1974

A Constitution for the Courts: The Standards in Summary

Geoffrey C. Hazard Jr.
UC Hastings College of the Law, hazardg@uchastings.edu

Author: Geoffrey C. Hazard, Jr.

Source: Judicature

Citation: 58 Judicature 34 (1974).

Title: *A Constitution for the Courts*

A Constitution for the Courts

The Standards in Summary

Geoffrey C. Hazard, Jr.

The Standards relating to Court Organization approved by the American Bar Association House of Delegates in February, 1974 represent a comprehensive program for improvement of court systems throughout the country. The standards deal with six principal topics: a unified court system; selection and tenure of judges and judicial officers; court rule-making power and administrative authority; organization of court administrative services; financing and budgeting for court systems; and court records, statistics, and information systems.

This article gives an overview of these six topics and their relationship to each other. It is important to recognize, however, that these topics, broad and important as they are, do not encompass the entire subject of judicial administration. Nor have they exhausted the responsibility assumed by the ABA Commission on Standards of Judicial Administration. The important matters that the Commission is still working on include administrative procedures and techniques for the trial court, and similar matters for appellate courts. The Commission hopes to have proposed Standards Relating to Trial Courts ready for general public discussion within the next several months.

Returning, then, to the Standards Relating to Court Organization, it may be said that they represent the constitutional structure of a modern court system. That is, they define the basic organization for an effective court system, the aims and methods of selecting qualified judges and auxiliary court staff, and the kinds of administrative services that such a court system requires to function under the demanding conditions of the present day.

Geoffrey C. Hazard, Jr. is a professor at Yale Law School and Reporter for the ABA Commission on Standards Relating to Judicial Administration.

The basic concept in court organization is that of a unified court system.[1] A "unified court system" means one that is organized into jurisdictional levels that are simple and uniform, and which operates under the central direction of the chief justice of the state's highest court.

The Standards recommend a very simple court structure: a supreme court at the top, an intermediate appellate court where necessary, and a single trial court. All the judges at all levels of jurisdiction would be members of the judiciary of the state, responsible to the court system as a whole as well as to the individual court in which they sit.

It is recommended that the rules of procedure be uniform throughout the system, and that there be similar uniformity in rules and policy of court administration, including such details as uniformity of forms and administrative records. In addition, there should be continuing education programs for judges and auxiliary court personnel, organized on a uniform basis throughout the system.

A major aspect of the unified court system relates to a unified trial court.[2] The concept of consolidating all original jurisdiction into a single trial court had been advocated for a good many years by recognized authorities on judicial administration,[3] and was implicitly endorsed by the National Conference on the Judiciary, held in Williamsburg in 1971. The adoption of this proposal by the American Bar Association, it is to be hoped, will lead to implementation of this important reform

1. ABA COMM. ON STANDARDS OF JUDICIAL ADM., STANDARDS RELATING TO COURT ORG., § 1.10 (Final Draft 1974). [hereinafter cited as ABA].
2. Id. § 1.12
3. Pound, *The Administration of Justice in the Modern City*, 26 HARV. L. REV. 302 (1913); *Compare* Am. Jud. Soc., AN ASSESSMENT OF THE COURTS OF LIMITED JURISDICTION (1968); Consensus Statement, Nat'l. Con. on the Judiciary, in JUSTICE IN THE STATES 265 (1971).

throughout the country.

The idea of the single trial court has in the past encountered some opposition from judges of trial courts of general jurisdiction. These judges are fearful that they may be "compelled to try traffic cases," as their concern is frequently expressed.

