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MERLE W. LOPER: A LIFE OF SERVICE

*Honorable Daniel E. Wathen**

Every society that relies on judges to apply and interpret the law inevitably faces the question—who is to judge the judges? In Maine we answered that question by forming the Committee on Judicial Responsibility in 1978. The Committee includes representatives from the judiciary, the legal profession, and most importantly, the general public. At present it is chaired by John DiMatteo, former President of Guy Gannett Publishing Company. Beginning in 1984, and until his death, Merle W. Loper served as the Executive Secretary of this Committee. Today, I would like to focus briefly on his years of service in what he described as “both a significant and vulnerable position for any attorney.”

Needless to say, the work of the Committee and its Executive Secretary is multi-faceted and extremely sensitive. The fact that Merle was selected for this position and that he served for thirteen years is a tribute to his legal knowledge, skill, and character. Do not assume, however, that he was much loved in his professional capacity nor that he was invariably viewed as a kind and benign presence by the judges. Any task worth performing leads to criticism. The only way to avoid criticism is to do nothing. In representing the Committee, Merle was sometimes criticized because he was not a practicing lawyer and was not thought to be acquainted with the reality of daily practice within Maine’s trial courts.

The administrative side of his duties introduced him into the prickly relationships produced by the separation of powers. To fairly conduct an investigation of judicial misconduct at the same time that the judge faces the process of reappointment and confirmation is not an easy task. On a practical level, Merle learned that the mere presence of the Executive Secretary at a courthouse threatened to destroy any confidentiality that a complainant might be entitled to. In preparing cases for consideration by the Committee, in implementing the dismissals ordered by the Committee, and in advising and representing the Committee in disciplinary hearings, both before the Committee and before the Supreme Judicial Court, Merle took his tasks seriously.

In fact, Merle was criticized for taking his tasks too seriously. In 1993, he evaluated his own performance as the Executive Secretary in a twelve-page report. He described the limited role of the Executive Secretary and cautioned that he should never be seen as a “prosecutor.” Rather, he thought it his responsibility to help the Committee make its determinations on the best evidence, analysis,

* Chief Justice, Maine Supreme Judicial Court.

and judgment available. Merle added, "As for myself, I am not a prosecutor by character. I prefer accommodation to conflict, peace to war, friendliness to hostility; but I likewise do not believe in letting matters go by in distorted form or on an unresolved basis."

With regard to his representation of the Committee before the Supreme Judicial Court, he described it as "pretty much a straight lawyer's role that does not raise the same tensions involved in presentations of cases to the Committee." Parenthetically he noted, "I view my brief writing as one of my stronger points; oral arguments are almost always frustrating."

Let me read Merle's cogent and thoughtful description of the tension that the Committee faces in enforcing a Code of Judicial Conduct for an independent judiciary. He wrote:

In conducting its review, the Committee walks a fine line between providing the kind of meaningful accountability that protects both the judiciary's and the public's interest in the ethical quality of judicial conduct and, on the other hand, respecting the judicial independence and discretion each judge must have to be free to make the difficult and important decisions day after day. To fall too far on either side of that line is to err. In my observation, the far greater likelihood of error for committees such as those typical of Maine and of the country as a whole lies on the side of deference to the judges. The pressures on such committees come primarily from the judicial side. The lines of communication, no doubt properly, are almost exclusively with the judicial institutions rather than with those who are the day-to-day consumers of the judicial product. The membership of such committees could hardly be characterized as radical, and even their nonjudicial and non-lawyer members usually have an extraordinary respect for the judicial office and those who hold it.

Part of the executive secretary's job, as a proper legal advisor to a committee such as this, is at times to serve as an insistent reminder of maintaining the balance.

And so today, I end with the observation that the people of Maine and Maine's judiciary continue to benefit from the fact that for thirteen years Merle W. Loper served as that insistent and deliberate reminder of the need to balance judicial independence with accountability. His steadfast example serves the cause of justice well.