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[Minimizing the Trauma of Judicial Ethical and Disciplinary Problems]

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The Honorable Edward F. Hennessey*

With your permission, I should like to change the emphasis in this discussion. Allow me to discuss some things that we can do to minimize the trauma of ethical and disciplinary problems.

I'm not referring to the sweeping of ethical and disciplinary problems under the rug. However, all speakers today have emphasized the necessity of doing everything valid that we can do to sustain public confidence in the judiciary. We're all lost, the country's lost, if we don't sustain that confidence. I am speaking of the many times when the judiciary, the system and the individual judge, have suffered needlessly. From these experiences we have learned of many things that could have been done to mitigate unnecessary damage to the system and to eliminate unnecessary suffering of the judge.

What have we learned? First and foremost, we have recognized the need for mandatory and early education of judges as to the code of judicial conduct, and as to ethical considerations for judges. There's probably nothing more important and nothing more thoroughly neglected. Some judges have never been aware of and have never had a copy of the code, don't know where it's found in their court rules, and have never read it. That is what leads some of them into trouble. I think we'd all agree that most judges, a great majority of judges, don't want to get into trouble, and they agonize when they do.

Second. We have found that bench and bar committees have been helpful. Here knowledgeable members of the bar meet regularly with presiding judges or committees of judges. Their purpose is to conduct a candid and confidential dialogue as to problems in the administration of the courts. Among other things, dignified discussion should be invited concerning the way judges do court business. Here, confidentiality of the discussions is exceedingly important.

Third. Chief judges must be willing to act to keep foreseeable situations from escalating into disciplinary proceedings. A good chief judge is not necessarily the most popular judge in the system. Troublesome things can be foreseen in many instances, such as bias and favoritism in the courtroom. That can even be detected in transcripts sometimes. Overbearing attitudes in the courtroom, unhealthy associations in and outside the courthouse: those things frequently are brought to the attention of the chief judge by bench-bar committees and other responsible sources. If the chief doesn't act, bad habits of a judge may blossom into an unnecessary disciplinary situation.

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Fourth. There must be openness and the appearance of openness for the investigating and disciplinary process. I think ideally the disciplinary body, whether it's created by the Legislature or by the court, should consist of lawyers, judges and nonlawyers. That in itself, particularly bringing members of the public in, gives actual openness and the appearance of openness. That in turn builds public confidence. However, should everything be open? I suggest definitely not. Most complaints are groundless. Most of them are brought by somebody who's upset or angry about a result in a court proceeding. The complaints often have nothing to do with a breach of judicial ethics.

So the confidentiality of the complaint procedure should not be open. You can't control the complainant and you can't control witnesses for the complainant, but you can control the staff of the judicial discipline group. You can by rule establish the rules of the judicial discipline group, to the end that the confidentiality of groundless complaints should be protected. But when does that cease to be a valid principle? I suggest that when probable cause of a breach of judicial ethics is established, the public is entitled to know, and promptly. It hurts our image to have such a breach concealed for even a short time, once probable cause is established. I add that, even if the complaint was groundless, but the matter has become known to the news media (perhaps from information supplied by the complainant) public disclosure of the dismissal of that proceeding should be at the option of the judge who was maligned by an improper complaint.

Fifth. I urge expedited proceedings. Delay in proceedings can do no good, particularly if the matter is prematurely reported in the media. The longer a matter lingers, the greater the trauma upon the system.

Sixth. I suggest, and this I suggest very strongly, judicial discipline bodies should meet fairly regularly with groups of judges. The judge groups should be of a manageable size for a meaningful dialogue. This dialogue is not to be aimed at either group attempting to brainwash the other. Rather, the purpose is to acquaint the disciplinary group with the problems and questions of the judges, and to acquaint the judges with the functions and the functioning of the disciplinary group. The aim is to prevent an "us" and "them" atmosphere from arising, and to promote cooperation. The cooperative effort is to keep judges out of trouble with every *valid* available means.

Seventh. I think it's up to the supreme courts and presiding judges and chief judges to establish policies and standards, so that, even aside from the code, the judges understand what's expected from them on such things as appointments of masters, and unhealthy associations. To promote this understanding, I suggest that there must be a recognized process, either formal or informal, for advice to judges. It should be stated categorically that this advice does not bind the court

(after all, it may be based on a hypothetical case) but it isn't fair to an inquiring judge to leave him with no help at all for a decision he must make.

Finally, there is the problem of drugs and alcohol, especially alcohol. Some people refer to us as an alcoholic society. That may or may not be so, but the fact is that excessive drinking is a problem for a small minority of judges. In my State we have avoided some serious disciplinary problems by providing remedial support. In Massachusetts, and in some of your states, we have dedicated groups of lawyers and judges who are the equivalent of Alcoholics Anonymous, and they provide confidential support. They have saved many judges from serious difficulty under the ethical and disciplinary rules.

Let me conclude by making it clear that the disciplinary structure must be designed to deal firmly and promptly with those rare instances where a judge's conduct is corrupt or is otherwise wilful and venal. Public confidence in the judiciary will be served by our cleaning our own house in that manner. What I have addressed in the last several minutes are those complaints against judges which relate to bad habits and poor judgment rather than venality. I have observed with regret that most of these judicial failures are avoidable, and I have suggested some valid ways which may eliminate their occurrence, and may mitigate their harmful effects when they do occur.