COURT MANAGER

IN THIS ISSUE

A PUBLICATION OF THE NATIONAL ASSOCIATION FOR COURT MANAGEMENT

Volume 31 Number 1 Spring 2016

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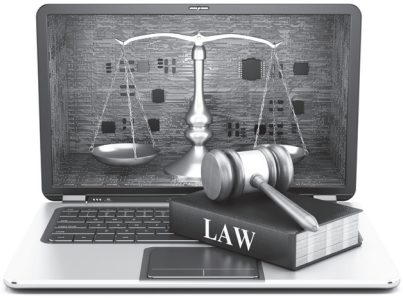

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A PUBLICATION OF THE NATIONAL ASSOCIATION FOR COURT MANAGEMENT

Court Manager Volume 31 Number 1 Spring 2016

President's Message

STEPHANIE HESS

It is always wise to look ahead, but difficult to look farther than you can see.

Woodrow Wilson

As many of you know, NACM is in the midst of a strategic visioning process. As a self-described "right angles person," this exercise has challenged me to stretch my imagination and to envision a NACM of the future that can provide the highest level of support to its membership while at the same time positioning itself as a thought leader in the field of court administration. In doing so, the NACM Board has identified several areas on which to focus in the upcoming years: 1) *Membership—Recruitment, Retention, and Engagement*; 2) *Services and Resources*; 3) *Advocacy for the Profession*; and 4) *Association Governance and Sustainability*.

Throughout this strategic visioning process, a number of exciting opportunities have presented themselves to the NACM leadership, one of which falls into the area of *Advocacy*. Following on the heels of court issues as uncovered in Ferguson, Missouri, in December the White House and the U.S. Department of Justice hosted events in Washington, D.C., to address the issue of fines, fees, and bail. Scott Griffith, NACM's president-elect, along with representatives from the Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA), attended those meetings. Scott has agreed to serve as a member of the joint CCJ/COSCA Task Force on Fines, Fees, and Bail. Several NACM members have also been asked to participate in various work groups.

As NACM looks to advance in the area of *Services and Resources* for members, it is also concluding its implementation of the new Core. At the same time, CCJ and COSCA have formed a joint subcommittee that will look for ways to cultivate future state court administrators. NACM is fortunate that one of our past presidents, David Slayton, serves as a COSCA representative on that subcommittee. This may provide NACM with a unique opportunity to assist CCJ and COSCA while also grooming our own members for future COSCA positions. This project may overlay the new Core as the next level of competencies for court administration professionals.

Finally, the NACM Board remains committed to its foundation, the membership, and will continue to focus on the area of *Membership–Recruitment*, *Retention*, and *Engagement*. The strategic visioning process has provided a vehicle by which we can examine our current way of doing business while pushing ourselves to consider additional possibilities that will better serve our members in the future. Many of you are contributing to this process as committee and subcommittee members. The NACM board is grateful to you for your dedication to our association, and we will continue to explore additional ways to add value to your NACM membership well into the future.

Editor's Notes

PHILLIP KNOX

When preparing my comments for the Editor's Notes every few months, I consider how best to link the articles, and I look for some thread or theme that might connect the various pieces. What is common among the four main articles this issue is that they each separately support the fundamental pillars of our profession.

The importance of public trust and confidence for the courts has advanced much work in the design and development of metrics and the means to track, monitor, and analyze performance indicators.

The National Center for State Courts (NCSC) has, since 2011, conducted public-opinion surveys in support of state court work. Much of this effort has benefited state-court-funding discussions. Even more recent work addresses the issues related to trends affecting society and are supportive of strategic planning efforts for courts.

In a display of this data we are enlightened as to all the work that is in front of us as court leaders. The public's response to our business model should drive us to question how we can continually improve.

In our next article, Brittany Kauffman with the Institute for the Advancement of the American Legal System (IAALS), offers us a view of how we might return value to a system of civil justice and, in doing so, achieve benefits for those we serve.

Nearly every court jurisdiction across the country has witnessed a decline in civil court filings over the past decade and even longer. There may be a number of factors that we can attribute to this downturn. Could it be that the court is a culprit, and then can the court and lawyers champion a solution that, in working together, might bring about just, speedy, and affordable justice?

Our third article is a compilation of two authors (interns) in the court where I work. I had the pleasure of working closely with the students, and, in doing so, I learned some things about my own court and about myself. The term "growth" that is used in the title of the article may in fact be my own.

It takes many positive attributes to be a mentor and teacher—patience and the desire to spend quality time with others, especially young people, that are willing and eager to learn. Mentoring should be a goal for all of us. If we care about our profession we should certainly care about the future of those who may someday fill our positions. How many of us can remember years back when someone, maybe an older person, took some time to mentor us in an important area? If that opportunity arises, please consider the value that it may bring to another, and to you and the organization.

Have you ever compared leadership in the courts to a fun activity? Well, Janet Cornell has us thinking differently about this important trait and quality of court professionals. Have some fun with the comparisons of driving a race car to leadership. The two have a number of similarities.

Many of you have cited the work of Matt Kleiman of NCSC and you may have had the pleasure of working with him over the years. Matt has offered to write a new column for the *Court Manager* to begin in our next issue. His role will be as an interviewer. Matt will sit with one of our colleagues and ask insightful questions related to their work in the courts. Inspired by a regular column in the *New York Times* ("Corner Office"), this feature is responsive to many of our readers who have asked for that personal connection with others in the profession. Look for Matt's column in the next issue.

Until next time, thanks for reading.

MARK YOUR CALENDARS FOR THE UPCOMING

ANNUAL CONFERENCE, PITTSBURGH, PENNSYLVANIA, JULY 10-14, 2016

The State of State Courts: Reviewing Public Opinion

Jesse Rutledge*

If your day job is at one of America's thousands of trial courts, you probably have noticed a significant decline in public trust in recent years. In part, this waning of confidence mirrors a steady downward trend of public faith in government and corporate America that has been apparent since the mid-1970s. And, in part, the decline reflects a general dissatisfaction with all institutions of government that has become more apparent in the last ten or so years. At a macro level, America's trust is diminishing, and its confidence wanes.

But if we are comfortable writing off this decline to larger, societal forces, we are missing a big part of the story—and potentially jeopardizing the future role of courts in American society. For when we look beyond the large systemic trends, it is apparent that public concerns about the courts are deep-seated and real. It is time to admit that these challenges exist, devise strategies to reverse these trends, and implement them. Though still the most trusted of the three branches of government, courts will continue to lose ground absent a willingness to hear the public's wake-up call.

History of Survey Work

In 2011 the National Center for State Courts (NCSC) embarked on a major public-opinion project. We worked in conjunction with our friends at Justice at Stake, a nonprofit organization based in Washington. D.C., which shared our concerns that judges and court managers were ill-equipped to communicate about the catastrophic budget crises that were capsizing most state court budgets. Jointly, we hired GBA Strategies, a national public-opinion-research firm, to conduct focus-group and survey work on how courts could improve their arguments for funding.[1] That work was presented to a wide national audience, including the 2012 annual conferences of NACM in Orlando and the Conference of Chief Justices and Conference of State Court Administrators (CCJ/COSCA) in St. Louis. A year later, a follow-up panel at the 2013 CCJ/COSCA annual meeting in Burlington, Vermont, highlighted the effective implementation of the messages. Court leaders reported positive responses to the messages and strategies that had been developed—some even directly tied funding

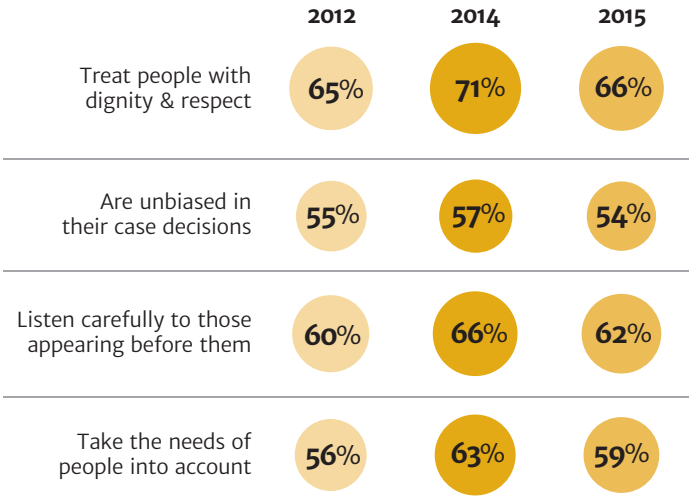
* The author thanks Blake Points Kavanagh of the National Center for State Courts for her assistance with research and editing of this article.

[1] Comprehensive information about this research can be found at ncsc.org/fundingjustice.

FIGURE #1

Opinions have softened (slightly) in the last year.

Q: ***"Do you agree or disagree with the following statements about state courts?"***



Percent saying well or very well.

increases to strategy and tactics gleaned from the research.

In 2014 NCSC established a new program called the "State of the State Courts." This project aims to replicate the success of the court-funding work by using opinion surveys to identify and track trends in public opinion, identify areas of concern for the courts, and inform strategic planning for the entire court community. A November 2014 national survey was followed by a similar effort in October 2015. Summaries of both surveys were published and disseminated online and in print form.[2]

Core Survey Findings

These two recent surveys, conducted in the span of about one year, allow significant insight into what Americans think about the courts. The research provides clarity on community challenges and what actions to take to address public concerns.[3]

While much of the survey work is designed to highlight public concerns, a fair review of the findings should include the positives who have been identified as well.

At a very high level, the public holds positive views about the courts and their core functions. Overall ratings for the judiciary remain higher than those for the executive and legislative branches of government.

A majority believe that the courts treat people with dignity and respect, are unbiased in their case decisions, listen carefully to those that appear before them, and take the needs of people into account. These are all positives for the courts, though some detractors would argue that these numbers should be much higher across the board (see Figure 1).

Procedural fairness is another area where the public, especially those with direct experience in a courtroom, gives high marks. Both the 2014 and the 2015 surveys filtered respondents based on their direct experience with a court.[4]

Across both surveys, 70 percent or more indicated that regardless of the outcome of the case, they were satisfied with the fairness of the process in their dealing with the system. Only one in four reported dissatisfaction. Those are solid numbers and are a positive on which courts should seek to build.

[2] Survey findings and analysis are available at ncsc.org/2014survey and ncsc.org/2015survey

[3] GBA Strategies surveyed 1,000 registered voters November 12-16, 2014, with a margin of error of +/-3.1 percentage points at the 95 percent confidence level. GBA surveyed 1,000 registered voters October 26-29, 2015, with the same margin of error. The 2015 poll was also administered to an oversample of 200 African-Americans over the same period, subject to a margin of error of +/-5.5 percent.

A clear-headed review of the data, however, requires one to conclude that negative views about the courts substantially outweigh these positives. Survey work over the past years, also informed by qualitative work in professional focus groups, helps us summarize some of these concerns into four general areas.

Customer Service

Conventional wisdom, widely held in the judicial and legal establishment, says that the key to stronger public support for the courts is increased interaction. Recent surveys indicate not only that this is incorrect, but also that those members of the public who have direct interaction with the courts give them *lower* grades on key customer-service indicators. This upends what is perhaps the community's most sacred of sacred cows: "To know us is to love us."

In our 2014 survey, we asked "How would you rate the job being done by courts in (your state)?" Only 41 percent of respondents who reported direct interaction *with* the courts rated the courts as good or excellent on this basic job performance measure, compared to 50 percent of those who reported no direct experience (see Figure 2).

