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### Safeguarding the Heritage

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an effort that today would make this book far more muscular. As a new U.S. Sentencing Commission searches for new direction, these authors have an unparalleled opportunity, as do others who complain of its ways. It seems a good bet that the underlying statute here is not likely to be repealed soon. Indeed, the spirit of the times seems more likely to yield further sentencing commissions in additional jurisdictions. Legislators and commissioners will seek

to learn from the unsatisfactory federal experience recounted here.

Excellent prescriptions enumerated in *Fear of Judging* are consistent with the near certainty that guidelines sentencing will live on. But not frontally addressed is how a revived or renewed commission might reinvent the system in a fashion consistent with individualized judging. I wish that the new commissioners who will be appointed in 1999 had available a detailed prescription defining

a program to achieve a system by which the sentencing ritual is restored, judicial discretion is channeled by guidelines that provide guidance and not binding prescriptions, and the entire process is reviewable on appeal through reference to a body of law that is meaningful and useful. ☞☞

**STEVEN FLANDERS**, an international court consultant, served as executive of the Second Judicial Circuit of the United States from 1980 to 1997.

## Safeguarding the heritage

by Daniel R. Coquillette

*Excellent Judges*, by Edward F. Hennessey. Franklin N. Flaschner Judicial Institute, Inc., 10 Winter Place, Boston, Mass. 02108. (617) 542-8838. 1997. 33 pages. \$6.

Edward F. Hennessey's *Excellent Judges* is a most challenging book for one so short and, at superficial glance, with such an obvious message. While I read the book in one sitting, I find myself reflecting on it, almost involuntarily, again and again. This is not a particularly comfortable book, but rather, given our day and age, a book with a warning.

Hennessey's purpose seems simple enough, to set out the "attributes of excellence in judges," and thus provide "some wisdom in this writing for appointing authorities, search committees, the bar, judges and judicial candidates." His writing and stated examples are direct, and crystal clear, as, indeed, was his own style of leadership and personal example as chief justice of Massachusetts for 13 years. The problem comes when we reflect on *Excellent Judges* in the context of our times.

Today, political logjams are crippling the federal judiciary, with key vacancies throughout the country, many open for years. There is intense political screening by both the administration and the Congress, including "litmus" tests of judicial ide-

ology and minute examination of candidates' social and cultural backgrounds. Sitting federal judges have been threatened with "impeachment" for unpopular decisions, and as Chief Justice William Rehnquist has courageously maintained, the independence of the judiciary must be constantly defended from erosion by low pay, legislative indifference, and political pressure.

Nor is the situation in the states any better. The federal courts are extraordinarily well administered, a legacy of former Chief Justice Warren Burger, and the constant efforts of Chief Justice Rehnquist and the Administrative Office of the United States Courts. But state chief justices are often hamstrung by narrow constitutional powers, and legislatures that are greedy for patronage with little or no understanding of proper court administration. Given the meager resources available, I remain astonished that these courts attract and keep such high caliber judges.

Finally, sensational media trials have shaken the faith of the public in the dignity of the justice system, and its protection of the rights of the poor, as well as the rich, and of victims as well as defendants. Chief Justice Hennessey discusses candidly the dilemma of the judge under media attack, and the pain of being unable to respond. He quotes Justice Oliver

Wendell Holmes: "I admit that it makes my heart ache...to know that many see sinister motives and would be glad to find evidence that one was consciously bad. But we must take such things philosophically and try to see what we can learn from hatred and distrust, and whether behind these there may not be some germ of inarticulate truth."

### Aware of the snakes

Hennessey is far too experienced not to be aware of the snakes in the garden. While he emphasizes the positive, and praises the "nobility" of character of most of the judges he has known, it is clear that this little book was not written just to say all was going well. Rather, like Yale Law School Dean Anthony Kronman in his best selling *The Last Lawyer* (1993) the chief justice is very much aware of the growing politicization of the appointment process, and of increased temptations to the uncontrolled ego or to the weak of character, or even just to the muddled minded. As he observes, quoting the great Paul Freund, "It may therefore be said that the most important thing about a judge is his philosophy; and if it is dangerous for him to have one, it is at all events less dangerous than the self-deception of having none." Yet having a well-defined judicial philosophy is not encouraged by a "lit-

mus test" political environment, as Hennessey recognizes.

