

## RECOMMENDATIONS FOR CHANGE

### WHAT CAN AN INDIVIDUAL JUDGE DO?

1. As a matter of practice, explain in understandable language what is about to go on to litigants, witnesses, and jurors. The more they know what to expect, the more likely they will be able to comprehend. Judges need to accept that it is their ultimate responsibility to ensure people understand their processes and orders.
2. Learn how to listen better. Listening is not the absence of talking. There are some excellent books about improving listening. The first step is good self-analysis. Each of us has different strengths and weaknesses. All of the literature concludes that you can become a better listener. The local academic community might be a good repository of advice.
3. While it is understandable to believe that a lawyer will explain judicial orders, not every litigant has a lawyer who will ensure an order is understood. It's your order. You have a responsibility to explain it in understandable terms.
4. Put something on the bench as a mental reminder that patience is a virtue not always easily practiced.
5. At the start of a docket, explain the ground rules for what will happen. For example, explain why certain cases will be heard first or why what litigants or defendants can say is limited in time or scope.
6. Share and discuss this paper with the courtroom staff. They can play a critical role in giving a judge feedback, reminders, and support.
7. Arrange to have yourself videotaped, particularly when you preside in heavy calendars. Ideally, review the tape with a professional or colleagues who will aid your analysis, but even if no one sees it except you (and perhaps a partner or spouse), you can still learn a lot about how you are perceived by the people before you.
8. Enlist the local academic community. Professors who specialize in communication and nonverbal behavior can offer great insight.
9. Thank people for their patience.

### WHAT CAN YOUR COURT DO?

1. Adopt the National Center for State Courts' *CourTools*, a set of ten trial-court-performance measures that offer perspective on court operations. If all ten are more than is feasible, start with number one: Access and Fairness.
2. Examine how your court deals with the three most troubling areas courts have in affording a high degree of procedural fairness: self-represented people, family law, and traffic offenses.
  - a. There is increasing understanding that a good trial judge must change not only the processes that lead

up to the courtroom, but also the way the courtroom itself is conducted. Judicial officers and those who work with them are beginning to think of ways to manage the courtroom so that neutrality is enhanced by making the systems work for all, regardless of whether they have a lawyer. People who appear pro se are more likely to be poor, a minority, and overwhelmed by the legal process.

- b. Some fear that changing court procedures to be friendly to the self-represented undercuts judicial neutrality. The American Judges Association is a member of the Self-Represented Litigant Network, which has resources.
  - c. Courtroom procedures as a whole must be designed to support the type of relaxed neutral communications between judges and self-represented litigants that is optimal for obtaining the facts necessary on which to base high-quality decision making.
3. Use the research cited in this paper to demand adequate numbers of judicial officers to be able to handle high-volume dockets in ways that *both* move the cases toward a timely disposition *and* allow those coming through the court to feel that they have been respected and listened to.
  4. Consider how procedures may affect perceptions of fairness. For example, providing a small-claims litigant a written explanation, even consisting of a few sentences, may be preferable to using a check-the-box form judgment. Or it may be that providing an oral decision from the bench will be seen as fairer than a cursory decision that arrives in the mail.

#### **WHAT CAN COURT ADMINISTRATORS DO?**

1. Share this paper with court employees. Engage them in a discussion of the importance of fairness in our courts. As important as the judge may be in the process, the judge is just one piece of the puzzle when it comes to the public's interaction with the court system. Conduct courtwide training so that all employees understand the important role they play in providing procedural fairness. How litigants are treated by court employees from the moment they enter the courthouse door—or the moment they encounter security personnel at a metal detector—sets the tone.
2. Make it a major project for 2008 to analyze the tone of public interaction that is set in your courthouse. Does it convey respect and care for the people who, often in stress, come there? Could it be improved? Many courthouses have child-care facilities, adequate handicapped-accessible areas (now required by the ADA), and domestic-violence waiting rooms. Are there improvements that should be made at your courthouse? Involve all stakeholders (judges, staff, attorneys, litigants, and the general public) in this process.
3. Treat employees fairly. If court employees do not feel that they are fairly treated in their jobs by court leaders, it is unlikely that they will treat the public any better. The National Center for State Courts' *CourTools* has a specific measurement tool for employee satisfaction. Court administrators need to strive to create a courthouse work environment that doesn't breed cynicism.
4. Work to provide sufficient support staff so that judges are not distracted by activities that may interfere with their perceived attention to the presentation of cases in the courtroom. For example, if a judge is fiddling with tape recorders and making constant notes of tape counter numbers, that judge is not going to be looking at the litigants and attorneys and is not going to be perceived as having paid careful attention to the parties' dispute. There are many roles that judges take on in understaffed courts and courtrooms. Those roles should be carefully monitored for possible interference with the