Focus-group work with members of the public that have direct experience with the court system can be almost startling in its negative intensity. Participants in an April 2015 focus group in Atlanta piled on their local courts, describing rude customer service, long lines to accomplish basic tasks like paying traffic infractions, and poorly designed websites. One respondent said of court websites: "It's almost by design that they have no design." The implication is: Courts are not helping us solve our problems—they are intent on making it more difficult.[5]

Outdated Technology/Lack of User-Friendliness

Many judges and court administrators focus their technology dollars on developing e-filing portals or upgrading case management systems. These are key priorities for the court and for good reasons. They represent major internal efficiency gains, save taxpayer dollars, and are often demanded by budget writers. Even so, the public is left with the perception that courts are woefully out of date with their customer-facing technology. In the mobile self-serve era, when many of us complete our holiday shopping without leaving our couch and then pay our credit-card bill without writing a check, the gap between public expectations and what courts are currently delivering is vast.

Our 2014 survey found a plurality of respondents who, when forced to choose between a statement pair,

FIGURE #2

People are more likely to give lower ratings on job performance and customer service.

Q: *"Do you agree or disagree with the following statements?"*

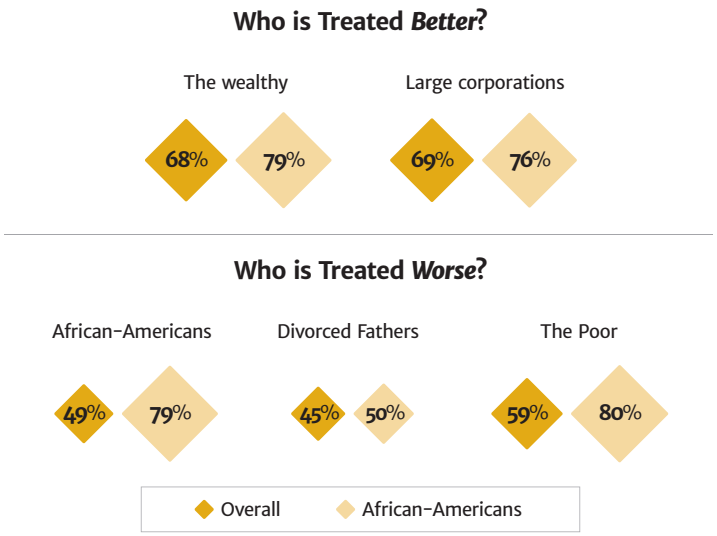
[4] We asked respondents whether they had been party to a family matter; had been to court for a traffic ticket; had been involved in any way in a criminal case; or had one filed against them. Respondents who said yes on any of these measures were deemed to have had direct contact with the courts; those who said no were deemed not to have had direct contact.

[5] Focus-group research on file with the author.

FIGURE #3

Beliefs in unequal justice are deep-seated and widespread.

Q: *"Tell me whether you believe that group is treated the same as other groups by the (court/justice) system, or whether you believe they are treated differently than others by the (court/justice) system."*



indicated that "courts are not effectively using technology to improve their own operations or how they interact with the people they serve." Perceptions are not always fair, which may be the case here as many state and local courts are sinking major dollars into backroom technology upgrades. Yet the survey response clearly highlights a missed opportunity by many courts to provide online payment or record-request options that would simultaneously alleviate demands on court employees and boost customer service ratings.[6]

Unfairness/Bias

The public also harbors considerable concern about unfairness in the court system. These viewpoints should be alarming to all of us. Our court system rests on the bedrock principle that everyone should receive equal justice, regardless of an individual's politics, income, or skin color.

Yet there is widespread concern that politics is having a significant impact on who makes it onto the bench and how they rule once there. Our 2014 survey found stronger support for the statement "Judges in (state) courts are there because of personal connections or political influence" than for its opposing statement that "Judges in (state) courts are selected based on their qualifications and experience." There is also evidence that negative campaigning in judicial elections is furthering these sorts of perceptions. Digging into the 2014 survey, respondents from the nine states with partisan contested elections to a state's court of last resort were more likely to feel this way than those from other states.

But concerns about politics affecting justice pale in comparison to the survey results found from talking to Americans about what other factors influence perceptions of unequal justice.

In our 2015 survey, we asked respondents about a series of different demographic groups in American society, and whether that group is treated the same as other groups by the courts. Nearly seven in ten Americans believe that both the wealthy and large corporations receive better treatment in the courts than other groups. Conversely, nearly six in ten believe that the poor receive worse treatment. Almost half of the entire population believes that African-Americans, as a group, receive worse treatment (see Figure 3).

Our 2015 survey oversampled African-American respondents, which allows us to get a more accurate perspective of that community's perceptions. Virtually across the board, on almost every measure, African-Americans exhibit greater skepticism than the overall population about the fairness of the court system. While half the population believes that African-

[6] NACM's 2016 guide will focus on strategies to make courts user-friendly. It is sure to be filled with good ideas for court managers to test in their jurisdictions.

Americans receive worse treatment, eight in ten African-Americans hold this view. And while 59 percent of the overall population believes the poor receive worse treatment, 80 percent of African-Americans hold this belief. This trend is seen throughout the entire survey. While it is easy to be desensitized to an array of polling numbers, one figure in particular stands out: only 32 percent of African-Americans believe that state courts "provide equal justice to all." That is an astonishing lack of confidence (see Figures 3 and 4).

Cost and Delay

That last two surveys have also confirmed that the public holds the belief that the legal system overall (not only the courts) takes too long and costs too much. For instance, over 70 percent of our 2014 respondents indicated that the cost of hiring a lawyer would dissuade them from taking a legal concern to court. This was the top reason cited for not taking a legal matter into the court system.

Focus-group participants expressed beliefs that vested parties—particularly lawyers—colluded with judges to defer and delay decisions. Many believe that the financial interests of the few disrupt the efficient administration of justice.

Is the public ready to leave the court system in droves? It is probably too soon to say.[7] However, our research indicates that the public is certainly very interested in alternatives to traditional dispute resolution in a courtroom setting. Our 2015 survey asked pointed questions about preferences for using the courts or using alternative systems, with about two respondents selecting the alternative option for every one selecting the courts.

Implications for the Real World

Looking at these four core findings, it is fairly easy to stitch together a portrait of what our community needs to do at an operational level to earn gains in public trust.

Strive to Meet Public Expectations

Attorneys and litigants can be better served. This begins with recognizing that the courts can no longer expect to have an enduring monopoly on conflict resolution in American society. For many, this may be a humbling change in perspective. The judiciary is an institution steeped in process and hierarchy, but various forces have coalesced to flatten (some would say democratize) traditionally unequal relationships.

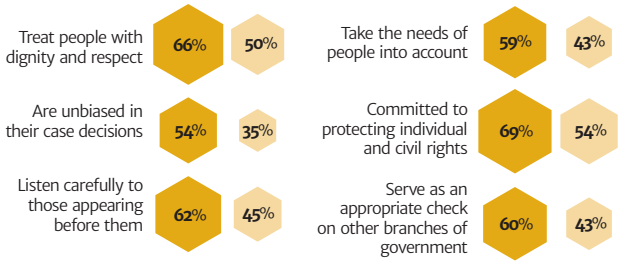
It continues with changing our mind-set: we must treat those who

FIGURE #4

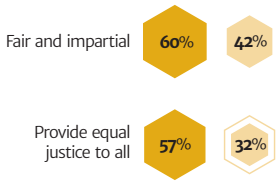
Race impacts perceptions of fairness...

...and less than a third of African-Americans believe courts provide equal justice.

Q: *"Do you agree or disagree with the following statements about state courts?"**



Q: *"How well does each of the following describe state courts?"***



***Percent saying agree or strongly agree.**
****Percent saying well or very well.**

[7] A decline in filings was tracked by NCSC's Court Statistics Project in their publication *Examining the Work of State Courts: An Overview of 2013 State Court Caseloads* (2015). Trial courts nationwide reported an 11 percent decline in incoming cases during 2008-2013. The population-adjusted rate of total caseloads during the decade from 2004 to 2013 shows an average 6 percent decline in incoming cases.

enter a courthouse to conduct business as customers, not as supplicants. Put simply: Bedside manner matters. By investing in the training of our frontline staff, we can improve the basic interactions between a court and its customers. This may sound painfully simple, but it is evident from the research that if we know this is important, we are not executing on it. Develop customer satisfaction surveys on paper and online; provide spot incentives to employees demonstrating outstanding service; integrate public-service expectations into performance plans. These are easily achievable goals that require minimal effort.

Focus on Self-Service Options

We are quickly entering an era where customers are frustrated if they cannot perform basic tasks on their mobile devices. Think of what you may have done on your smartphone in the past week: Renewed your vehicle registration? Ordered groceries? Received updates on your child's performance in school? And yet too many people are taking time out of their busy lives to stand in lines to conduct court business that could and should be handled remotely.

Our 2014 survey turned up truly amazing figures about the public's willingness to conduct business online. More than 75 percent of all respondents said they would definitely or probably use the Internet to access court records, pay fines or fees, or submit questions on procedure to court staff. It is not surprising that the numbers for those under 40 years of age were even higher. What is a surprise is that more than half of those over 65 echoed these sentiments. The demand is broad based; it is not a whim of the millennial generation.

We need to implement functional, consumer-facing technologies that we already take for granted in most other aspects of our lives. Why can I pay to park on the street electronically in most major urban areas, but not pay for a parking ticket in the same way? How come I can resolve a dispute about a credit-card charge using an online chat function on my desktop computer, but cannot use this technology to be pointed to an appropriate form on a court website?

Help People Help Themselves

The public prefers to help themselves. We know this from the skyrocketing increases in self-represented litigants.[8] To hear most judges and court managers describe this problem is to lay the problem at the feet of those who cannot afford representation. They do not know the rules; they do not know the process; they come unprepared; they are at fault for slowing down the system.

Maybe it is time to ask the question in a different way. How can we help people help themselves? What education can we provide without crossing into the unauthorized practice of law? How can we get useful information to those who plan to navigate the system without representation? To be fair, the courts are making gains in this area, but we need to pick up the pace.

Conclusion

Everyone who works in the courts believes in the shared mission to make justice as fair, equal, and accessible as it can be. We want to work in a system where the public feels heard, respected, and confident that they are receiving justice. Survey work provides market research about our customers and helps us better understand their needs. The initial challenges are vast, but there is a roadmap for turning negative perceptions into positive ones and to increasing public trust and confidence in America's state courts.

ABOUT THE AUTHOR
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[8] One of the most striking findings in the latest NCSC research revealed that 76 percent of the cases studied, which excluded domestic cases, had at least one self-represented party (i.e., tort, contract, and real-property claims). See *The Landscape of Civil Litigation in State Courts* (Williamsburg, VA: National Center for State Courts, 2015). Reliable data for the increase in self-representation has been nearly impossible due to the lack of a standard method for state courts to use when counting and reporting cases in which litigants are self-represented. The NCSC developed a uniform counting methodology for the courts to use, yet implementation is extremely difficult, mainly because it requires customization of a court's case management system. See "Developing Standardized Definitions and Counting Rules for Cases with Self-Represented Litigants," final report, National Center for State Courts, Williamsburg, Va., December 19, 2013.

Change the Culture, Change the System: A Top 10

Brittany K.T. Kauffman*

Ten years ago, in January 2006, IAALS, the Institute for the Advancement of the American Legal System at the University of Denver, opened its doors with a mission to improve the civil justice system. The goal was to provide original empirical research to identify the issues, develop solutions in partnership with some of the brightest minds in the country, and then support implementation and change. Ten years later, momentum toward change has built in our civil justice system at both the state and federal level. Recent amendments to the Federal Rules of Civil Procedure focus on proportionality, case management, and cooperation. Recommendations are also forthcoming from a committee, appointed by the Conference of Chief Justices, to address cost and delay and increase access at the state court level, the area where we see the vast majority of cases in the United States.

