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Court Review

Volume 52, Issue 1

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

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Court Review

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION
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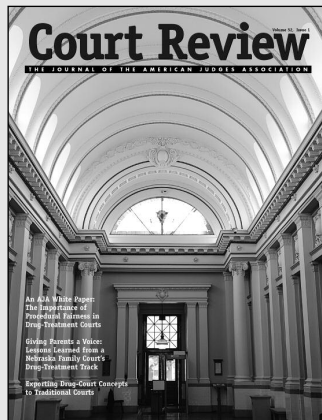
EDITOR'S NOTE

In this issue, we present the latest American Judges Association white paper. Written by last year's AJA president, Brian MacKenzie, the paper explores the role of the judge in a drug-treatment court. Based on his own experience as a drug-court judge and data from other studies, he argues that the judge is the key to drug-court success and that the successful drug-court judge must practice the principles of procedural fairness. MacKenzie's paper thus builds on the AJA's first white paper—a 2007 paper on procedural fairness. We hope you'll take a look at MacKenzie's paper as well as the past AJA white papers (listed, with links to each paper, at page 35, immediately following the latest white paper).

Two related articles are included in the issue. First, Nebraska judge Roger Heideman and several researchers provide an in-depth look at a Nebraska family court that has initiated a drug-treatment track for parents in cases in which parental rights might be terminated. Drug treatment is one important way some parents may be able to reunite with their children, and the Nebraska court has set up a mandatory drug-treatment track for some parents—those in cases in which parental substance abuse is identified in the affidavit supporting removal of a child from the parent's home. Judge Heideman and his coauthors present data on the first 42 families to participate in this program and comment on the lessons that other courts might learn from their experience.

Second, we have an article from judges Jamey Hueston and Kevin Burke; both have served as drug-court judges. Together, they contend that many drug-court concepts can be transferred to traditional court dockets. That's potentially a very important point—most cases are processed in general court dockets, not in specialized dockets like a drug court or a mental-health court. Both Judge Hueston and Judge Burke have many years of experience with drug courts, and each has also worked more broadly on problem-solving courts. We think you'll be interested in their suggestions for how to use drug-court concepts more broadly.

This issue also includes our new features—a law-related crossword puzzle from Arkansas judge Vic Fleming and a column on Canadian law from Canadian judge Wayne Gorman. In this issue, Gorman discusses both Canadian and U.S. views on when a judge can go outside the record to do fact-related research. You'll find a useful review of American law on this topic in a past *Court Review* article: John Monahan & Laurens Walker, *A Judges' Guide to Using Social Science*, 43 CT. REV. 156 (2007), available at <http://goo.gl/wRI2VU>.—SL



Court Review, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States and Canada. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work. Guidelines for the submission of manuscripts for *Court Review* are set forth on page 7 of this issue. *Court Review* reserves the right to edit, condense, or reject material submitted for publication.

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Cover photo, Mary S. Watkins (maryswatkins@mac.com). The cover photo is from the interior of the historic Riverside (California) Courthouse, built in 1904. The exterior of this courthouse was featured on our cover in Volume 45, Issue 3.

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President's Column

John Conery

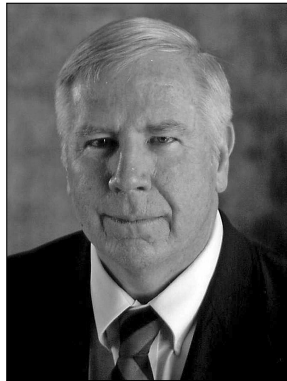
In the last issue of *Court Review*, I challenged our members, as Theodore Roosevelt challenged everyone in his speech, “The Man in the Arena,” to “strive valiantly” to realize the “triumph of high achievement” as you serve in the arena of public service. In this issue, I’m asking those who can to take a step back from the public arena and join your fellow AJA members for our midyear conference in a historic, relaxing, and beautiful setting: Santa Fe, New Mexico.

Those who do the hard work of judging know all too well the toll stress takes on those who toil in the “judicial arena.” Past President Brian MacKenzie highlighted the importance of recognizing and properly dealing with the health risks inherent in our stressful occupation by dedicating a column in *Court Review* (Vol. 51, Issue 1) and last year’s midyear conference in Fort Meyers, Florida, to the issue of “Judicial Stress.” The great programs presented at that conference can be accessed through our website, www.amjudges.org.

At this year’s midyear conference in Santa Fe, April 19-22, 2016, we hope to provide the judges in attendance with some much-needed “stress relief” by combining a top-notch education program with some fun and relaxing activities to share with your fellow judges from throughout the U.S. and Canada.

If you want to learn how to handle guns safely and professionally, especially how to properly handle guns as evidence in a court proceeding, our own Judges Gene Lucci and Richard Kayne will offer an optional tutorial on gun safety. An optional trip to a local gun range following the tutorial is in the planning stages.

In addition to the optional tutorial on gun safety, we have made room in our schedule for at least one afternoon for you to relax with colleagues. If fly fishing is your way to relax, expert guides are available to take you on a scenic trip to one of New Mexico’s finest trout streams. You may schedule your trip through www.thereellife.com or through any of a number of area guide services.



Santa Fe has many beautiful museums and historic buildings to tour, and we will furnish a tour guide familiar with the area to help you select from a variety of options as you plan your personal tour following our education programs. Senior United States District Judge James Parker is also offering a guided tour of the historic Santa Fe Federal Courthouse.

So please invest a few minutes of your time now to visit our website and register for our Santa Fe Midyear meeting: <http://www.amjudges.org/conferences/>. We have a room block at The Drury Plaza Hotel in beautiful downtown Santa Fe, within walking distance of many historic points of interest and museums.

As Will Rogers famously said: “Half our life is spent trying to find something to do with the time we have rushed through life trying to save.” So spend a little time with AJA in Santa Fe and refresh your mind and your spirit from the rigors and stress of public life as a judge. Then return to your “judicial arena” with renewed vigor to pursue the “triumph of high achievement” in your courtrooms!

We hope to see you in Santa Fe!

How Much Independent Judicial Research Is Appropriate?

Wayne K. Gorman

It is generally accepted that judges can conduct research beyond the materials provided by counsel. One cannot argue, for instance, that we are limited to case precedents submitted by counsel or that we cannot conduct our own legal research.¹ However, what if the research is not of a strictly legal nature? What if we are not satisfied with the evidence presented? How far can we go in examining exhibits and drawing conclusions from them? These are different and more difficult questions that have caused debate in Canada and the United States because in “an accusatory and adversarial system, the delicate task of bringing the truth to light falls first and foremost to the parties.”² As will be seen, in certain instances, independent research or examination of exhibits can both raise a reasonable apprehension of bias and prevent an accused person from making full answer and defence.

EXAMINATION OF EXHIBITS

When an exhibit is entered, we can examine it. No doubt we can draw inferences from the exhibit.³ A “trial judge is not a mere observer in a criminal trial.”⁴ However, how far can we go in such examinations before we become a witness?

An interesting illustration of this point can be found in the Supreme Court of Canada’s decision in *R. v. Nikolovski*.⁵ In *Nikolovski*, the Supreme Court of Canada affirmed a conviction for robbery based solely on the trial judge’s comparison of the person depicted in a crime-in-progress video with the accused who was sitting in the courtroom. There was no other identification evidence, and the store clerk was unable to identify the accused. The majority of the Supreme Court held that “it was certainly open to the trial judge to conclude that the accused before her was the person depicted on the tape.”⁶ However, two dissenting justices suggested that “the difficulty with the majority’s reasoning is that the judge’s observations [were] entirely untested by cross-examination.”⁷ Applying *Nikolovski*, it was held in *R. v. Benson* that a conviction should be upheld though the trial judge “relied on the recognition evidence of the complainant and his own supporting observations in making his decision on the appellant’s guilt.”⁸ Similarly, in *R. v.*

Gyles, it was held that in convicting the accused, the trial judge properly “relied on her comparison of the appellant’s voice when he testified in court with the voice heard on the tape recording [entered as an exhibit] in coming to her conclusion that it was the appellant’s voice on the tape recording.”⁹

An example of a trial judge going too far in examining exhibits can be found in *R. v. Bornyk*.¹⁰ In *Bornyk*, the accused was charged with the offence of break and entry. The key evidence against him was a fingerprint found inside the house. The Crown called an expert fingerprint examiner, who testified that the fingerprint had been deposited in the house by the accused. After reserving judgment, the trial judge sent counsel four articles critical of the accuracy of fingerprint analysis. After hearing further submissions, the trial judge entered an acquittal. In doing so he referred to the articles he had produced and his own comparison of the known print with the latent print.

The Crown appealed from the acquittal. The appeal raised two issues:

- (1) whether the trial judge erred “in relying upon independently researched literature that was not properly introduced by either party, not tested in evidence, and not put to the fingerprint witness”; and
- (2) whether the trial judge erred “by engaging in his own unguided comparison of the latent print and known print.”¹¹

The appeal was allowed and a new trial ordered. The British Columbia Court of Appeal noted that it “is basic to trial work that a judge may only rely upon the evidence presented at trial, except where judicial notice may be taken.”¹² The Court of Appeal indicated that it was “apparent from the excerpts found in the reasons for judgment and the descriptive titles of the articles uncovered by the judge that the articles are discussions on the subject of fingerprint analysis, including opinion. As articles commenting on forensic science, their contents are not matters of which the judge could take judicial notice. It is thus axiomatic that it was not open to the judge to embark on his independent investigation.”¹³

Footnotes

1. See *R. v. P.S.*, 2015 NBCA 74, ¶ 33 (Can. N.B.).
2. See *Imperial Oil v. Jacques*, [2014] 3 S.C.R. 287, ¶ 25 (Can.).
3. See *Agar v. Weber*, 2014 BCCA 297, 2014 CarswellBC 2129, ¶ 38 (Can. B.C.).
4. See *R. v. Brijeski*, 40 M.V.R. (3d) 251, 1999 CarswellOnt 675, ¶ 3 (Can. Ont.).
5. [1996] 3 S.C.R. 1197 (Can.).
6. *Id.* ¶ 33.

7. *Id.* ¶ 57.
8. 2015 ONCA 827, 2015 CarswellOnt 18304, ¶ 18 (Can. Ont.) (emphasis added).
9. 27 M.P.L.R. (4th) 193, 2005 CarswellOnt 7422, ¶ 13 (Can. Ont.).
10. 2015 BCCA 28, 2015 CarswellBC 126 (Can. B.C.).
11. *Id.* ¶ 6.
12. *Id.* ¶ 8.
13. *Id.* ¶ 10.

The Court of Appeal concluded that the trial judge “stepped beyond his proper neutral role and into the fray. In doing so, he compromised the appearance of judicial independence essential to a fair trial. While he sought submissions on the material he had located, by the very act of his self-directed research, in the words of Justice Doherty in *R. v. Hamilton* (2004), 189 O.A.C. 90, 241 D.L.R. (4th) 490 at para. 71, he assumed the multi-faceted role of ‘advocate, witness and judge.’”¹⁴

The Court of Appeal also concluded that the trial judge erred in “conducting his own analysis of the fingerprints”:

[T]he judge also erred by conducting his own analysis of the fingerprints, absent the assistance of the expert witness. The very point of having an expert witness in a technical area, here fingerprint analysis, is that the specialized field requires elucidation in order for the court to form a correct judgment: *Kelliher (Village) v. Smith*, [1931] S.C.R. 672; *R. v. Mohan*, [1994] 2 S.C.R. 9, 114 D.L.R. (4th) 419. While it may be desirable that a judge personally observe the similarities and differences between the latent point and known point, such examination should be guided by a witness so as to avoid the trier of fact forming a view contrary to an explanation that may be available if only the chance were provided to proffer it.¹⁵

A recent example from New Zealand constitutes another example of a judge going too far. In *Garrett-Phillips v. R.*, the accused pleaded guilty to a charge of wounding with intent to cause grievous bodily harm.¹⁶ The accused had stabbed the victim at a tavern and used a knife he had brought to the tavern with him. At the sentence hearing, evidence was presented to refute the suggestion that the stabbing had been premeditated. This evidence indicated that, earlier in the day, the accused had been paua fishing at Opunake, that the knife he had with him at the tavern had been used for paua shucking, and that, as he had not changed his clothes afterwards, that knife was still in his pocket when he went to the tavern.

The sentencing judge rejected this evidence. One of the grounds upon which he did so was that he had personally “consulted tide charts for Opunake on the day in question.” The sentencing judge concluded based upon his assessment of the charts that “the alleged paua fishing would have occurred at full-tide. The judge did not, therefore, accept that Garrett-Phillips would have been wearing the same clothes in the tavern as he had worn whilst fishing for paua. Further, the judge did not consider the knife to be the sort of knife that would be used for paua fishing.

On appeal, the New Zealand Court of Appeal upheld the sentence imposed but indicated that “it was unwise of the Judge to have consulted factual material that was not in evidence before him.”¹⁷

But how far should such restrictions go? Surely we are not limited solely to judicial notice. Can we not use our experience and knowledge of local conditions without evidence having been presented? Consider the decision in *R. v. Smarch*.¹⁸ In *Smarch*, the accused was convicted of the offence of sexual assault. The trial judge refused to impose a “long term supervision order” because he concluded “that suitable, high-intensity treatment programs were not available in the Yukon.”¹⁹

The Yukon Court of Appeal held that the foundation for the sentence was based “on an absence of evidence, which is an error in law. There was no evidence before the judge regarding programs that could adequately supervise Mr. Smarch in the community; rather, the judge based his conclusion that such programs were available on his own knowledge and experience. This is not enough.”²⁰

So it would appear that though we can view exhibited video tapes or photographs and reach our own conclusions without becoming “advocate, witness and judge,” we must be cautious in examining other types of evidence. The line of demarcation appears to involve, in part, whether expert explanation of the relevance and meaning of the evidence is necessary and whether it requires an examination that might be impacted by cross-examination.

THE INTERNET

The Internet allows for an unprecedented ease of worldwide legal research. However, it also allows for non-legal research, and this is where judges can fall into error.

An example can be found in *R. v. C.D.H.*²¹ In *C.D.H.*, the accused was acquitted of the offence of sexual assault. The trial judge had conducted his own Internet research on the website “Match.com” after it had been referred to in the evidence. The Ontario Court of Appeal held that the trial judge’s conduct contravened the “basic principle that judges and jurors must make their judicial decisions based only on the evidence presented in court on the record.”²²

The Ontario Court of Appeal also concluded “that the circumstances we have outlined gave rise to a reasonable apprehension of bias.”²³

In the United States, the decision in *Rowe v. Gibson*²⁴ nicely illustrates the problem because of the existence of a dissent.

In *Rowe*, a prisoner sued a prison and its staff in relation to medical treatment. The suit was dismissed but reversed on appeal by the United States Court of Appeals for the Seventh Circuit. The nature of the disagreement between the judges was described by one of the judges as follows:

A disagreement about the outcome of this relatively simple case has morphed into a debate over the propriety of appellate courts supplementing the record with Internet research.²⁵

14. *Id.* ¶ 11.

15. *Id.* ¶ 18.

16. [2015] NZCA 563 (N.Z.).

17. *Id.* ¶ 27.

18. 2015 YKCA 13, 2015 CarswellYukon 51 (Can. Yukon).

19. *Id.* ¶ 43.

20. *Id.* ¶ 54.

21. 2015 ONCA 102, 2015 CarswellOnt 4194 (Can. Ont.).

22. *Id.* ¶ 14.

23. *Id.*

24. 798 F.3d 622 (7th Cir. 2015).

25. *Id.* at 635 (Rovner, J., concurring).

In an opinion dissenting in part, Judge David F. Hamilton took umbrage at his colleagues' use of the Internet:

The ease of research on the internet has given new life to an old debate about the propriety of and limits to independent factual research by appellate courts. . . . The majority's approach turns the court from a neutral decision-maker into an advocate for one side. The majority also offers no meaningful guidance as to how it expects other judges to carry out such factual research and what standards should apply when they do so. Under the majority's approach, the factual record will never be truly closed. This invites endless expansion of the record and repetition in litigation as parties contend and decide that more and more information should have been considered.²⁶

However, Judge Richard A. Posner, writing for the majority, suggested that modern trial judges are not "like the English judges of yore":

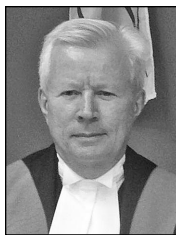
In citing even highly reputable medical websites in support of our conclusion that summary judgment was premature we may be thought to be "going outside the record" in an improper sense. It may be said that judges should confine their role to choosing between the evidentiary presentations of the opposing parties, much like referees of athletic events. But judges and their law clerks often conduct research on cases, and it is not always research confined to pure issues of law, without disclosure to the parties. We are not like the English judges of yore, who under the rule of "orality" were not permitted to have law clerks or other staff, or libraries, or even to deliberate—at the end of the oral argument in an appeal the judges would state their views seriatim as to the proper outcome of the appeal.²⁷

CONCLUSION

The decision in *Smarch* might have been different if the trial judge had raised his concern about a lack of treatment pro-

grams and asked for submissions or evidence. In *R. v. Turpin*, for instance, the Ontario Court of Appeal held that if a trial judge, in examining an exhibit, concludes it contradicts *viva voce* evidence on a point not raised, the trial judge should "advise the parties and offer an opportunity to have the trial reopened."²⁸ Such an approach might generally be wise. A criminal trial is after all not really a search for the truth. It constitutes "an independent testing of facts to the required legal standard in order to determine if facts have been proven beyond a reasonable doubt."²⁹

Though a request for further submissions based upon an examination of presented evidence may answer the problem of judges becoming their own witnesses, there appears to be no answer to a judge becoming her or his own witness by examining such evidence as fingerprints. Similarly, the competing views expressed by the judges in *Rowe* simply cannot be reconciled. The majority opinion proposes a wide scope for judicial evidence-gathering unencumbered by disclosure or the benefits of advocacy.



Wayne Gorman is a judge of the Provincial Court of Newfoundland and Labrador. His blog (*Keeping Up is Hard to Do: A Trial Judge's Reading Blog*) can be found on the web page of the Canadian Association of Provincial Court Judges. He also writes a regular column (*Of Particular Interest to Provincial Court Judges*) for the Canadian Provincial Judges' Journal. Judge Gorman's work has been widely published. His latest articles are *The Impact of the Supreme Court on Sentencing in Canada*, 72 *Supreme Court Law Review* (Second Series) 319 (2016), and *Ours Is to Reason Why: The Law of Rendering Judgment*, 62 *Criminal Law Quarterly* 301 (2015). Comments or suggestions to Judge Gorman may be sent to wgorman@provincial.court.nl.ca. For United States judges who may want to read in full one of the Canadian decisions referred to here, you can contact Judge Gorman and he will forward a copy to you by email.

26. *Id.* at 638, 641 (Hamilton, J., dissenting in part).

27. *Id.* at 628.

28. 2011 ONCA 193, 2011 CarswellOnt 1497, ¶ 36 (Can. Ont.).

29. See Keith D. Kilback & Michael D. Tochor, *Searching for Truth But Missing the Point*, 40 ALTA. L. REV. 333, 333 (2002).

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Answers to Crossword from page 51

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Court Review is received by the 2,000 members of the American Judges Association (AJA), as well as many law libraries. About 40 percent of the members of the AJA are general-jurisdiction, state trial judges. Another 40 percent are limited-jurisdiction judges, including municipal court and other specialized court judges. The remainder include federal trial judges, state and federal appellate judges, and administrative-law judges.

Articles: Articles should be submitted in double-spaced text with footnotes in Microsoft Word format. The suggested article length for *Court Review* is between 18 and 36 pages of double-spaced text (including the footnotes). Footnotes should conform to the current edition of *The Bluebook: A Uniform System of Citation*. Articles should be of a quality consistent with better state-bar-association law journals and/or other law reviews.

Essays: Essays should be submitted in the same format as articles. Suggested length is between 6 and 12 pages of double-spaced text (including any footnotes).

Book Reviews: Book reviews should be submitted in the same format as articles. Suggested length is between 3 and 9 pages of double-spaced text (including any footnotes).

Pre-commitment: For previously published authors, we will consider making a tentative publication commitment based upon an article outline. In addition to the outline, a comment about the specific ways in which the submission will be useful to judges and/or advance scholarly discourse on the subject matter would be appreciated. Final acceptance for publication cannot be given until a completed article, essay, or book review has been received and reviewed by the *Court Review* editor or board of editors.

Editing: *Court Review* reserves the right to edit all manuscripts.

Submission: Submissions may be made either by mail or e-mail. Please send them to *Court Review's* editors: Judge Steve Leben, 301 S.W. 10th Ave., Suite 278, Topeka, Kansas 66612, e-mail address: sleben56@gmail.com; or Professor Eve Brank, Department of Psychology, 334 Burnett Hall, PO Box 880308, Lincoln, NE 68588-0308, e-mail address: ebrank2@unl.edu. Submissions will be acknowledged by mail or e-mail; notice of acceptance or rejection will be sent following review.