Yet the Standards clearly demonstrate that it is possible to unify the trial court into a single tribunal without requiring experienced judges to devote attention to matters that do not require the attention of a full-fledged judge. As the report states, "trial court unification does not imply that all trial-court cases should be tried in the same way or according to the same procedures."[4] At the same time, "establishing a single trial court affirms the importance of administering justice on the basis of generally shared interpretations of the law and generally shared conceptions of fairness and substantial justice."[5]

MERIT SELECTION

The second major topic covered in the Standards concerns the selection and tenure of judges.[6] The procedure recommended for selection of judges is the familiar merit plan, sometimes also known as the "ABA Plan." For every judicial position, as it becomes vacant, a nominating commission composed of judges, lawyers, and members of the lay public nominates at least three qualified candidates. From these, the chief executive must choose a judge.[7] Provision is made that, should the chief executive fail to make a nomination from the list within a stipulated time, then the chief justice shall make an appointment from the list. In large states, regional nominating commissions may be established on the same principles. The slow but steady adoption of judicial merit selection should gain substantial impetus from this reaffirmation by the ABA.

In addition to the procedure for selection of judges, the Standards prescribe their qualifications. It is believed that this is the first time an effort has been made to specify qualifications for judges in legislative terms.[8] Although the definition is necessarily somewhat general, it appears to come closer to particularizing what is meant by a "good judge" than many members of the bench and bar might have supposed is possible. The definition is as follows:

> All persons selected as judges should be of good moral character, emotionally stable and mature, in good physical health, patient, courteous, and capable of deliberation and decisiveness when required to act on their reasoned judgment. They should have a broad general and legal education and should be admitted to the bar. They should have had substantial experience in the practice, administration, or teaching of law for a term of years commensurate with the judicial office to which they are appointed.[9]

The Standards further provide that:

> Persons selected as trial judges should have had substantial experience, preferably as judges or judicial officers in other trial courts, or as trial advocates, and in any event should have had experience in the preparation, presentation, or decision of legal argument and matters of proof according to rules of procedure and evidence.[10]

With respect to appellate judges, the Standards provide that:

> The selection of appellate judges should be guided by the aim of having an appellate bench composed of the individuals having a variety of practical and scholarly viewpoints, including some with substantial experience as a trial judge. Persons selected as appellate judges preferably should have high intellectual gifts and experience in developing and expressing legal ideas and facility in exchanging views and adjusting differences of opinion.[11]

No doubt thoughtful critics may find just quarrel with some nuances of these definitions. At the same time, it is submitted that the definitions represent significant advance in the age-old endeavor to express what is meant by a "good judge".

The Standards concerning the selection and tenure of judges also provide a procedure for discipline and removal of judges who may be

4. ABA to § 1.12(a)
5. ABA to § 1.11(b)
6. ABA § 1.20-1.25
7. ABA § 1.2.(b)

8. *Compare* Jones, *The Trial Judge—Role Analysis and Profile,* in THE COURTS, THE PUBLIC AND THE LAW EXPLOSION (Junes, ed. 1965); Rosenberg, *The Qualities of Justice—Are They Strainable?,* in SELECTED READINGS: JUDICIAL SELECTION AND TENURE (Am. Jud. Soc. 1967).
9. ABA § 1.21(a)
10. ABA § 1.21(a) (i)
11. ABA § 1.21(a) (ii),

guilty of serious misconduct.[12] The procedure, based on a pattern originated in California and now adopted in a number of states, calls for establishment of an independent board of judicial inquiry charged with the responsibility of investigating, hearing, and making recommendations concerning charges of misconduct by judges.

The board, consisting of judges, lawyers and members of the general public, would proceed on a confidential basis until completion of a formal hearing, in which case its report and recommendation would become a matter of public record if it recommends disciplinary action. The recommendation would be transmitted to the state's highest court, which thereupon must make the final decision. This procedure combines elements that have proven effective in several court systems and represents an indispensable improvement on the traditional device of judicial impeachment.[13]

Other provisions concerning tenure of judges include ones designed to assure that judges are adequately compensated, and a provision requiring judges to retire at age 70, subject to recall for continued service, with their consent, as senior judges.[14] In addition, it is recommended that continuing judicial education be a routine aspect of every judge's professional career and that organized programs for this purpose be part of the court system's regular operations.[15]

An aspect of the provisions concerning judges has to do with parajudicial officials. The Standards provide detailed recommendations concerning the appointment and functions of court officials denominated "judicial officers".[16] This term is used to include magistrates, commissioners, referees, hearing officers, auditors, and similar officers now employed in court systems in various parts of the country. The Standards require that judicial officers have qualifications substantially similar to those specified for judges; that they be selected on a merit basis by a procedure involving examination and open competition; and that after an initial probationary period they have security of office so long as they faithfully and effectively perform their responsibilities.