It took much hard work to get this far, but achieving the full impact of these recommendations and reforms ultimately comes down to implementation. How do we ensure that

* This article is a shortened version of the following publication by the same author: "Change the Culture, Change the System: Top 10 Cultural Shifts Needed to Create the Courts of Tomorrow," Institute for the Advancement of the American Legal System, University of Denver, 2015. The full article is available on IAALS's website at http://iaals.du.edu/sites/default/files/documents/publications/top_10_cultural_shifts_needed_to_create_the_courts_of_tomorrow.pdf.

the positive changes intended by the reforms come to fruition? How do we tap into this momentum to create the just, speedy, and affordable courts of tomorrow? The answer to this question is as important as the recommendations themselves, for without positive implementation, the efforts thus far will be wasted.

An important takeaway from the efforts around the country toward civil justice reform over the last 10 years is that rule changes are not enough to change our system. Culture—defined broadly as the shared norms and values that define the behavior of judges and lawyers, beyond the more formal rules and structure of our legal system—plays a pivotal role in the administration of justice in our country. We must recognize the importance of culture in achieving our goals for a better system, and in failing to achieve them. Thomas Church, an early researcher in the area of "legal culture," recognized that it is these established expectations and practices that result in considerable resistance to change.[1]

> Perhaps the most intriguing aspect of culture as a concept is that it points us to phenomena that are below the surface, that are powerful in their impact but invisible and to a considerable degree unconscious. . . . In another sense, culture is to a group what personality or character is to an individual. We can see the behavior that results, but we often cannot see the forces underneath that cause certain kinds of behavior. Yet, just as our personality and character guide and constrain our behavior, so does culture guide and constrain the behavior of members of a group through the shared norms that are held in that group.[2]

Thus, to make significant changes to the system, we must make changes in the pervasive legal culture.[3]

We have spoken with judges, court administrators, and lawyers on both sides of the "v" over the course of the past year to gain input on the cultural changes that are needed, the challenges, and possible solutions. We have conducted focus groups with lawyers, general counsel, and plaintiffs' counsel, and we have had individual conversations with an equally diverse group. There has been a consistent theme across these discussions—the agreement that culture change is an essential component of civil justice reform. Rules alone are not enough. We have boiled the consistent themes from these conversations down to the following "Top 10."

1. Back to Our Professional Roots

Law needs to be a collegial and civil profession first and foremost.

As a profession, we take pride in our work and believe that it is both essential to our democratic system and personally rewarding. Unfortunately, the vision of the lawyer and the judge—and the court—in mainstream America has changed. It is clear there has been a turn for the worse in the perception of our judges and our attorneys. At the same time, legal periodicals, business journals, and the Internet are filled with articles discussing the "business of law." Law firms around the country are focused on how to make the business of law profitable. Courts feel these same pressures, particularly given tight budgets.

When lawyers regularly met in person—be it at the courthouse, across the table, or at a bar event—the result was a level of accountability and collegiality. Lawyers do not get the same opportunities to meet each other in person and work across the aisle. It is clear the nature of our practice has changed, and there is no way to put the genie back in the bottle. But it is important that we do not lose our professional identity in the process. We are professionals, we are dedicated to the rule of law and to a fair system, and we must work together not only on a case-by-case basis, but also more broadly to achieve the common goal of a just, speedy, and inexpensive determination in every action.

2. Guided by Justice

The focus should be on justice, not on winning at all costs.

The issue with the word "adversarial" is that for some lawyers it serves as an invitation to battle, rather than an invitation to implement a procedurally fair, measured system. As lawyers and officers of the court, we have an obligation to use the system to find the truth, seek justice, and achieve fair and efficient outcomes for our clients. Focusing on achieving justice, rather than "winning" at all costs, can shift the representation and the goals to a positive effort that is more professional, more objective, and more consistent with our overarching goals of a fair and just system. Achieving

[1] See generally, Thomas Church, Jr., Alan Carlson, Jo-Lynne Lee, and Teresa Tann, "Executive Summary," *Justice Delayed: The Pace of Litigation in Urban Trial Courts* (Williamsburg, VA: National Center for State Courts, 1978), p. 15.
[2] See Edgar H. Schein, *Organizational Culture and Leadership*, 4th ed. (San Francisco: Jossey-Bass, 2010), p.14.
[3] Church et al., *Justice Delayed*, p. 192 (concluding that "the most important, and the most difficult, change a court should make is in the long-term expectations and practices of civil attorneys practicing in the court").

procedural fairness is an essential component of this shift. We need to recognize the importance of procedural fairness for litigants and make it a guiding star throughout the process.

3. Dig Deeper, Earlier

Lawyers need to develop a deep understanding of their case early in the process.

To achieve this justice for clients, lawyers need to understand the issues in their case and work with opposing counsel and the judge to tailor the process in a way that is designed to identify and resolve the real issues. With the continued growth and complexity of discovery, lawyers have gotten into the habit of seeking broad discovery that is neither tailored nor focused. Instead, lawyers ask for everything they can think of, putting off the difficult questions and analysis of the issues for later in the case. As a result, it is often the norm that lawyers are unprepared at the initial stages of a case. While there may be legitimate reasons that lawyers put off this preparation, lawyers also need to recognize that to best serve their clients, they need to stop and think about the issues in the case and the needs of the client. When they do not, the result is cost and delay for their clients and the entire system. The more our system—through the rules, the judges, and reminders from the court—encourages attorneys to efficiently think about their case at an early point, the better.

4. A New Approach to Discovery

We need to change how we view discovery.

Discovery has taken on a much different role in civil litigation than it held 30 years ago. Today, the discovery

phase of litigation can actually be the "end game." Cases are won and lost in discovery; it embraces procedural objectives beyond merely the search for the truth; and it has become grossly expensive for clients—and very profitable for lawyers. Technology has contributed to this expansion. We need to change this "discovery until the ends of the earth" mentality. As one lawyer puts it, we need to move from a smorgasbord of "all you can eat" to a menu where you get what you need.[4] This requires judgment, and for that reason it is challenging for those who are inexperienced. In addition, the lack of technical competence poses real challenges to lawyers facing rapidly evolving technology. Every case should represent an opportunity for innovative, case-specific application of the rules in a way that is best designed to discover the facts and prepare the case for trial—or settlement on the merits.

5. Engaged Judges

Judges need to be engaged, accessible, and guided by service.

Judges play a critical role in achieving these changes, as they are in a unique position to help recognize system-wide ideals and tip the scales in favor of those ideals. Just as lawyers need to own their cases, ask the hard questions, and engage with their clients, so too do judges need to be accessible and available to hear and resolve disputes. Some judges have resisted these changes on the grounds

[4] See Institute for the Advancement of the American Legal System, "Creating Momentum for Change: IAALS' Final Evaluation of Colorado Court Rule Changes," press release, October 2, 2014, available at http://iaals.du.edu/blog/creating-momentum-change-iaals-final-evaluation-colorado-court-rule-changes (quoting Skip Netzorg).

that hands-on management is making their jobs more managerial. But, in fact, these changes go to the heart of judicial function: applying the law, serving the litigants, and ensuring justice. Judges also play a critical role in fostering and setting the tone for civility and cooperation. They are the stewards of our system and the key in achieving culture change.

6. Courts Taking Ownership

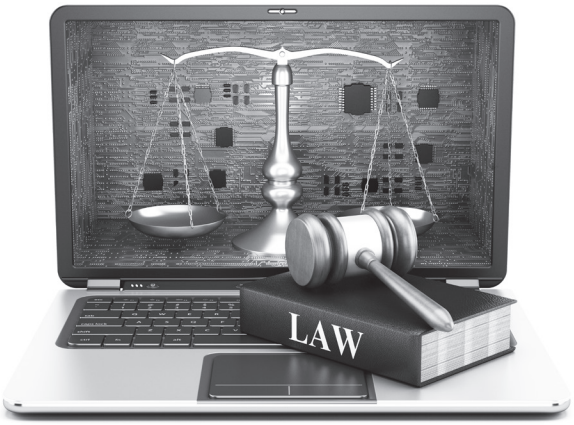
The courts need to be accessible, relevant, available to serve, and responsible for every case.

Beyond individual judges, the courts as a whole play an equally important role in our civil justice system. As the system becomes more complex—including all the possible inefficiencies and efficiencies that can come with technology—it is critical that the courts are managed to be accessible, relevant, available to serve, and responsible for the cases that come before them. This is different than individual judicial management at the case level. This is about management by the court of the entire docket so as to ensure that the court itself is maximizing access and effectiveness.

7. Efficiency Up the Court Ladder

We need to utilize everyone within the court structure more effectively and efficiently.

A critical way in which courts can make a difference in the provision of court services is to rethink the court structure so as to utilize everyone in the most efficient and effective way. With the advent of electronic filing and electronic case management systems, there are different staff needs in our courthouses today than there were 20 years ago. The modern court must be staffed in a way that employs each person in the most efficient way possible. We also need to rethink how we utilize the entire court infrastructure. It is critical that everyone work as a team, recognizing the valuable roles that everyone plays at all levels. We should not be cabined by the traditional positions or responsibilities of court staff. Just as law firms are being moved in this direction by the market, so too must courts adjust to the needs of modern society. We need to think with openness about the best way to do what court systems do.



8. Smart Use of Technology

We need to use technology for efficiency, effectiveness, and clarity—in the courts, in law practice, and in ensuring the legal system is accessible for nonlawyers.

Building on the use of people in the most efficient way possible, we also need to utilize technology to increase efficiency, effectiveness, and clarity. This is true for our courts, but it is equally true for law firms. The entire system needs to harness technology so as to create a system that is relevant in the 21st century. Lawyers, judges, and the courts need to harness technology to better meet the needs of a "just, speedy, and inexpensive" determination in every case. We must not use technology just to paper over outdated systems, or just to pave the cow paths. We actually need to think about how the system could be better and then utilize technology to get there. With the rising numbers of self-represented litigants, we also need to think about how best to utilize technology to meet their needs and ensure that the legal system is accessible to all.

9. Valuing Our System

We need to value our court system, our judges, and our juries.

Courts all over the country have struggled over the last five years with budget cuts. This has created many challenges, as courts are forced to justify their budgets while struggling to provide more with less. While budget constraints can force efficiencies, they also come at a cost. For our system of civil justice to remain relevant in the 21st century, it is critical that funding be available to facilitate the use of technology and innovation and support our courts through the transition.

And while funding is critical, the issue is deeper than adequacy of funding. It goes to the extent that we value our court system. We need to recognize the important role that courts, judges, and juries play in our society and value them accordingly. Much of this comes down to a lack of civic knowledge in our society, and a corresponding lack of understanding and value for our civil justice system and all of its components. The more society appreciates the important role our civil justice system plays, and the more individuals connect the system's value to their lives, the more likely it is that we will invest in that system and view it as essential.

10. Realign Incentives

We need to focus on the incentives driving lawyers and work to align them with our goals for improvement of the system as a whole.

