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## MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION IN WYOMING

FRANK J. TRELEASE\*

In 1937 the American Bar Association adopted a recommendation for the improvement of the selection and tenure of judges of the state courts, and in the following year that body unanimously approved<sup>1</sup> seven reports filed by the Section on Judicial Administration, dealing with the administration of the courts, pre-trial practice, trial practice, trial by jury, evidence, appellate practice, and administrative agencies. These reports, it was hoped, would be a guide to lawyers and laymen in dealing with the fundamental problems of adapting the courts to the social and business necessities of our times. Emphasis was on practicality. Many of the suggested standards are now and were then in effect in most American jurisdictions, and only one (out of approximately sixty) embodied an idea untried in the practice of at least one state.

Under the editorship of Arthur T. Vanderbilt, then president of the American Bar Association, now Chief Justice, Supreme Court of New Jersey, a full report has appeared on the extent to which these standards are in effect throughout the country. "Minimum Standards of Judicial Administration"<sup>2</sup> is a status report, a record of the acceptance of the standards, not an argument for their adoption. But the purpose of the publishers, the National Conference of Judicial Councils, is not to compile statistics for their own sake. The hope is expressed in Vanderbilt's introduction that this volume will supply a detailed knowledge of what should be done in each state to give it a reasonably effective procedural system, that it will stimulate discussions such as this paper, and that the bench, the bar, the law students, and influential laymen will join in a nationwide campaign for improving American life by improving the administration of justice.

This article was originally started as a short book review, but any Wyoming reader of the book, or of the review, will be interested primarily in how Wyoming measures up to the standards. This review will therefore set out or summarize some, but not all, of the recommendations and the corresponding Wyoming practice, and occasionally state or summarize the advantages of or arguments for the standard, as given in the original committee reports which are reprinted in an appendix to the book. These arguments are the committees' and do not necessarily reflect the views of the reviewer.

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  - 1. Several recommendations of the Committee on Appellate Practice were not adopted by the Bar. These are discussed in relation to that subject, *infra*.
  - 2. (1949) Published by the Law Center of New York University for the National Conference of Judicial Councils.

## JUDICIAL SELECTION

The recommendations adopted for the selection of judges embody the salient features of the "Missouri Plan" of appointment by the executive from a list named by a committee of judicial officers and citizens; the appointee, after a period of service, going before the electorate who would vote on the question of whether, on his record, he should be retained in office. Wyoming, of course, does not follow this procedure, and the possible advantages of this method have been thoroughly explored in recent articles in the *Wyoming Law Journal* by Burton S. Hill<sup>3</sup> and Glen R. Winters.<sup>4</sup>

## MANAGING THE BUSINESS OF THE COURTS

*Recommendation:* Provision should be made for a unified judicial system with power and responsibility in one of the judges to assign judges to judicial service so as to relieve congestion of dockets and utilize the available judges to the best advantage.

Wyoming is listed as one of eleven states with no external control over the individual courts, where problems of congestion are treated on a voluntary basis by an overburdened judge calling upon other judges for temporary assistance. The text states that an evaluation of Wyoming's system by local bench and bar indicates that there are few delays, little congestion, and general satisfaction with the informal system. The Committee Report, however, points out that personal efficiency of the individual judge may not be enough, and that there should be power to compel if indolence appears. Only four states exercise the recommended decree of control in all their courts, the remaining thirty-three have some of the features thought desirable.

*Recommendation:* A Judicial Council with representation accorded the Bar and the Judiciary Committees of the Legislature.

Wyoming is one of twelve states having no judicial council. While it is recognized that the problems of judicial administration may be handled quite well on an informal basis where the population is small and the volume of litigation is not great, nevertheless it may be asked whether such a council would not be an asset to the state. It might be given functions of research and collection of data for the drafting of rules and statutes necessary for the increase in efficiency of the courts and improvement of substantive law. While we do have an Advisory Committee to the Supreme Court on Rules of Procedure, and a Legislative Committee of the State Bar, that perform some of these functions, a continuing body, representing the bench, the bar, and the legislature, charged with the responsibility for investigating the possibilities of improvement, might seem desirable.

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3. Has Wyoming a Problem in Judicial Selection (1950) 5 Wyo. L. J. 51.

4. A Better Way to Select Our Judges, (1951) 5 Wyo. L. J. 117.

*Recommendation:* That quarterly judicial statistics should be required.

