1924. Interest in judicial conduct has been further stimulated by the new Code of Professional Responsibility recently drafted for the nation's lawyers by the American Bar Association. That Association has now started work on new standards for the judiciary.

President Segal of the American Bar Association appointed a Special Committee on Standards of Judicial Conduct in August, 1969.[1] The Committee, headed by former Chief Justice Roger J. Traynor of the California Supreme Court, has issued a Preliminary Statement and Interim Report on certain areas of the judicial function.[2] The Traynor Committee felt that the canons should be adjusted to meet modern demands. The initial effort of the Committee has been to concentrate on the areas of "conflict of interest, financial reporting and public disclosure, and nonadjudicatory activities of judges such as law teaching and serving as officers or directors on business corporations."[3]

As part of its survey, the Traynor Committee solicited a number of organizations and individuals to make suggestions on its work. One of the groups solicited was the National Conference of Special Court Judges, a new organization of judges created at the Annual Meeting of the American Bar Association in Dallas in 1969.[4] Basically, the members of this Conference include judges who preside over courts of limited jurisdiction such as Municipal Courts and Probate Courts, and persons who serve as federal magistrates and referees in bankruptcy.[5]

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[1] *See* 55 A.B.A.J. 843 (1969).

[2] ABA SPECIAL COMMITTEE ON STANDARDS OF JUDICIAL CONDUCT, PRELIMINARY STATEMENT and INTERIM REPORT (June 1970) [hereinafter cited separately as PRELIMINARY STATEMENT AND INTERIM REPORT]. This Report was issued in mimeographed form. Fourteen thousand copies were distributed prior to the annual meeting of the American Bar Association, held in St. Louis, Missouri, August 5-13, 1970.

[3] INTERIM REPORT 2.

[4] The National Conference of Special Court Judges is one of three Conferences affiliated with the Section of Judicial Administration of the American Bar Association. The judges, members of the Section who are not eligible for the Appellate Judges Conference or the National Conference of State Trial Judges, are automatically members of the National Conference of Special Court Judges.

[5] The judges replying to the questionnaire referred to in note 6, *infra*, represented the following types of courts: Municipal Court, District Court, County Court, Juvenile Court, Compensation Court, Law & Equity Court, Family Court, Magistrate Circuit Court, People's Court, Probate Court, Criminal Court, Civil Court, City Court, County & Surrogate's Court, Judicial Circuit-Magistrate Division, Court of General Sessions, Administrative Judge, and Referee in Bankruptcy.

In order to give the Traynor Committee the benefit of the thinking of the members of this Conference, the author submitted a questionnaire to the then existing membership.[6] Additionally, the author attended the annual conference of the Arizona Justices of the Peace in Tucson on May 15, 1970, and obtained answers to a similar questionnaire.[7] Members of both groups were asked to identify the types of activities they presently engaged in, the limits which they felt should be placed on judicial activities, and the type of financial disclosure rules which should be enacted. It is the purpose of this article to compare the views of these two groups of judges concerning standards of judicial conduct with the conclusions formulated by the Traynor Committee in its Interim Report.[8]

I

QUASI- AND EXTRA-JUDICIAL ACTIVITIES

The Special Court Judges and Justices of the Peace were asked to specify the type of judicial activities they engaged in outside of presiding in court, chambers work, or court committee matters. The Traynor Committee viewed these outside-of-court judicial activities as "quasi-judicial" and generally permissible. Within this classification, the Committee included teaching, writing, lecturing, and conducting seminars[9] as well as drafting, consulting, and testifying on legislation.[10] The judges reported they performed many more types of activities within this "quasi-judicial" area. Non-court judicial committees and marriages were suggested by 104 and seventy-eight of the 197 Special Court Judges and twenty-one of the thirty-five Justices of the Peace. The omission from the Interim Report of express consideration of marriages might be viewed an important oversight, as it has been found in at least

[6] Questionnaires were sent to 362 judges in January, 1970. Of these, 197, or 54.4 per cent, responded. This high level of response indicates the great degree of interest in this subject by judges. It is the author's experience that form-letter judicial surveys, even by judges to judges, are most often not replied to in great numbers.