There is a tension in our system between the adversarial model in which the parties are pursuing their own interests/client interests in individual cases and the good of the system as a whole. While there can be this tension between individual and system interests, the two are not mutually exclusive, and good lawyers and judges recognize this is true. The more we can create a system that fosters and values these overlapping interests, the better. We need to recognize that current economic incentives do not always line up with the goals of the system, and that current economic incentives tend to work against, rather than for, many of the changes above. To effect real, long-lasting change, we need to strive to align the incentives at the individual case level with the overarching goals of the system. We need to consider the actual incentives that motivate people to comply with change when changes are being adopted. This is an important takeaway from past research on local legal cultures, and it must be a central consideration in future reform efforts.[5]

Conclusion

In 1981 Sherwood and Clarke summed up the challenges of reform:

> To talk about how slow civil cases move, about the need to change the situation, about how difficult it is to effect change, to recount the long list of workshops, symposia and crash programs that have not produced permanent change—these become comfortable topics of conversation in much the same way that the weather provides a focus for empty discussion. Like the weather, everyone talks about civil case delay, but no one does anything about it. ***To produce any real change, the system itself has to change. People's attitudes toward discovery, settlement, continuances, etc., have to change. More importantly, the behavior of individuals would also have to change dramatically.*** These changes in behavior would be fairly profound; they would appear impolite, rash or irrational and would cause a great deal of discomfort to those affected. It is far easier merely to talk about the need for change.

The same can be said about civil justice reform today. It is far easier merely to talk about the need for change than actually to change. Enough talk. Now is the time for each of us to take responsibility for changing our own approach and biases, and to join in a common mission to achieve a truly just, speedy, and inexpensive dispute resolution system.

ABOUT THE AUTHOR

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[5] Joel B. Grossman, Herbert M. Kritzer, Kirstin Bumiller, and Stephen Dougal, "Measuring the Pace of Civil Litigation in Federal and State Trial Courts," *Judicature* 65 (1981): 86, 93 ("successful reform efforts must be based, in substantial part, on creating different kinds of incentives for the main actors in the system").
[6] David R. Sherwood and Mark A. Clarke, "Toward an Understanding of 'Local Legal Culture,'" *Justice System Journal* 6 (1981): 200, 213-14 (emphasis added).

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Practical Experience and Growth: Investing in Our Future

Jeremy Ashworth and Derek Kaye

Our work in courts can sometimes lead us to fulfillment that we may not have anticipated. I was recently the beneficiary of an opportunity that would prove personally rewarding. I am proud to say that this court regularly invites a number of undergraduate and law-school students to intern here during the summer. This particular opportunity, however, arose in September and rather than focus on research, the discipline preferred was alternative dispute resolution, and rather than be assigned to a certain judge, the students were assigned to me. All of this would have been routine if there were a few extra hours in each of my working days and if we had an intern program already developed in our ADR Department.

Little time will be committed here to describe how the program was successfully started, but suffice it to say that great support staff can solve any problem. These young people listened to divorcing couples and their attorneys, families in the midst of guardianship and conservatorship issues, victims of crime, and parties who suffered severe financial crises. It was quite an experience for young people who otherwise do not get this exposure in their classroom.

What follows are their accounts of what they experienced, in their words.
Phillip Knox

Upset spouse: "He cheated on me and that is why I want spousal maintenance."

Mediator: "Is this part of the four factors that a judge would consider for maintenance?"

Upset spouse: "No, but I want him to hurt."

This kind of dialogue is common within family mediations. In law-school negotiation class, it is said that "emotions can trump objective criteria." This connects to an understanding of human behavior from the study of psychology and to the difficulty of

negotiations in the practice of law. The law can be used to value the claim and assess the risks of moving forward with litigation.[1] Sometimes, emotions can act as a barrier to that person's ability to reason and empathize. Many attorneys and judicial officers struggle with the emotional component of legal negotiations. The legal system exists because of individuals' inability to reason when under intense emotions. One reason that alternative dispute resolution exists is to address people's intense emotional experience within litigation.

Each day as an intern in the Maricopa County alternative dispute resolution (ADR) program was like learning from a fire hose. In the ADR program, there are a few hundred cases each month that are referred by judges. The court staff would contact the parties before the conference to make sure they were comfortable with having an intern observe the negotiations. There were settlement conferences in the morning and in the afternoon. The issues involved probate, divorce, medical malpractice, personal injury, property disputes, and criminal cases. The judicial officers were either judges, retired judges, commissioners, or judges pro tem, who performed the work as mediators for the settlement conference. The judicial officers were incredibly gracious to explain the nuances of what was happening. We as interns were able to help judicial officers by consulting with them, talking the language of mediation, and discussing different interventions. There was an incredible amount to be learned from the judicial officers' extensive experience.

The difference between a decent mediator and a remarkable mediator is the same difference between decent athletes and Olympic athletes. That is the desire to improve. Olympic athletes swallow their pride and allow multiple coaches to critique every aspect of their sport. Mediators who seek feedback and additional training will see meaningful improvement. Most of the judges that participate in the settlement conferences even sought feedback from student interns. This culture of desiring to improve is such a crucial element for the success of mediation in the Maricopa court system.

When judges research the law in regards to a case, they are improving their knowledge of the legal system. When judge-mediators read up on mediation theory and seek feedback from peers, they are cultivating their mediation skills. There is room not only for judges to learn more about mediation but for lawyers, as well. Learning how to balance advocating and neutrality rounds out a lawyer's skills. Not all mediations reach successful resolutions. However, a skilled mediator can resolve some of the issues so that the case will have fewer issues when it goes to trial. This allows the court to operate more effectively and focus only on the issues the parties could not agree on. In this way, mediation and the trial system are complementary to each other. There is always room for improvement both within the system and with the mediators themselves. The best mediators are able to withhold their solutions. This is an interesting concept for the majority of mediators that do the settlement conferences because they are mostly current judges and judges pro tem. The court is using its most valuable resources for mediation: judges and seasoned lawyers. This is a huge benefit because of the judges' numerous experiences ruling on cases. Most judge-mediators mention their experience with the court and the potential negatives of a trial when working with the parties. Using their experience to paint a picture for the parties is hugely beneficial in reaching a settlement that can be best for all.

Judges tread carefully with their desire to push a particular outcome. When judge-mediators form their opinion of what a good resolution is and push for it, they are potentially missing a more creative settlement. If judges can switch roles and embrace the neutrality of a mediator, rather than the finality of a judge, they will excel. The best mediations were those where the parties created their own settlement terms guided by the mediator. It is important that judge-mediators listen to the parties' needs, desires, and solutions, rather than rule on what they think is just.

One main goal of the ADR internship was to learn ways of helping people communicate when it is really difficult. Party self-determination and informed consent are important to a mediator. Party self-determination is about the litigant making the decision to resolve the claim or litigate without any arm-twisting or unfair pressure. Informed consent is about how a litigant understands the choices within a negotiation. The effectiveness of the

[1] Roger Fisher and William Ury, *Getting to Yes: Negotiating Without Giving In*, 2nd ed. (New York: Penguin Books, 1991).

mediators in Maricopa County was particularly impressive because of their concern about party self-determination and informed consent. It was wonderful to be able to take the theoretical and practical interventions learned in a school-conducted mediation clinic and see them used with skill and professionalism. The Superior Court in Maricopa County does an incredible job of using ADR to resolve a wide variety of claims.

The negotiations surrounding family disputes have been the most emotionally intense. Whether it is a probate matter, dependency mediation, or divorce settlement conference, it seems any claim that has family dynamics as a significant component can get complex incredibly fast. The mediator is often faced with a choice of intervening to calm parties down or letting emotions escalate in a way that hopefully creates productive conversation. The negotiation can become a conflict. Conflicts are complex because a conflict is a system that both supports and reinforces itself.[2] Generally, persons' emotions will provide the fuel to set up the system and then, by verbalizing their anger or using force, they entrench their positions. Often by the time the negotiations for a given case happen, the system is already set up and the mediator has to sink or swim within it. The way people understand and experience conflict is definitely a factor that mediators want to address.

In the family court system, early resolution conferences (ERC) were more successful at focusing on the parties' interests. ERC is a form of mediation between divorcing couples usually before a judge sees the case.

- An ERC is scheduled when one party files an answer to a claim within the family court and when counsel does not represent either party. Family law case managers mediate divorce claims, paternity issues, and custody issues. The conference is an opportunity for pro se litigants to make decisions on their case.
- The mediators would primarily work on fostering productive conversation between the parties. At times, this is not possible and more mediator assertiveness will be needed. Another thing that was very impressive with ERC was the mediator's ability to see what happened with issues that did not get resolved in mediation.
- One case manager took the time to watch difficult issues go to trial to see how the judges made the final decisions. Also using this same idea, the case manager saw a pattern of issues that return to court. Taking this information into account, he set up his divorce agreements differently to try to have less recurring conflict in the family courts.

The family court system is where most mediations seem to be happening, and that is incredibly important. Studies also show family court cases are most likely to end up back in the court system. As difficult as family court can be for staff, judges, lawyers, and mediators, it is the area that has the most to gain from mediation. Studies have shown that when the parties create their own settlements, the cases are much less likely to reenter litigation to address the same issues.

> While mediation's goals of decreasing relitigation and increasing compliance are particularly appealing to legal professionals, mediation is also hypothesized to increase communication between parents, decrease bitterness and tension, and clarify the best interests of the children. Given the strong emotions and animosity associated with the divorce process, it can be argued that an adversarial method of dispute resolution such as the traditional litigation process can serve to fuel the hostility of the divorcing parents.[3]

Thus, more effective mediation in family courts should not only lead to fewer cycles in the court but also improved relationships. It is important to understand though that some issues like child support and parenting time may often need modification.

This brings up another important point. It is important to create a space for the parties to communicate effectively not only during mediation but also afterward. Efficient mediators are forward thinking. The more authentic the mediator is, the better able that mediator is at gaining the trust of the parties. When parties begin to come to agreement, a mediator can include plans for resolving future conflicts.

[2] Peter Coleman, *The Five Percent: Finding Solutions to Seemingly Impossible Conflicts* (New York: PublicAffairs, 2011).
[3] P. A. Dillon and R. A. Emrey, "Divorce Mediation and Child Custody Disputes: Long Term Effects," *American Journal of Orthopsychiatry* 8 (1996).

Divorced couples that have minor children still have important parenting decisions to make together. Without a well-crafted divorce agreement, conflict is more likely to escalate and cycle back into the courts. Because of this, it is important for the mediator to work past the marital conflict and turn the parents' priorities to effectively partnering to raise their children.

A wide variety of good practices are used in an effort to resolve conflict. They include:

- explaining complex legal issues in a way that anyone can understand
- making the parties feel heard and validated through intense listening
- flipping perspectives from judge to jury as a third-party perspective based upon extensive experience
- knowing how to create an environment where the parties feel safe to share what they are experiencing and then expressing why they feel this way
- using metaphors or stories with the parties and talking about issues to create rapport with the parties
- gaining professional judgment about when to intervene and when to let emotions escalate
- knowing when to reframe or reflect as a means of assisting the discussion

Another impressive point of Maricopa's court system is that most judges pro tem that are looking to get appointed as judges are doing many of these mediations. This is significant in helping shift their mentality from lawyer and advocate to mediator and possibly judge. These are different sides of a necessary equation that need to be balanced. This is not to say that mediators and judges are the same, but they are more related than that of lawyer-mediator. There is an increasing trend of law students pursuing a combination of law and mediation training. This is exactly what needs to be happening as it will make the next generation of judge-mediators doing settlement conferences more efficient. This next generation of lawyers will have years of experience in the legal system, as well as theoretical and practical knowledge about mediation. One question for both the judiciary and court staff has been, How do you deescalate emotion? The answers have been varied but informative:

- have both parties ignore each other and focus on the mediator
- tell stories or metaphors to relate to the parties
- create clear rules of who communicates, when, and for how long
- caucus to create a space of safety so they can express themselves and not be threatened
- use humor to break up the pressure and relieve stress

There is no silver bullet in helping people resolve their anger or frustration. Experience and a passion for understanding conflict allow a mediator to expand the skills necessary for resolving conflict. It is incredibly hard to determine who is emotionally ready for the negotiation they are entering. People's emotional states are incredibly varied and unpredictable. It may appear at the onset that a particular mediation does not stand a chance of resolution, but it works out and things pull together as the parties work through the issues. The reverse happens where the pleadings make it seem like it can be easily worked through, but in the mediation it is absolutely difficult and there are no agreements reached.