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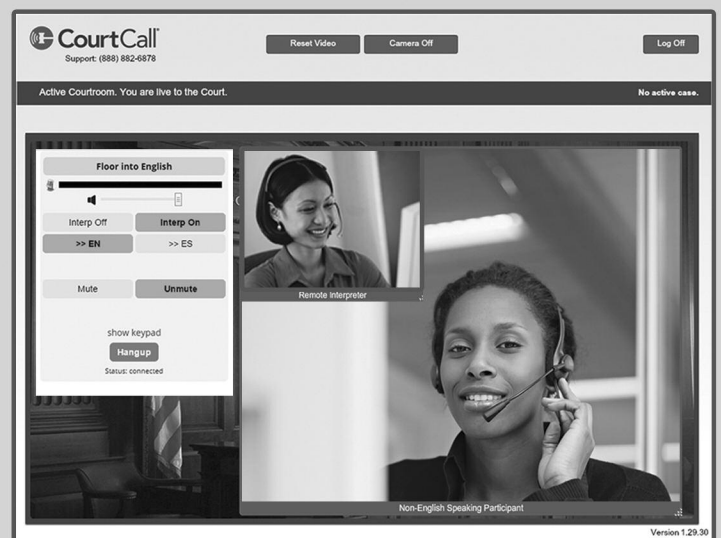
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THE JUDGE IS THE KEY COMPONENT:

THE IMPORTANCE OF PROCEDURAL FAIRNESS IN DRUG-TREATMENT COURTS

Brian MacKenzie

INTRODUCTION

“I’ve learned that people will forget what you said, people will forget what you did, but people will never forget how you made them feel.”¹

Beginning in the 1960s, the United States has suffered from waves of illicit drug epidemics, which have exerted immense stress on our system of criminal justice.² For decades, the governmental response has been to wage a “War on Drugs” that has siphoned funding away from our nation’s schools and into the budgets of our correctional systems.³ In spite of the considerable amount of taxpayer dollars that has been dedicated to enforcement and incarceration initiatives, substance abuse remains a driving force in the criminal-justice system.⁴ After five decades of inefficient spending and ineffective imprisonment, governments at every level are realizing just how ineffective this “war” has been.⁵

While the rest of the nation slowly develops an understanding that our courts and judges can become powerful motivators instead of intimidators, in 1989, Florida’s Eleventh Judicial Circuit took a visionary step toward ending perpetual criminality for drug-dependent defendants.⁶ By establishing the nation’s first drug-treatment court (DTC), the Eleventh Circuit created a revolutionary system that’s built healthier communities, cut spending, and changed how courts approach sentencing.⁷

Footnotes

1. Maya Angelou, quoted in *A Conversation with Dr. Maya Angelou*, BEAUTIFULLY SAID MAGAZINE, July 4, 2012, <http://beautifullymagazine.com/201207feature-of-the-month-3/>. Although the quote is often attributed to Angelou, one researcher has credited it to Carl Bueher. See Garson O’Toole, *They May Forget What You Said, But They Will Never Forget How You Made Them Feel*, QUOTE INVESTIGATOR, <http://quoteinvestigator.com/2014/04/06/they-feel>.
2. Jonathan P. Caulkins & Peter Reuter, *Reorienting U.S. Drug Policy*, 23 ISSUES ONLINE SCI. & TECH. (2006), <http://issues.org/23-1/caulkins/>.
3. MICHAEL MITCHELL & MICHAEL LEACHMAN, CENTER ON BUDGET AND POLICY PRIORITIES, CHANGING PRIORITIES: STATE CRIMINAL JUSTICE REFORMS AND INVESTMENTS IN EDUCATION (2014), <http://www.cbpp.org/cms/?fa=view&id=4220>.
4. Louisa Degenhardt et al., *Toward a Global View of Alcohol, Tobacco, Cannabis, and Cocaine Use: Findings from the WHO World Mental Health Surveys*, 5 PLOS MEDICINE e141 (2008), <http://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.0050141>.
5. Bryan Stevenson, *Drug Policy, Criminal Justice and Mass Imprisonment* 3, 4, 6 (Global Commission on Drug Policies, Working Paper, January 2011), http://www.globalcommissionondrugs.org/wp-content/themes/gcdp_v1/pdf/Global_Com_Bryan_Stevenson.pdf. See also Press Release, United States Department of Justice, Attorney General Eric Holder Delivers Remarks at the Annual Meeting of the American Bar Association’s House of Delegates (August 12, 2013), <http://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-annual-meeting-american-bar-associations>.
6. Peggy Fulton Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System’s Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 455 (1999).
7. DOUGLAS B. MARLOWE, NAT’L ASS’N OF DRUG COURT PROFESSIONALS, RESEARCH UPDATE ON ADULT DRUG COURTS (2010), http://www.nadcp.org/sites/default/files/nadcp/Research%20Update%20on%20Adult%20Drug%20Courts%20-%20NADCP_1.pdf.

The DTC methodology, which is based upon ten key components and best-practice standards, has since spread throughout the criminal-justice system to benefit other populations.⁸ The success of the DTC model has led to a series of specialty courts, such as veterans' treatment courts, that have realized newfound success in reducing recidivism among their participants.

In this paper, the American Judges Association (AJA) argues that, while programmatic success requires adherence to best practices based upon the ten key components, ongoing judicial interaction with drug-court participants based upon the four principles of procedural fairness (voice, neutrality, respectful treatment, and trustworthy authorities) is the most critical.⁹ After reviewing the mounting literature on the success of DTCs, researchers have confidently concluded that the power of the judge-participant relationship is so immense that it may have "effectively suppressed all other theoretical mechanisms" that could potentially lead to desired outcomes.¹⁰

The developing understanding of the power of the judge-participant relationship led to a 2007 white paper published by the AJA titled *Procedural Fairness: A Key Ingredient in Public Satisfaction*.¹¹ The findings included in that paper demonstrated how the four principles of procedural fairness transformed individuals' courtroom experiences, as well as the general public's perception of the judiciary. Current research has established that the success of DTCs is dependent upon a judge's adoption and use of the four principles of procedural fairness.

Procedural fairness is the tool that drives the judge's influence upon DTC participants. This finding holds true regardless of a participant's gender, race, age, or economic status.¹² The research is quite clear that judges who adhere to the four principles of procedural fairness achieve superior outcomes within their DTCs compared to judges who do not.¹³

While the AJA on behalf of its 2,000 member judges in the United States and Canada has consistently recognized and supported the achievements of DTCs, the purpose of this white paper is to identify and advocate for continued change that will improve the daily work of these courts and the judges who preside over them. We believe that the baseline social-science research underlying this paper is applicable not only in the U.S. and Canada, but in any country using the DTC model.

8. *Id.* at 3. These key components are:

1. Drug courts integrate alcohol and other drug-treatment services with justice-system case processing.
2. Using a non-adversarial approach, prosecution and defense counsel promote public safety while protecting participants' due-process rights.
3. Eligible participants are identified early and promptly placed in the drug-court program.
4. Drug courts provide access to a continuum of alcohol, drug, and other related treatment and rehabilitation services.
5. Abstinence is monitored by frequent alcohol and other drug testing.
6. A coordinated strategy governs drug-court responses to participants' compliance.
7. Ongoing judicial interaction with each drug-court participant is essential.
8. Monitoring and evaluation measure the achievement of program goals and gauge effectiveness.
9. Continuing interdisciplinary education promotes effective

drug-court planning, implementation, and operations.

10. Forging partnerships among drug courts, public agencies, and community-based organizations generates local support and enhances drug-court-program effectiveness.

NAT'L ASS'N OF DRUG COURT PROFESSIONALS, DRUG COURT STANDARDS COMM., *DEFINING DRUG COURTS: THE KEY COMPONENTS*, at iii (1997, reprinted 2004).

9. NAT'L ASS'N OF DRUG COURT PROFESSIONALS, *supra* note 8, at 15. See also Douglas B. Marlowe et al., *The Judge Is a Key Component of Drug Court*, 4 DRUG CT. REV. 1, 26 (2004), http://www.ndcrc.org/sites/default/files/dcr.iv2_.pdf.

10. SHELLI B. ROSSMAN ET AL., 4 THE MULTI-SITE ADULT DRUG COURT EVALUATION: THE IMPACT OF DRUG COURTS 5 (2011).

11. Kevin Burke & Steve Leben, *Procedural Fairness, A Key Ingredient in Public Satisfaction*, 44 CT. REV. 4, 4-5 (2007).

12. SHELLI B. ROSSMAN ET AL., THE MULTI-SITE ADULT DRUG COURT EVALUATION: EXECUTIVE SUMMARY 7 (2011).

13. *Id.*

DRUG-TREATMENT COURTS

“The truth is that Drug Courts have always placed inordinate demands on themselves. Dissatisfied with what was currently being done and had always been done, Drug Courts pushed through the envelope and redesigned the criminal justice system.”¹⁴

By 1980, the use of powdered cocaine was widespread in the United States.¹⁵ An oversupply of powdered cocaine in the early 1980s led to the creation of crack cocaine.¹⁶ Crack, being cheaper and easy to transport, spread like wildfire through the inner cities of America.¹⁷ Violent crime, including murder, soared as a result of this new drug epidemic.¹⁸ In response to public safety concerns, harsh new drug laws were passed.¹⁹ The resulting number of individuals arrested and imprisoned for drug-related crimes increased elevenfold between 1980 and 1997, overwhelming both courts and correctional systems.²⁰

In 1989, one of the cities struggling with this new criminal environment was Miami, Florida. South Florida's geography made it an ideal entry point for illicit drugs produced in Central and South America, forcing Miami officials to prepare for another onslaught of drug-related crime.²¹ Believing that Miami's criminal-justice system was already overburdened, Chief Judge Gerald Wetherington of Florida's Eleventh Judicial Circuit issued an administrative order creating the nation's first drug court and appointed Judge Herbert Klein to oversee its design and implementation.²²

Out of that single court grew a new movement. Starting with inner-city courts and expanding outward to suburban and rural communities, DTCs flourished.

As the number of DTCs grew, they began to evolve. The early courts focused on drug-addicted adults charged with nonviolent felonies. Soon thereafter, DWI courts (also known as sobriety courts) emerged, followed by juvenile drug courts, family dependency courts, reentry courts, campus drug-treatment courts, and tribal drug-treatment courts.²³ Each new court was born out of a unique response to a localized problem.

Pushing this growth at every stage was an organization founded in 1994 by the first twelve drug courts: The National Association of Drug Court Professionals (NADCP).²⁴ The core philosophy of the NADCP was expressed in a set of principles known as the ten key components of DTCs.²⁵ Taken together, the components represented a new approach to supervising defendants. Essential to the structure is a criminal-justice team led by a

14. NAT'L ASS'N OF DRUG COURT PROFESSIONALS, 1 ADULT DRUG COURT BEST PRACTICE STANDARDS 3 (2013).

15. Caulkins & Reuter, *supra* note 2.

16. DRUG ENFORCEMENT ADMINISTRATION, 1985-1990, at 59; <http://www.dea.gov/about/history/1985-1990.pdf>.

17. *Id.* at 59-60; Caulkins & Reuter, *supra* note 2.

18. David B. Kopel, *Crime: The Inner-City Crisis* (2010), <http://www.davekopel.com/CJ/Mags/InnerCityCrisis.htm>.

19. Ryan A. Kemper, *U.S. Drug Control Policy: Clinging to an Outdated Perspective*, 10 RES PUBLICA 73, 79, 83 (2005).

20. Stuart Taylor, Jr., *America's Prison Spree Has Brutal Impact*,

NATIONAL JOURNAL MAGAZINE, November 14, 2009.

21. Richard L. Berke, *Cities Move to Curb Summer Crime Increase*, N.Y. TIMES, May 21, 1989.

22. Hora et al., *supra* note 6, at 455.

23. *Types of Drug Courts*, NATIONAL ASSOCIATION OF DRUG COURT PROFESSIONALS, <http://www.nadcp.org/learn/what-are-drug-courts/models>.

24. *About NADCP*, NATIONAL ASSOCIATION OF DRUG COURT PROFESSIONALS, <http://www.nadcp.org/learn/about-nadcp>.

25. See MARLOWE, *supra* note 7, at 3.

judge and composed of a prosecutor, defense attorney, police officers, therapists, local community victim advocates, and probation officers. When combined with mandatory treatment, aggressive drug testing, regular review sessions, ongoing team training, community outreach, and a careful evaluation of outcomes, DTCs were able to reduce recidivism rates significantly.²⁶

One of the components, which calls for ongoing judicial interaction with each drug-court participant, began to emerge in importance so as to be described by drug-court researchers as a key component in DTCs.²⁷ As these researchers correctly pointed out, however, they were asserting this conclusion without detailed research on the impact of judicial interaction with DTC participants.²⁸ Nevertheless, there seemed to be an intuitive understanding among drug-court judges that their relationship with the participants had a substantial impact.²⁹ According to Judge Kevin Burke, who was among those early drug-court judges:

Many of the judges who engaged in the early generation of drug courts were quite transparent and open in how decisions were made and they gave explanations to the defendants as opposed to their lawyers. Their orders were understandable to defendants.³⁰

An early study of DTCs echoed Judge Burke's sentiment:

Nearly all the clients in Erie County (OH) agreed that the judge treated them with respect (96%), was fair (93%), and was concerned about them (86%). Three-quarters said that the court interactions with the judge helped them to stay off drugs, as did regular court appearances.³¹

In a focus-group study in 2002, participants in six locations were asked about their experiences in DTCs.³² In each location, participants' responses indicated that the judge was the most important influence in their success.³³ Participants stressed the significance of the individual attention they received from the judge and believed that their success mattered to the judge.³⁴ Participants indicated that without their relationship with the judge, they would not have felt the need to comply with the many conditions of the program, suggesting that the judge was the single most important element in their drug-court experience.³⁵ This positive impact was further reflected in some of the excerpts from their comments:³⁶

- "She helps, she cares, she wants you to get your life together."
- "Judge . . . is like a father figure in a sense . . . he seems to know your background,

26. "75% of adult criminal Drug Court graduates never see another pair of handcuffs." *Drug Courts Work*, NATIONAL ASSOCIATION OF DRUG COURT PROFESSIONALS, <http://www.nadcp.org/learn/drug-courts-work>. See also STEVE AOS ET AL., WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY, EVIDENCE-BASED PUBLIC POLICY OPTIONS TO REDUCE FUTURE PRISON CONSTRUCTION, CRIMINAL JUSTICE COSTS, AND CRIME RATES (2006); JEFF LATIMER ET AL., A META-ANALYTIC EXAMINATION OF DRUG TREATMENT COURTS: DO THEY REDUCE RECIDIVISM? (2006); Christopher T. Lowenkamp et al., *Are Drug Courts Effective: A Meta-Analytic Review*, 15 J. COMMUNITY CORRECTIONS 5 (2005); DEBORAH KOETZEL SHAFFER, RECONSIDERING DRUG COURT EFFECTIVENESS: A META-ANALYTIC REVIEW (2006); David B. Wilson et al., *A Systematic Review of Drug Court Effects on Recidivism*, 2 J. EXPERIMENTAL CRIMINOLOGY 459 (2006).

27. Marlowe et al., *supra* note 9, at 25.

28. *Id.* at 4.

29. Kevin Burke, *Just What Made Drug Courts Successful?* 36 NEW ENG. J. CRIM. & CIV. CONFINEMENT 39, 54 (2010).

30. *Id.* at 57.

31. STEVEN BELENKO, NAT'L CTR. ON ADDICTION & SUBSTANCE ABUSE, RESEARCH ON DRUG COURTS: A CRITICAL REVIEW, 2001 UPDATE 25 (2001).

32. JOHN S. GOLDKAMP ET AL., FROM WHETHER TO HOW DRUG COURTS WORK: RETROSPECTIVE EVALUATION OF DRUG COURTS IN CLARK COUNTY (LAS VEGAS) AND MULTNOMAH COUNTY (PORTLAND) 133 (2002).

33. *Id.* at 133.

34. *Id.*

35. *Id.*

36. *Id.* at 134.

your kids, your name, I mean he knows a lot of details about you—he remembers what he talked about with you last time.”

- “If you have one judge that oversees this program and she is constant then we all know what to expect, but when you have a whole lot of judges coming in they don’t know what you’ve been through or what’s really been happening with you.”
- “When you have one judge they are able to track what you are doing better . . . one is better because you have a link”
- “When it is such a personal issue, it is nice to be recognized by someone. I think that one judge is better because you already have a rapport built up with him.”

In 2004, an article in *Drug Court Review*, published by the National Drug Court Institute, argued that there was a need for significantly more research into the impact of the judge on successful participants in DTCs: “It is surprising . . . that little research has focused on the role of the judge in drug court.”³⁷ The authors acknowledged that participants indicated repeatedly that their success was due to their relationship with the judge, while, at the same time, stating:

Although it is true that drug court clients commonly credit their success in the program to their interactions with the judge . . . until very recently there was *no* experimental evidence to indicate whether the judge is, in fact, necessary or helpful to drug court outcomes.³⁸

The evidence for this intuitive judicial understanding was later codified in *The Drug Court Judicial Benchbook*.³⁹ In the *Benchbook*, researchers for the drug-court movement suggested that there are nine core competencies necessary for a judge to be successful in operating a drug court.⁴⁰

A close look at these core competencies highlights the key role that the drug-court judge plays in the successful operation of these courts. While not described in terms of procedural fairness, these core competencies create a circumstance where a judge is seen as having legitimate authority. That sense of legitimacy is derived from the involvement and preparation by the judge who provides a DTC participant with the subjective impression that the process they’re undergoing is fair.

The uniform approach of the ten key components combined with the nine core competencies fueled the growth of DTCs. By 2007, there were 1,667 DTCs across all 50 states.⁴¹

37. Marlowe et al., *supra* note 9, at 4.

38. *Id.* at 4.

39. THE DRUG COURT JUDICIAL BENCHBOOK 47-61 (Douglas B. Marlowe & William G. Meyer eds., 2011).

40. *Id.* at 47. These core competencies are:

1. Participates fully as a drug court team member, committing him or herself to the program, mission and goals, and works as a full partner to ensure their success.
2. As part of the drug court team, in appropriate non-court settings (i.e., staffing), the judge advocates for effective incentives and sanctions for program compliance or lack thereof.
3. Is knowledgeable of addiction, alcoholism, and pharmacology generally and applies that knowledge to respond to compliance in a therapeutically appropriate manner.
4. Is knowledgeable of gender, age, and cultural issues that may impact the offender’s success.

5. Initiates the planning process by bringing together the necessary agencies and stakeholders to evaluate the current court processes and procedures and thereafter collaborates to coordinate innovative solutions.

6. Becomes a program advocate by utilizing his or her community leadership role to create interest in and develop support for the program.

7. Effectively leads the team to develop all the protocols and procedures of the program.

8. Is aware of the impact that substance abuse has on the court system, the lives of offenders, their families, and the community at-large.

9. Contributes to education of peers, colleagues, and judiciary about the efficacy of drug courts.

41. BJA DRUG COURT CLEARINGHOUSE PROJECT, DRUG COURT ACTIVITY UPDATE 2 (April 12, 2007).

THE FOUR PRINCIPLES OF PROCEDURAL FAIRNESS

“Most people care more about procedural fairness—the kind of treatment they receive in Court—than they do about ‘distributive justice,’ i.e., winning or losing the particular case.”⁴²

In 2007, as the number of DTCs was expanding across the country, the AJA’s white paper fueled a new understanding of the impact of the principles of procedural fairness.

It is a well-established phenomenon that an individual’s distrust of the police is symptomatic of a wider belief that the criminal-justice system itself cannot be trusted.⁴³ This distrust, according to the research, is a result of negative experiences with individual police officers, particularly in minority and poverty-stricken neighborhoods.⁴⁴ A generalized distrust of the police in a particular neighborhood has been tied to increasing levels of crime and drug use.⁴⁵

As with exposure to the police, exposure to the justice system has the power to shape an individual’s perception of the system’s overall legitimacy.⁴⁶ Procedural fairness, therefore, is a subjective evaluation of a person’s experience in the justice system and is external to “distributive justice,” i.e., the actual outcome of the case.⁴⁷ While the distributive aspect of a case is important, individuals’ willingness to accept court decisions is rooted in their perceptions of how they were treated during the process itself.⁴⁸

The concept that the subjective perception of process fairness is more important than the actual disposition seems contradictory to the idea of the rule of law. For most citizens, however, the core of the justice system is about the fair treatment of an individual in a courtroom. As the AJA’s 2007 white paper explained, “People value fair procedures because they are perceived to produce fair outcomes.”⁴⁹ This subjective evaluation of courtroom procedures is what creates the sense of legitimacy.⁵⁰ This is particularly true in criminal cases.⁵¹ In fact, the evidence strongly suggests that in a criminal case, a defendant’s willingness to obey a court’s order is linked to his or her perception of the court’s legitimacy.⁵²

This is especially important for an individual who is being sentenced. Even if a defendant receives a more stringent sentence than they’d hoped for, they’ll nonetheless comply with the court’s order so long as they think the process was fair.⁵³ This leads to better out-

42. Burke & Leben, *supra* note 11, at 5.

43. Andrew V. Papachristos et al., *Why Do Criminals Obey the Law? The Influence of Legitimacy and Social Networks on Active Gun Offenders*, 102 J. CRIM. L. & CRIMINOLOGY 397, 404 (2012), <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7426&context=jclc>.

44. *Id.*

45. *Id.*

46. Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, in 30 CRIME AND JUSTICE: A REVIEW OF RESEARCH 283, 318 (Michael Tonry ed., 2003), <https://www.ncjrs.gov/pdffiles1/Digitization/202743-202750NCJRS.pdf>.

47. Burke & Leben, *supra* note 11, at 5-6.

48. Tyler, *supra* note 46, at 318.

49. Burke & Leben, *supra* note 11, at 6.

50. Tyler, *supra* note 46, at 287.

51. Jensen Cody Jorgensen, *Public Perceptions Matter: A Procedural Justice Study Examining an Arrestee Population* 67-68 (June 2011) (unpublished M.S. thesis, Arizona State University), https://cvpcs.asu.edu/sites/default/files/content/products/Jorgensen%20Thesis_Final2.pdf.

52. Tyler, *supra* note 46, at 284.

53. *Id.* at 300.

comes, as a defendant who successfully completes a probationary sentence has a reduced likelihood of rearrest.⁵⁴ It also, obviously, leads to a safer community and increases legitimacy of the entire justice system.

