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Sir Matthew Hale and Modern Judicial Ethics

Matthew W. Hill

Do not take too seriously my being a member of the State Supreme Court. It is said that there is a certain resemblance between our court and a baseball team in addition to the number nine, and that is that on a baseball team when a pitcher can't get them over the plate they put him on the bench.

We are fully aware that so far as the image of our courts is concerned infinitely more people will receive their impressions from what happens in trial courts than from what happens in ours. In disposing of some 380 to 400 appeals a year, I doubt whether more than 80 to 100 litigants are actually present in the courtroom during an entire year. Some judges will have that many in their courtrooms in a single day. Certainly, we are all a part of the same team trying our best. It is important for the judiciary at all levels to see not only that justice is done, but that it appears to be done. A kangaroo court may really reach a just result, but it's hard to make anybody believe it.

Unfortunately, there must of necessity be some overlapping between what Judge Charles Stafford said about the "Image of the Court" and what I have to say about the "Canons of Ethics." The only way for the courts to have a good image is for the judges to take seriously the Canons of Judicial Ethics.

There are 36 of the Canons, and they may be found in Volume 34 of the Washington Reports at pages 145-158.

Some 300 years ago there was a Lord Chief Justice of the Court of the King's Bench, Sir Matthew Hale, who wrote out for himself some 18 "Things Necessary to be Continually had in Remembrance."

The publishers of *Corpus Juris Secundum* have made copies available on an 8½" x 12½" parchment. They are suitable for framing, but I keep mine in my desk drawer where I have to take a look at it every time I open the drawer. They are significant in that if you

adhere to them it is most unlikely that a judge would materially err, even though three centuries have passed since they were written. Most have their counterparts in the modern Canons, but several are quite distinctive; the last one is "To be short and sparing at meals, that I may be fitter for business."

That is a warning against a heavy lunch for a judge who is going to be hearing arguments on a warm afternoon. There is a common story about the judge who dreamed he was trying a case and, when he woke up, he was!

Again, Sir Matthew Hale: "That in the execution of justice I carefully lay aside my own passions, and do not give way to them, however provoked."

I would caution that there are those who will deliberately try to provoke a short-fused judge to get some error into a record.

Then Sir Matthew Hale goes on: "That I be wholly intent upon the business I am about, remitting all other cares and thoughts as unseasonable, and interruptions."

In short, get lost in the case at hand; any particular case may never make the headlines, but it is important to the litigants.

Again he says: "That I suffer not myself to be prepossessed with any judgment at all, till the whole business, and both parties be heard."

"That I never engage myself in the beginning of a cause, but reserve myself unprejudiced till the whole be heard."

IMPARTIALITY AND OPENMINDEDNESS

Some of our present day Canons are but restatements of these precepts—stressing the necessity of impartiality and open mindedness until all parties have been fully heard.

The Canons warn against any interference in the course of a trial, except to keep the train on the track. I am afraid stories of judges who take over the examination of witnesses

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are plentiful. I will always remember one such occasion when exasperated counsel interrupted such an examination with the statement: "Your Honor, this case means a great deal to me; if you are going to try it, be very sure you win it."

Sir Matthew Hale warns that a judge should "be not biased with compassion for the poor or favor to the rich, in point of justice." And we still charge our juries to the same effect! Of course, I do not commend the impartiality of the judge who announced at the beginning of a trial that he had received \$5,000 from the plaintiff and \$10,000 from the defendant, and that he was returning \$5,000 to the defendant and would decide the case on the merits.

We may laugh at that because we think it can't happen to us. Very very seldom is there any deliberate attempt to bribe a judge; but the 32nd Canon warns against the acceptance by a judge of any presents or favors from litigants or lawyers, or from those whose interests are likely to be submitted to him for judgment.

Sir Matthew says, "To abhor all private solicitations, of what kind soever, and by whom-soever, in matters depending."