Of those replying, 182 are employed full time in their judicial duties; only 15 were employed part time and some of the latter perform judicial duties from 4 to 6 hours per day. As many of the questions submitted called for multiple responses, the total number of responses to a particular question may exceed the number of respondents.

[7] There are approximately 100 Justices of the Peace in Arizona. Although they are required to meet in conference, only 35 received and returned the questionnaire. In many instances, not all questions were answered. The overwhelming bulk (94 per cent) of the Arizona Justices of the Peace are non-lawyers. Nevertheless, they perform many of the same judicial functions as Municipal Court judges and, in addition, the duties of a coroner. Their salaries range from $2,400 to $11,000 per year. Of the Justices of the Peace replying, 30 performed their duties full time, and only 5 part time.

[8] The Interim Report set forth ten conclusions for consideration by interested persons at the American Bar Association's Annual Convention in St. Louis. After the annual meeting, the Committee plans to make such revisions of the first conclusions as appear necessary and then study revisions of the canons in their entirety.

[9] Twelve Special Court Judges felt these activities were "quasi-judicial." Ninety-six felt they were "extra-judicial." See text at note 13 *infra*.

[10] INTERIM REPORT, Conclusion No. 2.

one jursdiction that some judges interrupted their trials, neglected their judicial duties, and received substantial fees in the aggregate for performing marriages.[11]

So far as committee work is concerned, it is clear that many Special Court Judges engage in such work outside of their own court committees. Some judges feel that such committee work, seminars, workshops and so on cause a decrease in the quality and quantity of the judge's work on the bench. There is another view, however, that some judges have to do more than their share because most judges fail to perform any quasi-judicial functions. The Traynor Committee should directly consider these two areas where the judges themselves feel they are putting in substantial amounts of non-court time.

The Traynor Committee paid specific attention to civic and charitable activities, classifying them as "extra-judicial."[12] The judges, when polled, reported many varieties of such activity. In descending order of importance, the Special Court Judges referred to civic and charitable organizations; speeches; teaching, lecturing, and writing; judicial and bar committees; and church work.[13] Up to 160 hours per month of extra-judicial activities were reported; but over fifty per cent put in ten hours or less per month, and one-third, from eleven to forty hours per month. Eighty per cent of the part time Special Court Judges reported law practice as one of their extra-judicial activities. The Justices of the Peace reported similar outside activities but with a greater accent on business and professions, which may reflect their low pay scales.[14]

The Traynor Committee expressed several caveats concerning extra-judicial activities. Among these were concerns that the judge not serve if it is likely that the organization will be engaged in proceedings in the judge's court or if serving will divert substantial time from judicial duties.[15] It also advised that judges not engage in raising or investing funds.[16] The judges who were surveyed were not asked how close their connections were with their extra-judicial activities and organizations, so it cannot be said at this time whether the caveats of the Interim Report are presently being followed.

II

LIMITS ON QUASI- AND EXTRA-JUDICIAL ACTIVITIES

The judges were requested to state what limits, if any, should be placed on a

[11] In California, legislation was enacted limiting the power of judges to perform marriages on weekdays for compensation: "Every judge . . . who accepts any money or other thing of value for performing any marriage, . . . whether the acceptance occurs before or after performance of the marriage . . . is guilty of a misdemeanor. . . . This Section does not apply to an acceptance of a fee for performing a marriage on Saturday, Sunday or a legal holiday." CAL. PENAL CODE § 94.5.

[12] INTERIM REPORT, Conclusion No. 3.

[13] Approximately 50 per cent engaged in civic, charitable, and speech-making activities.

[14] *See* note 7 *supra.*

[15] INTERIM REPORT, Conclusion No. 3.