Hennessey's quote from Francis Bacon sums up the challenge that this book represents for all of us. The quotation, "Above all things, integrity is [the judge's] portion and proper virtue," is drawn from Bacon's great essay, "On Judicature." But, as Hennessey knows, Bacon fell short in practice, and was impeached as Lord Chancellor by a politically hostile Parliament for admittedly accepting bribes. Like Bacon's famous essay, Hennessey's book is the finest, most concise expression of the professional ideals of the judiciary I have ever encountered. But, like the sad history of Bacon's career, the politi-

cal, cultural, and economic morays of the times have put these ideals under siege.

This, I believe, is the chief justice's fundamental point. We cannot take for granted the great tradition of the American judiciary. Several times he refers to the "long line," the judges that went before. "They inspire others in their turn to the next generation and the next and the next." He also emphasizes the nature of this tradition. It cannot be ensured by rules and punishment. "A heritage of professionalism and excellence is not based on the 'do's' and 'don'ts' imposed upon lawyers; 'professionalism' speaks to the aspiration of the profession." In the end, Hennessey's

"excellence" is safeguarded and ensured only by a culture of professionalism, at the bench and bar alike.

What can we do? Organizations such as the Flaschner Judicial Institute, the publisher of this little book, have been founded to reinforce the professional ideals of the judiciary. But in the end it comes down to each of us, each lawyer and each citizen. It may be a matter of debate whether we can live without Dean Kronman's "Lawyer-Statesman," but no one, in a free society, can do without Chief Justice Hennessey's "Excellent Judge." ☞☞

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## Focus

(from page 234)

its potential impact on the courts, and the types of cases that fall into the Y2K category. All of these steps will give decision makers more information to help them best craft reasonable alternatives.

In Hawaii, the judiciary is in the process of implementing systems to monitor Y2K filings in each of its courts. For instance, in its court of general jurisdiction, a new civil information sheet (which must be filed with each complaint) is being drafted in which, effective January 2, 2000, the filing party must note if the filing is Y2K related. Records will also be kept in other courts of Y2K-related filings. Thus, after January 1, 2000, the Hawaii Judiciary will be able to determine the number of Y2K cases filed in each court, and the category into which the cases fall. With this information the courts will be able to assess the impact of Y2K filings on the Hawaii Judiciary, and to design appropriate procedures to address the impact.

In Michigan, State Court Administrative Office staff have met with the governor's Y2K compliance officer and the assistant attorney general in charge of monitoring Y2K filings, with discussions centering on the advisability of the State Court Adminis-

trative Office's taking early steps to respond to anticipated court filings. Implementing a new case code to track filings is under consideration, but given the time needed for implementation in the numerous information systems in use by Michigan's 246 trial courts, this option may not be practicable. For the moment, then, the State Court Administrative Office is relying on informal reporting of information about Y2K filings by court administrators, judges, and lawyers. Frequent monitoring of the Y2K litigation web sites will also continue. The ADR section of the State Bar of Michigan is actively involved in educating the bench and bar as to the appropriateness of ADR in Y2K disputes, particularly where parties have on-going relationships.

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The crystal ball is not yet sufficiently clear for anyone to see what anticipated Y2K problems will mean for courts, but there are steps courts can take to keep a current inventory of Y2K disputes and to create processes to facilitate their resolution. At a minimum, courts should closely monitor Y2K litigation nationally to best guide the development of Y2K case management strategies. ☞☞

**ELIZABETH KENT** is director of the Hawaii Judiciary's Center for Alternative Dispute Resolution.

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