

The Propriety of Off-Bench Judicial Writing or Speaking on Legal or Quasi-Legal Issues

The Honorable Albert Tate, Jr.*

"A Judge May Engage in Activities to Improve the Law, the Legal System, and the Administration of Justice." American Bar Association Code of Judicial Conduct, Canon 4 (1972).

Canon 4 contemplates that, in the interest of law improvement, a judge may speak and write for public and professional consumption on legal or quasi-legal issues. He may do so even though the issues may come before him in future litigation, and even though the issues may be the subject of public and political disagreement, *i.e.*, be controversial. The focus of this paper concerns questions of propriety that may arise when the judge engages in public, off-bench communication of this character.

We shall discuss these propriety questions in the light of specific illustrations. Before doing so, however, we should sketch briefly the context of the entire Code of Judicial Conduct in which the questions arise. The Code is designed to provide principles by which the judge should uphold the integrity and independence of the judiciary, as indispensable to justice in our society.¹ The cardinal principle is that the judge should avoid impropriety or even the *appearance* of impropriety in all his activities, judicial or personal.²

Thus, a judge should not only perform his judicial duties with impartiality and diligence;³ he must also regulate his extra-judicial activities of a nonlegal nature so as to minimize the risk of conflict with his judicial duties, the risk of detracting from public respect for the disinterested dignity of the office, and the risk of subjecting himself to improper influences or even the appearance of being so subjected. In this regard, the canons specifically refer to advocational,⁴ civic-charitable,⁵ financial,⁶ and inappropriate political⁷ ac-

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1. ABA CODE OF JUDICIAL CONDUCT [hereinafter cited as JUDICIAL CODE], Canon 1 (1972).

2. JUDICIAL CODE, Canon 2.

3. JUDICIAL CODE, Canon 3.

4. JUDICIAL CODE, Canon 5A.

5. JUDICIAL CODE, Canon 5B.

tivities. Excepted from the prohibition against political activity, however, is the judge's candidacy for and service in a state constitutional convention⁸ and his active participation "on behalf of measures to improve the law, the legal system, or the administration of justice."⁹

As contrasted with the prohibitions of the other canons, Canon 4 permissively encourages the judge to engage in law-improvement activities. The commentary to the canon articulates its reason:

As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that his time permits, he is encouraged to do so. . . .¹⁰

Nevertheless, the other (prohibitory) canons do furnish indicia as to potential limits implied by this canon's encouragement of quasi-judicial, law-reform, public pronouncement by the judge. Essentially, in addition to the neglect of his judicial duties, the two "propriety values" which the judge must take into consideration in speaking or writing for law-reform are: (1) the interference, or *seeming* interference, with his impartiality in cases that he must decide and (2) the impairment of respect for the judicial office.¹¹

In the context of the other canons, the latter propriety value may raise concern where the judge's activities or utterances may involve his court in political controversy. Also of concern are those statements which, by the nature of the topic or the degree of the judge's advocacy, may detract from his perceived role as a judicial expert contributing to law-reform—in contrast with a disapproved role as a political advocate actively campaigning for or against a controversial proposal hotly disputed in the political arena. One further qualification may be supposed: the closer the issue is related to judicial administration and procedure (lawyer-business), the less

6. JUDICIAL CODE, Canons 5C and 6.

7. JUDICIAL CODE, Canon 7.

8. JUDICIAL CODE, Canon 7A(3).

9. JUDICIAL CODE, Canon 7A(4).

10. JUDICIAL CODE, Canon 4 Commentary.

11. See E.W. THODE, REPORTER'S NOTES TO CODE OF JUDICIAL CONDUCT 74-77 (1973); McKay, *Judges, the Code of Judicial Conduct, and Nonjudicial Activities*, 1972 UTAH L. REV. 391; McKay, *The Judiciary and Nonjudicial Activities*, 35 L. & CONTEMP. PROB. 9 (1970).

likely is the judge's energetic expression and advocacy to be regarded in derogation of this propriety value. A judge's active support of merit-selection of the judiciary, for instance, may not be regarded as inappropriate, even though highly controversial, whereas off-bench activities directed at abolition of capital punishment might be the subject of propriety criticism.¹²

A. "Impartiality" Values

Despite the opposing view, I agree with the proponents of Canon 4 that,

a judge may write or lecture on a legal issue, analyzing the present law and its history, its virtues and its shortcomings; he may commend the present law or propose legal reform without compromising his capacity to decide impartially the very issue on which he has spoken or written.¹³

The judge may, as a dispassionate scholar or reformer, espouse one view of the law; nevertheless, in the performance of his judicial duty to decide a controversy, he may with equal conscientiousness decide the issue in accordance with his dispassionate view of what the law is, not necessarily on the basis of his opinion of what it *should* be.

