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THE CONTRIBUTION OF HENRY G. MANNE TOWARDS THE EDUCATION OF THE AMERICAN JUDICIARY

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Henry G. Manne set many judges to thinking on ways to learn more about the fundamental knowledge that supports much of our general law and the specific decisions in our courts. He was particularly helpful in providing the most inspiring teachers, particularly in the fields of economics and statistics. We are all deeply grateful to him, and to them, for opening up our minds.

It is likely that the knowledge and perspective Professor Manne helped impart did affect my decisions and those of my colleagues in the judiciary. This is an advantage, not a disadvantage. We cannot rule well out of ignorance. Because of Professor Manne's own prestige, he was able to induce outstanding academics in the field of economics to teach judges at weeklong intensive courses. The written materials were challenging, and the participants usually brought the readings back to their chambers as reference works. Not one of the instructors Professor Manne brought to our classrooms was less than balanced, and none sought to steer us to particular policy decisions.

This kind of judicial education is essential in any sophisticated system of justice. Judges in the United States come to the bench with a mature knowledge of the world.[1] Unlike continental systems, ours does not expect our law school graduates to select the judicial track until they have acquired a great deal of general and specific knowledge in practice, government, business, or in teaching. Many are rusty with respect to their general student-acquired understanding of science, history, economics, sociology, anthropology, philosophy and other disciplines, which are the foundations of judicial decisions of fact and of law.

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[1] Further discussion of this subject will be found with extensive footnotes in Jack B. Weinstein, *Learning, Speaking and Acting: What are the Limits for Judges?*, 77 Judicature 322 (1994); Jack B. Weinstein, *Limits On Judges' Learning, Speaking and Acting – Part I – Tentative First Thoughts: How May Judges Learn?*, 36 ARIZ. L. REV. 538 (1994); Jack B. Weinstein, *Limits on Judges' Learning, Speaking, and Acting: Part II Speaking and Part III Acting*, 20 U. DAYTON L. REV 1 (1994). This appreciation of Professor Manne relies heavily on the article from the *Arizona Law Review*.

The need for post-appointment education has become more urgent since the Supreme Court has emphasized recently the courts' obligations to exercise better control over scientific, medical, economic, technical and other specialized expert testimony.[2] Education through lectures, face-to-face conferences, satellite conferences, literature, audiocassettes, and videotapes is now supplied by many organizations. These organizations include the Federal and State Judicial Centers, the ABA Center for Continuing Legal Education and Law Schools and Bar Associations. Professor Manne was the trailblazer.

After appointment, judges should, to the extent that their arduous time-consuming duties permit, enhance their understanding of life and theory. As generalists they need to continue to acquire new information about the changing world—much as any intelligent, well-educated person does—by reading newspapers, magazines, and books, watching television, listening to the radio, taking adult education and formal college courses, attending lectures and seminars, and talking to friends and family. We cannot make intelligent fact decisions or evaluate the effect of our legal decisions on society unless we have some degree of understanding about that society as it currently exists.

Every judge brings an enormous background of knowledge to the bench—both factual and ideological—that will be utilized in drawing inferences about facts and making policy on law. We learn from everything in the world around us. We are inundated with information at home as well as at work. Like other judges, I receive a stack of mail every day that includes newsletters, magazines and books from many organizations, monographs, brochures for legal conferences, advance sheets, law reviews, and reports on many law-related topics. What is to be done with these daily attempts to educate judges? Should a judge protect neutrality by throwing all this useful information away without considering it? Should the judge log it all in on a disclosure form? Neither course is desirable or practicable.

This informal ongoing education process should not be stifled. Judges should be encouraged to subscribe to and read publications advocating many different viewpoints. They also must be able to participate in activities that examine and improve the judiciary and the

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[2] *See, e.g.*, Kumho Tire Co. v. Carmichael, 119 S. Ct. 1167 (1999) (holding that trial judges must determine the relevancy and reliability of all scientific, technical, and other specialized matters); General Elec. Co. v. Joiner, 522 U.S. 136, 142 (1997) ("[T]he Federal Rules of Evidence . . . leave in place the 'gatekeeper' role of the trial judge in screening [scientific] evidence."); Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 589 (1993) ("[T]he trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.").

legal process. Isolation of judges is not desirable. Even Holmes, who reportedly eschewed newspapers, read and corresponded widely.