Given that this subjective evaluation is so critical to successful sentencing, what should an individual judge do to maintain a sense of legitimacy with the individuals who appear before him or her? The AJA white paper revealed four principles that create the conditions for perceived legitimacy:⁵⁵

- 1) Voice: The ability to participate in a case by expressing one's viewpoint engages individuals in the process of courtroom decision making. This participation, as research suggests, is a critical indicator of overall satisfaction with a court proceeding. It turns out that the ability to talk to the judge increases satisfaction with the process even if individuals are told that their input will not affect the outcome.⁵⁶ The presence of voice, or lack thereof, has been shown to affect an individual's willingness to accept the decision in a courtroom.⁵⁷
- 2) Neutrality: Neutrality equates to a generalized concept of fairness. A person who believes that a judge is fair and is balanced between both sides is much more likely to accept the decision than one who believes that the judge has already decided the case for reasons extrinsic to the facts or law.
- 3) Respectful treatment: Although treating individuals with dignity constitutes respectful treatment and creates an environment of civility, this concept is incomplete. Actual fairness is not enough; the perception of fairness must be experienced by the individual and the group of participant observers as a whole. An individual in the courtroom must believe that he or she has fundamental rights during the process and that those rights are being protected. Research has shown that legitimacy is created through respectful treatment, which, in turn, affects compliance.
- 4) Trustworthy authorities: Authorities need to be seen as benevolent, caring, and sincerely trying to help the litigants. Garnering that trust can be accomplished by listening to individuals and by explaining or justifying decisions that address the litigants' needs. The level of trust that is generated by doing this will give participants an impression that the judge, while not necessarily on their side, is at least open to hearing what is said and then will decide the case fairly.⁵⁸

These four principles combine to create a sense of the court's legitimacy, and when that perception of authority is substantiated, compliance with the law is enhanced, even when it conflicts with one's immediate self-interest.⁵⁹ In other words, the perception of legitimacy, and the obedience that flows from it, are the keys to the success of the justice system in a free society.

54. Burke & Leben, *supra* note 11, at 7.

55. *Id.* at 6.

56. *Id.* at 12.

57. *Id.* at 6.

58. *Id.* at 6.

59. *Id.* at 7.

Judges simply do not have the resources to supervise every defendant who is given an alternative sentence to incarceration. Judges must rely upon a system of voluntary acceptance and compliance. Studies have shown that establishing a perceived legitimacy doubles the likelihood that a defendant will obey a court order.⁶⁰ The importance of judicial legitimacy and its impact on participant compliance has emerged in a series of studies focusing on DTCs.

THE JUDGE IS THE KEY COMPONENT

“The mechanism by which drug courts reduce substance use and crime is through participants’ attitudes toward the judge.”⁶¹

The intuitive understanding of the central role of the judge, which had been embraced by many of the original DTC judges in creating and operating their courts, has been supported by significant new research. DTCs have been the subject of more scientific research than any other judicial activity.⁶² However, the primary focus of the research was whether DTCs were an improvement over the other types of sentencing for drug-dependent defendants. Once it was clear that DTCs were more effective than other approaches, the question of how they were so effective became the subject of further research.⁶³ Very few of those studies, however, focused on the interaction between the participant and the judge. It is hard to imagine a DTC without the judicial status hearing and the relationship it creates between the participant and the judge.⁶⁴ Emerging research has now substantiated that intuitive understanding, as shown by the conclusion drawn by Douglas Marlowe, one of the preeminent researchers in the area of DTCs: “The results of this program of research provide compelling evidence that the judge is a key component of drug court”⁶⁵

Thus, the foundation of a successful DTC is the relationship between the participant and the judge.⁶⁶ This relationship for a drug-court participant can be transformational. The simple act of a judge rising to applaud the success of a DTC participant can be the first step. Such small outward signs of respect in the form of rewards from the judge can motivate participants in a way that improves their chances of success.⁶⁷

As one of the most extensive studies on DTCs, *The Multi-Site Adult Drug Court Evaluation: The Impact of Drug Courts* (MADCE), explained:

60. Tom R. Tyler, *The Psychology of Legitimacy: A Relational Perspective on Voluntary Deference to Authorities*, 1 PERSONALITY & SOC. PSYCH. REV. 323, 334 (1997).

61. ROSSMAN ET AL., *supra* note 10, at 258.

62. *Drug Courts Work*, *supra* note 26.

63. NAT’L INST. OF JUSTICE, *DRUG COURTS: THE SECOND DECADE* 3 (2006).

64. Marlowe et al., *supra* note 9, at 4.

65. *Id.* at 25. As a caveat, Marlowe’s statement is limited to a subset of high-risk, high-needs offenders. It should be noted, however, that Marlowe believes those are the only offenders who should be

placed in DTCs. As Marlowe stated in his article, “According to the criminal-justice theories of ‘Responsivity’ and the ‘Risk Principle,’ intensive interventions such as drug court are believed to be best suited for ‘high-risk’ offenders who have more severe criminal propensities and drug-use histories, but may be ineffective or contraindicated for ‘low-risk’ offenders” (at 4).

66. Sally L. Satel, *Observational Study of Courtroom Dynamics in Selected Drug Courts*, 1 NAT’L DRUG CT. INST. REV. 56, 59 (1998).

67. SHANNON M. CAREY ET AL., NPC RESEARCH, *EXPLORING THE KEY COMPONENTS OF DRUG COURTS: A COMPARATIVE STUDY OF 18 ADULT DRUG COURTS ON PRACTICES, OUTCOMES, AND COSTS* 51 (2008).

The most striking finding in this research is the power of the judge, and judicial interactions with the offenders, to promote desistance.⁶⁸

The authors continued:

Second, there is a strong judge effect: at the between-courts level, drug courts had an indirect effect, through attitude toward judge, on reductions in subsequent drug use and criminal behavior. Drug courts participants reported fewer subsequent days of drug use and crimes committed per month, on average across all courts, 18 months later, and, they expressed more positive attitudes toward the judge at their 6-month interview, which in turn was associated with lower levels of drug use and crime at their 18-month interview, on average across all courts.⁶⁹

This study confirmed Dr. Marlowe's finding that the judge plays a key role in a DTC and other researchers' assertion that the judge is the single most important component in a DTC.⁷⁰

While the MADCE is one of the most extensive studies of DTCs to be published, it's not alone in supporting the idea that the participants' ongoing contact with a single judge is the key component in DTCs. In a study of the Erie County, Ohio, drug court, 75% of drug-court participants said that regular interaction with the judge helped them stay off drugs.⁷¹

In an additional study involving the Multnomah County DTC in Oregon, researchers reported adverse ramifications when the court stopped using a single DTC judge and, over a four-year period, instead used 22 judges and one referee.⁷² As a result of this decision, attendance by participants at drug-court sessions dropped sharply, and those who appeared in front of more judges per 100 days had an increased likelihood of termination

68. ROSSMAN ET AL., *supra* note 10, at 117. The authors continue:

We find no evidence that motivation for treatment, specific deterrence, fairness of one's court outcome, or a broad measure of procedural justice are associated with desistance in our sample. We posit three potential explanations for this finding. First, it is possible that the results signify exactly what they purport, that is, that those theoretical processes are not associated with better outcomes in drug court. Second, it is possible that the drug courts in our sample did not effectively implement practices that would promote those theoretical mechanisms. Thus, for example, it is entirely possible that although drug courts self-report adherence to best treatment practices, treatment was not implemented in these drug courts in a manner consistent with effective evidence-based practice. Finally, it is possible that the power of the judge (typed by legal scholars as therapeutic jurisprudence) is so strong that it effectively suppresses all other theoretical mechanisms.

The authors' definition of procedural justice is different than the definition used in this paper. The definition of procedural fairness used in this paper appears to comport with the three theories the authors discuss on page 94:

A third theory, drawn from the psychological literature, posits that engaging drug-involved defendants in a holistic and transparent process that maximizes perceptions of

equality, fairness, and justice (e.g., procedural justice) leads to desistance. In a similar vein, legal scholarship has identified participants' attitudes toward the judge—or their beliefs about the judges' competence, impartiality, and concern for their general well-being—as being critical to subsequent desistance, under the rubric of therapeutic jurisprudence To that, we add a fifth theoretical mechanism, distributive justice, as measured by participants' perceptions of the justness of court outcomes.

On page 117, the authors appear to accept the body of literature supporting the connection between procedural fairness and desistance when they say: "a substantial body of literature supports many of the underlying premises of deterrence and treatment motivation and eagerness. Thus, it is probably fair to conclude that if drug courts used these mechanisms more effectively, drug court results likely would be even better." The difference between the definition of procedural justice in the MADCE study and the definition of procedural fairness used in this paper allows for a different understanding of the factual information contained in the MADCE study.

69. *Id.* at 116-17.

70. Marlowe et al., *supra* note 9, at 25; GOLDKAMP ET AL., *supra* note 32, at 133.

71. BELENKO, *supra* note 31, at 25.

72. GOLDKAMP ET AL., *supra* note 32, at 107-08.

from the program.⁷³ Additionally, those who saw multiple judges also had an increased likelihood of being rearrested for non-drug-related offenses.⁷⁴

Participants who interacted with a single judge during their time in the DTC missed fewer treatment sessions, were less likely to be terminated, and were more likely to complete the program.⁷⁵ In the focus-group sessions that followed their graduation, participants told the researchers that it was their personal relationship with the judge that was the most important factor in their success.⁷⁶

Additional research has shown that when participants were asked if they would've completed the DTC program without the support of their judge, 73% indicated that they did not believe they would have.⁷⁷

A study by NPC Research titled *Exploring the Key Components of Drug Courts: A Comparative Study of 18 Adult Drug Courts on Practices, Outcomes and Costs*, reached the same conclusion: "The interaction of the drug court judge with participants is central to the drug court model."⁷⁸ The study investigated the length of time a single judge served in a DTC and the impact that judicial consistency had on participants.⁷⁹ Initially, the authors confirmed results similar to those of the Multnomah County DTC study:

In programs where judges rotate more frequently, staff and *participants report* that they have little continuity with the judge during the length of the program.⁸⁰

The authors then focused on the length of time that a single judge presided over a DTC. They found that a judge who sat for at least two years had a lower recidivism rate by participants than judges who presided for a lesser period of time.⁸¹ They also discovered that the reduction in recidivism improved dramatically during the judge's second year.⁸² A DTC judge who served for more than two years reduced recidivism by over 300% (Figure 1).⁸³

The reduction in recidivism also led to greater long-term cost savings, which totaled more than 300% (Figure 2).⁸⁴

The study also found that a drug-court judge who served for two years or longer had a slightly higher graduation rate among drug participants.⁸⁵

The reduction in recidivism when one judge presides for two years or longer in a DTC

73. *Id.* at 155.

74. NAT'L INST. OF JUSTICE, *supra* note 63, at 11. The report, however, contained an interesting caveat:

Researchers found evidence both to support and not to support the importance of the single judge approach, depending on the outcome that was examined. They speculate that the single judge hypothesis might actually represent other presumptions of the drug court model, such as the need for effective judicial supervision, continuity of monitoring, and consistency in rules and responses to participant behavior during the drug court process. Additional studies are currently being conducted to specifically test the impact of judicial oversight.

75. GOLDKAMP ET AL., *supra* note 32, at 157.

76. *Id.* at 133.

77. Scott Senjo & Leslie A. Leip, *Testing Therapeutic Jurisprudence Theory: An Empirical Assessment of the Drug Court Process*, 3 WESTERN CRIMINOLOGY REV. 1 (2001), <http://www.westerncriminology.org/documents/WCR/v03n1/senjo/senjo.html>.

78. CAREY ET AL., *supra* note 67, at 59.

79. *Id.*

80. *Id.* (emphasis added).

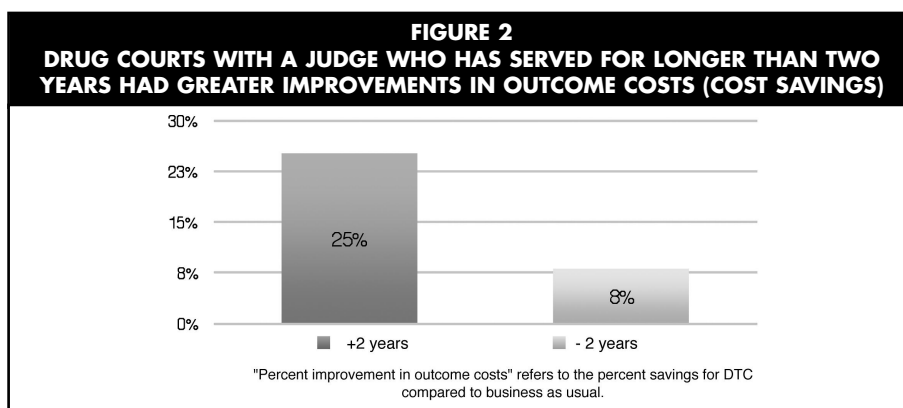
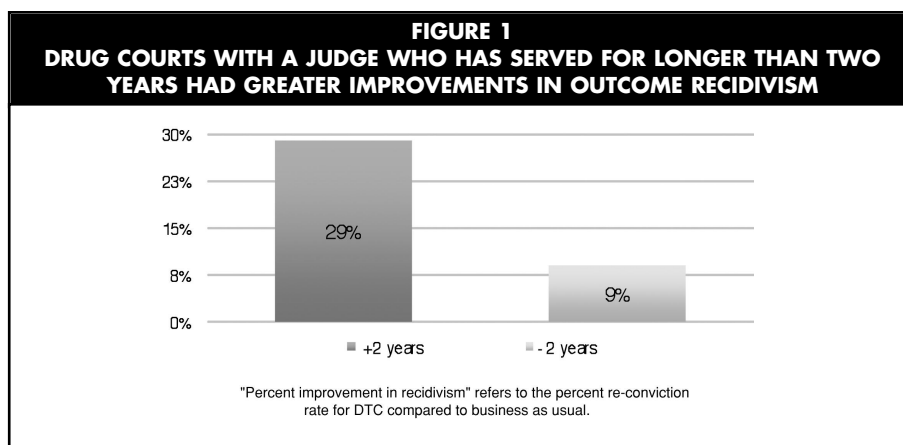
81. *Id.* at 56.

82. *Id.*

83. *Id.*

84. *Id.*

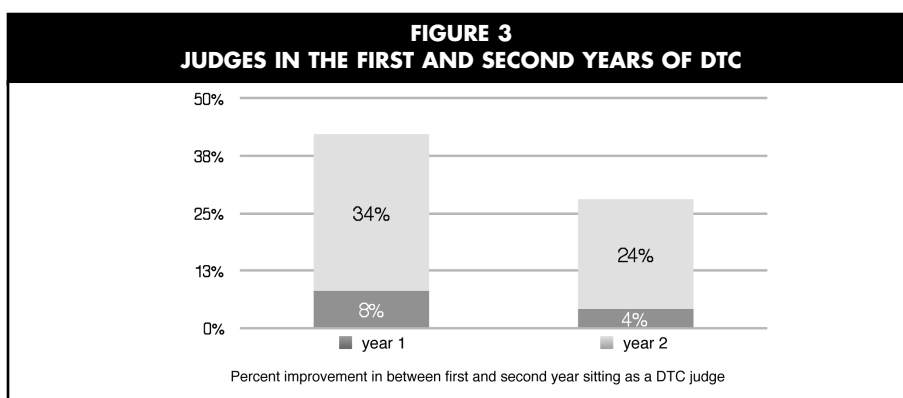
85. *Id.* The graduation rates were 52% for programs with judges who stayed longer versus 45% for programs with judges who stayed less than two years.



was highlighted by yet another study by NPC Research. In that study, the two judges exhibited dramatic decreases in recidivism rates during their second year. One judge went from an 8% reduction in recidivism in year one to a 42% reduction in year two. (Figure 3). A second judge went from a 4% reduction in recidivism to a 28% reduction.⁸⁶

On the other hand, courts that use numerous judges in their DTCs do not make the best use of the power of the judge, “as many drug courts engage in practices (*such as rotating judges or having multiple drug court judges*) that would be expected to diminish judicial effectiveness.”⁸⁷

Another significant finding involved judges who presided over DTCs in the later stages of their existence. The success rate for these later judges was better than their predecessors.⁸⁸



86. *Id.*

87. ROSSMAN ET AL., *supra* note 10, at 117 (emphasis added).

88. MICHAEL W. FINIGAN ET AL., *IMPACT OF A MATURE DRUG COURT OVER*

One of the earliest DTCs, the Multnomah County Drug Court, discovered that the court itself had to invent its own operating procedures. As the court matured, the information was passed on from one judge to the next, leading to a more formal process where experienced judges taught their successors.⁸⁹

These new judges were learning that the value of having a relationship with the participant made that individual feel respected and supported, predisposing them to success.⁹⁰ According to the MADCE final report, this approach caused participants to believe

that their judge treated them more fairly than the comparison group, including demonstrating *greater respect* and interest in them as individuals and *greater opportunities to express their own voice during the proceedings*. Furthermore, when offenders have more *positive attitudes toward the judge*, they have *better outcomes*. This was true across all offender subgroups when examining demographics, drug use history, criminality, and mental health.⁹¹

The researchers also did a separate, structured observation of the review sessions and confirmed that DTC judges who exhibited

a more positive judicial demeanor (e.g., respectful, fair, attentive, enthusiastic, consistent/predictable, caring, and knowledgeable) produced better outcomes than other drug courts. Both analyses reaffirmed the central role of the judge.⁹²

The evidence showed that individuals who felt that their judge gave them a *voice* by providing them with a chance to tell their story, maintained neutrality through fair treatment, demonstrated *respect*, was knowledgeable about their case, and could be trusted reported fewer days of drug use one year later, confirming the interventive power of the four principles of procedural fairness.⁹³

THE IMPACT OF PROCEDURAL FAIRNESS IN A DTC

“The mechanism by which drug courts reduce substance use and crime is through participants’ attitudes toward the judge. When participants have more positive attitudes toward the judge, they have better outcomes.”⁹⁴

The question is no longer “does the judge’s relationship with a DTC participant affect that participant’s success?” but “what are the best ways for a judge to build a connection with the participant so that successful outcomes are maximized?” It’s increasingly clear that the answer is the adoption of the four principles of procedural fairness and their active application in review sessions.

This paper represents an original consolidation of the existing research on the four principles of procedural fairness and their impact on DTC success.

89. *Id.* at 38.

90. ROSSMAN ET AL., *supra* note 10, at 208.

91. ROSSMAN ET AL., *supra* note 12, at 7 (emphasis added).

92. *Id.* (emphasis added).

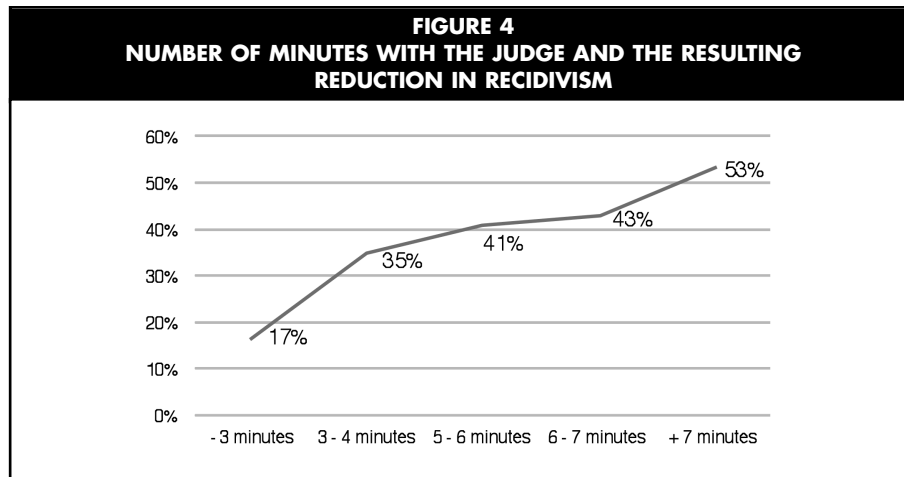
93. ROSSMAN ET AL., *supra* note 10, at 106.

94. *Id.* at 258.

“Drug court participants clearly personalized the experience of appearing before and speaking to the judge in court; it appears to have a powerful effect. Participants spoke about being very nervous before court appearances, particularly when they anticipated sanction or reprimand[,] and also about the sense of satisfaction when they received positive feedback from the judge.”⁹⁵

Participants’ perception that their voice mattered in a DTC review session has been shown to be critical to their success.⁹⁶ Regular judicial interaction during a review session allows participants to converse with their judge, respond to judicial queries, and make independent statements.⁹⁷ Although this level of interaction requires time, when a judge engages in this way, it has a significant and positive impact.

NPC’s researchers established that if a judge spends the time to give participants an opportunity to express themselves in a review session, it significantly reduces recidivism.⁹⁸ Further, the longer a judge interacts with a drug-court participant in a review session, the greater the reduction in recidivism. Judicial interaction that lasts over three minutes reduces participant recidivism by almost half.⁹⁹ A judge who spends more than seven minutes with a participant attains more than triple the reduction in recidivism (Figure 4).¹⁰⁰



Judicial status hearings, one of the defining features of DTCs, are admittedly both time-consuming and expensive.¹⁰¹ However, a judge who meets with a participant at least every other week during the early stages of a DTC has greater reductions in recidivism and costs to the taxpayer than a judge who meets less often.¹⁰² When a judge meets with a partici-

95. DONALD J. FAROLE, JR. & AMANDA B. CISSNER, *SEEING EYE TO EYE? PARTICIPANT AND STAFF PERSPECTIVES ON DRUG COURTS*, at iii (2005).

96. ROSSMAN ET AL., *supra* note 12, at 7.

97. SHELLI B. ROSSMAN ET AL., 3 *THE MULTI-SITE ADULT DRUG COURT EVALUATION: THE DRUG COURT EXPERIENCE* 28 (2011).

98. Shannon M. Carey et al., *What Works? The Ten Key Components of*

Drug Court: Research-Based Best Practices, 8 *DRUG CT. REV.* 6, 24 (2012).