Just how good are our courts? Where is improvement needed? How many cases do the various judges handle? How long do the judges take per case? By what means (demurrer, jury, etc.) are they decided? We may have general ideas on these questions, but we will not know the answers so long as Wyoming is one of seventeen states that do not collect the figures. Although the standard calls for quarterly statistics, the Committee Report points out that the requirement should not be burdensome and that data should be collected only so often as is felt necessary.

#### RULE-MAKING

*Recommendation:* That practice and procedure in the courts should be regulated by rules of court; and that to this end the courts should be given full rule-making power.

The text of the book is supplemented with maps showing the extent of the adoption of the recommendations with the states shaded from white to black, according to how far the particular standard is met. Wyoming appears as one of the bright spots on the map showing the extent of judicial regulation of procedure, being one of sixteen states where the courts have full rule-making authority (eight others have full power in regard to civil procedure only). Yet so far as effective utilization of this power is concerned, Wyoming should be shown as a dark oxford gray. For in the five years since the Supreme Court was invested with the rule-making power, but two rules have been handed down by the Court. One, authorizing pre-trial conferences, may be considered a significant advance in the Wyoming practice; the other relates to a mere detail under the existing code. Meanwhile there lies dormant a complete set of Rules of Civil Procedure, that was painstakingly prepared by the Rules Advisory Committee from the Federal Rules where applicable to state practice and from desirable features of the present code. These were circulated to every member of the bar, and recommended officially to the Supreme Court by the Wyoming State Bar with one dissent in 1948, unanimously in 1949, with one dissent in 1950, and without opposition in 1951. On this subject Vanderbilt says, "The courts cannot afford to be sluggish; they must assume their proper responsibilities. If rule-making is authorized and such power is not exercised when necessary, a reversal of the present trend toward granting courts rule-making power may occur. If the bar and the courts fail to fulfill their duty where there is dissatisfaction with court procedure, the legislatures may be forced to act again as they did in the nineteenth century when the Field Code of Civil Procedure literally swept the country." Indeed, in its 1951 legislative session the Wyoming State Bar was asked to approve a bill to adopt the Rules as legislation.<sup>5</sup> While the move failed, largely due to

5. Minutes of the Legislative meeting of the Wyoming State Bar (1951) 5 Wyo. L. J. 156, 157.

a feeling that the continued existence of rule-making power in the courts was more to be desired than quick adoption of the rules themselves, it shows the dissatisfaction and impatience which inaction by the court brings.

#### SELECTION AND SERVICE OF JURIES

*Recommendation:* That jurors should be selected by commissioners appointed by the courts.

While Wyoming does not follow this recommendation, it is not subject to the main criticism directed against the fifteen other states whose jurors are selected by elected officials. The primary concern of the American Bar was the elimination of political influence in the selection of talesmen; in Wyoming the function of the commission, which is composed of the chairman of the county commissioners, the county treasurer, and the county clerk, is to make a list from the assessment roll of *all* persons qualified; the selection from that list is then by lot. The only discretion of the commission is in omitting from the list the names of persons known to be disqualified. The main objection to this system is that the wheel of chance may pick gamblers or drunkards, or an unrepresentative panel from a particular class or section of the people. An impartial commission charged with the duty of selecting physically fit, intelligent, moral jurors, chosen from all economic and social groups of the community, might well improve the caliber of Wyoming juries and dispel much of the criticism of jury trials which are current today.

*Recommendation:* That the examination of jurors on their *voir dire* should be in accordance with Rule 47 of the Federal Rules of Civil Procedure: "The Court may permit parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the Court shall permit the parties or their attorneys to supplement the examination by such further inquiries as it deems proper or shall itself submit to the prospective juror such additional questions of the parties or their attorneys as it deems proper."

Wyoming is one of the eleven states where the questioning of the panel as a basis for exercising the right of challenge is conducted solely by the attorneys. The Committee on Selection of Jurors stated the problem and the proposed selection as follows: "In some states, in cases of large public interest, it not infrequently happens that several days or even a week or more of judicial time is required to select the particular panel. This is due to the too extensive latitude allowed to counsel for the parties in the questioning of individual jurors, and the trial is thus unduly protracted. It can be obviated by placing the initial questioning of jurors on their *voir dire* in the hands of the judge, who puts to the jurors singly, or preferably in groups of convenient size, general questions to elicit answers directly relating to the ultimate question to be decided, whether the juror is free from bias in the particular case; and after the judge has asked all

pertinent questions which occur to him as having a probable bearing on the matter, opportunity is then afforded, within measurably restricted limits, to counsel to supplement the examination by directly relevant questions. The judge should actively intervene if necessary to eliminate immaterial and unimportant interrogation of prospective jurors. When this course is pursued, examination of jurors on their *voir dire*, even in such unusual cases, can generally be completed in an hour or two and much time otherwise really wasted can be saved."