[16] *Id.*

full time judge's extra-judicial activities. Their responses were quite varied, but basically fall into four main areas:

1) Listing those activities definitely to be proscribed, such as no political activity, no solicitation of funds;
2) Listing those activities which were felt to be acceptable, such as law teaching, charitable activities;
3) Formulating general standards on conduct, such as "no activities that reflect unfavorably."
4) Objecting to new standards of conduct, such as "no limits needed."

The greatest number of responses fell into the third category in the following three formulations: (a) nonconflicting activities were acceptable; (b) no restrictions were needed if the judge did not neglect his judicial duties; and (c) the judge should not engage in activities which would reflect unfavorably upon him or his court. To some extent, this type of response reflects the conclusions of the Traynor Committee, although it is difficult to determine what each judge felt would be "nonconflicting" or might "reflect unfavorably." The Interim Report commences by stating that the judge may engage in out-of-court activities if they do not reflect adversely on his impartiality or detract from his judicial energies.[17]

The Traynor Committee devoted substantial thought to the question of desirable limits. Each of its proscriptions is mentioned by some replying judge, but it cannot be said what the feeling of the judges is concerning all of the limitations recommended by the Interim Report. Obviously the substantial number of judges who want no limitations would disagree wholeheartedly with the Traynor Report. It would also appear that even those judges who would outlaw conflicting activities would differ from the Traynor Committee in its conclusions as to what activities actually conflict. It would appear, however, that the Interim Report does deal with activities which many judges believe important to the question of judicial ethics.

So far as the desirable limits on the activities of part time judges, the Traynor Committee is expressly silent.[18] The conclusions developed apply only to the full time judge. The greatest number of responses from the full time Special Court Judges was the same with respect to a part time judge's judicial activities as for a full time judge's activities, that is, activities of full or part time judges are acceptable if nonconflicting. The replies of the part time Special Court Judges

[17] INTERIM REPORT, Conclusions Nos. 1 & 2.

At the extremes, 14 per cent of the Special Court Judges' responses were to the effect that no limits should be prescribed, and 7 per cent felt they should engage in no nonjudicial activities.

Forty-six per cent of the part time Special Court Judges felt that there should be no special standards. The Justices of the Peace, even though most of those replying were full time judges, overwhelmingly sided with the part time Special Court Judges: 13 of the 22 felt no limits should be required. Obviously, the Interim Report disagrees with this "hands-off" attitude.

[18] PRELIMINARY STATEMENT 3.

and the Arizona Justices of the Peace were also similar: both groups expressed the greatest preference for no limits for a part time judge's activities.

The question of whether compensation of the judge has any bearing on the performance or nonperformance of extra-judicial activities was also explored with the judges. Both the Special Court Judges and the Justices of the Peace overwhelmingly felt that their answers on permitted and proscribed activities would be the same whether or not compensation was received.[19]

The Traynor Committee did not make a distinction based on the factor of compensation. The only reference to compensation and expense reimbursement was a general approval with the limitations that such payment be (1) reasonable, (2) the same as a non-judge would receive, and (3) from a proper source.[20] Additionally, the Committee would require such payments to be reported.[21] Thus it would appear that both the judges and the Committee adopted the same conclusion that the factor of compensation alone—leaving aside the question of the amount of compensation—is not significant in placing limits on a judge's activities.

III

FINANCIAL DISCLOSURE

One of the most critical areas in current debate, not restricted entirely to the judicial branch of government, is the issue of financial disclosure. The judges were approached on two separate facets of this problem: (1) whether they would be willing to report their financial transactions; and (2) whether such reports should be required. Surprisingly, the judges replying to the questionnaire were much more willing to file reports of financial transactions than the Traynor Committee wants to require. The judges were slightly less receptive to mandatory disclosure than to voluntarily reporting. The full time Special Court Judges, by a ratio of 3.5 to one, were willing to report their financial transactions and felt, by 2.5 to one, that some kind of report should be required.[22] This was one of the few areas where full time and part time judges significantly differed. The part time judges were willing to report on a six to one ratio, and this was duplicated by the Justices of the Peace. Contrary to the feeling of the full time Special Court Judges that reports should be required, both the part time Special Court Judges and the Justices of the Peace were very narrowly divided on whether reports should be required.[23]

[19] More than eighty per cent felt this way. The Special Court Judges felt their answers on acceptable activities would be the same with or without compensation by 112 to 32; Justices of the Peace, by 17 to 3.

