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Your Honor

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YOUR HONOR

By Honorable Edward J. Devitt
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Federal Judicial Center
1986

This paper results from a talk given by Judge Devitt at several Center seminars for newly appointed district judges. The selection and presentation of materials reflect his judgment. On matters of policy the Center speaks only through its Board.

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I welcome you to the close friendship and cordiality of our federal judicial family. You are entering upon a new and challenging professional life which will give you great satisfaction and pleasure. We receive you with warm hearts.

I think you will find that being a federal judge is a first-rate job. The pay is relatively good. The hours aren't bad--8:30 to 5. No work on Saturdays except in emergencies. You may have up to four weeks' annual vacation with full pay. There is no profit-sharing plan available in the system, but we do have a liberal health and accident and life insurance program. We must pay for our robes but that isn't too bad. A good robe should last for at least five years--with full-time wear, of course. You will have healthy working conditions in air-conditioned comfort in association with lawyers of the highest professional ability. We have a munificent retirement plan--than which there is no better in the entire United States. An additional fringe benefit is the pleasurable experience of being greeted daily as "Your Honor." And that leads me to a short judicial homily about our work as judges.

Being called "Your Honor" day in and day out is a constant reminder, not alone of the prestige of the office, but more importantly of the tremendous power and heavy responsibility and absolute independence of the federal judge. We are practically

immune from discipline or censure or supervision. We cannot be defeated at an election or discharged by a superior. It is our conscience which is the disciplinarian, the censor, the supervisor. The appellation "Your Honor" is the trigger which commands our conscience to proper personal conduct and to the faithful performance of our duties; and it is "Your Honor" which encourages judicial patience, inspires industry, nurtures prudence, and counsels us with the great virtue of common sense.

And so it is that the perquisites of the federal judicial office are complemented by the awesome responsibility for self-generated aspiration for professional perfection as federal judges. This is the obligation of our oath and the duty of the office.

You Must Learn to Be a Judge

Your purpose in being in Washington this week is to learn something about the business of judging or, to say it more accurately, the art of judging. Believe me, it is an art. Judges are made, not born. We must learn how to be a judge. A distinguished retired chief judge with thirty-five years' service says: "Far too many have the false impression that any lawyer who has enjoyed a successful practice can mount the bench and be an immediate success there."

A judgeship is not a sinecure or a form of retirement. As you have already found, or soon will, things are completely different from the other side of the bench. It takes time and

study--and hard work--to learn how to be a judge.

Although many of your present concerns about the new office may encompass such things as the management of calendars, instructions to juries, the proper handling of pretrial conferences, the sentencing of convicted persons, and similar matters, there will come a time when you will be wondering about the more personal things in connection with your new status. How do I act now that I am a judge? Do I still keep the same friends and go to the same places of recreation? Does my relationship with people in general, and with lawyers in particular, change? These and many other questions must come to your mind, as they came to ours, in the early days of your judgeship.

And, of course, the simple answer to all of them is to act in all respects the same as you did before--just be yourself. A judgeship may change your office hours, or the nature of your work, or your compensation, but surely it shouldn't change the person.

Be Yourself

But this business of adjusting yourself personally is not always as easy as would be implied by the suggested answer "just be yourself." The transition from bar to bench is a big one and making the change with equilibrium is not always the easiest task. We must keep our heads about us. Senior Circuit Judge Harold R. Medina observes: "After all is said and done, we cannot deny the fact that a judge is almost of necessity surrounded

by people who keep telling him what a wonderful fellow he is. And if he once begins to believe it, he is a lost soul."[1]

A Mississippi judge once said, in suggesting to his fellow judges to be cautious so they did not usurp authority which was not lodged in the judiciary, that "judges at least are men encompassed by error, seasoned with sin, and fettered by fallibility." Perhaps we judges would not be too ready to admit that we are seasoned with sin, but that most judges are encompassed by error and fettered by fallibility seems only too evident when we read the divergent opinions of our judges on the trial and appellate courts.

A Chicago lawyer of long acquaintance is wont to observe, when capsulizing his displeasure with defects in the judicial personality, that as the cowl does not make the monk so the robe does not make the judge.