In this case, the proposed Wyoming Rules of Civil Procedure do not go as far as the American Bar Association suggests, Rule 47 (a) reading as follows: "The parties, or their attorneys, shall conduct the examination of prospective jurors and the court may itself conduct such examination as it deems proper."

*Recommendation:* That for prospective long trials, one or more jurors in addition to the regular panel should be selected and impanelled to sit as alternate jurors. . . .

Section 12-145, Wyo. Comp. Stat. 1945, and the proposed Rule 47 (b), authorize one alternate juror in substantial accordance with this standard.

#### PRE-TRIAL CONFERENCES

With the adoption of Rule 1 of the Wyoming Rules of Civil Procedure,<sup>6</sup> Wyoming fully meets the recommendation for pre-trial procedures. However, a suggestion was made in the body of the report of the Committee on Pre-trial Conferences for the adoption and use of a strong summary judgment procedure, although the specific recommendations in the report did not include this. *Minimum Standards* adds the summary judgment to the list and points out that it would save time, effort, and expense, since through its use a final judgment may be entered immediately on a showing that there are no issues of fact requiring a trial. Twenty-eight states have some form of summary judgment; Wyoming would be added to the list by the adoption of proposed Rule 56.

#### TRIAL PRACTICE

*Recommendations:* That the common law concept of the function and authority of the trial judge be uniformly restored in the states which have departed therefrom.

That after the evidence has been closed and counsel have concluded their arguments to the jury, the trial judge should instruct the jury orally as to the law of the case, and should have power to advise them as to the facts by summarizing and analyzing the evidence and commenting on the weight and credibility

6. Wyo. Comp. Stat. 1945 (1949 Supp.) Sec. 1-470, § Wyo. L. J. 178. Since the book went to press prior to the effective date of this rule, it shows Wyoming as not complying with this standard.

of the evidence or upon any part of it, always leaving the final decision on questions of fact to the jury.

That the trial judge should be at all times the governor of the trial in the sense of actively, and firmly when necessary, requiring that the proceedings be conducted with dignity, decorum and the avoidance of waste of time.

The Report of the Committee on Trial Practice presented these recommendations with this argument: "Trial by jury in certain classes of cases is still a vitally important feature of our judicial administration; but it in recent years has become the target of serious criticism. The charge is that it often results in a miscarriage of justice, principally in the field of criminal cases. To preserve the jury as an important institution and to obviate any just criticism of its function, it is obvious that the efficiency of the system should be strengthened as fully as possible. It is believed that the criticism to the extent well founded, is much more prevalent in those jurisdictions where the authority and function of the trial judge are most restricted. The jury by its very nature and position is uninformed as to the law and unaccustomed to weighing the probative force of testimony. It is the proper function of lawyers in the case to be advocates for the respective parties to the litigation. The only experienced lawyer in the trial who is personally disinterested in the outcome of the case is the judge. He is required to know the law and is accustomed to weighing evidence. In equity, admiralty, bankruptcy and other classes of cases, he is the sole judge both of the law and of the facts. He is the only participant in the jury trial who is qualified by knowledge, experience and lack of interest, to instruct the jury as to the law and to advise them, based on his experience, as to the probative force and the relative significance of the parts of the testimony as bearing on the particular issues made by the pleadings, and submitted to the jury for its decisions. If the verdict of the jury is opposed to the evidence, the trial judge, probably in every jurisdiction, has the power to set aside their verdict by granting a new trial. It seems highly illogical in any efficient system of judicial administration to grant to the trial judge this ultimate power to set aside the jury's verdict, but to withhold from him the power to advise them from his experience, prior to their verdict, by an analysis, summary and comment on the evidence; especially when, as is always absolutely requisite, except in the case of directed verdicts, he makes clear to them that his comments are merely advisory, and theirs is the power to decide in their uncontrolled discretion.

"The tendency in some jurisdictions to unwisely restrict the authority of the trial judge in this respect springs from conditions in the early history of the development of our American law which no longer now obtains. The departure in some states from the common law conception of the functions of the trial judge was rooted in the distrust of arbitrary and absolute power as supposed to be exemplified in some Colonial judges who received their appointment, not from the duly constituted representatives

of the people, but from an absolute monarch. These conditions have long ceased to prevail, and there is no longer reason to sacrifice efficiency in the administration of justice to a popular feeling which traces its origin to very different political conditions. In our judicial system public dissatisfaction has largely shifted from the judge to the jury. To restore public confidence in the jury system we must make it more efficient. The remedy where needed is ready to hand—restore the common law functions of the trial judge.