ADR allows people an opportunity to control the outcome of their own case if they come to agreement, or even if the person does not come to an agreement, the person has a much better understanding of the components of the conflict. The mediators in Maricopa County are concerned about party self-determination and informed consent. ADR provides a wonderful forum for people to be heard and validated. My favorite aspect of ADR is that it allows people an opportunity to make decisions and learn that they can work through difficult conflict.

As far as procedural justice goes, letting a party whose runaway emotions are controlling them stall the mediation, until the party is emotionally ready, is troubling. Central to mediation is allowing the parties themselves to come to agreement or to go on to litigate the claim. If one party cannot get control of their emotions, then it makes sense for the case to go on to trial. When patience, empathy, and validation fail, then it is time for a judge to hear the

matter in court. Even then, it is possible to whittle a case of many issues into a more manageable dispute by coming to a partial agreement, so that a judicial officer can focus on the matters that remain in dispute.

The future is bright for the mediation system within the courts. Emphasizing mediation within the court system is wise and efficient. Judges and lawyers who are willing to learn and embrace mediation within the courts will be the most effective mediators. This system will be greatly strengthened by lawyers who are being trained not only to advocate but also to mediate. This new wave of lawyer-mediators will become the next generation of judges. Being able to balance both their expertise in the law while using mediation techniques is invaluable.

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Jeremy Ashworth is a student at Arizona State University Law School.
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Authors' Note: We are deeply grateful to Judge David Udall and Phillip Knox, who helped us by setting up the alternative dispute resolution (ADR) internship and externship in the Superior Court of Arizona in Maricopa County. We are also deeply grateful to our educational advisors, especially Professor Art Hinshaw, the director of the Lodestar Mediation Clinic and professor of negotiation, Arizona State University, and Dr. Chad Ford, director, David O. McKay Center of Intercultural Understanding, Brigham Young University, Hawaii.

The Court Management Profession: Leadership Is Like Driving a Race Car!

Janet G. Cornell

Some of you may know that this author has an interest in driving race cars — Indy, NASCAR, "formula" cars (entry-level, open-wheel, single seat), and, on occasion, go-karts. Yep! — experiencing the thrill of speed, mastering (keeping control of) the car, and conquering the track. The premise of this article is that leading a court is very much like driving a race car. Let me tell you why. You can then decide for yourself.[1]

Let's begin with some race-car-driving basics:

1. **Look ahead**. Keep your eyes on the horizon and focus ahead, not directly in front. This will contribute toward a better drive.

2. **Move smoothly around the track.** Remember to make your drive smooth. Avoid jerky or sudden changes. A smooth drive helps you drive through the pack.

3. **Know the basics.** As a driver you must learn the elements of a good drive, and continue to practice. Applying the basics will make your driving experience more fulfilling.

4. **Lean in.** Sitting closer to the wheel positions you to be in control of the car.

5. **Look for opportunities to advance.** Take the right risks to keep moving forward toward first place. Keep practicing.

6. **Finally, keep an eye on your resources**. This means your personal energy, the fuel, and your tires. They are the juice that will support your drive.

Now, consider these same basics related to court management and leadership.

1. Look ahead.

In the court, this can mean having a vision. Look to the future. Figure out what is needed to prepare the organization for what is to come. Looking ahead will assist you, the leader, in being prepared—for example, budget needs, new initiatives, COOP ("continuity of operations preparedness") planning, implementation of technology, and establishment of partnerships and relationships. Kiefer and Knox have conducted a survey on what court leaders need to expect for 2025 and continually urge us to be prepared.[2]

[1] Opinions are the author's. They are adapted from personal experience in driving school and from driving tips at https://www.yahoo.com/autos/bp/5-driving-tips-former-racecar-driver-130608055.html.

[2] See National Association for Court Management, 2014 Annual Conference "Future of the Courts 2025—Looking Out on the Horizon," https://nacmnet.org/educational-opportunities/nacm-annual-conference-2014-videos.html; and P. Knox, J. Cornell, and P. Kiefer, "Did You See That Coming?" *Court Manager* 28, no. 4 (2013-14).

2. Move smoothly.

Be prepared. Study. Emulate leadership skills and traits. Be committed and give it your all. Continue to study and learn. Strive for consistency and constancy of purpose. Commit to making your court fulfill the purposes of courts.[3]

3. Know the basics.

Know your job. Know our profession. The NACM Core (http://nacmcore.org) provides us with expansive and practical information on the knowledge, skills, and abilities needed for court professionals. Expand skills, and experience, through educational and networking opportunities. Practice leadership in different, non-court environments. Alex Aikman asserted that there indeed is a need for leaders in court administration.[4] We need to find out what leaders do, how they are effective, and then practice it.

4. Look for opportunities.

A court leader should always be ready to recognize opportunities—opportunities for new programs, prospects for operational improvements via reengineering, and occasions to improve things for judicial officers and staff. Judge Kevin Burke has written on the "need to practice leadership without fear," stating, "Courts desperately need risk takers."[5] He says we should be "spirited" and "take calculated risks." This includes being open to change, to using technology, and to working for accountability and trust.

5. Lean in.

Be alert. "Lean in" toward others: seek their input, engage and seek feedback, and obtain and share information from and with partners and collaborators. Use it for improved personal and organizational performance. As Sheryl Sandberg noted in *Lean In*, we should seek to empower and to challenge ourselves. One way is to increase our relationships and interactions with others.[6]

6. Keep an eye on your resources.

Seek efficiencies and economies of scale. Find ways to reengineer processes. Increasingly, courts are paying attention to things that can be done to streamline and recast work tasks.[7] What are the possibilities for reengineering? They include implementing technology to conduct tasks; realigning operational tasks; scrutinizing processes and functions; centralizing or regionalizing functions; and revamping structures and authorities. NACM published a guide for reengineering; it contains real and practical court examples.[8]

I conclude that these principles apply to court leadership. What do you think? These techniques could be used as interesting guideposts to those just entering the court leadership profession. Would it not be interesting if those in court leadership, whether seasoned professionals, those newly promoted to court leadership positions, or newly hired court employees, became aware of and understood basics such as these and could take concrete steps to create and solidify their future?

To fellow court leaders, happy and fulfilling driving! (That is, happy and fulfilling court leadership!)

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[3] E. Friesen, *Purposes of Courts*, video, Bureau of Justice Assistance and School of Public Affairs, American University, Washington, D.C., at https://www.youtube.com/watch?v=saHb06PNadQ.
[4] A. Aikman, "The Need for Leaders in Court Administration," ***Court Manager*** 22, no. 1 (2007).
[5] K. S. Burke, "Leadership Without Fear," in C. Flango, A. McDowell, N. Sydow, C. Campbell, and N. Kauder (eds.), *Future Trends in State Courts* 2012 (Williamsburg, VA: National Center for State Courts, 2012).
[6] S. Sandberg, ***Lean In: Women, Work and the Will to Lead*** (New York: Alfred A. Knopf, 2013).
[7] See National Center for State Courts, "NCSC Offers Steps for Court Reengineering Success," at http://www.ncsc.org/Services-and-Experts/Court-reengineering.aspx; "Processes," at http://www.ncsc.org/Services-and-Experts/Court-reengineering/Processes.aspx; and "Court Reengineering: Compilation of Ideas from the States," at http://www.sji.gov/wp/wp-content/uploads/Court_Reengineering_Compilation_of_Ideas_from_the_States.pdf
[8] *Steps to Reengineering: Fundamental Rethinking for High Performing Courts* (Williamsburg, VA: National Association for Court Management, 2012-13).

Jury News

JAMES M. BINNALL

The Exclusion of Convicted Felons from Jury Service: What Do We Know?

A quiet discussion has been taking place among policymakers concerned about the representativeness of jury pools. In spite of concerted efforts by jury managers to improve the quality of master jury lists, to follow-up on FTA jurors, and to address other problems that make it difficult for many prospective jurors to serve, the jury pool in many jurisdictions still falls short of reflecting a fair cross-section of the community. Some of the more interesting proposals include changing the qualification criteria to allow people who are not currently eligible to serve. The California legislature, for example, approved a bill that would permit noncitizens who are legal residents to serve; the bill was ultimately vetoed by Governor Jerry Brown. New Mexico provides foreign-language interpreters to non-English-speaking jurors. Another proposal—restoring civil rights, including the right to serve on a jury, to persons convicted of crimes—is also getting some attention. Recently, I learned about some research that had been undertaken to examine the likely impact on the justice system. I invited Professor James M. Binnall, California State University, Long Beach, to guest-author the following "Jury News" column and share his findings.

– Paula Hannaford-Agor, Jury News

In recent years, the issue of jury representativeness has arisen in a number of high-profile criminal trials. Many commentators and critics of the jury argue that seldom do juries "look like" the population from which they are drawn. Today, an estimated 19.8 million people, roughly 8.6 percent of the adult population and one third of the African-American male adult population, have been convicted of a felony.[1] Importantly, in many jurisdictions, these citizens are forever barred from serving as jurors. Thus, as America imprisons, our jury system loses countless prospective jurors and the unique life experiences that would assuredly diversify any deliberation room.

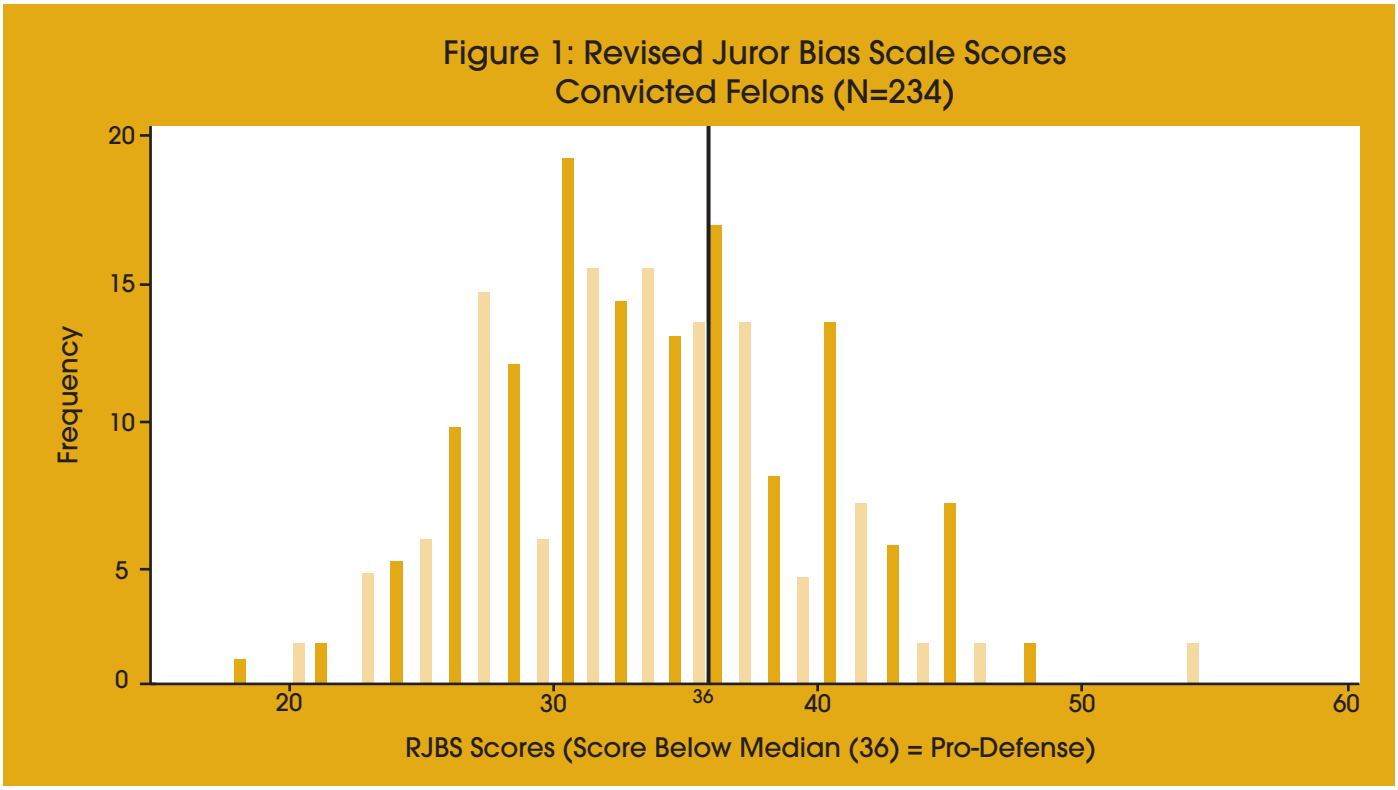
Felon jury-exclusion statutes divide roughly into two types: those that permanently eliminate a convicted felon's opportunity to serve as a juror (lifetime ban) and those that allow for the possibility that a convicted felon might, at some point, decide a litigated matter (temporal ban). While 27 states and the federal government bar convicted felons from the jury process permanently, remaining jurisdictions impose less severe, record-based juror eligibility criteria that vary significantly.