[20] INTERIM REPORT, Conclusion No. 7(a).

[21] *Id.*, Conclusion No. 7(c)(d).

[22] Of the full time Special Court Judges replying, 131 expressed a willingness to file reports of financial transactions; 38 were not willing. Of those 38, 15 were willing to report transactions over a set dollar limit. 81 thought some report should be required, and 32 were opposed.

[23] The part time Special Court Judges split on the question of mandatory reports, with 4 in favor and 5 opposed. The Justices of the Peace were 10 in favor and 8 opposed.

The Report of the Traynor Committee suggests that the judge need *not* disclose the identity or extent of his investments or the income therefrom,[24] but that he must report his compensation and expense reimbursement from outside agencies.[25]

The positions of the judges are not as far from the Traynor Committee as might seem at first glance when it is taken into consideration the fact that the Traynor Committee calls for a public disclosure, whereas most judges were in favor of an in-house disclosure only.[26] The judges were asked to specify the agency to which financial reports should be made. The majority felt that disclosure should be primarily to a judicial body, while a minority suggested a court administrator, and the balance had many other suggestions.[27] The Traynor Committee suggested that the reports be filed as a public document with the clerk of the court.[28] Obviously the effect of making a report a public record is more pronounced on the judges than a private report kept within the judicial branch.

Along with their feeling that such financial reports should be made to a judicial body, the judges felt that access to these reports should be limited to a judicial body only. A minority felt that the public should have access.[29] The Traynor Committee makes such financial disclosures as it recommends open to access by the public.[30]

Lastly, the judges were asked to specify the circumstances under which such financial reports should be revealed to interested persons or the public. There was no discernible majority or plurality feeling in the replies. Of the 106 replying judges, the requirement of revealing the report upon complaint was most frequently suggested, but only from fifteen judges. There was more diversity of viewpoint on this question than on any other in the questionnaire. The Traynor Committee sidesteps the dilemma by making the reports it requires a public document, which ends the necessity to determine whether a complaint is well-founded or whether any body should exercise its discretion in opening the report to "interested persons" or the public.

IV

CONCLUSION

It would appear that the Traynor Report has reflected many of the same views

[24] INTERIM REPORT, Conclusion No. 6.

[25] INTERIM REPORT, Conclusion No. 7.

[26] *See* note 29 *infra.*

[27] Seventy-one preferred reporting to some type of judicial body; 31 to a court administrator; 5 to their immediate chief executive. Five favored reports to be filed of record; 9 to a bar committee; and 17 had miscellaneous suggestions.

The responses of the Justices of the Peace broke down as follows: 14 to a judicial body, 2 to the Board of Supervisors (their appointing body), and 3 miscellaneous.

[28] INTERIM REPORT, Conclusion No. 7(c).

[29] Sixty-one judges felt a judicial body should have access; 21 felt the public should have access; 15, the state bar; 7, at the court administrator's discretion; and 32 had miscellaneous suggestions. Four Justices of the Peace favored a judicial body; 2, the bar association; 2 would deny access to anyone; and 3 had miscellaneous views.

[30] INTERIM REPORT, Conclusion No. 7(c).

as do such diverse groups as the National Conference of Special Court Judges and the Arizona Justices of the Peace. The questionnaires to the judges have shown some areas, such as the performance of marriages and committee work outside of the judge's own court, where recommendations and standards are needed, and the judges have shown a greater willingness to report financial transactions than the Traynor Committee has so far suggested. If other judicial bodies respond in the same manner, the Traynor Committee might well raise its standards of reporting rather than lag behind the current level of acceptance by judges.