We should remember that a certificate from the president, a polished gavel from the bar association, and a cushioned seat on an elevated dais are only apparent indicia of the judicial officer. But daily association with these external trappings may mislead us to an inflated appraisal of our own importance, so a practical application of the virtue of humility counsels that we must be on our guard.

Some judges may become so impressed with their own impor-

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1. Medina, Some Reflections on the Judicial Function: A Personal Viewpoint, 38 A.B.A. J. 107, 108 (1952).

tance that they forget the practical facts of their judicial birth. It is a fact that most federal judges are appointed through the influence or approval of United States senators or other political officials.[2] This is not to detract from their qualifications, especially in recent years when the absence of objections from the American Bar Association is almost a prerequisite to appointment. In practical effect, judicial nominees must now be acceptable to the organized bar. This is a great step forward and the persistent work of the Federal Judiciary Committee of the American Bar Association is largely responsible for this meritorious state of affairs. I doubt if federal judges ever will be appointed solely on the basis of merit. That would be the millenium. So long as the United States Senate has the constitutionally granted authority to "advise and consent" to such appointments, it is unlikely that some politics will not be involved in most of them. But as long as we get qualified Democrats during a Democratic administration and qualified Republicans during a Republican administration, we are doing about as well as can be expected.

The truth remains, however, that you were appointed to office because, personally or vicariously, you knew the United States senator; and that, I emphasize, is not a sinful thing at

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2. For some interesting background on federal judicial appointments during the Johnson administration through part of the Reagan administration, see Goldman, Reagan's Judicial Appointments at Mid-Term: Shaping the Bench in His Own Image, 66 Judicature 384 (1983).

all. The point is that it is distinctly unbecoming to claim later that you were chosen solely because of your outstanding ability as a lawyer and leader of the bar, and that you were reluctantly persuaded to give up your lucrative practice and were practically dragged up to the bench. That would be taking yourself too seriously.

The greatest deterrent to taking yourself too seriously in any respect is a wise and observing spouse who periodically remarks, as Mrs. Medina did, "Don't be judgey." My wife has an alternate injunction which she issues when she thinks I am getting too dignified for my own good. She says, "Climb down off that bench!"

A Judge and His Dignity

But, notwithstanding these needful reins on our assumed importance, a judge does need to have dignity--it goes with the office. I don't mean that you must go around with nose on high putting on airs; or that, upon assumption of office, you should change your whole manner of life and circle of friends; or that, with monklike subjection, you should withdraw from the world. I only mean that we must possess an appreciation of the great prestige of the judicial office and of the respect which is accorded it and its occupant by the American public.

"To the people of his jurisdiction, the judge is the personal embodiment of our American ideal of justice," according to Arch M. Cantrell, former chief counsel of the Internal Revenue

Service, writing in the American Bar Association Journal. He goes on to state:

> People generally, and lawyers as well, want to look up to their judges. They want to admire and respect him for his ability as a judge and for the way he runs his court. The ideal of justice seems to be innate in every American, and part of his nature is to want to look up to, and respect, his court and his judge.[3]

Daniel Webster is quoted as saying that "there is no character on earth more elevated and pure than that of a learned and upright judge. . . . He exerts an influence like the dews of heaven falling without observation."[4]

So long as he knows the public's regard for the judicial office, the conscientious judge will conduct himself fittingly. The best piece of advice I can give you is to act like the ordinary prudent judge would act under the same or similar circumstances.

Lawyers Are Our Best Judges

Our success as judges will be measured in large degree by our success in relations with members of the bar. There is no group better qualified to appraise the competence of judges than the lawyers who practice before them.

We owe a duty to lawyers to treat them courteously, to hear

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3. Cantrell, The Judge as a Leader: The Embodiment of the Ideal of Justice, 45 A.B.A. J. 339 (1959).

4. Quoted during a memorial service for Justice Marcus Perrin Knowlton in a session of the Supreme Judicial Court of Massachusetts on March 22, 1919, as reported in 231 Mass. 625.

them patiently, to study their arguments conscientiously, and to decide their cases promptly. It seems to me that, particularly to the lawyer, patience is the virtue most admired in the judicial personality.