Twelve states bar convicted felons from jury service until the full completion of their sentence, notably disqualifying individuals serving felony parole and felony probation. Seven states enforce hybrid regulations that may incorporate penal status, charge category, type of jury proceeding, or a term of years. For example, the District of Columbia and Colorado adhere to differing hybrid models; the former excludes convicted felons from jury service during any period of supervision and for ten years following the termination of supervision, while the latter excludes convicted felons solely from grand-jury proceedings. And finally, two states recognize lifetime for-cause challenges, permitting a trial judge to dismiss a prospective juror from the venire solely on the basis of a felony conviction. Only Maine places no restrictions on a convicted felon's opportunity to serve as a juror.

Across jurisdictions, the application of felon jury-exclusion statutes is relatively consistent. Only four jurisdictions tailor felon jury-exclusion statutes, distinguishing first-time offenders from repeat offenders (Arizona), violent offenders from nonviolent offenders (Nevada), grand juries from petit juries (Colorado), and civil cases from criminal cases (Oregon). In all remaining jurisdictions, felon jury-exclusion statutes are categorical, applying to *all* prospective jurors with a prior felony conviction in all types of proceedings.[2]

[1] Sarah Shannon et al., Growth in the U.S. Ex-Felon and Ex-Prisoner Population, 1948 to 2010, at 12 (paper presented at the 2011 Annual Meeting of the Population Association of America).

[2] Brian Kalt, *The Exclusion of Felons From Jury Service*, 53 Am. U.L. Rev. (2003); Margaret Colgate Love, Relief from the Collateral Consequences of a Criminal Conviction (2007); James M. Binnall, *A Field Study of the Presumptively Biased: Is There Empirical Support for Excluding Convicted Felons from Jury Service?*, 36 Law & Pol'y 1 (2014).



Legislators and courts cite two practical rationales for felon jury-exclusion statutes. The first is the probity or character rationale.[3] The probity rationale seemingly contends that a convicted felon's character is forever marred by his or her involvement in criminal activity, to the point that only categorical exclusion from the venire will ensure the purity of the adjudicative process. As the Supreme Court of Arkansas has stated, "[u]nquestionably that exclusion is intended to bar from the jury box the one class of persons least likely to respect and give effect to the criminal laws."[4]

A second rationale for the exclusion of convicted felons from jury service is the inherent-bias rationale. Unlike the probity rationale, the inherent-bias rationale has spawned considerable precision among courts and lawmakers. The inherent-bias rationale holds that convicted felons harbor biases directly resulting from their experiences with the criminal justice system. [5] Forecasting the direction and strength of such biases, courts have opined that a convicted felon's "former conviction and imprisonment would ordinarily incline him to compassion for others accused of crime,"[6] and that convicted felons are "biased against the government."[7]

While voter-disenfranchisement statutes dominate literature on the civic marginalization of convicted felons, to date little research has focused on the exclusion of convicted felons from the jury process. The first empirical study on the topic revealed that Georgia's felon jury-exclusion statute (a permanent exclusion) racially homogenizes juries.[8] In particular, felon jury exclusion in Georgia reduces the number of African-American men expected to serve as jurors from 1.65 to 1.17 per jury.[9] In many Georgia counties, this effect is even more pronounced, reducing the expected number of African-American male-jurors to under 1, a significant reduction as prior research suggests that, in capital cases, juries with 1 African-American male are less likely to sentence a defendant to death than juries without an African-American male.

More recent empirical research on felon jury exclusion explores 1) whether the rationales for felon jury exclusion

[3] *See, e.g.*, United States v. Barry, 71 F3d 1269 (7th Cir 1995).
[4] Rector v. State, 280 Ark. 385, 395 (1983).
[5] People v. Miller, 759 NW2d 850 (2008).
[6] State v. Baxter, 357 So.2d 271, 275 (La.1978).
[7] United States v. Greene, 995 F2d 793, 796 (8th Cir 1993).
[8] Darren Wheelock, *A Jury of One's "Peers": The Racial Impact of Felon Jury Exclusion in Georgia*, 32 Just. Sys. J., 335 (2011).
[9] *Id.* at 352

are empirically viable and 2) how exclusion may impact the reintegration of convicted felons. A study conducted in southern California examines the inherent-bias rationale by comparing the pretrial biases of convicted felons to those of non-felon jurors and non-felon jurors currently enrolled in law school. Results reveal that on a measure of pretrial bias, convicted felons take on a near normal distribution, such that nearly one-third of convicted felons harbor a neutral or pro-prosecution pretrial bias (see Figure 1). Additionally, while convicted felons and law students are more likely to favor the defense than are eligible jurors, the pretrial biases of convicted felons and law students do not differ statistically. Hence, it is as likely that a law student would harbor a pro-defense bias as strong as that of a convicted felon. These results tend to suggest that categorical felon jury-exclusion statutes are both over- and under-inclusive, eliminating nonthreatening jurors and doing little to insulate the jury pool from at least one group of prospective jurors that may harbor "unacceptable" pro-defense biases.[10]

A related pilot study examining the character rationale for felon jury exclusion assesses how convicted felons may deliberate. Using a mock-jury design, the study compares homogenous juries (comprising only non-felon eligible jurors) to mixed juries (comprising non-felon eligible jurors and otherwise eligible jurors with a felony conviction). Participants viewed an edited version of a criminal trial, heard applicable jury instructions, and then deliberated. While the character rationale for felon jury-exclusion suggests that convicted felons would somehow diminish the quality of deliberations, findings suggest that convicted felons have no negative impact on the process and may, in fact, enhance deliberations. Compared on several measures of deliberation quality, homogenous juries did not outperform mixed juries. Additionally, at the juror level, time spoken as a percentage of total deliberation time was higher for felon jurors. Felon jurors also raised more novel case facts than did their non-felon counterparts. Though this pilot study was hampered by the small size of its sample, its results, while not conclusive, do suggest that convicted felons would not taint the deliberation process in the manner the character rationale presumes.[11]

Apart from empirical research on the rationales for felon jury exclusion, another recent study explores the impacts of exclusion on the reintegration of convicted felons. That study reveals that eligibility for jury service "matters" to those with a criminal record. In a series of in-depth semi-structured interviews in Maine, the only jurisdiction that places no restriction on convicted felons' opportunities to serve, convicted felons generally held the jury and the jury process in high regard. Moreover, they viewed their eligibility as a measure of trust, placed in them by the state. In turn, they reported a desire to "live up to" that trust, suggesting that their eligibility enhanced their own views of themselves and the criminal justice system. Such evidence suggests that inclusion may serve to facilitate successful reentry.[12]

A vestige of the notion of "civil death," the history of felon jury exclusion is rather unremarkable. The blind adoption of traditional practices makes felon jury exclusion the most pervasive and severe form of civic marginalization in the United States. Yet, unlike other forms of civic marginalization, felon jury exclusion is understudied. Still, while scant, recent empirical research on felon jury exclusion tends to show that the threat convicted felons pose to the jury may be overstated. Moreover, some evidence seemingly demonstrates that convicted felons benefit from eligibility and eventually service, and that their inclusion in the process may have the potential to alter their concepts of self and ease their reintegration. In sum, though further research is needed, existing research calls into question the wisdom of continuing to exclude some of our most marginalized citizens from arguably our most direct form of democratic participation.

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[10] Binnall, *supra* n. 2.
[11] James M. Binnall, Convicted Felons Deliberate: A Mock Jury Experiment (Ph.D. dissertation, University of California, Irvine, 2015).
[12] James M. Binnall, *Summonsing Criminal Desistance: Convicted Felons' Perspectives on Jury Service*, Law & Soc. Inquiry (forthcoming, 2016).

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IJIS Exchange

A COLUMN DEDICATED TO THE EXCHANGE OF IDEAS ON INFORMATION SHARING IN JUSTICE.

In case you missed it in the hustle and bustle of 2015, the IJIS Institute Courts Advisory Committee has released a critical *Info Brief* about the "Role of Courts in Accuracy and Completeness of Criminal History Records." Even if you made a point of reading this paper since its original publishing last June, we think that it bears repeating again—it is just that central, in our opinion, to advancing public safety and the general well-being of our communities. And it is something that each of us can positively affect in one way or another.

Every minute of every day, law enforcement and other criminal justice agencies across the country are making critical decisions. Decisions that take into account a full range of facts . . . or not. Decisions that are informed by relevant circumstances and outcomes . . . or not. Decisions that protect "we, the people" while preserving our individual rights . . . or not. The point is, even when policing and justice agencies do not have the most complete picture possible or all of the known facts, **they still must make critical decisions**; they simply must, because in many situations they do not have the luxury to sift through stacks of paper or multiple systems or unravel complicated, confusing, or incomplete data. Certain decisions must be made, right now. So they do their best with what is available. And even though the urgency is dialed back a bit for agencies and organizations unrelated to justice, it is becoming more common for them to also turn to criminal history repositories when conducting background checks before issuing firearms, screening for employment, approving rental agreements, granting security clearances, and performing other functions of that nature.

Criticism Accompanies Awareness

As the need for and awareness about criminal history grows, so too does criticism—the majority of which focuses on concerns about the integrity of computerized criminal history (CCH) records and, in particular, records that are not complete, accurate, and timely. According to a July 2013 report from the National Employment Law Project, background checks for employment and licensing purposes have increased from roughly 2.8 million conducted in 2002 to almost 17 million in 2012. Not that more motivation was needed, but this ever-increasing use of background checks, and the significance of decisions being made based on those checks, has put greater pressure on justice agencies, including our courts, to provide "a net" to catch inaccuracies and improve the integrity of criminal history records.