An instance of the potential conflict between an off-bench expression and judicial duty occurred during my first year as an intermediate appellate judge.

At a well-attended law school seminar for the practicing bar I had discussed and, I thought, resolved conflicting jurisprudence concerning prescription of an admittedly disabled workman's claim for compensation benefits. The suit was untimely unless *wages* paid during his retained employment could be considered payments in lieu of *compensation*, thus suspending prescription (*i.e.*, the statute

12. Would less propriety criticism be leveled against a judge who, to the contrary, spoke in favor of retaining capital punishment and who opposed attempts to abolish it? Might there be a different standard? If so, does this suggest that propriety considerations sometimes arise because of the popularity or unpopularity of the reform in the climate of the time? But there is one further consideration: what if, because of its unpopularity, no elected official is willing to take a stand in favor of a proposal which a judge, from his unique experience and point of view, feels deserves serious consideration? Might the balance of values support the judge's opening a public dialogue of the issue, despite its controversial nature, in the absence of espousal by those government officers less directly concerned with the legal system than the judge himself?

13. E.W. THODE, *supra* note 11, at 74.

of limitations). Early jurisprudence to this effect was cast into doubt by later state supreme court decisions which denied compensation credit for wages earned, as well as by decisions which forbade wages to be considered as workmen's compensation so as to bar as premature the disabled employee's suit. At the seminar, in the light of these decisions, my analysis led to the conclusion that the payment of wages could no longer be considered compensation payments so as to avoid the accrual of prescription.

Six weeks after the seminar I heard a case on appeal that presented the identical issue. In dismissing the suit as untimely, the trial court had independently made an analysis of the later supreme court cases identical with mine at the seminar. The attorney for the defendant quite confidently commented in oral argument that the suit was obviously prescribed, referring to my seminar lecture (at which he had been present).

At our post-hearing conference following argument, I told my two senior colleagues that I thought affirmance of the dismissal was required. They both disagreed, stating that they could not believe that the "premature" or the "credit" jurisprudence had overruled the earlier (and equitable) holdings that the payment of wages to a retained but disabled employee should be considered as compensation payments for "prescription" purposes. Researching the issue again—this time as a judge with responsibility to decide a prescription issue, not of a nonjudicial analyst deducing prescription answers from prematurity and credit decisions—I ultimately concluded that my colleagues were right and that the suit was not prescribed.¹⁴

I do not mean that it is easy for a judge to reject, for decisional guidance, his formal off-bench expressed view of the law, if the issue subsequently arises before him in litigation. Nor am I sure that a judge *should* be concerned about reevaluating his position in the absence of some new consideration or pretending he has a completely open mind on the issue, any more than if his views had been expressed in a concurring judicial opinion similarly designed to influence the future development of the law.

In my own case, for instance, I once deliberately published an article in order to clarify and correct judicial interpretations, with the hope and intent that it would be persuasive for more rational development of the law as to the procedural issue involved. The

14. *Scalise v. Liberty Mut. Ins. Co.*, 84 So. 2d 88 (La. Ct. App. 1955).

Louisiana Code of Civil Procedure, adopted in 1960, incorporates from the federal rules liberal policies permitting much more liberal amendment of pleadings than did our former Code of Practice of 1870. For several years after 1960, however, the bar continued to cite restrictive decisions interpreting the 1870 Code to us; indeed, these superseded interpretations were sometimes followed by our courts. I therefore thought it appropriate to write a law review article to contrast the approaches of the two codes, which also criticized what in my view were incorrect interpretations by post-1960 amendment decisions.¹⁵ Subsequently these views were adopted by courts on which I sat,¹⁶ as well as by other courts.