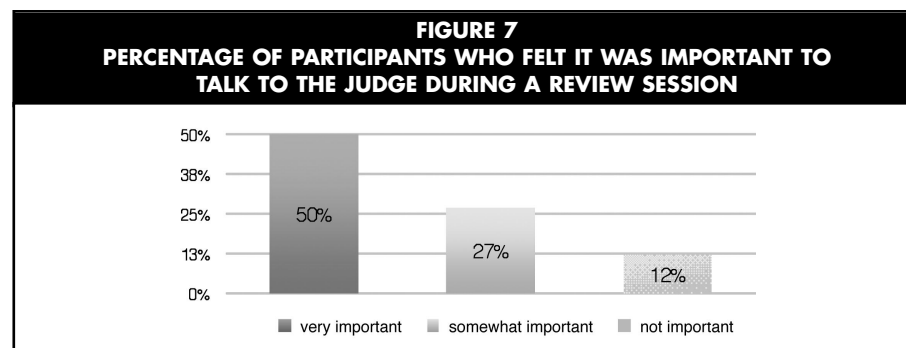
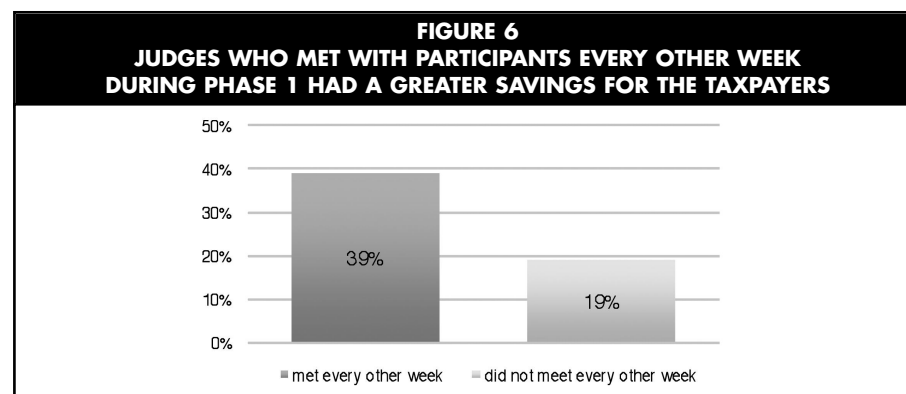
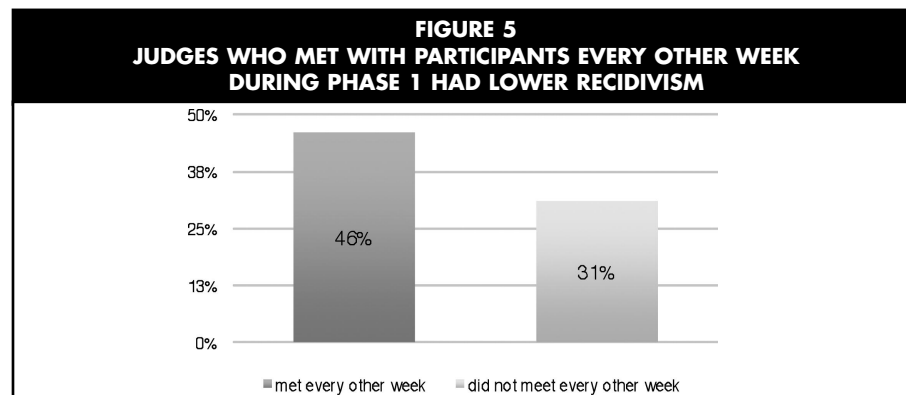
99. *Id.*

100. *Id.*

101. Marlowe et al., *supra* note 9, at 26.

102. CAREY ET AL., *supra* note 67, at 57.

pant every two weeks, there's a nearly 50% reduction in recidivism (Figure 5)¹⁰³ and an over 50% cost savings to the taxpayer (Figure 6).¹⁰⁴



These statistics are supported by responses from the participants themselves. In one study, 65% of respondents said that they would not have been able to complete the drug-court program if they had appeared before a judge less frequently.¹⁰⁵

Participants have been telling researchers since the inception of DTCs that their relationship with the judge was a major factor in their success in becoming drug-free. One study found that 77% of DTC participants thought it was important or somewhat important that they talk to the judge during a review session (Figure 7).¹⁰⁶

103. *Id.*; see also Anna M. Malsch & Paige M. Harrison, NPC Research, Reentry Court Planning, Implementation, and Evaluation, presentation to the Oregon Judicial Conference (October 22, 2013), http://npcresearch.com/wp-content/uploads/Oregon_

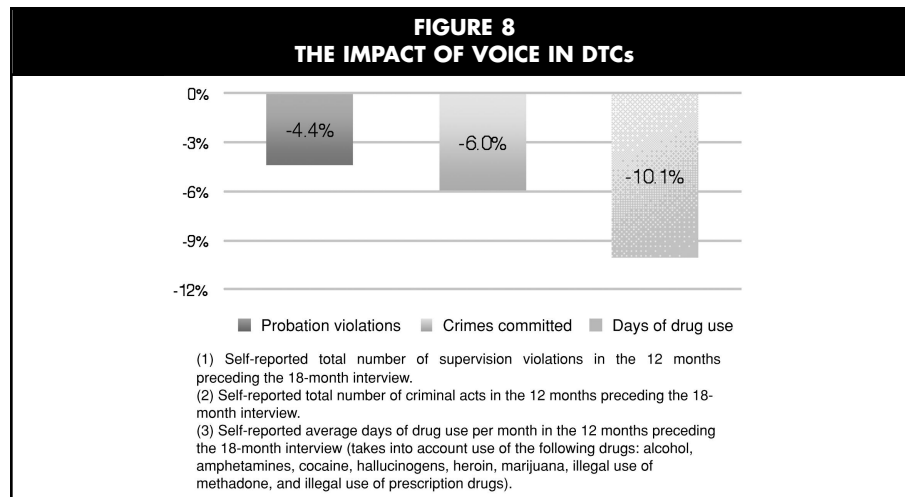
Judicial_Conference_1013.pdf.

104. *Id.*

105. Senjo & Leip, *supra* note 77.

106. *Id.*

Giving voice to a DTC participant led to a more positive attitude toward the judge, which, in turn, caused greater reductions in drug use and crime.¹⁰⁷ Participants in the study also felt that their judge gave them greater opportunities to express their own voice during the proceedings.¹⁰⁸ There is a marked correlation between participant success and voice (Figure 8).¹⁰⁹



NEUTRALITY

“Hence, taking steps to promote a fair court experience, and having a judge who can serve as an effective symbol of the court’s commitment to fairness, neutrality, and respect, can improve concrete offender outcomes”¹¹⁰

The impact of having a voice in the proceedings is dramatically reduced if the participant holds a perception that a magistrate has pre-decided the outcome. The status session in a DTC creates an opportunity for judges to use their inherent authority in a productive way. The repeated sessions enable judges to engage the participant in ways that are fruitful and establish ongoing relationships that are perceived as fair.¹¹¹

Praise by a judge is a primary reward that can be offered to participants in a DTC.¹¹² Judges in DTCs are almost eight times more likely to praise the defendant than judges in non-DTCs (Figure 9).¹¹³

Using praise as a reward for appropriate behavior has been shown to significantly reduce recidivism and drug use.¹¹⁴ In one study, the number of crimes expected to be committed after 6 months was reduced by 19.3% and at 18 months was reduced by 9.8% when compared to a court that does not offer rewards (Figure 10).¹¹⁵

107. ROSSMAN ET AL., *supra* note 10, at 259.

108. ROSSMAN ET AL., *supra* note 12, at 7.

109. ROSSMAN ET AL., *supra* note 97, at 95-96.

110. *Id.* at 98.

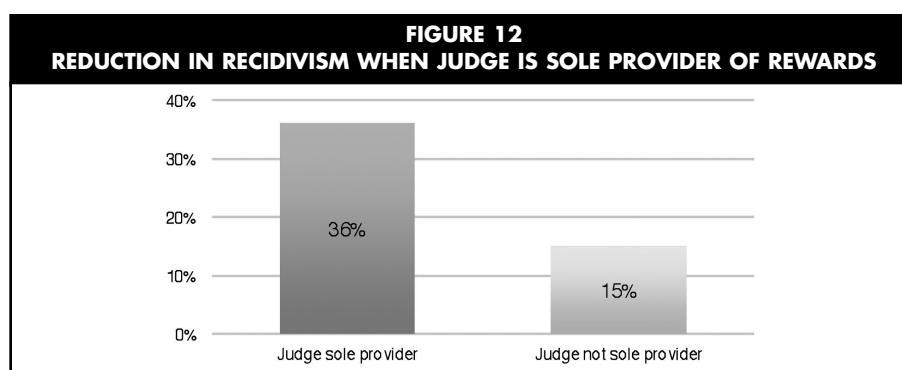
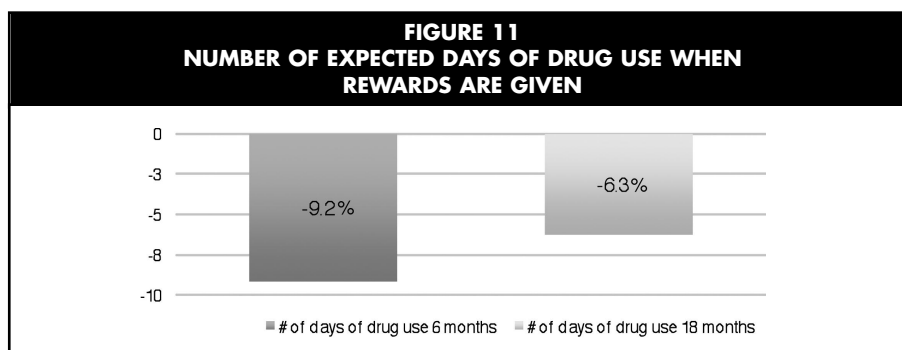
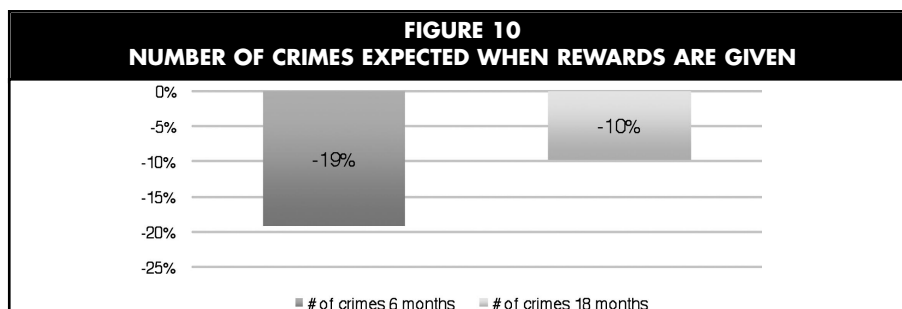
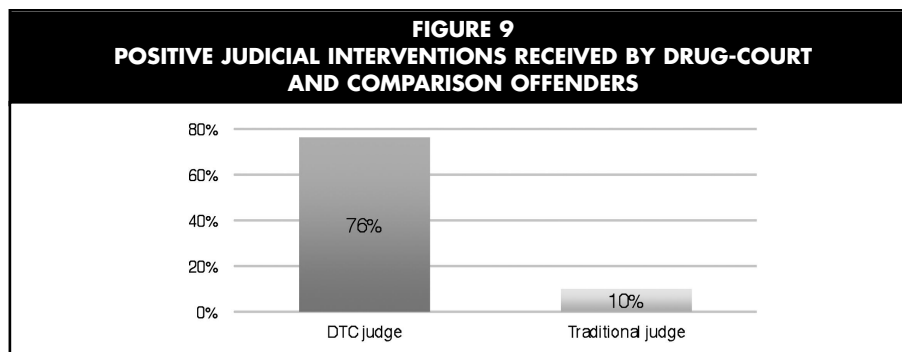
111. ROSSMAN ET AL., *supra* note 10, at 259.

112. NAT’L ASS’N OF DRUG COURT PROFESSIONALS, *supra* note 9, at 13.

113. ROSSMAN ET AL., *supra* note 10, at 29.

114. *Id.* at 224.

115. *Id.*



There was also a decline in the number of expected days of drug use, with a reduction of 9.2% at 6 months and 6.3% at 18 months (Figure 11).¹¹⁶

The impact of rewards is enhanced when the judge is the sole provider of those rewards, both in terms of recidivism (Figure 12) and savings to the taxpayers (Figure 13).¹¹⁷

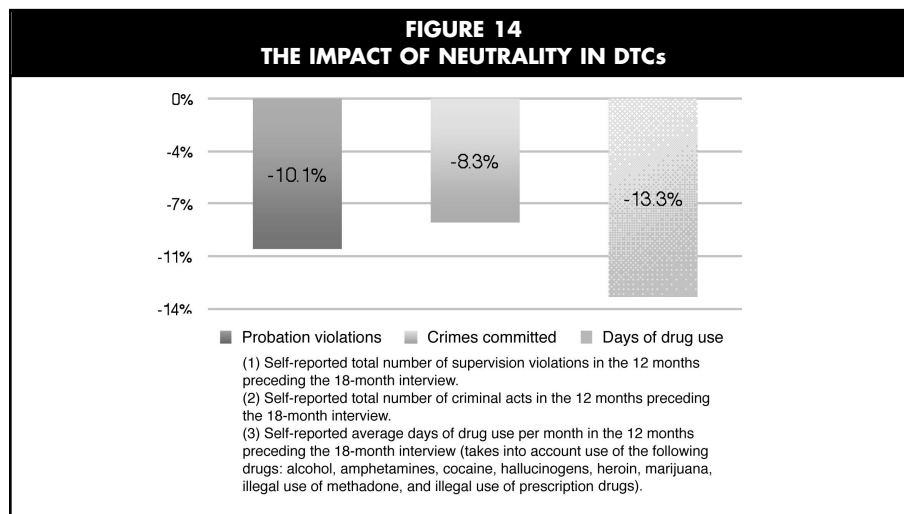
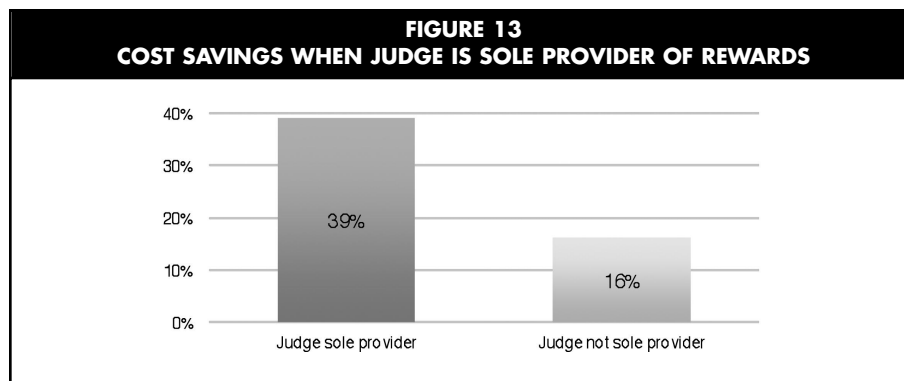
An additional benefit of the judge being the sole provider of rewards is a slight increase in program graduation rates.¹¹⁸ Interestingly, in their study, NPC researchers found no

116. *Id.*

117. CAREY ET AL., *supra* note 67, at 51. Special thanks to Dr. Carey for

translating the cost-savings data to recidivism data.

118. *Id.*



evidence that suggested a judge should be the sole provider of sanctions for program violations. This suggests that sanctions, equitably applied, have little impact upon participant perceptions of judicial fairness or neutrality. However, there is an unmistakable connection between participant success and judicial neutrality (Figure 14).¹¹⁹

RESPECTFUL TREATMENT

“Programs with judges that treated clients fairly and respectfully were shown to achieve better success than programs without such judges.”¹²⁰

The commonality shared by top-performing DTCs is that the judges who preside over them understand the importance of making participants feel respected, which leads to better outcomes.¹²¹ Participants in these top-performing courts believed that their judge treated them with more respect than participants in a comparison group.¹²² This perception was validated by research observations that found that DTC judges who were respectful presided over courts that were more successful.¹²³

119. ROSSMAN ET AL., *supra* note 97, at 96.

120. ROSSMAN ET AL., *supra* note 10, at 211.

121. *Id.* at 209.

122. ROSSMAN ET AL., *supra* note 12, at 7.

123. *Id.*

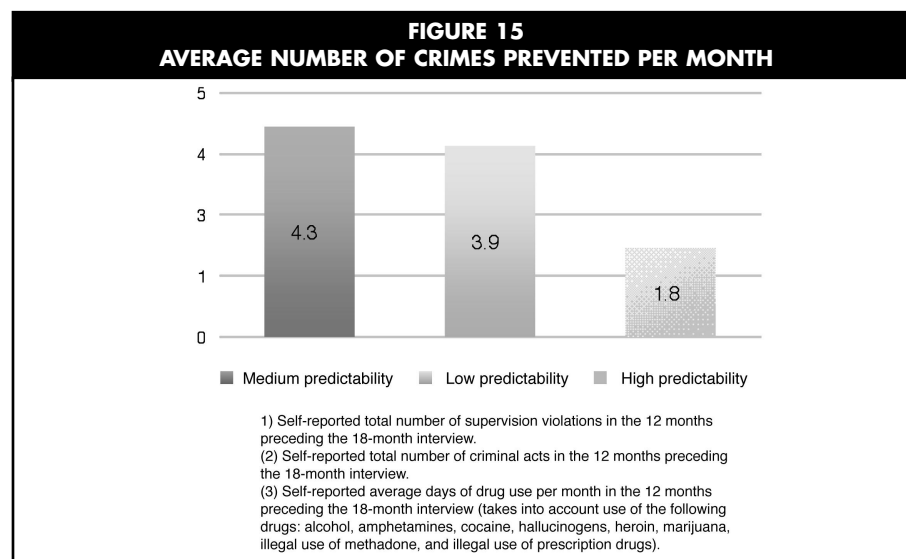
A study of a domestic-violence court modeled on the components of the DTC found that the respect that existed between the participant and the judge appeared to be the primary reason that the defendants complied with the court's orders.¹²⁴

DTCs with judges who treat participants respectfully achieve better success than programs without such judges.¹²⁵ In contrast, judges who use criticism and negative feedback had higher rates of recidivism.¹²⁶

In addition to promoting neutrality, judicial praise is a particularly important way of showing respect to participants. Drug-court participants who received judicial praise more often and who had a higher frequency of judicial status hearings reported committing fewer crimes and using drugs on fewer days.¹²⁷

Moreover, participants do less well with judges who do not deviate from a fixed sanction structure.¹²⁸ Judges who are flexible in following a known sanction structure are almost two and a half times more likely to reduce recidivism when compared to judges who follow a rigid sanction structure (Figure 15).¹²⁹

Even judges who rarely follow a known sentencing structure are more than twice as likely to prevent recidivism as judges who follow a rigid structure.¹³⁰



Judges who follow a flexible pattern and customize incentives and sanctions are almost one and a half times more likely to reduce drug use than those judges who follow a rigid pattern and twice as likely to reduce drug use as judges who rarely follow a sentencing pattern (Figure 16).¹³¹

124. Carrie J. Petrucci, *Respect as a Component in the Judge-Defendant Interaction in a Specialized Domestic Violence Court that Utilizes Therapeutic Jurisprudence*, 38 CRIM. L. BULL. 263, 295 (2002).

125. Scott R. Senjo & Leslie A. Leip, *Testing and Developing Theory in Drug Court: A Four Part Logit Model to Predict Program Completion*, 12 CRIM. JUST. POLY REV. 66, 66 (2001). Note: Some have suggested that the results of the study may suffer from a causation problem, as those who do well in the program are more likely to receive praise and encouragement.

126. Terance D. Miethe et al., *Reintegrative Shaming and Recidivism Risks in Drug Court: Explanations for Some Unexpected Findings*, 46 CRIME & DELINQUENCY 522 (2000).

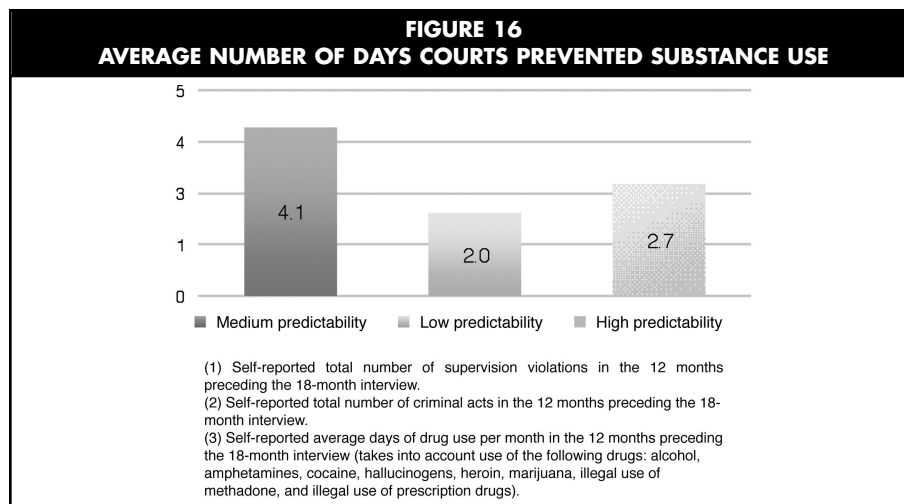
127. ROSSMAN ET AL., *supra* note 10, at 259.

128. *Id.* at 211.

129. *Id.* at 144.

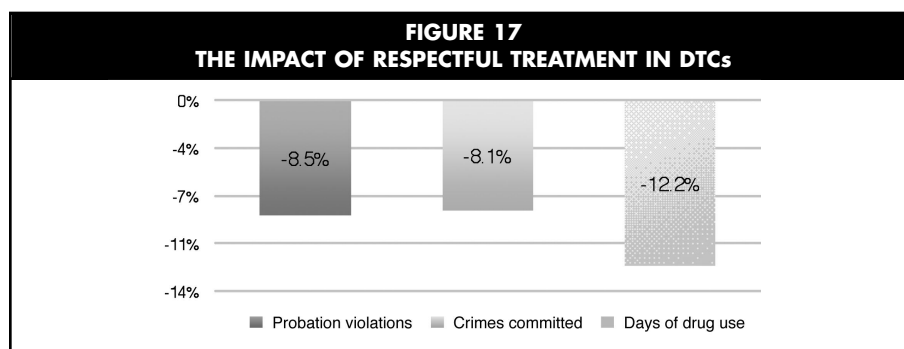
130. ROSSMAN ET AL., *supra* note 10, at 144.