The Canons make it very clear that not only should there be no impropriety but that there should be no conduct which could arouse doubts—the judge of any court, like Caesar's wife, should be above suspicion. I quote Canon 4:

A judge's official conduct should be free from impropriety and the appearance of impropriety; he should avoid infractions of law; and his personal behavior, not only upon the bench and in the performance of judicial duties, but also in his every day life, should be beyond reproach.

Sir Matthew says that things in court should be done: (1) Uprightly; (2) Deliberately; (3) Resolutely. Canon 7 adds "Promptly."

A judge should be prompt in the performance of his judicial duties, recognizing that the time of

litigants, jurors and attorneys is of value and that habitual lack of punctuality on his part justifies dissatisfaction with the administration of the business of the court.

Not only should courts convene promptly, but the hearings and the trial should proceed promptly. Rulings should be made promptly, and cases should be decided promptly (preferably at the conclusion of the trial, but concededly that is not always possible).

WITHHOLD SALARIES

There have been legislative attempts to secure promptness by withholding salary payments until a judge can make an affidavit that certain statutory requirements as to promptness have been met.

Whether the case is decided from the bench at the conclusion of the trial, or decided in a written opinion, Canon 19 says that the judge's opinion should make it clear that he understands the issues presented and that he has not overlooked any serious argument of counsel. This avoids the suspicion of arbitrary conclusions.

Lawyers are the world's worst procrastinators. A procrastinator is one who puts off until next week what he should have done several months ago. To all generalities there are of course exceptions, but Canon 18 recognizes that delay in the administration of justice is a common cause of complaint, and that counsel are frequently responsible for the delay, and urges that judges, without being arbitrary or unreasonable, be chary of continuances and endeavor to hold counsel to a proper appreciation of their duty to dispatch diligently the business before the court.

The admonitions of Sir Matthew Hale and the Canons on the matter of sentencing are especially noteworthy. The Canons warn against the bizarre, the spectacular or sensational:

Though vested with discretion in the imposition of mild or severe sentences, he [the judge] should not compel persons brought before him to submit to some humiliating act or discipline of his own devising, without authority of law, because he thinks it will have a beneficial corrective influence.

In imposing sentence he should endeavor to conform to a reasonable standard of punishment and should not seek popularity or publicity either by exceptional severity or undue leniency.

And 300 years ago it was written that popular applause or distaste should have no influence upon anything a judge does "in point of distribution of justice," and he should not be concerned about "what men will say or think, so long as I keep myself exactly according to the rules of justice."

AVOID POLITICS

Almost 60 years ago, we, in Washington, took the judiciary out of politics. Canon 28, regardless of state laws on the matter, says that the judge must eschew participation in politics, because it is inevitable that suspicions of being warped by political bias will attach to the judge who is active in politics. This does not imply that he is not entitled to entertain his personal views on political questions, or that he surrenders his right or opinions as a citizen.

This, naturally, leads to the next Canon which points out the impropriety of a judge using his judicial position to promote a candidacy for any office.

Finally, or at least next to finally, the Canons

point out that the judge is responsible for the conduct and attitude of the clerks, bailiffs, reporters, and others who serve in the court with him; and that conduct and the attitude should be centered on the idea that "courts exist to promote justice, and thus to serve the public interest;" being always aware that the courts are made for the litigants, and not the litigants for the courts. When, in this last suggestion from Sir Matthew Hale, which I shall quote, he uses the word "servants," he is speaking of clerks, bailiffs, and other court attaches. He charges his "servants":

1st, not to interpose in any business whatsoever;
2nd, not to take more than their known fees;
3d, not to give any undue precedence to causes;
4th, not to recommend counsel.

And in the intervening 300 years, we haven't said it any better.

I close with the 34th Canon, which is by way of being "A Summary of Judicial Obligation":

In every particular his conduct should be above reproach. He should be conscientious, studious, thorough, courteous, patient, punctual, just, impartial, fearless of public clamor, regardless of public praise, and indifferent to private, political or partisan influences; he should administer justice according to law, and deal with his appointments as a public trust; he should not allow other affairs or his private interests to interfere with the prompt and proper performance of his judicial duties, nor should he administer the office for the purpose of advancing his personal ambitions or increasing his popularity.