Background checks on an individual will generally include a record of any arrests and how the resulting charges and court cases were resolved. The scope of the *Info Brief* (which can be found in its entirety at http://c.ymcdn.com/sites/www.ijis.org/resource/collection/93F7DF36-8973-4B78-A190-0E786D87F74F/ijis_info_brief_criminal_hx_records_20150609.pdf) focuses on the latter—disposition of charges and cases resulting from an arrest, indictment, or both—which is a major area of concern. Many challenges and criticisms are related to incomplete information on dispositions. Criminal history repositories in many states contain a vast number of arrests with what appear to be pending charges or counts that have not been resolved. Though difficult to quantify, cases associated with most of these arrests have long been resolved, but not reported to the repository in a manner that can be definitively associated with the originating arrest/indictment.

> *"[criminal history] checks for employment and licensing purposes have increased from roughly 2.8 million conducted in 2002* ***to almost 17 million in 2012****"*
>
> - National Employment Law Project, 2013

Courts and prosecutorial agencies are largely responsible for reporting the disposition of cases to state criminal history repositories, and the agency or organization responsible for maintaining criminal history in the state will then attempt to match reported dispositions to original arrest records. These two functions—reporting dispositions and matching dispositions to arrest records—are where many problems arise, resulting in negative impacts on completeness and accuracy of criminal history records.

The more detailed *Info Brief* addresses common problems in CCH accuracy and completeness. While methods, approaches, and policies for disposition reporting vary from state to state, overarching challenges and problems with reporting and matching are very similar. These issues are compounded since the functional environment under which records are collected

and maintained is high-risk and publicly visible, especially as CCH consumers continue to perceive the data to be largely inaccurate or incomplete. The *Info Brief* addresses some of the common themes around disjointed reporting of disposition information to the central repository:

- Stewardship
- Statutory Reporting Requirements
- Documented Procedures
- Workflows
- Local Agency Capabilities
- Arrest-Oriented
- No Files
- Amended, Consolidated, New, and Dropped Charges
- Cite and Release
- When Matching Fails
- Arrest Warrant Processing
- Probation/Parole Violation Bookings
- Release Agreements
- Violation Treatments
- Old Records

Where Do We Go From Here?

The *Info Brief* goes on to discuss potential solutions, noting that the spectrum of possibilities is very broad and completely reliant on the objectives and scope of projects that may or may not directly address disposition-reporting improvements. It is worth noting that improving completeness and accuracy of criminal history records is not generally a *technical* problem—it is more often a *political* or *management* problem. So, we really must think of technology as a tool, and not the solution itself. More likely, solutions will be found in things like:

- Improved Collaboration
- Reporting Disposition of Initial Charges
- Biometric Identification
- Information-Sharing Standards
- Error Handling
- Cleaning Up Old Records

As the need for criminal histories continues to grow, so too will concerns about the condition of criminal history repositories and the consequential impacts on the livelihood and well-being of thousands of individuals each year—and that is over and above public-safety concerns that may impact tens of thousands more. The causes of data accuracy and completeness are surprisingly similar across jurisdictions, and while there is no absolute cure-all, it seems that challenges can be overcome with governance, incentives, policy, management discipline, and more effective use of information-sharing technologies. Some of these ideas are shared above, and there are many more studies and resources available that elaborate and further explore challenges and potential solutions. You can start by checking out our complete *Info Brief*, available online along with all of the IJIS Institute reference papers at http://www.ijis.org/?page=Reference_Papers.

"Improving completeness and accuracy of criminal history records is not generally a technical problem — it is more often a ***political or management problem****."*

- IJIS Institute, 2015
Role of Courts in Accuracy and Completeness of Criminal History Records

A Question of Ethics

PETER C. KIEFER

Whistleblowing

Why are we so ambivalent about whistleblowers? Most ethics codes require reporting violations to appropriate authorities. The NACM code does as well, stating in Canon 2.3 that a court professional should expect fellow professionals to abide by the canons and to report violations of the code to the appropriate authority.

As a society however, we don't seem like whistleblowers very much. We often describe their actions as "ratting" someone out. Think of whistleblowers who have made headlines in recent years. When we can even remember them, we have conflicting images.

- Edward Snowden (NSA leaks)
- Ambassador Joseph Wilson (Valerie Plame Wilson's husband)
- Sherron Watkins (Enron malfeasance)
- Coleen Rowley (FBI and 9/11)
- Jeffrey Wigand (Brown & Williamson tobacco)
- Linda Tripp (President Bill Clinton and Monica Lewinski)

So how difficult is it to step up, do the right thing, and "call out" a person or an institution? Should we reasonably expect someone to raise their voice when so much might be at stake?

The Scenario

Municipal court administrator Julian Ellis and Presiding Judge Mel Harris have made it their court's predominant strategic agenda item to replace the present decrepit old municipal court building with something new and modern. Built in the 1930s, the creaky old structure has long since outlived its usefulness. Badly insulated, it freezes in winter and broils in summer. So many old coaxial cables swarm through the walls that many joke that it is really the cabling that holds up the building. Pipes burst, flooding offices and occasionally courtrooms. Legendary power surges from the ancient electrical wiring have fried more than one desktop PC.

Years before Judge Harris, Julian had worked with Judge Alcorn on the new courthouse campaign. Before coming on the bench, Alcorn was corporate counsel for Milgram Manufacturing, and as such he approached his old friend, Miles Milgram, to help pressure the city council and find the necessary $75 million. Things looked good for a while, since Miles was the major campaign contributor to four of the five council members. However, once the global financial crisis hit, hopes for a new courthouse were dashed. To make matters worse, Julian's wife lost her job. The family had to rely on a single income to provide for two growing boys and a mortgage.

The courthouse wasn't Miles's only civic interest. He also was on a personal crusade against the city's red-light cameras. This consisted mostly of Miles flying his Ferrari through downtown intersections while shooting obscene salutes at the Safe-T-Cam systems. To date, he had amassed an even dozen e-tickets. Secretly, the mayor agreed with Miles and wouldn't mind seeing the Safe-T-Cams crash and burn, but last year, fatal traffic accidents at red-light-camera intersections were nearly eliminated; the cameras also raked in thousands in city revenue. Privately, he is aware of Miles's antics, and since Julian has two young boys, he worries that Miles is going to run down a child someday.

Late on a Friday, the mayor drops by to chat with Julian and Judge Harris. Good news! The council thinks it has a path to a new courthouse by putting together a public-private construction partnership. A consortium of community business leaders will front the $75 million, build the courthouse, and

then rent it to the city (along with a healthy mark-up) on a 30-year lease. After the lease terminates, the consortium will sell the courthouse to the city for $1.

As the mayor prepares to leave, he drops a final nugget. "Oh, by the way, since Miles Milgram is the principal consortium partner, can't we find some way to deal with his damn red-light-camera tickets?" The mayor is out the door before Julian can respond. He turns to Judge Harris, asking what the mayor meant by that comment, but the judge replies that he doesn't know.

The next week, Marisa, the criminal traffic supervisor, drops by Julian's office for their regular status meeting. Toward the end of their chat, Marisa mentions that all of Milgram's red-light cases have been transferred to Judge Alcorn. Julian assumes that it is a system glitch, and that Judge Alcorn will recuse himself. A week later Judge Alcorn dismisses all of Milgram's tickets, citing significant questions about service. Julian confronts Judge Harris, who angrily replies that it is standard policy to assign similar cases to a single judge. Judge Alcorn was randomly assigned, and the judge obviously felt he could deal with the matters impartially. End of discussion.

Julian thinks about what he has seen and what he can do. 1) Go to the Commission on Judicial Performance? The process will take months if not years. He'll destroy his relationship with Judge Alcorn, who is an old friend and advisor. Besides, he doesn't actually have any proof, just circumstantial evidence. 2) Go to the media? One can never be certain how that will end up and who the media will paint as the ultimate villain. 3) Search for more evidence? Look for a "smoking gun"? Julian isn't a detective; he's not sure he even knows what to look for. 4) Do nothing? He told Judge Harris his suspicions, and the judge is technically the "appropriate authority."

If he pursues one of the first three options, Julian will lose his job, lose his career, and ruin his family financially. Legally, there are whistleblower protections in place, but Julian is smart enough to know that those laws aren't going to shield him from being ostracized and eventually let go.

A month later, Julian attends the huge media-covered groundbreaking for the new courthouse. Julian, Judge Harris, and Miles all are on the 10 o'clock news with a giant cardboard $75 million check and gold-painted shovels turning over scoops of dirt.

The Respondents

Here to comment on this scenario are Twinette A. Jones, administrative operations manager, Clerk of the Superior Court DeKalb County, Georgia; Jeff Chapple, court administrator, O'Fallon Missouri Municipal Court; Rashad Shabaka-Burns, trial court administrator, Superior Court of New Jersey, Vicinage 10; and Michael J. Kelley, judicial district administrator, Fifth Judicial District of Minnesota.

Questions

Does Julian have a move that doesn't put his career and family at risk?

Michael Kelley opened his comments with a reminder of NACM's ethics code Canon 2.3 on the misconduct of others, which states, "[a] court professional shall report to the appropriate authority the behavior of any court professional who violates this code including, but not limited to, potential conflicts of interest involving one's duties and attempts to inappropriately influence one in performing one's duties."

Mike pointed out that Judge Alcorn (and probably Judge Harris) used their positions and authority to influence Miles Milgram's support for funding the new courthouse, which was wrong. A judge using his position to improperly influence the decision or action of another undermines the independence, impartiality, and integrity of the judicial branch and its officers. If Miles was going to violate the Model Code of Conduct for Court Professionals, Julian had no other option than to report Judge Alcorn to the Commission on Judicial Performance. "Perhaps this will destroy Julian's relationship with Judge

Alcorn, but what kind of friend is he really to put Julian in this situation? Likewise, as to their advisor-advisee relationship, does Julian really want to be receiving advice from somebody with such questionable professional scruples?"

Twinette Jones said that since he feels so strongly about reporting the issues, Julian should report his concerns to the appropriate authority, who is Judge Harris. "He needs to provide proper documentation to submit to the judge to report his claim as well as keep a copy for his records to show that it had been mentioned to the proper authority. Also, if there are no time restraints on seeing results then he should report it to the Commission on Judicial Performance and let them run the complaint through the necessary channels."

Without knowing about whistleblower protection, Jeff Chapple sensed that Julian saw no other options. "There is no evidence that the Judge's decisions were influenced, but I think he [Julian] could seek legal advice on options that would protect him and his position."

Rashad Shabaka-Burns said that Julian recognized there was a moral and ethical dilemma. "It appears he has chosen to ignore what happened. He did have the option of reporting to a higher authority within the judiciary. He also has the option of discussing the topic with Judge Harris and Judge Alcorn. It is important to follow judicial procedures and report to the designated authority, rather than going outside the judiciary, which could lead the public to believe Julian did not have faith in the judiciary to act ethically."

Is the severity of this problem an issue regarding whether or not Julian needs to speak up?

Rashad thought that Julian should speak up in light of the fact that all of Miles Milgram's tickets were assigned to a judge and dismissed. "This demonstrates the severity of this ethical issue. The judiciary must be fair and impartial in all matters or public confidence in the institution will be damaged."

Jeff noted that red-light cameras are very political, and many of the public have a negative impression of them. "Any appearance of impropriety needs to be addressed to keep the credibility of the court."

Twinette responded that running red lights is an issue, but one the judge felt needed to go away. "We have a man that is putting 75 million dollars into our new courthouse; there is no need to have issues as minute as red-light violations as being a topic of discussion."

Mike's opinion was that dismissing tickets that were "only" for red-light violations has no bearing on whether Julian should report the incident. "The significant issue here is that a judge used his position to improperly influence the decision or action of another. This type of conduct undermines the independence, impartiality, and integrity of the judicial branch and its officers."