131. *Id.* at 144-51.



Research findings confirm that judges who show defendants respect through the use of positive reinforcement and a willingness to be flexible in their sanctions preside over the most successful DTCs.¹³² In these high-performing courtrooms, participants understand that their judge is treating them as individuals, taking into account both their efforts and their circumstances.¹³³ Courts that are considered too rigid or too flexible are less successful and may, in fact, create frustration and noncompliance through their inconsistency or rigidity.¹³⁴ This suggests that providing participants with a known set of sanctions that are applied with flexibility, are not arbitrary, and are clearly explained creates a sense of respect in participants that enhances DTC success.¹³⁵

There's a distinct association between participant success and respectful treatment (Figure 17).¹³⁶ DTC participants who perceived their judges as respectful committed 8.5% fewer probation violations, committed 8.1% fewer new crimes, and had a 12.2% reduction in days of drug use.



132. *Id.* at 211.

133. *Id.* at 208.

134. *Id.* at 211.

135. Janine M. Zweig et al., *Drug Court Policies and Practices: How Pro-*

gram Implementation Affects Offender Substance Use and Criminal Behavior Outcomes, 8 *DRUG CT. REV.* 43, 74-75 (2012).

136. ROSSMAN ET AL., *supra* note 97, at 95-96.

TRUSTWORTHY AUTHORITIES

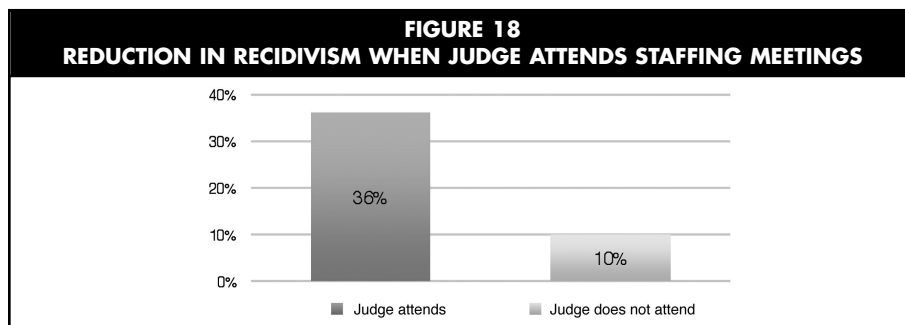
“Most clients indicated that the judge was fair, respectful, and trustworthy. Moreover, the judge was believed by the majority to be influential in terms of their progress.”¹³⁷

DTC participants who believed that their judge could be trusted to be fair and treated them with respect reported fewer days of drug use 18 months into the program.¹³⁸ Additionally, participant trust in the judge is critical to participant success in a DTC, according to a report published by the National Institute of Justice:

Offenders report that interactions with the judge are one of the most important influences on the experience they have while in the program. They respond to the judge’s interpersonal skills and ability to resolve legal problems expeditiously and provide ready access to services.¹³⁹ Thus, it’s not just the amount of time a judge spends with a participant during a review session, but how the judge interacts with the person. A judge must be knowledgeable about the participant. The best way for a judge to become acquainted with each participant is to attend the staffing session.¹⁴⁰ The staffing session, also known as a DTC team meeting, generally occurs just before the courtroom review session.¹⁴¹ During these sessions, the team generally reviews how each participant has done since his or her last court date and recommends to the drug court (judge) what action to take or what topics to address with each participant.¹⁴²

The information gained during a staffing session allows the judge to become familiar with each participant, knowing their name and the circumstances of their case, thus providing the foundation for a sense of trust.¹⁴³ Studies show that a judge who attends staffing sessions reduces recidivism by more than 300% (Figure 18).¹⁴⁴

However, attending the staffing session is only the beginning. Judges who are not willing to do the additional work necessary to gain a participant’s trust are unlikely to preside



137. Christine A. Saum et al., *Drug Court Participants’ Satisfaction with Treatment and the Court Experience*, 4 DRUG CT. REV. 39, 56 (2002).

138. ROSSMAN ET AL., *supra* note 10, at 106.

139. NAT’L INST. OF JUSTICE, *supra* note 63, at iii.

140. Shannon M. Carey, 2013 Best Practices Top 10, presentation to Michigan Association of Drug Court Professionals, slide 62 (2013) (on file with the author).

141. Carey et al., *supra* note 98, at 37; Michael Tobin, *Participation of Defense Attorneys in Drug Courts*, 8 DRUG CT. REV. 96, 106. The staffing is generally composed of the judge, attorneys, coordinator, probation, treatment, and a representative from law enforcement.

142. Tobin, *supra* note 141, at 106.

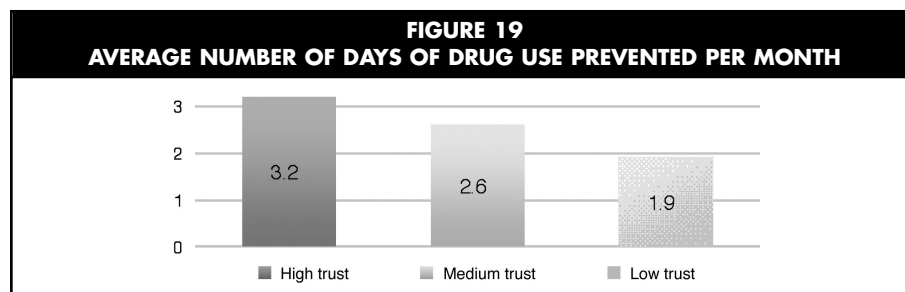
143. THE DRUG COURT JUDICIAL BENCHMARK, *supra* note 39, at 47-61.

144. Carey, *supra* note 140, at slide 62.

over successful DTCs.¹⁴⁵ Courts with judges who understand the value of building trust with participants by making them feel respected and supported create a positive relationship. This positive attitude toward the judge has a direct impact on a participant's subsequent success:

[R]espondents who displayed a more positive attitude toward the judge six months after the baseline interview (e.g., said their judge was knowledgeable about their case, gave them a chance to tell their side of the story, could be trusted to treat them fairly, treated them with respect) reported fewer days of drug use in the subsequent 18-month interview.¹⁴⁶

This participant feedback is supported by actual observation. Judges with high positive attributes (i.e., judges who were respectful, fair, attentive, enthusiastic, consistent, predictable, caring, and knowledgeable) were able to establish trust, which led to reduced participant drug use when compared to judges who were not considered to be trustworthy.¹⁴⁷ Judges who were highly trusted were almost twice as effective in preventing drug use as judges who were not highly trusted (Figure 19).¹⁴⁸ DTCs whose judges were perceived as trustworthy also prevented crimes among their participants.¹⁴⁹ The positive attributes that each DTC judge displayed created an environment of trust. When participants came to the understanding that they could trust their judge, their chances of success increased.



SUMMARY

“[T]aking steps to promote a fair court experience, and having a judge who can serve as an effective symbol of the court’s commitment to fairness, neutrality, and respect, can improve concrete offender outcomes”¹⁵⁰

The factors that make up a successful DTC are diverse, but the emerging research demonstrates, beyond a reasonable doubt, that the interaction between a judge and a participant is central to that success.¹⁵¹ The bond between participant and judge is not solely dependent upon the judge’s personality but rather upon the nature of that judge-participant relationship.

145. ROSSMAN ET AL., *supra* note 10, at 260.

146. *Id.* at 106.

147. ROSSMAN ET AL., *supra* note 10, at 197; *see also* AMANDA B. CISSNER & MICHAEL REMPEL, CENTER FOR COURT INNOVATION, THE STATE OF DRUG COURT RESEARCH: MOVING BEYOND “DO THEY WORK?” 11 (2006) (“By contrast, the overriding prevalence of negative and stigmatizing judicial feedback was held largely responsible for

the negative evaluation results (higher rates of re-offending among participants than the comparison group) in one study of the Las Vegas drug court.”).

148. *Id.*

149. *Id.*

150. ROSSMAN ET AL., *supra* note 97, at 98.

151. ROSSMAN ET AL., *supra* note 12, at 7.

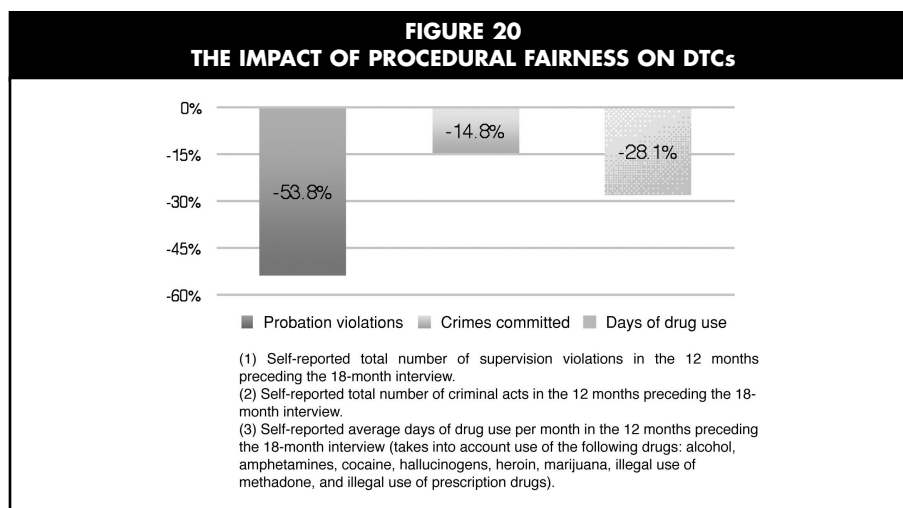
Different judges have different outcomes. There are significant divergences in DTC participant re-arrest rates based upon the judge.¹⁵² As the authors of the MADCE study conclude:

[T]hese findings suggest that although drug courts are effective at promoting desistance in their present form, there is potential for drug courts to be even more effective.¹⁵³

Making DTCs more effective requires focusing on the role that the judge plays:

First, even though we find that the judge has a prime role in shaping participant behavior, we note that drug courts do not necessarily maximize the potential of the judge—as many drug courts engage in practices (such as rotating judges or having multiple drug court judges) that would be expected to diminish judicial effectiveness. And finally, although other theoretical mechanisms were not shown here to be effective at modifying behavior, a substantial body of literature supports many of the underlying premises of deterrence and treatment motivation and eagerness. Thus, it is probably fair to conclude that if drug courts used these mechanisms more effectively, drug court results likely would be even better.¹⁵⁴

The mechanisms for improvement are the application of the four principles of procedural fairness. There's a strong correlation between the principles and reductions in drug use, crimes committed, and probation violations (Figure 20).¹⁵⁵



The evidence is overwhelming. For a DTC to be successful, a judge must provide participants with an opportunity to voice their concerns and a sense that they're treated with respect by a neutral and trustworthy authority.¹⁵⁶ The combined effect of the four principles of procedural fairness leads DTC participants to respond in a way that creates greater success. The success that these participants find in the courtroom transmutes into societal success, which reduces crime and decreases costs borne by taxpayers. This is the community-wide impact of procedural fairness.

152. FINIGAN ET AL., *supra* note 88, at 36.

153. ROSSMAN ET AL., *supra* note 10, at 117.

154. *Id.*

155. ROSSMAN ET AL., *supra* note 97, at 97.

156. ROSSMAN ET AL., *supra* note 10, at 212.

RECOMMENDATIONS

FOR DTC JUDGES

1. Read the AJA's 2007 white paper, *Procedural Fairness: A Key Ingredient in Public Satisfaction*.¹⁵⁷ It will provide a deeper understanding of the key components of procedural fairness and act as a primer for the day-to-day operation of a DTC.
2. Promote *Voice*
 - Practice being a better listener. As the 2007 AJA white paper noted: "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."¹⁵⁸
 - Hold frequent judicial status hearings, which will provide participants more opportunities for voice. Frequent status hearings increase participant contact with judges, which research has shown to be critically important. Additionally, in light of previous research on this topic, consider increasing the frequency of status hearings for "high risk" participants in particular.
 - During judicial status hearings, begin by greeting each participant by name, and conclude by offering well-wishes. Give participants a chance to speak before making key decisions. When making decisions, show respect by acknowledging participants' points of view. Even when their voiced opinion does not change the outcome, participants are more likely to view the decision as fair when they've been heard.
 - Spend at least three minutes with each participant. As previously discussed, the more time above three minutes spent with the participant, the greater the reduction in recidivism.
3. Promote *Neutrality*
 - Take time, when admitting a participant into a DTC, to explain the rules that will apply to the program and what rights they are giving up when they enter. This will also begin the process of establishing trust. The better participants understand the process, the more likely they are to succeed.
 - At the start of a judicial status hearing, explain the ground rules. Explain what is going to happen and why cases are going to be called in a particular order. Remind participants of their responsibilities and consequences of compliance and noncompliance in multiple hearings; ask if participants need new copies of the handbook or other materials used to deliver incentives and sanctions. It will help the new participants understand the nature of a status hearing and serve as a reminder for those who have more time in the program.
 - When making a decision, cite relevant laws, procedures, or program policies.
 - Always provide due process before imposing sanctions.
4. Promote *Respect*
 - List incentives and sanctions and their ground rules in the participant handbook but maintain some flexibility when applying them. Have examples of incentives and sanctions and the grounds for them in the handbook.

157. Available at <http://aja.ncsc.dni.us/pdfs/AJAWhitePaper9-26-07.pdf>.

158. Burke & Leben, *supra* note 11, at 20.

- Be flexible in the imposition of incentives and sanctions by giving the participants' circumstances due consideration. Explain the reasons to both the participant and observers in the courtroom.
5. Promote *Trust*
- Be positive. Judges who were more supportive of participants produced better outcomes. Establish trust by being respectful, fair, consistent, caring, and knowledgeable about participants' lives. Do this by focusing on the participant instead of the computer or other things on the bench. Make use of nonverbal cues like eye contact and facial expressions. Avoid negative language and sarcasm. Do not sigh or express exasperation.
 - Attend all staffing sessions before the status hearing. Attendance at the staffing session will provide judges with information about individual participants that will improve judicial interaction with those participants. This, in turn, will give participants a sense that the judge can be trusted.
 - Ensure that participants comprehend the nature of the judicial status hearing and their place in it. It's the judge's responsibility to ensure that the participants, and the people in the courtroom supporting them, understand the process.

FOR COURTS

6. Judges may take some time developing effective approaches in a DTC, and, therefore, a reasonable period of time may be needed before their style effects change in offender behaviors. For this reason, routinely rotating judges on and off drug-court benches will likely decrease judges' ability to successfully implement their roles and reduce the overall level of success of those drug-court programs.
7. Prepare judges new to the assignment by having them watch the online program for DTC judges, observe a DTC staffing and session, and read *The Drug Court Judicial Benchbook*.¹⁵⁹ Have the judge attend an orientation and judicial training as soon as possible after being assigned to the DTC.¹⁶⁰
8. Choose DTC judges carefully. Not all judges are suited to the DTC model. Assigning a judge who does not believe in engaging participants or who will not follow the four principles of procedural fairness will negatively affect the operation of the DTC. The court will be best served if the judges assigned to the DTC docket are those who are committed to such courts and, equally as important, to the precepts of procedural fairness.
9. Monitor the DTC judge. There are a number of ways this can be accomplished. For example: distribute a survey at graduation asking participants about their attitude toward the judge or request that observers from the Supreme Court administrative office or the state drug-court association observe both staffing sessions and status hearings. Call in an outside expert to observe and provide technical assistance, including judicial coaching, to increase effectiveness. Use the data collected through these methods to help educate the judge in the core values of procedural fairness.
10. Provide a written handbook about the DTC to participants. The handbook should be in plain language and should include DTC policies, procedures, and expectations, including the incentives and sanctions.

159. Available at http://www.ndci.org/Transitioning_Judges.

<https://register.judges.org/default.aspx?p=S12-WBTDCL>.

160. To register for courses at the National Judicial College, visit

11. Courts should send DTC judges to procedural-fairness trainings conducted by qualified judicial educators. Administrative offices of the courts should provide continuing education in this area.

FOR RESEARCHERS

12. Additional research examining the impact of the other members of the DTC team, and clients' perceptions of them, should be performed. This would allow the DTC community to determine the level to which these team members can further influence reductions in drug use and crime. Specifically, researchers could investigate attitudes toward primary case managers, probation officers, prosecutors, and defense attorneys.
13. Continuing studies on the impact of judges trained in the four principles of procedural fairness and DTC success should be undertaken.

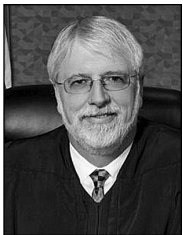
FOR JUDICIAL EDUCATORS

14. In our 2007 white paper, the AJA called upon the National Science Foundation and others who fund social-justice research to reach out to judges to develop strategies that 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. We renew this call with an added emphasis on the need to share research on the effects of procedural fairness in DTCs.
15. The AJA encourages judicial educators to distribute this paper. If judicial educators make appropriate and accessible information about procedural fairness easily available to DTC judges, change will begin to occur, even without a call for specific action.
16. Train judges on best practices regarding the four principles of procedural fairness. Judges do not innately have the traits that elicit the most positive outcomes from participants. As a result, drug-court training programs should be developed to specifically address best practices.
17. DTC judges should be formally educated on the implications of research regarding procedural issues and the action steps available to them. Procedural fairness might be developed as an intensive course of study presented by the NADCP or its educational branch, the National Drug Court Institute. In addition to considering procedural fairness as a stand-alone subject, the AJA suggests that training on procedural fairness be integrated into the NADCP's annual educational conference.
18. Judicial educators should train judicial trainers in procedural fairness. The AJA will do its part by developing a program to train the trainer on the core principles of procedural fairness.
19. The American Judges Association calls on the National Judicial College to develop a course on procedural fairness and to integrate its principles in its general-jurisdiction courses.

FOR JUDICIAL LEADERS

20. The AJA encourages the Conference of Chief Justices to place the issue of procedural fairness in DTCs on its agenda. Each state chief justice has enormous influence on the agenda for justice and education in his or her state. Collectively the Conference of Chief Justices can set the agenda for our nation's state courts. Many states already are deeply committed to the development of additional DTCs, and many individual chief justices are champions of this issue. The AJA would be happy to work with the Conference of Chief Justices DTC committee in developing ways to teach state DTC judges the four principles of procedural fairness.
21. The AJA also encourages the Federal Judges Association to place the issue of procedural fairness in DTCs on its agenda. The AJA would be happy to work with the Federal Judges Association and the Federal Judicial Center to develop ways to teach federal DTC judges the four principles of procedural fairness.
22. The AJA encourages the Bureau of Justice Assistance, the Veterans Administration, and the National Highway Traffic Safety Administration to fund research specifically targeted to improving the procedural fairness of DTCs, veterans' treatment courts, and DWI courts. The AJA encourages the National Center for State Courts and the Center for Court Innovation to join it in developing educational approaches to integrating procedural-fairness principles into DTCs.
23. The AJA encourages the American Bar Association and other bar-association leaders to join with the courts to ensure greater procedural fairness in our DTCs. Lawyers need to be educated on the social-science research described in this paper so that all of the stakeholders within the court system can work together toward a system of justice that can be respected by all.

ABOUT THE AUTHOR



Judge Brian MacKenzie is an award-winning judicial educator who has written and presented on a broad range of issues, including procedural fairness, veterans' treatment courts, domestic violence, and court-media relations. He was honored by the Foundation for the Improvement of Justice with the Paul H. Chapman medal for significant contributions to the American criminal-justice system. He is the co-editor of the book *Michigan Criminal Procedure*, and his most recent article is *Extrajudicial Speech: Judicial Ethics in the New Media Age*, published by the *Reynolds Courts & Media Law Journal*.

Judge MacKenzie is currently the Chief Financial Officer of the Justice Speakers Institute, having retired from the 52nd District Court, located in Novi, Michigan, after almost 27 years of service. He has served as President of the American Judges Association and President of the Michigan Association of Drug Court Professionals and was the American Bar Association/National Highway Traffic Safety Administration Judicial Fellow.

Judge MacKenzie received his Juris Doctorate from Wayne State University Law School in 1974. He is married to Karen MacKenzie, and they share three children (Kate, David, and Breanna) and three grandsons (Daniel, Raymond, and Henry).

ABOUT THE AMERICAN JUDGES ASSOCIATION

The American Judges Association (AJA) is the largest independent association of judges in North America. Formed in 1959, it has about 2,000 members from all levels of the judiciary: municipal, state or provincial, and federal; trial, appellate, and administrative. The majority of its membership consists of trial-court judges from the United States and Canada.

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 (www.justiceatstake.org), a partnership of more than 30 organizations, including the AJA, dedicated to maintaining fair and impartial courts.

The American Judges Association is governed primarily by a 45-member Board of Governors and an 8-member Executive Committee. This white paper was approved by the American Judges Association acting through its General Assembly at its meeting on October 4, 2015.

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Giving Parents a Voice:

A Case Study of a Family Treatment Drug Court Track in Lancaster County, Nebraska

Roger J. Heideman, Jennie Cole-Mossman, Lori Hoetger & Katherine Hazen

Family drug courts (FDCs) were first established in 1994 as one judge's response to substance abuse in the majority of his dependency-court cases.¹ Since then, hundreds of similar specialized dependency courts have been established around the country. FDCs are based on an adult-drug-court model established in response to the apparent revolving door of drug offenders in criminal court. Drug courts and other problem-solving courts seek to identify the social and psychological dysfunction that brought the individuals before the court. Problem-solving-court judges adopt therapeutic jurisprudence to assess the dysfunction, prescribe appropriate services, and provide support, encouragement, and accountability. Procedural justice, characterized by judicial leadership and participant autonomy, is one of the psychological tools used to successfully adopt therapeutic jurisprudence. Successful problem-solving courts rely on judicial leadership for the network of providers and to engage with the participants. Additionally, the voluntary nature of problem-solving courts ensures participants are given autonomy and allowed to exercise voice and control in the process.