One form of judicial education that has recently drawn public attention is conferences and privately sponsored classes for judges. This method of education developed in part from the training sessions for federal judges sponsored by Professor Manne and the Federal Judicial Center.

The Center is funded through the judicial branch of the federal government. Private foundation money supplements the federal budget on some projects. The Center was created primarily to assist newly appointed judges in making the transition from practice and academia to the bench. The early courses sponsored by the Center included evidence, civil and criminal procedure and habeas corpus. These background courses are still taught, but the Judicial Center's mission has expanded enormously to include continuing education courses for judges, preparation of training materials and research on the operation and improvement of the courts. In 1984, Congress created the State Justice Institute, which is a similar organization designed to improve the administration of justice in state courts.

Other legal institutions have followed the Judicial Center's and Professor Manne's lead, initiating judicial conferences and seminars of their own. Universities, foundations, bar associations, special interest groups, and corporations sponsor these sessions.

Ethical issues for judges arise, and such conferences may cause concern, when the sponsor is a group that participates regularly in litigation or because the program may be perceived as biased. Professor Manne scrupulously avoided this pitfall, despite the fact that he was able to procure private finding for such education. Seminars and courses he sponsored were funded by unrestricted grants from private, non-corporate foundations that do not participate in litigation. A good practice would be to routinely provide payment for judge's expenses at such seminars only by the law school or by funds from the federal Administrative Office or Judicial Center.

The Alliance for Justice has criticized the Law & Economics Center of the George Mason University School of Law, as well as Yale Law School programs in economics and law, for providing a series of judicial education programs.[3] According to the Alliance, the Law & Economics Center headed by Dean Henry Manne presented a

[3] *See* ALLIANCE FOR JUSTICE, JUSTICE FOR SALE: SHORTCHANGING THE PUBLIC INTEREST FOR PRIVATE GAIN 70-74 (1993); *see also* Alliance for Justice, *Public Interest or Special Interest,* ORG. TRENDS, Aug. 1993, at 1; Henry J. Reske, *Expense-Paid Judicial Seminars Hit,* A.B.A. J., Aug. 1993, at 36; Jay Mathews, *Business Tries to Shape Legal System Report Says,* WASH. POST, May 19, 1993, at F4.

conservative, or corporate, oriented view intended to influence the judiciary. The Alliance implied that the program was biased toward advancing the financial interests of corporate America, and that it attempted to sway the judiciary toward free market ideals and away from governmental intervention in the economy. The Alliance report based many of its implications on the fact that corporations fund the Center. That was true, but non-corporate foundations funded the judicial programs. The Center used corporate donations to fund other Center projects.

These criticisms are unsound. First, the funding comes primarily from sources that will find no direct venal gain from judicial decisions. This factor is significant. Funding from groups that regularly participate in litigation would be more suspect. Where sponsorship is solely by an accredited law school, judges have a buffer and assurance of impartiality.

In the past, when this kind of education was in its infancy, joint control and sponsorship of programs, such as those in statistics by the Federal Judicial Center, and the Law & Economics Center at George Mason University under the direction of Professor Manne, were developed. Such joint sponsorship, where appropriate, should be encouraged since it extends the Judicial Center's resources beyond its limited budgetary restrictions. Were sufficient funding available, it would be best to have much of the training of judges paid for by the most neutral source of all—the government. How this can be accomplished depends on management decisions of state and federal training centers and legislatures, which tend to emphasize more directly useful instruction in current substantive and procedural developments.

Generally, judges should be entitled to rely on the neutrality of government bodies such as the Judicial Center, the Court Administrative Office, the State Justice Institute, the Federal Judicial Conference, and the Administrative Conference of the United States. Yet, even reliance on government agencies has its own dangers. The view of a government agency may itself be slanted. There may, for example, be a tendency of some in the federal establishment to close the courthouse doors by an ideological bent toward procedural and other restrictions. The Justice Department, the major federal litigator, has definite views that vary with different administrations and that are reflected in federal policies.