It is contemplated that the wider use of judicial officers could at the same time facilitate the adoption of the unified trial court, by providing qualified parajudicial officers to hear preliminary matters and, in appropriate situations, summary proceedings and short causes.[17] Their assistance could also save the time of regular judges in dealing with routine judicial matters.

RULES AND POLICY

Another group of topics covered by the Standards relates to rule-making, policy-making, and administration. Three general concepts are expressed in this regard. The first is the familiar one that the courts should have rule-making authority—that is, the power to prescribe rules of procedure in both civil and criminal cases for all courts within the system.[18] In the exercise of this authority, the Standards provide that the courts should use the services of consulting committees and of staff research and drafting services. The Standards in this respect draw upon the rule-making experience of the United States Supreme Court for the Federal system, and the comparable procedures now widely employed by state courts that have rule-making authority.

A second concept concerns formulation of administrative policy as distinct from procedural rules. The Standards recognize that the considerations involved in formulating regulations for the internal administration of courts are somewhat different from those involved with rules to govern the procedure in individual cases. Accordingly, the Standards differentiate between administrative policy-making, which is to be an internal function of the court system itself, and rule-making, in which the bar and representatives of the general public should directly participate.

It must be acknowledged that this division could, under unfortunate circumstances, result in conflict between the rule-making function and that of administrative policy-making.

12. ABA § 1.22.
13. *See* Braithwaite, WHO JUDGES THE JUDGES? (1971); AM. JUD. SOC. SELECTED READINGS: JUDICIAL DISCIPLINE AND REMOVAL (1969).
14. ABA § 1.23, 1.24.
15. ABA § 1.25
16. ABA § 1.26
17. ABA to § 1.12(b)
18. ABA § 1.31

There is no escaping this risk, however, so long as it is regarded as essential that the bar and the public have a right of direct participation in rule-making and no such right as far as the internal affairs of the courts are concerned. At the same time, under the recommendations of the Standards, the court system, and particularly the chief justice, has sufficient involvement in both rule-making and administrative policy-making so that effective coordination between the two procedures should be readily achieved.

A third concept is that of administrative authority. The Standards recognize the important difference between *making* administrative policy—for example concerning calendars, assignment of judges, and the like—and carrying it out. In general, the distinction may be likened to the difference between legislation and administration in the domain of government generally. The general principle is that the carrying out of policy—that is, administration—should be the responsibility of specific individuals in a chain of administrative authority, beginning with the chief justice at the top. As the Commentary to Section 1.33 states,

> Court systems now depend on their survival on vigorous administrative direction to guide and coordinate effort, to monitor what the system is doing, and to maintain satisfactory working relationships with external organizations. Responsibility for supervision of the court system should rest principally on a chief justice selected and holding office on a basis that makes such direction possible. The chief justice should be selected for his administrative ability, as well as his ability to provide intellectual and professional leadership to the state's highest court . . . The considerations concerning selection, tenure, and responsibilities of the chief justice are applicable in their essentials to presiding judges and associate presiding judges.[19]

It is therefore provided in the Standards that not only should the chief justice exercise general administrative authority over the court system as a whole but that each subordinate court unit—appellate court or multi-judge trial court—should have its own presiding judge, charged with like responsibility within his own court.[20]

The last three topics in the Standards relate to supportive services and procedures necessary for effective administration of the court system.[21]

The first concerns the court administrative office itself. The Standards provide for creation of a statewide administrative office, headed by an executive director who is appointed by the chief justice with the advice and consent of the judicial council. The administrative office is responsible for all nonjudicial personnel, financial administration, management of continuing education programs for judges and court staff, developing and managing records and information systems, maintaining liaison with other branches of government and with the news media, and for research and planning for future needs.[22]

The Standards contemplate the possibility of a court system having, where needed, an "information officer" to provide accurate and specific information for the news media and the general public concerning the activities of the court system. Many court systems believe that such an officer is a necessity now that so many activities of the courts have become matters of public notice and discussion.