judge's primary role—hearing and deciding the matter at hand in a way that clearly adheres to the requirements for a high public perception of procedural fairness. Having judges perform duties that might more appropriately be done by a clerk should especially be avoided in high-volume dockets.

5. Provide opportunities for courthouse visitors to evaluate their experience before they leave the courthouse. Doing so communicates respect and gives an opportunity for voice.

## WHAT CAN RESEARCHERS DO?

1. For more than thirty years, the social-science academic community has learned a great deal about fairness in our courts. The knowledge that they have gained, however, has too often remained within the confines of academia. The truth is that most judges don't know about the journals the research appears in and often don't easily understand the jargon. The National Science Foundation and others who fund social-justice research need to reach out to judges to develop strategies to ensure that sound academic social-science research is shared in forms that are likely to produce change within the courts—journals like *Court Review*, the quarterly journal of the American Judges Association, and judicial-education conferences are key venues for the dissemination of this information.
2. While there is a lot of research at the trial-court level on the issue of procedural fairness, there is little research about how the concept applies at the appellate level. This could be an important area for additional thought and research.
3. The American Judges Association encourages the National Highway Traffic Safety Administration to fund research specifically targeted to improving the procedural fairness of courts dealing with traffic cases.
4. Substantial research documents the need to have a voice in the proceedings. Usually, litigants express themselves in court through their attorneys. Researchers could attempt to determine whether it is always sufficient for the litigant to be represented by an attorney in a forum in which the litigant is present, or whether litigant satisfaction would be substantially improved by having some time in which the litigant is heard from directly. This sort of research could be done in a variety of contexts, civil and criminal.
5. Help to evaluate the potential consequences on perceptions of procedural fairness through pilot projects on changes in court procedure. At a minimum, changes in procedure should not reduce the sense of procedural fairness by people who come to court.

## WHAT CAN JUDICIAL EDUCATORS DO?

1. The American Judges Association encourages judicial educators to simply distribute this paper as a start. (We'll happily provide it in electronic form.) Judicial education is driven by advocacy; that is, educators try to get judges to *do* something by *telling them about* something. If judicial educators simply make good, accessible information about procedural fairness known to judges, change will begin to occur even without a call for specific action.
2. Judges should be formally educated on the implications of research regarding procedural issues and action steps they might take. Procedural Fairness might be developed as an intensive course of study presented by the National Judicial College. But, in addition to considering Procedural Fairness as a stand-alone subject, it also should be integrated into virtually all judicial-education subject areas.

3. Judicial education must include—for lack of a better term—“leadership” development. Programs like the Leadership Institute in Judicial Education at the University of Memphis help participating judges to understand themselves better, as well as how others learn and change. Such programs teach the role of emotions in those processes in ways that can be useful in educating others, in judging, and in life. Judges need honest feedback in a safe environment in order to build self-awareness and continue to develop as leaders in their courtrooms.
4. Judicial educators need to train judicial mentors. The habits and values judges adopt within the first 24 months are likely to be the ones they keep throughout their careers. Effective mentoring is a key in shaping this.