The grand seignior of our trial bench in the Eighth Circuit was wont to say that there are three fundamental requisites for a good judge--first, he should have patience; second, he should have patience; and third, he should have patience.

We must constantly keep in mind the marked displeasure we felt as practicing lawyers for the judge who would not hear us out. It may well be a waste of time for us to listen to extensive arguments on a point of evidence or law upon which we think we have already made up our mind. But we owe it to the lawyers to let them make their point. It may well be that they can change our mind--at least they are entitled to try.

Do you recall the irritation you felt toward the judge who "stuck his nose" into your lawsuit? How we looked askance when he took over the questioning of our witnesses or led them down unwelcome paths, prematurely elicited answers to key questions, and completely disrupted our well-laid plans for the systematic presentation of our case. We recall that Bacon said in his Essay on Judicature that "an overspeaking judge is no well-tuned cymbal." Minding our own business and permitting lawyers to mind theirs are essential corollaries of patience.

The judge should be particularly patient with the young lawyer who comes to court for the first time. The reception we ac-

cord that lawyer will make a lasting impression, good or bad. We want it to be good.

When we go to the Great Chambers Beyond, or whatever special place is reserved for judges, we may hope that we will leave behind us a reputation among the members of the bar that, while maybe we weren't the greatest judges in the world, and certainly not the smartest, still we were unfailingly courteous and always patient. That alone should afford us great claim to immortality.

Common Sense--Our Best Tool

It may be that in the first blush of assuming the duties of a federal judge you will be so engrossed with conflicting statutes, inconsistent decisions, and all kinds of government rules and regulations that you will forget all about using one of the principal tools of a good judge, and that is common sense. Really, there is no substitute for it. It has been said that "the law is common sense as modified by the legislature."

"A judge will never go far wrong," wrote Levi S. Udall, the longtime chief justice of the Arizona Supreme Court, "if he applies the test: Does my proposed action square with good common sense?"[5]

Here is an example of what happens when you disregard your common sense. As a neophyte judge, I was trying an action on a promissory note in a jury-waived case. Parol evidence was of-

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5. Udall, The Essential Characteristics of a Judge, 41 J. Am. Judicature Soc'y 69 (1957).

fered to show the capacity in which the promisor signed. Common sense told me I should receive that evidence for what it was worth. But I sustained an objection to it for the reason that the court decisions were clear (or at least I thought they were) that parol evidence was inadmissible to vary the terms of the unambiguous written instrument.

The court of appeals reversed me.[6] I do not scourge myself for misinterpreting the pertinent law of Minnesota, but rather for failing to receive the proffered evidence subject to the objection (as my common sense told me I should), and later determining its eligibility for consideration in the quiet and contemplative atmosphere of my chambers. After all, absent a jury, what harm could result from at least receiving the evidence?

After this experience, you may be sure I was always mindful of the observations of the court of appeals of my circuit when, speaking through one of its senior spokesmen, noted for his practical wisdom, it said:

> In the trial of a non-jury case, it is virtually impossible for a trial judge to commit reversible error by receiving incompetent evidence, whether objected to or not. . . . One who is capable of ruling accurately upon the admissibility of evidence is equally capable of sifting it accurately after it has been received.[7]

Common sense should tell us many things in the law. For in-

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6. Rosen v. Westinghouse Elec. Supply Co., 240 F.2d 488 (1957).

7. Builders Steel Co. v. Commissioner of Internal Revenue, 179 F.2d 377 (1950).

stance, it tells us that only under exceptional circumstances, and after a most forceful showing, should we sign an ex parte order. Too many needless judicial headaches have been occasioned by the improvident signing of ex parte orders.

Common sense tells us, too, that while summary judgment looks like an expeditious device for speedy disposition of our cases, it is really a special tool for very limited application to relatively few cases, and should be granted only on an unmistakable showing of a complete absence of any fact controversy. It is likely that more trial judges have been reversed more often for improper granting of summary judgment than for any other single judicial act.