“Criticism of juries in federal courts is comparatively rare. There the common law function of the trial judge is firmly established. . . .”<sup>7</sup>

As for the time of the charge, and for oral rather than written instructions, Judge Merrill E. Otis of the United States District Court has said, “To do these things effectively they must be done orally, with freedom of repetition, freedom of illustration, and after arguments of counsel, so that the enlightenment they give will not be utterly eclipsed.”<sup>8</sup>

Wyoming is one of the half of the states that permit a judge to sum up the evidence, but is not one of the thirteen jurisdictions where he may comment on the weight of the evidence. It is one of twenty-two states requiring the instructions to be in writing, and one of twenty where the instructions are given prior to argument by counsel.

*Recommendation:* That the provisions of the new Federal Rules 26 to 37 relating to discovery should be adopted in all of the states.

Fifteen states have discovery procedures liberal enough to qualify as complying with this standard. Wyoming would be added to the list by the adoption of the proposed Rules.

• *Recommendation:* That the trial court should be authorized, in its discretion, to submit specific issues to the jury to be considered in connection with a general verdict.

Both the present Wyoming Code and the proposed Rule 49 meet this standard.

*Recommendation:* That the trial judge should have power to grant a partial new trial where in his judgment the several issues are clearly and fairly separable.

Wyoming is listed as not complying with this standard, although Section 3-3401 defines a new trial as a re-examination of *an* issue of fact, which would seem to permit a new trial on less than *all* issues. The power

7. Appendix A, p. 537.

8. Otis, *The Judge to the Jury*, 6 *Kans. City L. Rev.* 1; 14-15 (1937) quoted at p. 225.



of the Supreme Court to order a partial new trial is clear under Section 3-5303. The proposed Rule 59(a) would clearly permit Wyoming trial judges to save time and money by this practice.

*Recommendation:* That the practice of granting judgment *non obstante veredicto* be uniformly adopted, and that it be extended to authorize judgment on motion, in accordance with the original motion for a directed verdict, after the jury has disagreed and upon discharge.

Sections 3-3604 and 3-3605 comply with the first part of this standard, but apparently require that the jury must have reached a verdict before such a judgment may be granted. Proposed Rule 50(b) would permit a judge to avoid a new trial in this situation.

*Recommendation:* That after the trial of a law suit has begun, dismissal without prejudice by voluntary *non-pros* be permitted only in the legally reviewable discretion of the trial judge.

Under Section 3-3501 it is possible for a plaintiff to drag his opponent through a long trial, and forewarned by adverse rulings on fundamental points, dismiss his action, only to reinstate it in some other court in the hope of obtaining a different ruling. Of course, a key witness may not be available, other unexpected difficulties may arise, and fairness to plaintiff may require the allowance of a voluntary non-suit. This standard (and proposed Rule 41) would prevent the abuse of the voluntary *non-pros* yet preserve the device for those cases where justice would be served by its employment. Twenty-three states now so limit dismissals.

The Committee concluded with recommendations on references to masters and on preliminary injunctions, with which the Wyoming practice is substantially in accord.

#### APPELLATE PRACTICE

The American Bar adopted sixteen recommendations relating to appeals, and on this subject Wyoming's practice measures up to the standards quite well. The direct appeal proceedings in particular seem to meet the requirements for simple and inexpensive procedures. In two instances, however, there are substantial deviations from the standards.

*Recommendation:* That either the trial or the appellate court should have power at any time to make an order authorizing any amendment of the record on appeal which is necessary to present the case fully and correctly, upon such showing, in such manner, and on such terms as may be just.

One criticised feature of Wyoming's practice is the power of the Supreme Court to dismiss an appeal where the record<sup>9</sup> or the abstract<sup>10</sup> is

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9. Wyo. Comp. Stat. 1945 Sec. 1-412.

10. Wyo. Comp. Stat. 1945 Sec. 1-437.

defective. Since valid claims should not be defeated because of technical imperfections, amendment of the appellate record should be as simple a process as amendment of a pleading in the trial court. Our practice, which now only partially meets this criterion, would be brought to full compliance by the adoption of proposed Rule 75 (h).