A useful model, which seems to me to be beyond reproach, is that of the Carnegie Commission on Science, Technology, and Government. Its studies of how the judiciary incorporates scientific and technological knowledge into decisions and its proposed improvements in process and organization are first rate. Cooperative efforts with the Federal Judicial

Center have culminated in a project at the Judicial Center to create a Science and Technology Resource Center that focuses on judicial education in science and technology.[4] As a result of joint work involving federal and state judges, scientists, and law professors, a continuing program of general training in science was devised. It combines the substantial funds of the Carnegie Commission with the know-how and judicial connections of the Federal Judicial Center. The jointly sponsored seminars and training materials cover topics ranging from the use of DNA evidence, to computer generated evidence, to proving causation in toxic tort litigation, to basic problems in science such as those in astrophysics.

The funding problem for universities is, I recognize, a serious one. In medicine, where pharmaceutical companies sponsor many lectures, attempts have been made to limit the impact of that sponsorship. Some articles, even those in well-recognized legal and medical journals, undoubtedly result from funding by special interest groups or work by professors or lawyers for paying clients. A footnote should alert the reader to this possible bias, so a judge can evaluate the article with this fact in mind. Where non-suspect, non-criticizable funding from a foundation without any apparent axe to grind is available, it seems appropriate to use joint arrangements of official groups such as the Federal Judicial Center, ALI/ABA, and national and local bar associations. If sponsorship by a narrower bar association such as the Association of Trial Lawyers of America is used, balancing by the Defense Research Institute, if possible, is desirable.

The Alliance for Justice report also raised the issue of whether the "resort locations" where the Law & Economics Center holds its conferences entice judges to take the courses. This criticism of the lush settings for the courses is not, in my opinion, entitled to weight. Off-season recreational locations in Florida and the Carolinas are where I attended classes on statistics, economics and risk analysis. Spouses are discouraged from coming and the readings are intensive, constituting the equivalent of a college course in a week. While classes are conducted only from 8:00 a.m. to 12:00 noon, with an occasional night session, the readings require a great deal of homework. Given the age of the students, these courses can hardly be characterized as junkets.

Providing comfortable settings for education may be objectionable if carried to an extreme, since the public believes it pays us enough and perks are resented by taxpayers. "Junkets" with judges' expenses paid

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[4] *See generally* CARNEGIE COMM'N ON SCIENCE, TECH. & GOV'T, SCIENCE AND TECHNOLOGY IN JUDICIAL DECISIONMAKING: CREATING OPPORTUNITIES AND MEETING CHALLENGES (1993).

may cement bar and bench healthy relationships, but they could be subject to understandable lay criticism since judges affect lawyers' livelihoods.

Both Yale Law School's conferences and the Law & Economics Center seminars originated by Professor Manne have been criticized by the Alliance for what it perceived to be an ideological bias. The report attacks the Yale program because of the Aetna Insurance Company sponsorship, and because of some of the professors' backgrounds in law and economics and support of comprehensive tort reform. This criticism also seems unfounded. In my opinion the material presented by Professor Manne's programs, or at Yale, was always balanced. Discussions were lively and uncontrolled by the sponsors or the moderators in charge. In point of fact, other judges and I disagreed with the views of some presentations and were encouraged to voice our opinions and flesh out our ideological differences.

Professor Manne had a long and distinguished history as an advocate of law and economics. At the seminars I attended there were no overt attempts to proselytize. After attending some of the seminars, I have become more sensitive to economic analysis. As a result, my thinking on torts may have shifted somewhat. It has moved toward a regime of court and bureaucratic protections in the field of mass torts that might not be congenial to either corporate or plaintiffs' lawyers' interests.[5]

Mature and experienced judges' thoughts can seldom be re-channeled by an instructor's bias. Judges should not be deterred from attending conferences that espouse a certain viewpoint as long as the funding of the programs is balanced, and any potential bias is disclosed. I sat on a National Academy of Science Committee that wrote a key report on DNA testing and another on statistics. I would not on that account recuse myself from cases using DNA evidence.

In general, a judge ought to be able to attend any lecture or public meeting. Judges' civil liberties remain in force during their tenure. Nevertheless, discretion is prescribed. Pending cases need special sensitivity, lest the judge give the impression that his or her private views will have some influence on the case. Even in the absence of a pending case, if the lecture is, for example, pro- or anti-abortion, or radically pro- or anti-feminist, or ethnically biased one way or the other, the judge should consider the sensibilities of the public. The public's view of neutrality by the judge needs to be considered by the judge.