When the issue arose before my court, I do not think that I would have lightly concluded to the contrary of the views expressed by my law review article, any more (or less) than if they had been expressed by me in a majority, concurring, or dissenting opinion in the course of judicial decision. In my mind, since these were my considered views (which, if correct, were in my view properly available for persuasion of the bar and of other judges), it was appropriate for me to discuss them in the interest of law improvement through a published law review article. Nevertheless, I am aware that some might feel that the prejudgment, so reflected extrajudicially, might raise a propriety consideration as to my impartiality in a subsequent decision concerning the issue.¹⁷

Let us go a step further. What if a judge publicly expressed off-bench views that the harshness of penalties in drug cases was unrealistic and unjust; that, for instance, marijuana possession should receive light penalties, if criminalized at all? The changes suggested obviously require action by the legislature; theoretically they could not influence the judge's decision of cases under existing law. Although controversial in the view of many, the expression of these views might be seen as motivated by a dispassionate concern for improving the legal system, whether made by an academic or by a

15. Tate, *Amendment of Pleadings in Louisiana*, 43 TUL. L. REV. 211 (1969).

16. See, e.g., *Nini v. Sanford Bros., Inc.*, 276 So. 2d 262 (La. 1973).

17. Query: Would different propriety considerations be involved if the law review commentary called for strict liability for defects in prepackaged goods sold by commercial retailers? Would different propriety considerations apply as to this call for *substantive* change in the law through judicial interpretation? I have more doubts as to the propriety of such expression, although I am inclined to think it is permissible under appropriate circumstances. The preponderant professional sentiment would probably disapprove, however.

judge. The judicial officer with solely civil jurisdiction is less likely to have questions of his partiality later arise in the performance of his judicial duties proper. The judge with criminal jurisdiction, on the other hand, whose caseload includes a volume of these drug prosecutions, is more likely to have the expressions of his views attacked on propriety considerations; and his actions in actual drug cases (*e.g.*, suppressing seizures or holding that the state has not met its burden of proving possession with the intent to distribute, a felony) are more subject to be questioned as "politically" rather than "judicially" motivated.

Needless to state, the more closely related is the judge's pronouncement to issues in a pending case, the more likely it is that propriety considerations should inhibit comment. For instance, his public explication of abstract views becomes improper if related to specific litigation: "A judge should refrain from public comment about a pending or impending proceeding in any court."¹⁸

B. "Respect for the Judiciary" Values

The contrasting poles of these values involve the stance of a disinterested judicial expert versus that of a warring advocate in the political arena. The opposing connotations may arise from a number of factors. I will attempt to list some factors which immediately suggest themselves.

1. *The subject-matter.* Judicial expressions concerning process (lawyer-business) are less likely to be perceived as inappropriate than those concerned with substantive change in principles of criminal or civil law, which are more likely to be considered political business.

2. *The degree of present public interest or controversy concerning the topic.* The more heated and widespread the public interest, the more likely it is that the judge will be regarded as entering the arena of political dispute and as departing from his role as a supposedly impersonal, thoughtful contributor to law improvement. However, the more long-range and utopian the improvement suggested, the less likely it is that propriety considerations will be raised. Nevertheless, the more closely related the topic is to law-process, even if it is in fact substantive, the less criticized will be the propriety of the judge's expression. For example, views for

18. JUDICIAL CODE, Canon 5A(6).

correctional reform in the abstract can be perceived as expressions of a judicial expert; less so may be support for or opposition to a bond program to build better prisons. A judge's off-bench public expression for or against a no-fault automobile insurance plan may be regarded as a political intrusion and used for purposes of attacking the objectivity of his rulings in automobile tort problems, especially when feelings run high, even though the expression may be couched in terms of docket-concern and administration rather than of merit or equities of the plan.

3. *The forum.* The expression of views before a scholarly seminar or a legislative committee (especially if solicited for the latter) may involve fewer propriety considerations than his expression of similar views before a public meeting or, even more, a program sponsored by an activist group. Publication in a law review or a bar journal is more likely to be considered appropriate for the expression of judicial expertise than publication of the identical views in a popular magazine or newspaper.¹⁹

4. *The audience.* A discussion before a limited live audience of professional peers accords the judge a freer opportunity for frank and full disclosure of controversial views than does an appearance or publication destined for a wider audience, even as media coverage of the limited peer-appearance may impose upon him a greater consideration of the propriety values involved in expressing his views.