The Standards have parallel provisions concerning administrative offices for trial courts.[23] It is recognized that care must be taken to define the relationship between the central administrative office and that serving each court. As Section 1.40 states,

> The central administrative office should be primarily responsible for assisting in development of policy, budgeting, development of record systems and statistics, and planning for the court system as a whole. The administrative offices of the individual court units, corresponding to the organization of the court system itself, should be primarily responsible for assisting with calendar management, office and housekeeping operations, and the management of auxiliary services in the courts that they serve.

Provisions are made for selection, management, training, and security in office of administrative staff personnel.[24] The recommendations call for a staff that is responsible to the courts, is selected on a merit basis, and enjoys protection from arbitrary discipline or dis-

19. ABA to § 1.33.
20. ABA § 1.33
21. ABA § 1.40.
22. ABA § 1.41(a)
23. ABA § 141(b)
24. ABA § 142-1.44.

charge. The underlying theme is that the courts need high quality supporting staff as well as high quality judges.

The second basic element of administration concerns finance. On this subject, the Standards recommend that, as soon as and to the extent feasible, the financing of a state's court system should be taken over at the state level, rather than continuing to be dependent on local government as it now is in most jurisdictions. In addition, it is recommended that "the financial operations of the court system should be administered through a unified budget in which all revenues and expenditures for all activities of all courts in the system are presented and supervised."[25] This recommendation recognizes that financial management is an indispensable companion to effective administration, serving both as a means of directing effort in the first place and of assessing efforts as reflected in its expenditure patterns.[26]

Preparation of the budget should be the responsibility of the central administrative office, and the judicial branch should present the budget directly to the legislature without being obliged to subject its requests to reductions ordered by the executive branch.[27] This position derives from the premise that the judicial branch of government is co-equal with the legislature and the executive, and that as such it should be allowed to make its case for funding directly to the legislature without subordination to the wishes of the executive. At the same time, the Standards recognize that ultimate responsibility for providing adequate financing for the courts rests in the hands of the legislature, as the branch of government having the power of the purse.

The third basic administrative element is a records and information system.[28] The Standards establish a set of objectives and a method of analysis by which court systems can evaluate their present record-keeping and can go about developing an efficient records and information system.

It is obviously impossible to prescribe forms and records that would be usable in all jurisdictions, because records and statistical formats depend on local procedure and local needs. At the same time, it is possible to state the objectives of a records and information system and the concepts that should guide its development and use. As the Commentary states,

> The essential questions are whether the system provides court officials and others who need it with the information they need, when they need it, in reliable and easily usable form, at the lowest possible cost and with minimal duplication of effort. Each court system should critically examine its information-processing procedures in light of these principles.[29]

In this connection, the Standards deal with the question of computerization.[30] They recognize that computerization of records can be helpful in certain circumstances, but also that computers are no panacea in court administration. Many court administrative procedures can be accomplished efficiently with less expensive, though less exotic, information processing procedures. For example, many court systems could be vastly improved by using simple copying techniques (carbon or photocopying) to reduce the number of times that the same information is re-recorded by hand under existing procedures. At the same time, hasty and ill-considered adoption of a computerized information system for a court can result in serious difficulties. "Attempts to introduce such changes without careful preliminary planning and experimentation often lead to frustration of hopes and to introduction of chaos into existing records and procedures."[31] Accordingly, the Standards set forth a step-by-step method of analyzing a court's records and information system needs and a procedure for developing their improvement.

Taken as a whole, the Standards Relating to Court Organization attempt to state principles, procedures, and techniques that have stood the test of experience around the country. At the same time, the Standards represent a formidable agenda for court improvement: No jurisdiction now fully achieves what could be accomplished if the standards were implemented. That task lies ahead. □

25. ABA § 1.50
26. ABA § 1.52.
27. ABA § 1.51.
28. ABA § 1.60
29. ABA to § 1.60.
30. ABA § 1.63.
31. ABA to §1.63.