Judicial education conferences have made a significant contribution in promoting collegiality among the judiciary, and between judges and experts in other fields. The educational sessions of federal

[5] *See* JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION (1995).

judges meeting in intense small groups under distinguished professors, with excellent materials in pleasant surroundings, have done much to improve the morale of the federal bench. The judges feel part of a distinguished, educated, and motivated corps. This is not elitism, but the result of superior selection and training. We are impressed with each other and strive to enhance the level of work of all of us.

Conferences and other educational opportunities have become especially important in bringing federal judges together as the number of judges has increased. When I was first appointed to the bench in 1967, there were a few hundred federal judges. Most of the judges knew each other. Today there are about one thousand authorized and senior judges. It has become increasingly difficult for the judges to get to know each other. Consequently, they are less likely to consult with each other and involve themselves in the fellowship so important to morale. There is interchange in the corridors and over meals at seminars that is exciting. No special interest controls these contacts.

Judges cannot disclose everything they read, hear, or see, but as much disclosure as is practicable is desirable. Judges could open their calendars to the public so that their attendance at meetings, seminars, and lectures is disclosed. Seminars, judicial conferences and judges' meetings should be publicized in legal newspapers and magazines, disclosing the topics, the sponsors and the attendees. Any paper delivered by a judge should be sent to the pressroom. Judges are currently required to disclose all reimbursements they receive for travel and related expenses, as well as the source of the funds, a brief description of the travel itinerary, and the nature of the expenses provided.

More care and discretion by the judge needs to be shown if the knowledge is being acquired for a specific case. Here it is important that all sides be informed as soon as possible about what the judge is reading, hearing, or seeing. The judge should create a record of all material the judge reads and hears that is related to the facts of a pending case. I file and docket everything I read that is related to my Agent Orange, breast implant, asbestos, and other cases so that the parties can become aware of the information that might in some way affect my decision. There is, however, a limit to what can be disclosed to the parties in pending suits. During the Agent Orange case I read *Scientific American* every month. Should I have disclosed that?

The key in this area is openness and balance. Whenever possible, materials and notices of work and studies should be filed and docketed or announced at sessions with the attorneys and experts. Parties must have the opportunity to counter these extra-judicial sources of knowledge.

It is hard to cover the give and take over the dinner table. One judge related to me an experience where he invited some judges of the appellate court that the judge sat on to meet for dinner at the judge's house. Also present were some long-time friends who were educators with expertise in the nature of science. The judge directed the conversation to the issue of scientific proof at a philosophical level. Other judges on the court were upset since the court was then dealing with concrete scientific issues. This seems too prissy an attitude.

In my own court, as chief judge I invited distinguished visitors from academia and abroad to address the judges and law clerks at brown bag lunches. The sessions were open to the bar and a notice was posted in the clerk's office. As with any judicial seminars, it would seem useful to send notice of any such sessions to the local press and to post them.

Judges should be impartial and unbiased. Two different models exist to achieve these traits. The first model—judges living in a hermetically sealed tower with no outside influences of any kind—is unrealistic and unwise. That leaves us with a second model—judges who acquire an intimate knowledge of the real world. If judges cannot be shielded from acquiring information, how can we insure that they remain impartial? Encouraging and allowing judges to learn as much as they can about the world, their craft, and the cases before them is desirable. Some limits and caveats are required to give the parties a fair opportunity to meet the judges' possible misperceptions, and to assure the public of an unbiased and fair-minded judiciary. I offer the following tentative suggestions:

1. Judges should be encouraged to gain as much general knowledge as possible, preferably from sources not tainted by venal or extreme ideological views.

2. Educational institutions should obtain funding for judicial education programs from the government, neutral sources, or balanced sources. Funding for educational programs is critical. It should come from sources that will not benefit from the programs. Judges' expenses should be paid by neutral government bodies or educational institutions. Joint meetings of judges in a pending case should not be funded by attorneys or other obvious advocacy groups.

3. Too rich a setting for conferences should be avoided.

4. Flouting by judges of the local sensibilities by public attendance at controversial meetings should be avoided.

5. Disclosure of judges' participation in educational events is desirable. Judges should make their diaries available to the general public. Seminars and conferences should be publicized in legal

newspapers describing the agenda, the participants, and the sponsors. Meetings should be open to the public and practitioners wherever practicable.

Henry G. Manne understood fully the necessity as well as the pitfalls of judicial education. In this, as in so many other matters, he pointed to the right path that we still follow.