In this article, we explore the successes and struggles of one family drug court, the Family Treatment Drug Court (FTDC) Track, in Lancaster County, Nebraska. The FTDC Track developed out of a voluntary FTDC initiated by a Lancaster County juvenile-court judge with grant funding. Funding from Project Safe Start–Nebraska was used to train court personnel (including a Department of Health and Human Services case manager dedicated to the FTDC), provide Child Parent Psychotherapy to families, and ensure parents on the Track were able to get immediate treatment placement through an agreement made with a local residential treatment facility. At the termination of the grant, the Lancaster County FTDC no longer had any incentive to offer participants, and the court had difficulty enrolling parents. Judge Roger Heideman, the first author and a Lancaster County juvenile-court judge, decided to create a mandatory Family Treatment Drug Court Track. Any families with allegations of child abuse or neglect related to substance use or abuse by a parent are assigned to Judge Heideman's docket, ordered to participate in the FTDC Track in the dispositional order, and receive specialized services, more frequent

meetings, and more supervision and accountability.²

An independent evaluation, including case-file reviews and parent interviews, demonstrates that the mandatory nature of the FTDC Track has not negatively impacted perceptions of fairness. Forty-two cases have been assigned to the FTDC Track since it began in early 2014. Parents report that they feel the process of getting their children returned to them is fair and that they can be open and honest in team meetings. Additionally, parents on the FTDC Track report that they receive praise from the judge more than do families not on the Track. Though the FTDC Track is mandatory, parents on the FTDC Track indicate that they feel they have a voice in the dependency-court process.

This article will first discuss the goals and tools of problem-solving courts, specifically the role of the judge in implementing therapeutic jurisprudence through the use of procedural justice principles. Next, it will discuss the development of family drug courts and how the FTDC Track was started and developed in Lancaster County. The goals and methods of the FTDC Track will be presented, along with the results of an ongoing evaluation of the FTDC Track. Finally, the article will conclude with an in-depth discussion of the evolution of the FTDC Track, emphasizing the issues faced, solutions implemented, and lessons learned. Though problem-solving courts are usually voluntary, the experience in the FTDC Track demonstrates that there are alternative ways to give participants voice in a mandatory program.

PROCEDURAL JUSTICE IN PROBLEM-SOLVING COURTS

Problem-solving courts seek to identify and address the psychological and social issues that bring individuals before the court, including drug addiction, mental illness, and domestic violence. Juvenile court, first established in Illinois in 1899,³ is often considered the first problem-solving court.⁴ Each day, dependency-court judges consider issues of permanency case by case, based on the issues facing each family. Judges consider whether parents are suffering from mental illness, substance abuse, or other relevant issues and determine what will best address those needs, including treatment, vocational training, parenting classes, and other rehabilitative services. More

Footnotes

1. José B. Ashford, *Comparing the Effects of Judicial Versus Child Protective Service Relationships on Parental Attitudes in the Juvenile Dependency Process*, 16 RES. SOC. WORK PRAC. 582 (2006).
2. The court administrator examines all petitions filed in Lancaster County Juvenile Court for allegations of child abuse and neglect that include substance abuse by a parent. This may include an allegation that the child is placed at risk of harm due to the parent's substance abuse or information included in a supporting affi-

davit that indicates a parent's substance abuse contributed to the allegations.

3. Marvin Ventrell, *Evolution of the Dependency Component of the Juvenile Court*, 49 JUV. & FAM. CT. J. 17, 17 (1998).
4. Cindy S. Lederman, *The Marriage of Science and the Law in Child Welfare Cases*, in PROBLEM SOLVING COURTS 23, 25 (Richard L. Wiener & Eve M. Brank eds., 2013).

recently, judges in adult court have also looked beyond the traditional legal goals of the criminal-justice system to address the revolving door of nonviolent offenses.⁵ Drug courts,⁶ mental-health courts,⁷ and domestic-violence courts⁸ seeking to address this concern have been established across the country. Specialized dependency courts have also begun to focus on the specific issues facing families, establishing family drug courts and family domestic-violence courts.

Like traditional dependency courts, problem-solving courts and specialized dependency courts should be based on the principles of therapeutic jurisprudence to address the psychological and social causes of crime.⁹ Therapeutic jurisprudence is a change in jurisprudential practice that incorporates social science into the legal system and recognizes the (often negative) impact the law and legal actors can have on an individual.¹⁰ The judge acts as a therapeutic agent by assessing the social and psychological malfunctions of the defendant, prescribing services to address those malfunctions, and providing social support through listening and accountability to promote compliance.¹¹ Therapeutic jurisprudence provides judges insight into what they need to know and do to be successful through psychological principles.

Procedural justice is among the tools and principles available for successful application of therapeutic jurisprudence.¹² As discussed in this article, “procedural justice” refers to the evaluation of formal decision-making procedures as fair and unbiased.¹³ The fair-process effect demonstrates that when individuals are allowed to present their side of the story, they are more satisfied with the outcome and the experience.¹⁴ Fair process has been operationalized in the research as providing participants the opportunity to express their preferences.¹⁵ Through a variety of mechanisms, evaluations of fair process and satisfaction with the process predict compliance with the outcome, such as the court order.¹⁶ As a tool of therapeutic

jurisprudence, judges in problem-solving courts employ the principles of procedural justice by actively listening to participants’ needs and concerns.¹⁷

Judicial leadership is key to successfully implementing problem-solving courts with therapeutic jurisprudence and procedural justice.¹⁸ Participants receive signals related to procedural justice from the judge. The judge’s therapeutic actions, including active listening, oversight, and engagement, communicate to participants that their preferences and needs are heard, valued, and respected, and that someone else cares about the outcome of their case.¹⁹ When judges take the time to listen to the court participants’ successes and struggles, as problem-solving-court judges do, participants experience and evaluate the whole process differently, as more just and fair. The just-and-fair evaluation increases the likelihood the participants will engage in services, comply with court orders, and be successfully discharged from the court.

Traditionally, respect for participant autonomy and expression of preferences are considered central to ensuring therapeutic jurisprudence and procedural justice. Problem-solving-court judges should seek to avoid paternalism and allow participants to decide for themselves if they want treatment and the other benefits that go along with participation or if they would rather address the charges in a traditional court.²⁰ The voluntary nature of problem-solving courts is thought to provide for self-determination and choice, which are central to psychological health.²¹ Additionally, it allows participants to

Judicial leadership is key to successfully implementing problem-solving courts with therapeutic jurisprudence and procedural justice.

5. Richard L. Wiener, Bruce J. Winick, Leah Skovran Georges & Anthony Castro, *A Testable Theory of Problem Solving Courts: Avoiding Past Empirical and Legal Failures*, 33 INT’L J. L. & PSYCHIATRY 417, 419-20 (2010).
6. See Office of Justice Programs National Institute of Justice, *Drug Courts*, <http://www.nij.gov/topics/courts/drug-courts/pages/welcome.aspx>; David B. Wilson, Ojmarrah Mitchell & Doris L. Mackenzie, *A Systematic Review of Drug Court Effects on Recidivism*, 2 J. EXPERIMENTAL CRIMINOLOGY 459 (2006).
7. See THE COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER, *MENTAL HEALTH COURT: A PRIMER FOR POLICYMAKERS AND PRACTITIONERS* (2008).
8. See Department of Justice National Institute of Justice, *Domestic Violence Courts*, <http://www.nij.gov/topics/courts/domestic-violence-courts/pages/welcome.aspx>.
9. See Bruce J. Winick, *Applying the Law Therapeutically in Domestic Violence Cases*, 69 UMKC L. REV. 33 (2000); Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 FORDHAM URB. L.J. 1055 (2003); Lederman, *supra* note 4.
10. Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB. POL’Y & L. 184, 185 (1997).
11. Winick, *supra* note 9, at 1066-89.
12. *Id.* at 1088-89.
13. Wiener et al., *supra* note 5, at 422.

14. John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 CAL. L. REV. 541, 547-52 (1978); Tom R. Tyler & Robert Folger, *Distributional and Procedural Aspects of Satisfaction with Citizen-Police Encounters*, 1 BASIC APPL. SOC. PSYCHOL. 281 (1980).
15. Robert Folger, David Rosenfield, Janet Grove & Louise Corkran, *Effects of “Voice” and Peer Opinions on Responses to Inequity*, 37 J. PERS. SOC. PSYCHOL. 2253 (1979).
16. Norman G. Poythress, Joe Schumacher, Richard Wiener & Mary Murrin, *Procedural Justice Judgments of Alternative Procedures for Resolving Medical Malpractice Claims*, J. APPL. SOC. PSYCHOL. 1639 (1993); Norman G. Poythress, *Procedural Preferences, Perceptions of Fairness, and Compliance with Outcomes: A Study of Alternatives to the Standard Adversary Trial Procedures*, 18 LAW & HUM. BEHAV. 361 (1994).
17. Winick, *supra* note 9, at 1088-89.
18. Brian MacKenzie, *The Judge Is the Key Component: The Importance of Procedural Fairness in Drug-Treatment Courts*, 52 CT. REV. 8 (2016); Sophia I. Gatowski, Shirley A. Dobbin & Alicia Summers, *Exploring the Value-Added of Specialized Problem-Solving Court for Dependency Cases*, in PROBLEM SOLVING COURTS 33, 37-38 (Richard L. Wiener & Eve M. Brank eds., 2013).
19. See Wiener et al. *supra* note 5; Gatowski, *supra* note 18.
20. Winick, *supra* note 9, at 1071-78.
21. *Id.* at 1072.

Problem-solving courts can help improve outcomes for vulnerable children involved in dependency cases.

therapeutic jurisprudence and procedural justice in part through their voluntary nature.

Problem-solving courts generally aim to address a particular population or problem in the court system. One population that is particularly vulnerable is abused and neglected children. Problem-solving courts can help improve outcomes for vulnerable children involved in dependency cases. Family drug courts developed to address cases where children are removed from their parents' care due to substance-abuse issues.

FAMILY DRUG COURTS

Judge Charles McGee implemented the first family drug court in 1994 as a response to observing that a large majority of cases on his dependency-court docket involved substance abuse.²² In the more than 20 years since then, over 300 jurisdictions have established such programs.²³ FDCs were adapted from the adult-criminal-drug-court model with an emphasis on individualized services and substance-abuse treatment.²⁴ The general FDC model stresses the importance of coordinating substance-abuse treatment with child protective services. Parents are presented with the option to voluntarily enroll in the FDC instead of participating in the traditional dependency-court docket. FDCs often involve more frequent hearings or meetings, escalating sanctions for infractions, and rewards for compliance and case progression.

An important aspect of FDCs is the relationship between the judge and the parents. In an FDC in Pima County, Arizona, the judge served a case-management function and was focused on providing parents with support in substance-abuse treatment. This may explain the findings that parents in the Pima County FDC perceived more trust and fairness in the judge than non-FDC parents perceived in their social worker.²⁵ These findings provide evidence that a judge highly involved in all aspects of the case can result in better perceptions of fairness by the parents.

For these reasons, Judge Linda Porter in Lancaster County, Nebraska, decided to implement an FDC with the aid of grants

express their preferences or exercise voice and gives participants some process control, two of the central features of procedural justice. It is important for the psychosocial well-being of the participants and their perceptions of and engagement in the process that participants do not feel coerced into treatment. Problem-solving courts are thought to achieve the goals of

from Project Safe Start–Nebraska and the Substance Abuse and Mental Health Services Administration (SAMHSA). The Project Safe Start grant, starting in 2010, intended to raise the bar for services for young children and their relationship with their parents, particularly in families with methamphetamine abuse. These grants enabled Judge Porter to establish a voluntary family-treatment drug court that followed the core tenets of family drug courts. The initial FTDC paid for Child Parent Psychotherapy, an evidence-based therapy that helps reestablish healthy parent-child relationships and was not paid for by Medicaid in Nebraska until more recently. In 2014, Judge Heideman assumed the role of the presiding judge of the FTDC. The families were provided with a specialized substance-abuse intake and a caseworker dedicated to the FTDC. In addition, families participated in monthly team meetings with the judge and more frequent review hearings than non-FTDC dependency cases.

The Lancaster County FTDC was entirely voluntary; parents who have substance abuse alleged in the petition were given the option of proceeding with the Lancaster County FTDC or with the traditional court system. Initially, the main incentive for participating in the Lancaster County FTDC was the immediate availability of treatment and payment for Child Parent Psychotherapy. A treatment provider in Lincoln, Nebraska, agreed to hold beds open for parents involved with the program. This meant that parents would be able to enter treatment immediately instead of having to be placed on a waiting list that could mean days or weeks before getting treatment. Once the grants that funded the initial Lancaster County FTDC ended, there was less incentive to participate in the additional hearings and team meetings. Very few parents chose to participate with the Lancaster County FTDC.²⁶

Families were not asked why they refused to participate. However, one hypothesis suggested by the team in Lancaster County is that there was not enough of an incentive to participate. In adult criminal drug court, the incentives are clear and very different from those defendants can receive in adult criminal court (e.g., expungement of record). But the incentives in Lancaster County FTDC did not differ from those in traditional dependency court. Parents who comply with court orders and complete a case plan in both FTDC and traditional dependency court will work toward reunification with their children and case closure. There were no immediately obvious benefits to participating in the Lancaster County FTDC, other than potentially pleasing the judge.

In early 2014, Judge Heideman decided to change the Family Treatment Drug Court from a voluntary program to a mandatory one. The program would retain many of the other tenets of the FTDC, except parents would not be presented with the choice to participate. This raised several concerns

22. Ashford, *supra* note 1, at 582.

23. WEST HUDDLESTON & DOUGLAS B. MARLOWE, PAINTING THE CURRENT PICTURE: A NATIONAL REPORT ON DRUG COURTS AND OTHER PROBLEM SOLVING COURT PROGRAMS IN THE UNITED STATES (2011), <http://www.ndci.org/sites/default/files/nadcp/PCP%20Report%20FINAL.PDF>

24. Meghan M. Wheeler & Carson L. Fox, Jr., *Family Dependency*

Treatment Court: Applying the Drug Court Model in Child Maltreatment Cases, 5 DRUG CT. PRAC. FACT SHEET 1 (2006).

25. Ashford, *supra* note 1, at 588.

26. Other studies on family-treatment drug courts report a refusal rate of approximately 56%. José B. Ashford, *Treating Substance-Abusing Parents: A Study of the Pima County Family Drug Court Approach*, 55 JUV. & FAM. CT. J. 27, 31 (2004).

about the program. For one, it was possible parents would be resistant to a mandatory track that included elements additional to the traditional dependency court. Also, the team was concerned that making the FTDC mandatory would fundamentally change the effectiveness of the program. The team decided to conduct an evaluation of the new program to determine if these concerns were warranted.

FAMILY TREATMENT DRUG COURT TRACK

The new program was renamed the Family Treatment Drug Court Track to reflect its mandatory nature. The FTDC Track was officially implemented in January 2014. The main goals of the FTDC Track include: establish a network of evidence-based service providers who have experience with substance abuse and can adequately serve families; provide ongoing support to parents; monitor families' growth and progress and acknowledge positive steps with praise; allow parents to assess their own strengths, weaknesses, and progress throughout the Track; and provide services for children to ensure healthy emotional and physical development through evidence-based practices. The main components of the FTDC Track are identification and selection of families, monthly team meetings, emergency team meetings as needed, 90-day review hearings, specialized trauma-informed substance-abuse and parenting services, and timely implementation of corrective measures.

Identification and Selection of Families

As stated above, the FTDC Track is mandatory for eligible families. The primary way families are identified as eligible for the FTDC Track is if parental substance abuse is identified in the affidavit supporting the removal of the children from the parents' care. This could include individuals who were on drugs or in possession of drugs while caring for their child or whose child tested positive for drugs at birth. These families are automatically placed on Judge Heideman's docket. Families are also identified as eligible if parental substance abuse is identified in the initial investigation by Child Protective Services or if parental substance abuse is identified following adjudication. All eligible families are placed on or transferred to Judge Heideman's docket. The only exception is if the family has had a prior child-dependency-court case with a different juvenile-court judge; these families remain with their initial judge unless that judge determines the FTDC Track is a better option for the family. It is not known how many families qualify for the FTDC Track but remain with another judge.

Monthly Team Meetings and Emergency Team Meetings

Each family participates in a monthly team meeting that includes the caseworker, parents, parents' attorneys, guardian ad litem, county attorney, and any other interested party. The judge is not present for the first part of the team meeting. The caseworker leads the team meetings but involves and engages the parents as much as possible. For example, the caseworker asks the parents to report on their own progress in the case, state their self-reported sobriety date, and inform other parties how the children are doing. If there is an issue the parties come to agreement on, such as visitation, the parties can stipulate to changes in the rehabilitative plan.

Judge Heideman joins each team meeting for the last 10

minutes. He sits at the table with the parents and does not wear his judicial robes. The judge engages the parents, asking them for updates and how they feel the case is going. Importantly, he directly asks the parents for a self-assessment of their progress. This allows parents to express their hopes and frustrations and

allows all parties to get a sense of how the parents are feeling about their own progress. The judge directly gives the parents praise or criticism based on their report. Throughout the case, the judge ensures that the parents are aware that everyone's goal is to have the children safely reunified with their parents.

In addition, any party is able to schedule an emergency team meeting to address concerning behaviors or new situations such as a discharge from treatment or loss of housing. This provides the ability to immediately get the parent back on track. Parties can address issues as they arise instead of waiting for future hearings. This prevents parents from deteriorating quickly.

90-Day Review Hearings

In addition to the monthly team meetings, the families have formal review hearings every 90 days (or more frequently if necessary). More frequent review hearings have been held for issues such as a change in treatment needs or reported non-compliance with the case plan. These hearings are more structured than the team meetings. Judge Heideman presides from the bench, attorneys can call witnesses and raise objections, and parties introduce exhibits into evidence. The judge issues orders following the review hearings.

Specialized Substance-Abuse Services

Case managers dedicated to the FTDC Track have familiarity with what services are available for people with a history of substance abuse. All recommendations the case managers submit to the court incorporate best practices for families with parental substance abuse. Parents undergo recommended drug and alcohol treatment that may range from outpatient to long-term inpatient. All parents are also required to undergo random drug and alcohol testing. The preferred method of testing is a call-in method where the parent must call in to the designated line each morning to know if they are scheduled to test that day. The judge prefers this method, as it allows the parents to be accountable for their own testing.

If the family includes children under the age of five, the family also receives a Parent Child Interaction Assessment (sometimes referred to as a Safe Start Assessment) and Child Parent Psychotherapy if needed. The assessment and the therapy are designed to address any trauma or harm caused by the parental substance abuse and accompanying events that led to the removal of the child. This evidence-based therapy can help repair and enhance the parent-child relationship, promote the child's social and emotional development, and minimize the harmful developmental consequences that may have resulted from the necessity of being placed in care.

Other services that address the specific needs of this popu-

The judge engages the parents, asking them . . . how they feel the case is going.

These corrective measures are designed to hold the parent accountable . . . and to provide a structured schedule to give the parent less time to be tempted by drugs or alcohol.

lation include an assigned Parent Partner (a peer mentor who has had prior experience with dependency court) and parenting classes such as Circle of Security (a relationship-based parenting class designed to enhance attachment security between children and parents). The services are tailored to each family and designed to put the parents back on track to be reunited with the children.

Potential Corrective Measures

If a parent fails to participate in ordered services or otherwise

is not complying with the provisions of the case plan, the caseworker may use corrective measures. These measures are only ordered following disposition. Corrective measures include (1) paying lab costs associated with drug tests, (2) participating in structured activities, and (3) completing writing assignments. These corrective measures are designed to hold the parent accountable for his or her actions and to provide a structured schedule to give the parent less time to be tempted by drugs or alcohol.

Parents will never be terminated from the FTDC Track. The only ways parents are discharged from the Track are (1) reuniting with their children and closing the case or (2) terminating their parental rights to the children. As long as the family has an open case, the family will be on the FTDC Track.

EVALUATION OF THE FTDC TRACK

As stated above, an evaluation of the FTDC Track is ongoing to ensure the mandatory nature of the Track does not impede its effectiveness or deter parents from fully engaging. Members of the evaluation team reviewed case files for information on dates of court hearings, case-closure information, and case plans. In addition, members of the evaluation team interviewed parents following family team meetings on their perceptions of the FTDC Track.

Case Information

As of October 15, 2015, 42 families have participated in the FTDC Track for a total of 69 children (average age = 2.2 years). Twenty-eight families (66.7%) identify as white, four (9.5%) identify as African-American, four (9.5%) identify as Hispanic, and three (7.1%) identify as American Indian (the race and ethnicity of the remaining families are unknown).

Eleven cases (26.2%) have closed as of October 15, 2015, due to establishment of permanency via reunification ($N = 6$)

or termination of parental rights and successful adoption ($N = 5$). The average number of days between when the petition is filed to the date the court terminates its jurisdiction over the case is 451.1, approximately 15 months. The parents in nine cases additional to the above closed cases (21.4%) have relinquished their parental rights, and the parents in three additional cases (7.1%) have had their parental rights terminated.

Notably, it is becoming clear early in FTDC Track cases whether children can be safely reunited with their parents or whether alternative permanency options need to be pursued. Children have been reunified with a parent in 11 cases (26.2%). Anecdotally, it appears that children are reunifying with parents relatively quickly (on average, 213.8 days, or about 7 months).²⁷ Parental rights have been relinquished or terminated in 12 cases. The average number of days from the petition being filed to parents relinquishing their parental rights is 428 days, a little over 14 months. The average number of days from the petition being filed to the filing of a motion to terminate parental rights is 389.1 days, or less than 13 months. Although these data are preliminary, they indicate that the parties are able to identify whether reunification or an alternative permanency placement should be sought early in the case.