Julian actually did tell Judge Harris. Is this enough?

Jeff suggested that Julian place his concerns and observations in writing to Judge Harris with notice that his next step would be to go to the Commission on Judicial Performance with the written documentation so he is covered if nothing is done.

Mike believed that it's a stretch to assume that telling Judge Harris was sufficient as being within the spirit of the ethics code. "It seemed immediately obvious that the Judge Harris has no intention of doing anything with what Julian told him about Judge Alcorn's actions. That's why I say he should probably report Judge Harris to the Commission as well."

Twinette thought what Julian did was enough. Julian reported his concerns to the appropriate authority, who was the judge. "He covered his ethical duty; there is no need to discuss unless there was harm done."

Rashad said, "Julian did act upon his ethical judgment by speaking to Judge Harris; however, he could have spoken to him again or included Judge Alcorn to express his concern. He also had an obligation to further report."

Is Julian obligated to search for more evidence? If he doesn't, whose responsibility is it to find evidence?

Twinette, Jeff, and Rashad did not consider it Julian's job to collect more evidence; that would be the job of the state's Commission on Judicial Performance. Rashad thought, "If Julian does his own further investigation, it could be inferred that he does not have faith in the judiciary to pursue the matter." Jeff noted that Canon 2.3 requires Julian to report the violation, even if he has incomplete information. "I think the observations are enough to report it to his supervisor who then would be able to inquire or assign for further clarification of the issue."

Mike, on the other hand, thought it would be in Julian's best interest professionally to look for more evidence. "He is making serious allegations and should be certain that he has his facts before damaging reputations of and working relationships with the judges."

My thanks again to Twinette Jones, Jeff Chapple, Rashad Shabaka-Burns, and Michael Kelley for their thoughts on this very salient issue. Whistleblowing in the judicial branch is a theme not often addressed but calls for more consideration. Be sure to visit the NACM ethics Web page at http://nacmnet.org/ethics to see previous ethics columns and to download educational ethics modules your court or state association could use to present ethics training in your state. If you have an ethical issue you would like to discuss, if you have comments on this or any of the previous columns, please contact me at pkiefer@superiorcourt.maricopa.gov.

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Peter C. Kiefer is the southeast regional court administrator for Maricopa Superior Court in Phoenix, Arizona. He has been questioning ethics for *Court Manager* since 1994.

Management Musings

GIUSEPPE M. FAZARI

Travel Light

Dale Carnegie once said "our fatigue is often caused not by work, but by worry, frustration and resentment." Because of the nature of the position and the difficult (but necessary) decisions that are inherent in the course of the work, it is not uncommon for court managers to find themselves feeling frustrated and occasionally beset by staff intent on jettisoning improvements that, while beneficial to the organization, run counter to their personal interests. The obstinacy can take on many different forms (and the more broad the experience, the more creative obstacles the manager will inevitably encounter)—all of which can stymie a manager's ability to institute best practices and processes. While some might resist a manager's direction for personal and petty reasons, others might oppose changes because they genuinely do not understand them (or why they are an improvement). Some folks see change as threatening, others simply see it as ill-advised, and some need to see a new method work before they will believe in it. What can worsen these situations, however, is when the court manager does not have a good handle on their emotional intelligence. Indeed, there is likely no other skill more important than emotional intelligence in overseeing an organization's employees. In *Emotional Intelligence: Why It Can Matter More Than IQ*, Goleman estimates that IQ contributes only 20 percent to one's success in life. The lion's share is more attributable to emotional intelligence, including factors such as the ability to be intrinsically motivated, persistence, impulse control, mood regulation, empathy, and hope. And while IQ and emotional intelligence are not mutually exclusive, they do function in distinct and important ways.

In her *New York Times* bestseller *Emotional Freedom*, Orloff describes a strategy in transforming negative emotions into positive ones. A book that is not exclusively geared toward work life (and the court in particular), its general principles are applicable to the daily challenges of managing people. The strategy operates using a three-stage process. First, set your intention to release your resentment. Second, cultivate your ability to forgive. Although it is much easier said than done, as Orloff admits, the approach here is to train one's mind to contemplate the person's actions by considering the individual's particular circumstances—especially the fears and insecurities that might be motivating them. Finally (and perhaps most importantly), the author submits that the reader take a "reality check" in understanding that people bring a lifetime of past experiences to the present. These experiences impact their perceptions of people and conditions and so their behavior is more about them than about you.

On the cover of the U2 album *All That You Can't Leave Behind*, it shows the band waiting in an airport. My interpretation of the illustration and the music wrapped up inside is about what we often refer to as "baggage." So long as we are living, no one is invulnerable from those negative experiences that we all have and sometimes feel compelled to carry with us. To believe that folks can check their baggage at the workplace door seldom happens in reality. As Toni shows, what's most important for managers is in how they choose to hold onto their own experiences while at the same time considering the undercurrent of others' experience and how it can shape the choices they make.

***

"It's an otherwise quiet morning, and I'm sipping my tea when I hear this intense revving of a car's engine. It sounds like it's coming from the rear of the house. You're familiar with the layout—so I make my way to the kitchen to look out the back window and I see this minivan doing these 360 turns in my yard. It's really ripping up the turf and driving up and down the yard at what seems to be top speed. The dirt, grass, everything I've planted is just getting uprooted and—."

"I don't mean to interrupt, but as your talking I just noticed that our flight is going to be delayed."

"Really?" I quickly turn to check the streaming message on the monitor above the ticket counter and it reads that our flight to Cleveland is, in fact, delayed, but it doesn't give any other information.

"Looks to be that way," Toni asserts.

"I'm going to check." I get up to speak with the ticketing agent and return almost immediately.

"That didn't take very long. What's going on?" Toni asks.

"They said they'll be making an announcement shortly, but we're looking at about a two-hour delay."

"If that's the case, I say we grab some lunch," Toni suggests.

I agree, suggesting we head to the sandwich-wrap place for a quick bite. As we make our way over to kill some time, Toni is suddenly in the mood for a turkey and spinach wrap.

I was intrigued by the cranberry-walnut-cream cheese spread that Toni's wrap came with so I ordered the same thing. While we're waiting, the waitress brings over our two cups of cranberry apple herbal tea that we thought would pair well with the wrap. Toni takes a sip and asks, "So, what happens next?"

I look at her bewildered, momentarily forgetting where I had left off.

"You were saying someone was driving around in your yard—tearing up the landscape."

"Right. It was so bizarre. So when I see what's going on, I run outside through the garage and by this point, they're driving the van up the side lawn ripping that up too, heading toward the street."

"Knowing the care you take of the landscape that sounds like more a nightmare than a dream."

"It gets worse. I see that they're heading toward the street and I really lay into them—cursing up a storm—figuring I'll give them a piece of my unadulterated mind."

"And then?" Toni asks.

"Well, the car suddenly stops at the edge of the lawn and street and just sits there for a minute. I can't tell who's inside because the windows are tinted. I begin to make my way towards it and after a couple steps, the side door slides open and out come two of the largest German Shepherds I've ever seen. They're foaming at the mouth, and they're coming straight for me."

"I would've woken up by now," Toni said with a smile.

"I wish I would have. Instead I bolt back inside and quickly shut the garage. The door shuts, but for some reason I panic thinking that my kids are in the yard playing and that the dogs are going to sic them. So I rush out the patio to protect them and get them inside when I'm suddenly attacked by the dogs."

"This is incredible—you're still asleep?" Toni asks rhetorically.

"Hold on. The only good part happens next. So they're attacking me."

"Where are the kids?"

"I have no idea, but both dogs are on me so I'm guessing they're fine. All of sudden, you come out the back door."

"Me! How did I get mixed up in this?"

"You come running out with a long broom stick and begin going to town whacking the heck out of these dogs."

"I couldn't manage anything better than a broom stick, huh? So what happens next?"

"That's when I woke up. I've been thinking about it since yesterday, and I figured I'd share it with you—especially since you were in it."

Toni stares at me and I know she's already read me like a book—and a children's one at that. She takes a few more sips of her tea and looks over to the scores of passengers that are waiting in line to check in. The restaurant is on an upper floor, and from our vantage point we have a good panorama of a few of the major airlines' counters where the lines are the longest.

"What are your thoughts, Toni?" I ask, anxious for her psychoanalysis.

"You see all those people down there waiting to check in?" she asks, raising her chin slightly in the direction she wants me to look.

"Yes."

"What do they all have in common?"

"They all plan to travel today."

"Right. But think in more concrete terms. Physically—what do they all have in common?"

I look over and see a diverse assortment of people, but then the obvious hits me. "They all have baggage."

"Yes. Notice that some are checking in an entire set of luggage—moving each of them foot-by-foot as they make their way to the counter. Others have a carry-on and one piece they plan to check in. And look at that guy over there with the red shirt. You see him?"

"I do—looks like all he has is his backpack and an e-ticket."

"Yes he does—he's traveling light. That's what your dream is about."

"Traveling light?" I ask, curious to see her connection.

"No. Baggage. The dream is about baggage."

"You mean psychological baggage."

"Yes."

"Okay—walk me through it."

"It's nothing you couldn't figure out on your own if you think about it a little bit. You recall the discussion we had some weeks ago about the dreadful management problem you were dealing with?"

"Of course."

"It's connected. Your resentment over workplace people and issues has weighed heavily on your mind as of late, and you're carrying those ill-feelings around with you—like luggage. It's not unexpected—you're human first and a manager second."

"Hmm. That's good, Toni."

"People are a product of their environment, but dig a little deeper and you'll find that everyone is a product of their experiences. Knowing that about not just yourself, but other folks you manage, will make you more aware of how the past has the potential to negatively influence present and future behavior. This insight is very important as you mentor others to become conscious of their emotion so that it doesn't limit their success."

"But aren't the wrongs you experience important to hold onto for the lessons that are learned."

"Correct—you hold and carry the lesson, but let go of the experience and people that were wrapped up in the wrongdoing. The lesson part can fit in a toiletry bag and makes easy traveling."

***

The ability to manage emotions is the basis of emotional intelligence. In their book, *The Emotionally Intelligent Manager: How to Develop and Use the Four Key Emotional Skills of Leadership*, Caruso and Salovey posit that the emotionally intelligent manager learns to disengage the emotion from the response, but not at the expense of ignoring the emotion. In one example they provide, a subordinate caused a manager's presentation to digress from its objectives by continually interrupting her. The emotionally intelligent manager would recognize her own feelings of frustration, but would quickly come to understand that a real threat did not exist. The manager would then proceed in managing the emotional experience in a constructive manner. The authors suggested that the manager could publicly state her desire to move forward with the discussion while also mentioning her willingness to address the employee's concerns in a private, one-on-one meeting. As the authors point out, however, managing one's emotions does not mean being devoid of having emotions; rather, it implies having the ability and training to translate them into productive action. It is not unlike any other aspect of life when one must strive to respond with a balance of thoughts and feelings and strike an equilibrium between the heart and mind.

Building emotional intelligence requires an acute understanding of oneself, but also a deep sense of empathy. Toni's insight showed that developing emotional intelligence allows one to be mindful of why people behave in certain ways. This enables the manager to gain perspective, but more importantly allows the manager to separate personally from the other person's behavior. Shedding the experience so that only the core lesson remains ensures one's objectivity and does not hamper the ability to continue to lead and guide the organization. While it can prove difficult in a real world work environment, emotionally intelligent managers work to sharpen their skill because they understand its importance and the dividend it pays in the end. As Harriet Nelson stated, "Forgive all who have offended you, not for them, but for yourself." Good managers owe it to themselves.

And those are just some of my musings on management.

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