If the issues are relatively noncontroversial in terms of widespread public interest, no propriety problem is posed by the judge's performance of his quasi-judicial function to contribute his expertise in the interest of improving the law and law-related areas. When the views *are* controversial in this sense, then the judge must always balance the good he may do for law and society by his utterance against the harm that can result from loss of public respect for his own impartiality or for the dignity of the judicial system as a whole or of the court upon which he sits. This balance is not easily resolved.

If I may be pardoned one more personal war story, early in my judicial career I thought myself obliged to defend the concept of

19. If a nonacademic publication is used as the forum, the particular organ of publication may color the public's perceptions of the propriety of the expression. Witness candidate Jimmy Carter's interview with *Playboy*, which created controversy, where publication (with minor excisions) of the identical views in the *Southern Baptist Messenger* might have passed unnoticed.

respect for the United States Supreme Court and its decisions, whether on their merits we agreed with them or not.²⁰ In 1978 this does not seem to be controversial, but, in the wake of the segregation crisis and the Warren Court criminal rights decisions, propriety questions were posed by the expression of these views during 1955 to 1963. It was not unlikely that demagogues could bring into controversy (and even disrepute) the judge (and thus the court he served) as expressing unpopular and supposedly radical views which endorsed the substantive concepts of the high tribunal's decisions. Nevertheless, at the time, caution was outweighed by my concern that long-term erosion of public acceptance of the judicial function in our region might result if the prevailing climate of unrestrained criticism was generally accepted as unanimous—unless thoughtful people were reminded by a responsible spokesman of the fundamental value of an independent judiciary, irrespective of the popularity of its decisions or of our personal agreement with them.

My public expressions at the time can perhaps be described as motivated by the following consideration:

Even where public controversies directly affect the law and the courts, it is desirable that the judges play a less than active role, if, and only if, the bar can and does carry the burden. If the bar cannot or does not carry the burden, the judges have no choice except to take their stand to protect and foster the law and its institutions.²¹

In retrospect, I think few would believe now that my actions violated propriety values, perhaps especially since, as an intermediate state appellate judge, the issues decided by the United States Supreme Court rarely if ever were involved in litigation before us. At the time, however, those who disagreed with the Warren Court might (and did) disagree with the propriety of my expressing views in a "political" area.

20. See, e.g., Tate, *The Role of the Judge in the American Republic*, 3 LA. B.J. 77 (1955), reprinted in 16 LA. L. REV. 386 (1956). I note that this talk was given at an opening-of-court ceremony, and other talks of a similar nature were delivered as part of Law Day observances before civil and bar groups and other public meetings in most of the major cities of Louisiana during 1954-63. Query: If appropriate at all, would an expression of these views be less appropriate at gatherings not related to law issues or law programs?

21. Breitel, *Ethical Problems in the Performance of the Judicial Function*, in JUDICIAL ETHICS 64, 81 (Univ. of Chicago Law School Conference Series No. 19, 1964).

At the time, the public encouraged and approved public criticism by judges of the Warren Court opinions, whether on-bench or off-bench. Many commentators, however, (often those who were pro-Warren Court) felt that such off-bench judicial expressions were improper as contributing to public loss of respect for the judicial institutions as a whole of our society. Temperate analysis of the deficiencies in reasoning or authority does not ever appear to be inappropriate on the part of inferior judges; but it is difficult for me to believe, then and now, that any positive value for the judicial system was served by emotional attacks by sitting judges upon the political merits of the decisions of our country's high court. Nevertheless, it is probably accurate to say that a preponderance of our bar found no impropriety represented by these attacks. Indeed, the Conference of Chief Justices itself adopted a resolution highly critical, in a non-analytic way, of the decisions of the United States Supreme Court.

Perhaps these examples illustrate that reasonable men may differ as to the propriety of a judge's expression of views on issues which in the time and place are deemed to be controversial. In the last analysis, the judge must determine for himself whether the good he is attempting to do for the law and society is outweighed by the disrespect he may create for the judiciary in some or in many people, either because the substance of his expression is distasteful to them or because they perceive him less as an impartial and disinterested judge and more as an active political advocate.