Parents' Perceptions of Procedural Justice

A member of the evaluation team conducted interviews with parents following team meetings. The interviewer explained that he or she was assisting the judge in implementing and evaluating the Track and that the judge would appreciate hearing from parents involved with the Track. The interviewer also told the parents that their individual responses would never be shared with the judge or any other person outside the evaluation team; the responses would only be aggregated and shared in summary form.

Parents who agreed to answer the questions were given a form with 11 questions about their experiences on the Track. The questions asked the parents whether they thought the process was fair and how much say they had in the process. The parents also answered questions about their relationship with Judge Heideman and their case manager. Each question was answered on a scale of 1 (*strongly disagree*) to 5 (*strongly agree*). Statements were aimed at parents' perceptions of the fairness of the court process and the degree to which they felt comfortable speaking at team meetings. Parents were allowed to skip questions if they did not feel comfortable answering and also had the opportunity to provide comments and questions about the Track at the bottom of the form.

To examine whether a difference exists between parents involved with the FTDC Track and those who were not, evaluators interviewed eight parents from five families involved in dependency cases in Judge Heideman's court who were not on

27. In 2014, the median number of months from removal to reunification in the southeastern Department of Health and Human Services service area, including Lancaster County, Nebraska, was 12 months. This is not a directly comparable sample as this includes families that do not have allegations of substance abuse, but it

provides some context for the current data. See THROUGH THE EYES OF THE CHILD INITIATIVE, CASE PROGRESSION & COURT IMPROVEMENT DATA REPORT 2014-2015: DISTRICT 3: LANCASTER COUNTY, https://cip.nebraska.gov/sites/cip.nebraska.gov/files/files/34/2015_data_team_3.pdf.

the Track.²⁸ These families are different than FTDC Track families because they did not have allegations of substance abuse included in the petition or subsequently discovered in the initial investigation, but the parents did have children removed from their care. These comparison families only participated in traditional dependency court, and the judge did not attend their team meetings (held every three months).

Forty-three parents were interviewed in 33 separate FTDC Track cases.²⁹ Overall, parents seemed to appreciate the Track and recognized that it aims to safely return the children to the parents' care. Twenty-nine parents (65.9%) agreed that the process of getting their children back was fair, and 38 (88.4%) agreed that the goal of the FTDC Track was to get their children returned to them. Thirty-four (79.1%) reported that they had access to the services they needed to get their children returned to them. Importantly, the majority of parents (86%) stated that they knew what needed to be done to get their children returned to them. These results indicate that parents understood the FTDC Track process and viewed it as fair.

A majority of parents on the FTDC Track reported that they had voice in the process of getting their children returned to their care. Thirty-three parents (76.8%) agreed that their voice was heard at family team meetings; thirty-one (72.1%) agreed that they had a say in decisions that affected them and their children. This is important because it demonstrates that parents still felt like valuable participants in the process even though the FTDC Track is mandatory.

As discussed above, judicial leadership and parents' relationship with the judge are both important in problem-solving courts. Thirty-six parents (83.7%) reported that they received praise from the judge when they made progress toward their goals. In contrast, only 30 parents (69.8%) stated they received praise from their caseworker when they made progress. Consistent with previous research,³⁰ it appears that parents on the FTDC Track have a positive relationship with the judge.

The parents in the comparison group not on the FTDC Track perceived the dependency-court process similarly to those on the Track. The majority (87.5%) recognized that the goal of the process was to get their children returned to them, reported that they knew what needed to be done to have their children returned to their care (87.5%), and said that they had access to the services they needed (87.5%). Additionally, all of the parents indicated that they felt comfortable speaking in team meetings, but just over half (62.5%) felt that their voice was heard in team meetings. The majority (87.5%) agreed that they had a say in the decisions that affected them and their children. Five parents (62.5%) agreed that the dependency-court process was fair. Overall, there were not many differences in how parents on the Track and traditional dependency-court parents perceived the process.

Similarly, the majority of non-Track parents (75%) agreed

that they received praise from their caseworker when they made progress toward their goals. Five (62.5%) agreed that they could go to their caseworker if they had concerns about their ability to meet their goals. However, only three non-Track parents (37.5%) agreed that they received praise from the judge when they made progress toward their goals as

compared to the majority (83.7%) of Track parents. Track parents reported receiving praise significantly more than did non-Track families ($\chi^2(4) = 19.806, p = .001$).

Parents on the FTDC Track may perceive more praise from the judge than similar parents not on the Track. Though the comparison group is small, preliminary analysis shows that proportionally more parents on the Track report receiving praise from the judge than parents not on the Track. This indicates that the FTDC Track may be fostering a more positive relationship between parents and the judge, a factor that may be important in improving outcomes for children.

DISCUSSION

Judicial leadership plays a major role in problem-solving courts and can lead to better engagement among participants. Participants who are engaged in the process and perceive the process as fair are more likely to comply with the terms of the process. This can result in better outcomes for all participants, including vulnerable children in family problem-solving courts.

One potential barrier to implementing problem-solving courts and maintaining the implementation is funding. Funding is often temporary or contingent on factors external to the program itself, thus not always guaranteed for any length of time. Once a problem-solving court loses its funding, it may be difficult or impossible for the court to continue.

For family drug courts in particular, the loss of funding may mean the program can no longer support the incentives that encourage parents to participate in a voluntary program. FDCs require parents to participate in more meetings and to be subjected to more potential sanctions than traditional dependency court; there is no real incentive from FDCs themselves. Programs often include incentives for parents, such as the immediate availability of a treatment bed. But without a funding source, these incentives become more difficult to maintain.

One solution to that problem is to make the FDC mandatory for eligible parents. However, an important part of many problem-solving courts is that they give participants a voice in the process, beginning with the decision to choose to partici-

A majority of parents . . . reported that they had voice in the process of getting their children returned to their care.

28. Parents interviewed for the control group do not have substance abuse identified as an issue contributing to their involvement in the court. Therefore, it is not a perfect comparison group but the best one that could be constructed because it was not feasible to do a randomized control trial.

29. Parents are interviewed at multiple time points throughout the

case to evaluate changes in perception over time, but due to the small sample size, the results presented here are only for one interview from each parent. We included the parent's most recent interview in these analyses.

30. Ashford, *supra* note 1.

pate. If a program is no longer voluntary, participants could perceive the program as less fair and feel that they have less of a voice in the process.

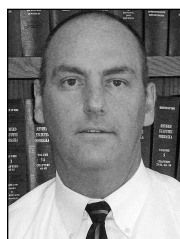
This article describes one program that was mandatory for all eligible participants. From the beginning, the program was driven by strong judicial leadership that encouraged all program participants, from caseworkers to attorneys to parents, that the program would help children safely reunify with their parents. A year and a half after implementation of the program, the mandatory FTDC Track is working well. Forty-two families have participated in the Track; eleven of these families have successfully reunified. Families appear to be either reunifying or terminating the relationship between parents and children more quickly than in other dependency cases. Children seem to be achieving permanency quickly in FTDC Track cases. In addition, the mandatory nature of the Track does not appear to hurt perceptions of procedural justice. Parents report they feel they have a voice in the process and that their voice is heard at team meetings to the same extent as in traditional dependency court. The similarity of these ratings is not surprising because traditional dependency court and the FTDC Track are both problem-solving models, seeking to address social and psychological dysfunction. Importantly, parents on the FTDC Track recognize that the judge praises them for their progress toward their goals. This indicates the relationship between parents and the judge is positive, despite the mandatory nature of the Track.

More data collected over time can help determine whether the Track successfully and safely reunifies children with their parents when there are issues with substance abuse. Such a program can be a model for other courts that wish to use a problem-solving court to address substance abuse in dependency cases but lack long-term funding to implement incentives to participate. Preliminary results indicate that judicial adoption of therapeutic jurisprudence and procedural-justice principles can have a positive impact for substance-abuse-involved parents and their children in dependency court, even if participation in the program is not voluntary.

LESSONS LEARNED FOR OTHER COURTS

For other courts considering beginning a mandatory FDC, there are a few important lessons the Lancaster County FTDC Track has taught the authors. First, judicial leadership is vital to the success of the Track. A judge will have to devote considerable resources to the Track and convince other court personnel of the Track's importance. Part of judicial leadership is being a therapeutic agent to the parents on the Track. This includes providing support to parents in a way that may be very different than traditional dependency court. Informal interaction can help parents relate to the judge and see him or her as another support person instead of someone who is working to keep their kids away from them. Second, the mandatory nature of the Track does not necessarily take away from its impact. This may be because the informal interaction with the judge creates a relaxed, collaborative atmosphere and allows for the parents to feel they are an important part of a team. Lastly, it is very important to create buy-in to the Track early on in the process of development. Many individuals, including court personnel, Department of Health and Human

Services staff, family support agencies, and mental-health service providers, can give important insight to what is needed to help parents succeed. Whatever form a family drug court may take, it will help parents in their journey and will work toward the goal of reunifying children with their families.



Judge Roger Heideman earned his B.A. from Benedictine College in Atchison, Kansas, in 1984, then went on to complete his J.D. at the University of Nebraska–Lincoln College of Law in 1992. After serving as partner for the law firm of Morris, Titus & Heideman, Judge Heideman was appointed to the Separate Juvenile Court bench in 2006 by Governor Heineman.

He served as the lead judge for Lancaster County's Through the Eyes of the Child team from 2007 to 2009. He is currently the lead judge for the Lancaster County Family Treatment Drug Court Track.



Jennie Cole-Mossman, LIMHP, is currently co-director of the Nebraska Resource Project for Vulnerable Young Children. She was previously the coordinator of the Nebraska Infant and Toddler Court Improvement Project, which was part of the Through the Eyes of the Child Initiative, where she provided technical assistance and training to overcome system barriers for

infants and toddlers in the child-welfare system. Before that time, she was the young-child-services coordinator of Project Safe Start–Nebraska, a SAMHSA-funded project providing technical assistance and Child Parent Psychotherapy to family drug courts in Omaha and Lincoln. She is a licensed independent mental-health practitioner with extensive training and experience in early childhood trauma, Child Parent Psychotherapy, and parent-child relationship assessments.



Lori Hoetger is a project evaluator at the University of Nebraska–Lincoln's Center on Children, Families, and the Law. She is a current graduate student in the University of Nebraska–Lincoln Psychology and Law dual-degree program. Lori received her J.D. from UNL in 2009 with highest distinction and will complete her Ph.D. in psychology in 2016. Her

research focuses on legal decision making, including adolescent decision making.



Katherine Hazen is a graduate research assistant for the Nebraska Resource Project for Vulnerable Young Children at the Center on Children, Families, and the Law at the University of Nebraska–Lincoln. She is in her third year of the Law and Psychology Program at UNL, pursuing a Juris Doctorate and Doctorate of Philosophy in social psychology. Katherine

received her Bachelor of Science in psychology from Endicott College, in Beverly, Massachusetts, in 2012. She is currently working on her Master's Equivalency, examining authority perceptions of fair process.

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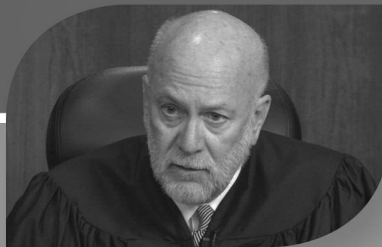
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Exporting Drug-Court Concepts to Traditional Courts:

A Roadmap to an Effective Therapeutic Court

Jamey Hueston & Kevin Burke

On any given day, in courtrooms across the country, judges witness the unfortunate consequences of drug abuse reflected by some offenders who are in court “nodding out” from a “heroin high” while waiting for their cases to be called. A steady stream of people with untreated mental-health issues also enter courtrooms, often displaying oppositional attitudes, disruptive behavior, and cognitive disabilities. Judges are understandably frustrated with the justice system’s revolving door in which these offenders continuously rotate and with a system that cannot adequately address the numerous complex issues, insufficient life skills, and collateral problems that contribute to drug abuse or help users navigate to recovery. These individuals and problems are not the sole domain of the criminal-justice system and, unfortunately, are represented equally in civil and other non-criminal matters—just in another context.

The lessons we have learned and skills we have developed serving as drug-court judges are powerful, and they provide cogent strategies for dealing with traditional court litigants in the variety of criminal and civil matters that “full service” trial judges handle. This article describes drug-court-employed options and strategies used effectively over the last two decades to address drug use and associated mental-health conditions—approaches that promote healing and rehabilitation with substantially better results than those achieved by traditional punitive methods. This article also offers a roadmap for applying successful drug-court techniques, available to all judges in traditional court settings—techniques that will widen a judge’s repertoire of judicial skills.

THE CONTRAST BETWEEN COURTS

Drug courts encourage behavioral changes in offenders by imposing a regime of immediate behavioral management, known as sanctions and incentives; intense community supervision; frequent drug testing; appropriately matched treatment; and a range of support services under the vigilant monitoring of the judge. As Judge Brian MacKenzie’s white paper in this issue¹ so compellingly demonstrates, although each drug court is different, the dynamic and continuous interaction of the judge with each defendant is a critical factor. Someone once said, “They may forget what you said, but they will never for-

get how you made them feel.”² The quality, length, frequency, and content of communications with a judge are meaningful and purposeful. A judge becomes familiar with the participant’s personal life and triggers to aid in recovery. In contrast, the role of the judge in most traditional courtrooms is that of an impartial arbiter who has limited interaction with the defendant, even at the sentencing phase.

Let’s start by considering how a case would traditionally proceed in court. John, a 20-year heroin abuser, ingests “as much as I can get every day.” As a result of his abuse, he has numerous arrests and convictions and has failed several treatment attempts. Continuous drug usage has altered his brain chemistry, which overwhelms his self-control and compels continuous drug-seeking behaviors. A probation order issued by the sentencing judge—who emphasized his order by wagging his finger and demanding John to immediately stop using drugs—will not trump John’s compulsion to use. John will tell the judge whatever he believes will gain his release and propel him to his next “fix” on the streets. Once John is back in the community, the sentencing judge will play no role in John’s post-sentence probation. Rather, John’s probation officer or community-service supervisor, juggling an exhaustive caseload of other offenders, will try to provide adequate supervision. John’s drug-testing regime will likely be inconsistent and sporadic. His treatment program may also be insufficient to meet his needs.

Only when John fails to comply with the court’s orders will he find himself before the judge for a probation-revocation or adjustment hearing—a negatively driven process, often in custody and where the tension is often palpable. The judge supervising John’s case, as with most traditional court judges who are exposed to a steady diet of probation violators, is frustrated by the persistent failure of those under her supervision and by the repeat violations of her sentencing orders. Business as usual is particularly unsatisfying.

If John were in drug court, however, both he and the judge would find a very different view of probation, the justice system, and his potential future. The atmosphere during drug-court hearings is dramatically different; it is often didactic, motivating, and healing. While in court, the judge is engaging and instructive, and the defense and prosecuting attorneys are collaborative, not adversarial. The approach is therapeutic;

Footnotes

1. Brian MacKenzie, *The Judge Is The Key Component: The Importance of Procedural Fairness in Drug-Treatment Courts*, 52 CT. REV. 8 (2016).
2. Although a similar quote is often attributed to Maya Angelou, it

appears that the statement originated with a man named Carl W. Bueher. See Garson O’Toole, *They May Forget What You Said, But They Will Never Forget How You Made Them Feel*, QUOTE INVESTIGATOR, <http://quoteinvestigator.com/2014/04/06/they-feel>.

built on praise, not punishment; and built on treatment, not threats.

As illustrated by Judge MacKenzie's white paper, the efficiency of the typical drug-court techniques is supported by extensive research, which reveals significant improvement in the lives of participants, often dramatic reduction in recidivism, and substantial cost savings to the criminal-justice system and society.³ Not surprisingly, drug-court judges who have witnessed the extraordinary transformation of their most difficult participants routinely employ drug-court techniques when sitting in traditional judicial assignments.

THE ROADMAP

BEGIN YOUR JOURNEY TOGETHER: DEVELOP A RELATIONSHIP

The hallmark of drug court is the unique relationship between the judge and the defendant. Although their styles may differ, drug-court judges uniformly step beyond the traditionally distant and formal judicial persona and adopt a variety of roles to motivate positive behaviors and admonish negative ones. It is not unusual for drug-court participants to credit their improvement and success in the program to the judge's encouragement and enthusiasm: "for caring about me when I did not care about myself." This noteworthy rapport that defendants establish with the judge is, for many offenders, the first time a person of stature has taken the time to engage with them, demonstrate concern, and offer constructive assistance.

Case volume in traditional courts is frequently offered as the reason preventing the judge from spending more than a perfunctory amount of time with each defendant. Yet research has shown a significant reduction in recidivism when the judge spends "adequate" time with each participant to demonstrate interest in their lives, build trust, and create a bond. The critical question that remains is whether judges are ready to invest the necessary time, maybe only minutes, to influence offenders' lives and encourage them to finally exit through the revolving door.

Signpost: Build a Relationship

Courts can be intimidating and overwhelming, which can interfere with a person's capacity to understand what is happening in the court. Employing the principles of procedural fairness—ensuring people are treated fairly in court—helps create a more positive atmosphere and improves perceptions of the court. Social-science research overwhelmingly supports the notion of affording parties sufficient opportunity to express themselves—having a voice in the matter before a neutral

arbitrator—and is a key component of procedural fairness. Getting the rule or law "right" is profoundly important for judges, but, although counterintuitive, litigants confirm that case outcomes are not as important to them as the perceived procedural fairness of the litigation.⁴

People naturally want to win their case, but they are also willing to accept loss or punishment if they feel that the court procedures were fair, they had the opportunity to present their side of the case, and their case was considered by the court.⁵ Parties need to trust the process and feel that they have received respect from the judge. Spending a bit of time to learn about the defendant initiates a rapport, reduces barriers to listening, and creates an environment for improvement. Additionally, acceptance and compliance with orders is significantly increased when the reasoning for decisions is explained and expectations and requirements are adequately described.

MAPPING THE ROUTE: OBTAIN BACKGROUND INFORMATION

The crushing volume of cases in many courts can intensify the challenge of assuring adequate time to provide individualized justice at all stages of court proceedings. The focus of many courts sadly becomes disposing of the docket, not listening to the cases. Time limitations can also easily be used to rationalize a court's failure to obtain necessary information for fashioning meaningful sentences or probation plans. As in the trial stage, where the court requires evidence to make informed decisions, the sentencing phase also demands that the court obtains relevant information regarding a defendant's background to craft an appropriate and meaningful sentence that will have a chance of success—one that will shape the defendant's future as well as protect the public.

Even the most conscientious and mindful judges may render decisions at times that are less than precise. Faulty decision making can be affected by a variety of factors, including depleted physical resources, multitasking, mood, and fluency (i.e., ease of processing information).⁶ Judges also fall victim to "decision fatigue" as reflected in a study that demonstrated that sentencing decisions varied depending on the sequence in which criminal cases were presented during the day.⁷ However, a judicial officer's decisions can have substantial direct and con-

Courts can be intimidating and overwhelming, which can interfere with a person's capacity to understand what is happening in the court.

3. MacKenzie, *supra* note 1; SHELLI B. ROSSMAN & JANINE M. ZWEIG, NAT'L ASS'N OF DRUG COURT PROFESSIONALS, WHAT HAVE WE LEARNED FROM THE MULTISITE ADULT DRUG COURT EVALUATION? IMPLICATIONS FOR PRACTICE AND POLICY: THE MULTISITE ADULT DRUG COURT EVALUATION (2012).
4. Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 CT. REV. 4 (2007).
5. Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integra-*

tive Potential, 33 LAW & SOC. INQUIRY 473 (2008).

6. Pamela Casey, Kevin Burke & Steve Leben, *Minding the Court: Enhancing the Decision-Making Process*, 49 CT. REV. 76 (2013). For an abridged version of the same article, see Pamela Casey, Kevin Burke & Steve Leben, *Minding the Court: Enhancing the Decision-Making Process*, INT'L J. CT. ADMIN., Feb. 2013, at 1.
7. Shai Danziger, Jonathan Levav & Liora Avnaim-Pesso, *Extraneous Factors in Judicial Decisions*, 108 PROC. NAT'L ACAD. SCI. 6889 (2011).

The court system is perfectly positioned to intervene in the lives of drug offenders and to facilitate treatment even before trial

sequential impact on the lives and freedom of those before them. We expect our doctors to offer their most thoughtful and well-researched recommendations regarding our treatment after reviewing our history, administering necessary tests, and making a thorough case evaluation; so too should individuals under our supervision—and tangentially, the public—expect nothing less from us.

Judicial imperfection is inherent in judicial decision making and impossible to eliminate, but it can be reduced with information produced from appropriate risk-and-needs assessments.

Signpost: Assess First, Sentence Last

Drug courts consistently require initial risk-and-needs assessments before program entry, as well as ongoing evaluations throughout the program to monitor progress and to ensure that proper treatment and services are provided. An assessment provides a comprehensive criminogenic examination of psychosocial problems; measures criminal risk factors; and measures other issues contributing to an individual's substance-abuse issues that, if addressed, will reduce the likelihood of recidivism or failure on community supervision.

Too often defendants are plagued with co-occurring issues or cognitive brain injuries, which can hinder their ability to navigate even life's daily obligations, much less court orders. Therefore, it is critical for a judge to be informed of the nature and extent of these problems to fashion a meaningful sentence that ensures the appropriate treatment is ordered and that proper probationary conditions are imposed—a sentence that will positively shape the defendant's future as well as protect the public. Good assessments before sentencing can mean the difference between success and failure. For example, one particular drug-court risk-and-needs assessment revealed that an offender, before the court for prostitution and drug usage, had been sexually abused by her father. Armed with that information, the court ensured that the probationer received trauma treatment.

Not every case requires special attention from the judge, but for those offenders who would benefit from more concentrated efforts, assessments can significantly enhance a judge's ability to make informed decisions, especially where drug and mental-health issues are extant. Good information and sound assessments are possible and, indeed, just as important in traditional courts. "Garbage in, garbage out" is sadly applicable without assessments, and obtaining sufficient information at the front end will decrease future probation-violation hearings and jail consequences and will avoid setting defendants up for most certain failure. Time constraints are a challenge, but, with sound case management, they are a challenge that can be overcome.