## **WHAT CAN COURT LEADERS DO?**

1. The American Judges Association encourages the Conference of Chief Justices to place the issue of procedural fairness in state courts on their agenda during 2008. Each state Chief Justice has enormous influence on the agenda for justice in their state. Collectively the Conference of Chief Justices can set the agenda for our nation’s state courts. It may at first glance seem presumptuous for the American Judges Association to encourage the Conference to place this issue on their agenda in 2008. Many states already are deeply committed to improving the procedural fairness of their courts, and many individual Chief Justices are champions of this issue. But the performance of our courts on matters of procedural fairness has certainly not been perfected, which is why the Conference of Chief Justices should place this issue on their agenda.
2. Similarly, the American Judges Association encourages the Conference of State Court Administrators to place the issue of procedural fairness on their agenda during 2008. We acknowledge the leadership of COSCA in developing excellent white papers to guide future action; we have modeled our white-paper process on COSCA’s excellent efforts. State-court administrators have been the traditional champions of improved case management. The new mantra of court administration should be that effective case management that also affords procedural fairness to litigants is the essence of effective court administration. Unless both goals are achieved, the system of justice will flounder.
3. The American Judges Association encourages courts to examine the National Center for State Courts’ *CourTools*. Our goal is to have at least 100 additional courts adopt and implement the CourTool on access and fairness in 2008.
4. The American Judges Association invites the courts community to plan for a national conference on procedural fairness in 2009. The National Center for State Courts, the National Judicial College, the Center for Court Innovation, the Institute for the Reform of the American Legal System, Justice at Stake, and the American Judicature Society all have tried to improve the fairness of our courts. If these organizations and others were willing to partner with the American Judges Association to plan and seek funding for a national conference on procedural fairness, the issue of fairness in our courts could be advanced exponentially.
5. The American Judges Association encourages bar-association leaders to join with the courts to ensure greater procedural fairness in our courts. Lawyers need to be educated on the social-science research described in this paper so that all of the players within the court system can work together toward a justice system that can be respected by all.
6. The American Judges Association encourages the Urban Court Manager Network, working with the

Justice Management Institute and others, to examine the issue of how to improve the sense of procedural fairness for racial minorities.

7. By embracing procedural fairness, courts can embrace judicial accountability without reference to specific decisions on the merits of individual cases. Judges should be held accountable for running a courtroom in which everyone is treated with respect, has the opportunity to be heard, and receives an adequate explanation of court orders. Judges cannot avoid controversy—we must decide the cases before us. But in the face of potentially unfair criticism for specific decisions, it should be an effective defense by a judge to be able to say that the people who appear in my courtroom feel they have been treated fairly.

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**Kevin Burke** has been a district judge in Hennepin County, Minnesota, since 1984. He served as chair of the AJA's White Paper Committee in 2006-2007; he is also a member of the AJA's Board of Governors. He has been elected to four terms as chief judge and three terms as assistant chief judge of the Hennepin County District Court, which has 61 judges and more than 750,000 annual case filings.

Burke received the William H. Rehnquist Award from the National Center for State Courts in 2003; the Rehnquist Award is presented annually to a state judge who meets the highest level of judicial excellence, integrity, fairness, and professional ethics. Among his many other awards, *Governing* magazine named him the Public Official of the Year in 2004; the Minnesota Chapter of the American Board of Trial Advocates named him the trial judge of the year in 2005; and the magazine *Law & Politics* named him one of the 100 most influential lawyers in the history of Minnesota. Burke is a past chair of the Minnesota State Board of Public Defense and was a leader in efforts to improve and expand the state's public defender system.

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## **ABOUT THE AMERICAN JUDGES ASSOCIATION**

The American Judges Association (AJA) is the largest independent association of judges in the United States, and it also has about 150 members who are Canadian judges. Formed in 1959, it has about 2,500 members from all levels of the judiciary—municipal, state or provincial, and federal; trial, appellate, and administrative. The majority of its membership consists of state trial-court judges.

The American Judges Association seeks to serve as the Voice of the Judiciary® by speaking out on issues of concern to judges and by working to improve the work done by judges and the judiciary. The AJA provides high-quality educational programs for judges at an annual educational conference and publications with information useful to judges. The AJA supports a variety of programs and initiatives that promote fair and impartial courts, including the work of Justice at Stake, a partnership of more than 30 organizations, including AJA, dedicated to maintaining fair and impartial courts.

The American Judges Association is governed primarily by a 45-member Board of Governors and an eight-member Executive Committee. This white paper was approved by American Judges Association acting through its General Assembly at its meeting on September 29, 2007.

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