*Recommendation:* That abstracts of the record should not be required, but that such matters in the record as the parties desire to bring to the attention of the court should be set forth in appendices to the brief, either by summarized statement or quotation.

Wyoming is one of only five states using the outmoded and frequently burdensome abstract of the entire record. While the Committee on Appellate Practice recognized that abstracts are often useful to the court in enabling it to ascertain the facts without reading the entire record, it felt that the court would enjoy every benefit derived from an abstract if the facts relied upon by the parties were stated in the briefs with ample references to the pages of the record.

Two recommendations of the Committee were not adopted by the full Bar. As to these, Vanderbilt says that it would seem that the Committee was ahead of its time. The first dealt with appeals on short records, in the large number of cases where a brief statement of the facts, settled by the trial judge, would be an entirely adequate basis for the judgment of the upper court. This procedure would be analogous to the practice of reserving important constitutional questions under Section 3-5501. Such questions and supporting statements of facts should save labor and expense and should be extremely convenient to the reviewing court. They are authorized by proposed Rule 76.

The other recommendation that was not adopted by the Bar was for the adoption of the requirement, now in force in five states, that the appellant shall on the first page of his brief set forth in general terms each question or issue in the case together with a statement of how the issue was handled by the trial court. These statements of the issues enable the court to quickly see the legal issues without being compelled to examine the argument of counsel or the record, and seem to be valuable in forcing the lawyer to discipline his own thinking. They are apparently highly regarded by the judges, but resisted by the attorneys.

#### CONCLUSION

This review has not covered the entire book, which also contains standards for traffic courts and justice of the peace courts, the law of evidence, and state administrative agencies. Since the only contact with "the law" for many citizens is an appearance before a magistrate, a J. P., or an administrator, those forums should not be overlooked. And in many respects the law of evidence has become cumbersome and arbitrary, as

where the reason for some rule of exclusion has disappeared but the rule remains; so that a thorough job of modernization would seem to be in order. But these topics are outside the scope of this paper, which is restricted to the administration of the law in our courts of record.

While an accurate box score is impossible because some of the standards are simply statements of high ideals, some are obviously applicable only to metropolitan centers, and because partial compliance is hard to measure, a survey of the maps in this volume shows that in the opinion of the compilers Wyoming can claim clear compliance with only twenty-five standards, partial observance of sixteen others, and in twenty-one instances the recommendations are not followed. Although the Rules of Civil Procedure deal with only a small section of the area covered by the standards, their adoption by the Supreme Court would bring the state into full accord with nine more recommendations, and with two improvements (summary judgment and appeals on short records) endorsed by the committees and by Vanderbilt but not by the American Bar as a whole. This does not mean that Wyoming is handing out justice at 50% efficiency, but it does mean that there is a need for a thorough study of our judicial machinery, looking forward to a possible overhaul. The standards are entitled to great weight because they bear the unanimous approval of the American Bar Association, but that does not mean that they should be followed blindly. Many are corrective measures designed for overcrowded courts in industrial areas with large populations, and may not be necessary or desirable here. Failure to follow many of these standards will affect only a small number of cases; other considerations may militate against their adoption as part of our practice. But the discrepancy between these highly endorsed criteria for justice and the Wyoming practice certainly calls for a searching analysis of our court organization and procedure. The proper body to do this would be a judicial council, which might take this book as a starting point and work out a truly modern machinery for ensuring justice, adapted to this state and to these times, using the suggested procedures where applicable and going beyond them where necessary (for after all, they are *minimum* standards). Of course, adoption of the Rules of Civil Procedure should be the very first step, since eleven of the deficiencies would be made up immediately in addition to the many other benefits that would result from the simplification and clarification of process and pleading.

The lawyers of the state must take the initiative and should recommend a judicial council to the legislature. Vanderbilt pulls no punches in castigating attorneys for their complacency in procedural matters. Yet paradoxically, in practically the same breath, he cites and praises the work of the American Bar Association, the American Judicature Society, Homer S. Cummings, Roscoe Pound, and Judge John J. Parker in leading the reform movement in this country. The Wyoming lawyer can be proud that this Bar has sponsored the granting of the rule-making power to the courts, and has taken so firm a stand in urging the adoption of the Rules. The im-

portant thing is to be not dismayed at temporary setbacks. He may take such comfort as he can from the recitals in this book of the delays and troubles which have beset others in this field, and from Vanderbilt's words: "Manifestly judicial reform is no sport for the short-winded or for lawyers who are afraid of temporary defeat."