Yes, and it is common sense, plus a good deal of humility, which tells us that, shocking to our professional dignity though it may be, a reversal by the court of appeals now and then may be a good thing. A reversal keeps us on our toes; it teaches us to be careful and industrious; it curbs our impetuosity and nurtures judicial-mindedness. And, most of the time, fairness requires us to conclude, after the personal sting has worn off, that the court of appeals was right. Not all of the time, to be sure! But even when the higher court is wrong we can't do anything about it anyway, so we had best forget it.

Here is a word of advice about reversals: Do not keep track of them. The judge who charts a batting average as to his percentage in the court of appeals is likely to become a hesitant and timid judge. Such record keeping may make him too cautious--

so sensitive to committing error that it deprives him of the intellectual courage which should be the hallmark of a good trial judge.

All in all, common sense is the best tool in our judicial kit. We might be able to get by as judges if we don't know much law, but we just can't make it without common sense.

Judicial Qualities

What makes a good judge? Former Lord Chief Justice Goddard of England tells us in his interesting manner what the appointing authority in Britain looks for. He says:

> The qualities to be looked for in a judge . . . are first that he should be a lawyer of reasonable capacity. A judge of first instance need not necessarily be a consummate lawyer. He should be a man of even temper and one who can be trusted to display and continue to display courtesy to the litigants and bar; in short, if I may use a much abused expression, he should be a gentleman. A sense of humor is always an asset, but, a constant joker is anathema. Another quality devoutly to be wished for is the ability to keep reasonably silent while trying a case. A garrulous judge is a misfortune; he maddens the bar and slows up proceedings, but, unhappily, it does happen that a somewhat taciturn barrister becomes surprisingly talkative once he is seated on the bench.[8]

As trial judges in the federal system, you and I have a special and important place in the scheme of things. Our close proximity to the lawyers and to the litigants gives us a burden of public responsibility much greater than we may appreciate offhand. May I leave you with a story which makes the point?

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8. Lord Goddard, Politics and the British Bench, 43 J. Am. Judicature Soc'y 124, 131 (1959).

A certain bishop of Paris, known throughout Europe for his great learning and humility, came to the conclusion that he was unworthy of his high place in the church and successfully petitioned the pope for reassignment to service as a simple parish priest. The legend is regrettably vague as to whether this happened in the twelfth century or the thirteenth, or indeed as to whether our almost unbecomingly humble prelate was bishop in Paris or someplace else, but it is perfectly clear as to what came of the reassignment. After less than a year of parish work, the former bishop was back in Rome with another petition, this one praying for his restoration to episcopal status, and for good and sufficient reason. He said:

> If I am unworthy to be bishop of Paris, how much more unworthy am I to be priest of a parish. As bishop, I was remote from men and women of lowly station, my shortcomings and weaknesses concealed from them by distance and ecclesiastical dignity. But as parish priest, I move intimately each day among the members of my flock, endeavoring by comfort, counsel and admonition to make their hard lot on earth seem better than it is. I am the church to them; when my faith flags or my wisdom fails or my patience wears thin, it is the church that has failed them. Demote me, Your Holiness, and make me bishop again, for I have learned how much easier it is to be a saintly bishop than to be a godly priest.

The trial judge is the parish priest of our legal order.[9]

Now this is not to say to any appellate jurists here that you should turn in your commission for one of ours, but rather to say that as trial judges on the action line of the law, we re-

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9. Jones, The Trial Judge--Role Analysis and Profile, in The Courts, the Public, and the Law Explosion 125 (H. Jones ed. 1965).

flect to the bar and to a large segment of the public the good, or the bad, of the American legal system. That is a large responsibility.

I welcome you again to our federal judicial fraternity. We are an exclusive group of men and women--there are fewer than one thousand of us in the United States. It isn't every one of our profession who is privileged, as are we, to be recommended by a senator, nominated by the president, confirmed by the Senate, and appointed by the chief executive to the office of United States district judge. It is a great honor and with it goes the equally great responsibility, by our personal and professional conduct, to make justice work fairly and efficiently in the trial courts of the United States.

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THE FEDERAL JUDICIAL CENTER

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