Signpost: Assess—The Sooner the Better

Drug-court research indicates that offenders should be enrolled in drug-treatment services "promptly"—that is, as quickly as possible—after a crisis or a triggering event when motivation to engage in treatment is strongest and before resolve diminishes.⁸ For many chemically dependent individuals, an arrest for drugs or related crimes is a crisis, an attention-capturing event that may motivate, at least momentarily, an offender's desire for help. Many traditional criminal courts lack the ability or willingness to address treatment issues until the merits of the case are resolved and the offender is definitively placed under a posttrial supervision order of the judge. However, failing to intervene with treatment during this critical early window of opportunity delays the offender's recovery and promotes the likelihood that the drug behavior will continue, affecting the offender, family, and community.

The court system is perfectly positioned to intervene in the lives of drug offenders and to facilitate treatment even before trial, leaving the lawyers to haggle over legal outcomes. For years, the Baltimore City judiciary recognized that the failure of the justice system to install identification and placement mechanisms immediately after arrest led to lost opportunities to engage drug offenders in early treatment while negative behaviors continued awaiting trial. After prodigious and concerted efforts and negotiations with health-department officials, however, certified assessors were assigned to each courthouse, and judges now routinely obtain same-day assessments and treatment placements before defendants leave the courts at any stage in the proceedings. Baltimore City's success is not unique but is regrettably far from standard. Early assessments and engagement in treatment is a best practice, and our citizens deserve nothing less.

TURN ON GUIDANCE SYSTEM: ENHANCE PROBATION

Many probation offices, inundated by large caseloads, often focus their limited resources on violent, higher-risk, younger defendants and place drug-addicted criminals on minimal supervision. Judges lament the ineffectiveness of probation and are frustrated by their inability to adequately help individuals under their supervision. By default, many defendants do not receive intensive support services and the stricter community supervision they need; regrettably, many of these individuals violate probation and are returned to the sentencing judge to address their failures. By that time, the persistent dysfunctional and damaging behavior has continued, if not compounded, their problems. The probationers have frequently committed new offenses, families and communities have been disrupted, and the negative cycle of despair and destruction has continued.

A judge's relationship with the defendant does not have to end after imposition of the original sentence. Drug courts provide the model for maintaining continuous contact with each participant through ongoing judicial interaction. At periodic status hearings or progress conferences, the court conducts meaningful exchanges with each participant to learn about the

8. SHANNON M. CAREY, MICHAEL W. FINIGAN & KIMBERLY PUKSTAS, EXPLORING THE KEY COMPONENTS OF DRUG COURTS: A COMPARATIVE

STUDY OF 18 ADULT DRUG COURTS ON PRACTICES, OUTCOMES, AND COSTS (2008).

participant's challenges and successes. Defendants are encouraged to express themselves to the judge, who monitors defendants' behavior and develops significant relationships with them that are critical to defendants' improvement and achievement of goals.

Signpost: Personalizing Probation

Certain defendants clearly warrant closer monitoring of their probationary conditions and will benefit from additional personalized support and attention from the court. Instituting periodic status reviews fills the gap between what traditional probation supervision can realistically provide and what offenders may actually need. Status reviews telegraph care and concern to neglected defendants who have received little attention or nurturing in their lives.

Additionally, the court is able to hold service providers accountable for their supervision and delivery of services and to encourage greater vigilance of the offender. As a result, judges have a front row seat to watch the positive changes and advances of their probationers—typically seen in drug-court settings but rarely in traditional courts. Hearings can also be structured to showcase these probationers before an audience, whose members are waiting their turn before the court, which also adds a therapeutic and didactic quality to the hearing.

Demands on judicial schedules warrant that only the most appropriate candidates are chosen to ensure that dockets are manageable and will be based on criteria determined by the individual judge (e.g., younger defendants, mental-health issues, poor motivation, depression, lack of family or community support). Additionally, the judge can regulate the frequency of these reviews to accommodate crowded court calendars and defendant needs (e.g., every two weeks, bimonthly, quarterly).

The positive impact that one caring judge can have upon defendants under his or her supervision is remarkable and is well worth the effort to justify the added work.

PERSONALIZED PROBATION: A SUCCESS STORY

Joe, a 19-year-old African-American defendant who appeared before a court for drug distribution had a sordid history of delinquency. In foster care since age 2, he was suspended from school numerous times and was expelled for fighting by the 10th grade. His inauspicious career in the juvenile system began as a car thief at age 13. By age 14, he smoked marijuana daily and soon graduated to pills and heroin. In addition to standard probation, the judge placed him on "personal probation," which required his periodic return to court for status conferences to monitor achievement of his probationary conditions that included obtaining a GED, a job, and life-skills training. His public defender, in an unusual gesture, also agreed to be his mentor and scheduled routine visits. Through periodic reviews, the court conveyed to Joe that his life mattered and that he would not be abandoned again. Joe thrived and successfully completed probation.

SHARE THE DRIVING EXPERIENCE: CREATE A PARTNERSHIP

There is often an inherent distrust of the police among the criminal population, which too frequently generalizes to the entire criminal-justice system. Previous justice-system experience also teaches offenders that it is unsafe to admit failures, confess drug relapses, or ask for help—especially to probation officers. However, these are exactly the disclosures that should be reinforced and rewarded to aid recovery. Drug-court judges embrace this behavior-management technique and regularly encourage—if not order—participants to inform their community supervisors, treatment providers, and drug-court team members of obstacles and of when they fear relapse, are in crises, or are in need of assistance. At drug-court hearings, participants will hear the persistent mantra "we cannot help what we do not know." The goal is to encourage defendants to seek help and to take responsibility for their recovery and success.

Signpost: Develop Trust

Traditional courts can create similar opportunities through "partnerships" or verbal or written contracts with defendants that encourage them to contact their attorney or probation agent or to return to court and seek assistance. To achieve success, defendants must broaden their support network, which includes the court, and pursue help before disaster strikes. The court must create a place of safety that encourages offenders to seek help when they are struggling with their treatment or when barriers thwart their recovery. Judges must ensure that probation officers will not threaten arrest of probationers who admit to drug use—otherwise, the probationers will refuse to share their mistakes. This does not convey a license to use drugs; rather, it establishes an environment where honesty is rewarded and help-seeking behavior is promoted. Research suggests that, on average, highly addicted offenders submit to multiple treatment episodes before reaching sustained recovery. One probationer did exactly as instructed and reminded the judge of "our partnership" when he appeared in court requesting help obtaining additional job services. The judge's staff, in turn, connected the probationer to the appropriate agency.

These "partnerships" are indeed possible in traditional courts, and defendants can be encouraged to take advantage of the judge's offer to intercede.

ENJOY THE SCENERY AND AVOID THE HAZARDS: SHAPE BEHAVIOR

The concept of sanctions and incentives is not part of the typical curriculum for new judges—or perhaps even envisioned as necessary during one's judicial career—but when employed correctly, it can greatly improve the judge's success with offenders. Behavioral management is based upon numerous scientific studies that support the use of contingency-management strategies of rewards to encourage positive behavior

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Behavioral research indicates that changes most consistently occur when individuals are rewarded for positive behavior.

and sanctions when necessary to reform behavior.

Behavioral research indicates that changes most consistently occur when individuals are rewarded for positive behavior. Drug courts consistently recognize and structure rewards for defendant progress by using a variety of tangible motivational devices, such as award of trinkets, gift cards or certificates, and bus passes. Intangible

responses, such as applause, praise, marking accomplishments in open court, and decreasing program requirements, are equally effective and powerful. Drug-court graduation ceremonies are standard events to celebrate achievement.

Noncompliant behaviors are handled through an array of graduated sanctions, which range from verbal reprimands; essays (write 25 things you will do the next time you are tempted to use drugs); courtroom or jury-box detentions; community service; and short periods of jail confinement.

Signpost: Using Incentives and Sanctions

Not every judge has either the temperament or desire to sit in drug court, and there is a range of motivational behaviors that even some drug-court judges will not engage. However, there are many alternatives to standard drug-court incentives and sanctions that can enhance the effectiveness of an offender's experience and improve case outcomes and that are remarkably effective in traditional court settings.

Research has garnered the following seminal principles that guide drug courts and can be adapted in other court settings:

Specificity. Clearly and unambiguously defining the behaviors that are expected will reduce confusion. Concrete words should be employed, such as "appear at all treatment appointments" and "complete community service within two months." In contrast, "do not engage inappropriate behavior" is not specific and is open to interpretation.⁹

Fairness. Participants are more likely to comply with court orders when they believe they are being treated fairly and with respect and that they are capable of completing the required behavior. Procedural fairness dictates that they should also be afforded an opportunity to explain their situation and understand the basis for the court's decision.¹⁰

Certainty. The judge should consistently monitor accomplishment of probationary conditions and specific goals and consistently respond by reward or punishment as appropriate.

Immediacy. Speed is essential. Incentives and sanctions should be imposed as soon after the behavior as possible to have the greatest influence on transforming behavior. Admon-

ishing a negative behavior days after its commission dilutes its effect or even renders the response fruitless.¹¹ Consider the ineffectiveness of admonishing a child for negative behavior weeks after the event.

Magnitude. The strength or severity of the incentive or sanction should be commensurate with what is realistically achievable by the defendant at the time of its imposition. One would not expect a novice jogger to win a 25K race without sufficient training. In the same vein, it would be unrealistic to demand abstinence before a chronic drug user has significantly engaged in treatment and developed skills to comply. Imposing severe sanctions too early can lead to frustration and a feeling of helplessness and may cause participants to abandon their efforts.¹²

Setting incremental and achievable benchmarks to note accomplishments is an excellent technique for encouraging behavioral change. Success can also be highlighted in open court. Linking completion of goals and positive behavior with incentives or rewards is another hallmark and standard in all drug courts. By example, a defendant on "personal probation" was praised by the court during a status hearing for presenting documentation that she had attended daily self-help meetings and acquired a sponsor. The judge subsequently reduced her probationary period upon proof that she completed treatment.

DON'T DRIVE UNDER THE INFLUENCE: DRUG TESTING

A robust drug-testing program is the most immediate, objective, and effective method of monitoring drug use and ensuring defendant accountability. However, to be effective, drug testing must be randomly administered, any day of the week. Reinforcing this point, a drug user once quipped, "When you schedule tests, I schedule usage." A vigorous drug-testing protocol is considered so vital that drug-court testing, according to the Best Practice Standards of the National Association of Drug Court Professionals, remains constant throughout the life of the program—certainly at least until the last phase of the program—even as most other requirements are decreased in response to advancement through the program (e.g., reporting to community supervision appointments or court hearings).

Signpost: Require Vigilant Drug Testing

The accuracy of self-disclosure, although encouraged, is inconsistent among the criminal-justice population and, as in drug court, the traditional court judge should maintain oversight by ordering defendants to submit to drug testing throughout probation. Ideally, testing should be random and no less than twice weekly for addicted individuals. A structured testing regime offers the court needed information to hold defendants accountable for their behavior and demonstrates the effectiveness of probation and the court's vigilance.

9. Douglas B. Marlowe, *Applying Incentives and Sanctions*, in THE DRUG COURT JUDICIAL BENCHMARK 139 (Douglas B. Marlowe & William G. Meyer eds., 2011).

10. TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2d ed. 2006).

11. James G. Murphy, Rudy E. Vuchinich & Cathy A. Simpson,

Delayed Reward and Cost Discounting, 51 PSYCHOL. REC. 571 (2001).

12. Douglas B. Marlowe & Kimberly C. Kirby, *Effective Use of Sanctions in Drug Courts: Lessons from Behavioral Research*, 2 NAT'L DRUG CT. INST. REV. 11 (1999).

LEARN FROM EXPERIENCED DRIVERS: COURTROOM CONNECTION

Drug-court hearings afford the judge continuous opportunities to instruct, motivate, encourage, or admonish, when necessary, participants in an effort to therapeutically promote positive behavioral changes. Hearings are didactic and educational for the individual standing immediately before the court, as well as for the audience members who await their turn. Drug-court judges also receive training regarding the physiological, cognitive, and behavioral effects of drugs on the system, as well as behavioral-modification and interviewing techniques to facilitate and improve their interactions with participants. The drug-courtroom setting provides a dynamic and continuous forum for participants to learn from both their individual interactions with the judge and from their fellow colleagues.

Signpost: Reach and Teach

Every court occasion, no matter the nature of the docket, provides opportunities for the court to connect with litigants and to help them learn. As the court commends an offender for attending parenting classes and reuniting with her child, the audience listens. As the court offers to find supportive housing and treatment for an addicted youthful offender who was abandoned to the streets at an early age, the offender feels less alone, thanking the judge for caring—and the audience listens. As the court discusses with warring parents alternatives to abusive language and physical fighting in front of their children, the audience listens. As the court reframes conflicts to empower individuals who feel victimized, the audience listens.

Learning how to encourage without preaching, to artfully guide others toward constructive behavior, does not require a psychology degree. But judges who obtain training regarding the physiological effects of drugs on the brain, the dynamics of mental-health issues, or motivational interviewing are better equipped to make a difference they hope to see in those under their charge.

Courtrooms can be arenas for tension, stress, and highly charged emotions. Litigants are often afraid and intimidated by their opponents, the lawyers, the judge, and the court process. Additionally, an increasing number of individuals appearing in court suffer from mental-health challenges and co-occurring disorders. Some litigants yell at opponents and display oppositional or even contemptuous conduct, which may be attributable to these behaviors. Again, a bit of training will aid the judge in considering the genesis of disruptive behavior and addressing these situations calmly and with aplomb and finesse.

MAKE STOPS ALONG THE WAY: PROVIDE SERVICES

After shyly exposing a mouth full of rotten teeth from years of neglect while chasing methamphetamine, one drug-court participant dejectedly admitted to the judge that she could not obtain employment. Other defendants lack education and have limited literacy, much less interview skills or adequate clothing. Many have destroyed relationships with family and friends who distrust them after years of abuse and are ill-equipped to repair the damage. The defendants have neither the necessary life skills nor adequate support networks to achieve success.

Successful drug courts fill holes in the lives of participants that years of addiction have created and provide an array of support services to aid recovery. Support services are varied and often include GED training, job training and placement, housing, medical and dental care, nutritional assistance, recovery support groups, meditation, mediation, and conflict-resolution training.

[D]rug-court techniques and concepts . . . are easily exportable to traditional courtrooms.

Signpost: Seek Community Support

Excellent drug treatment alone is insufficient without addressing the issues that contribute to addiction. Judges in all courts should consider the additional problems that can weaken a defendant's resolve and will compromise compliance with probationary requirements. Defendants who lack a place to sleep, for example, or cannot feed or clothe their children will find it difficult to concentrate on recovery and comply with probation requirements. In jurisdictions that are resource poor, judges—by virtue of their leadership status and position in the community—can develop partnerships and links to access services to improve the success of those under their supervision. Religious organizations, educational institutions, community coalitions, medical facilities, and service clubs are but a few examples of resources that can supplement the missing pieces that the court system alone is unable to fill. For example, judges have obtained bikes from police departments to aid participants with transportation, partnered with community organizations to facilitate housing placements, and connected with colleges to provide GED and literacy training. With a bit of ingenuity and outreach, judges can fill gaps in the system and locate needed services to improve probationers' success.

ARRIVE AT YOUR DESTINATION: CONCLUSION

"Behold the turtle. He makes progress only when he sticks his neck out."

—James B. Conant

The last 25 years of drug-court practice has proven that research-based, non-traditional approaches to judging significantly improve the life condition of defendants, reduce recidivism, and repair fractured lives. Drug-court practitioners are fervent about the ability of these programs to address deep-seated and exceedingly difficult issues of drugs and crime when other methods have failed. It is not surprising that judges routinely proclaim their assignments in drug court to be the most valuable and satisfying of their careers.

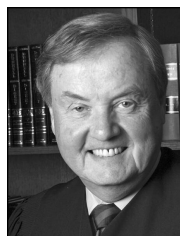
Drug-court judges, not satisfied with the status quo, are willing to implement innovative methods, are guided by new research findings, and make programmatic changes as needed. However, drug-court techniques and concepts are not the exclusive possessions of these programs and are easily exportable to traditional courtrooms. Judges in all assignments can experience the satisfaction and success enjoyed by drug-court practitioners.

For over a decade, the drug-court model has expanded to other specialized courts. Veterans' courts, mental-health courts, prostitution courts, homeless courts, dependency courts, community courts, and even co-parenting courts are founded on many of the same basic therapeutic principles employed in drug courts. Implementing a new specialized court is an option, but the critical components of a drug-court model can be replicated with surprising ease and success in traditional courtrooms without instituting an entire program. The options are many, and judges are limited only by their imaginations. All that judges need to do is to expose their necks a little.



Jamey Hueston is the founding judge of the Baltimore City Drug Treatment Court. She administered the program for over 20 years and has hosted hundreds of national and international visiting judges and others seeking to observe its operations and adapt them to their respective jurisdictions. She also founded and chaired the

Maryland Office of Problem-Solving Courts, one of the first statewide drug-court-oversight offices in the country, for over a decade and is a pioneer founder of the National Association of Drug Court Professionals. Judge Hueston lectures and consults throughout the U.S. and internationally regarding drug courts and court justice.



*Kevin Burke has been a Minneapolis trial judge since 1984. He established the first drug court in the state of Minnesota. He served several terms as chief judge of the Hennepin County District Court in Minnesota, a 62-judge court, where he instituted social-science studies examining—and reforms improving—procedural fairness. Burke coauthored the American Judges Association's white paper on procedural fairness in 2007. Since then, he and coauthor Kansas Judge Steve Leben have made invited presentations on procedural fairness to more than 3,000 state and federal judges. He is a recipient of the William Rehnquist Award. In 2004, the magazine *Governing* named him Public Official of the Year.*



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ORDERLY PLACE by Victor Fleming

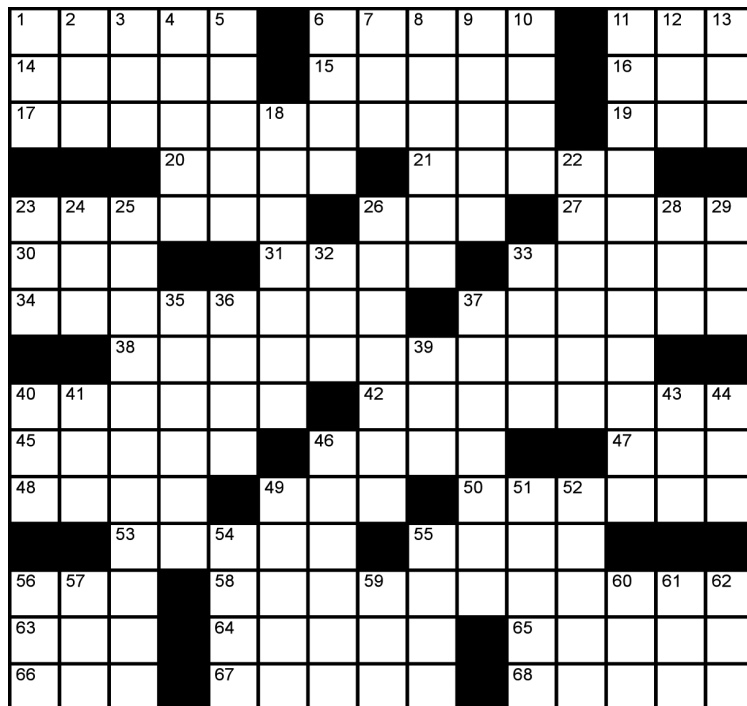
Across

- 1** Eights, in Madrid
6 Taco Bell topping
11 Banned insecticide, briefly
14 '90s singer Apple
15 Jones of the '69 Mets
16 Be sorry about
17 With 52-Down, judge's bud?
19 Dollar rival
20 No, to Natasha
21 Soprano's note
23 Caterpillar's quarters
26 ___ Paulo
27 Shade trees
30 Tuna type, on menus
31 Arduous activity
33 Party paper
34 One engaged in public displays of affection, often
37 Cheeseburger dripping, maybe
38 With 52-Down, "Let's let a judge decide!"?
40 Cope, slangily
42 Male-pattern ___
45 Primrose variety
46 "You remind ___ a guy I once knew"
47 Chromosome stuff
48 Minor party?
49 E, to Morse
50 Arizona health resort destination
53 It might be liquid or frozen
55 Mount from which Moses viewed the Promised Land
56 "Are you ___ at me?"

- 58** With 52-Down, not let a judge decide?
63 '50s campaign name
64 Garson of "Madame Curie"
65 "___ of One's Own"
66 Long-snouted fish
67 Dumbbell marking (abbr.)
68 Removable car roofs

Down

- 1** Not running
2 Fig. with a diameter
3 ___ polloi
4 Bridge bid, for short
5 Aiva competitor
6 Macbeth, for one
7 '80s TV E.T.
8 Kind of injection
9 Old Cleveland-based gas company
10 Rare blood type (abbr.)
11 Where a suit may be pressed?
12 To be paid
13 Two-digit card
18 One who might get down in the mouth?
22 Throughout this document
23 Baseball great Ripken Jr.
24 "Now I get it!"
25 Local judge, e.g. (one would hope)
26 Auxiliary wager
28 Army cops, briefly
29 "What did I tell you?"
32 Gold digger's strike
33 Lcky buildup



- 35** West Virginia city
36 Radar screen spot
37 Driver's aid
39 Eight-time NBA All-Star ___ Ming
40 Currently in
41 Tool used in a lumberjack competition
43 ___-Caps (movie candy)
44 ___ Luis Obispo
46 Hand protector
49 Surname on some lawn mowers
51 WWII convoy menace

- 52** Where a suit may be pressed?
54 APO addressee
55 Worker's rights grp.
56 Korean War fighting plane
57 Alias introducer
59 No. with an area code
60 Overly
61 Alley in a cave
62 Bands on the radio?

Vic Fleming is a district judge in Little Rock, Arkansas.

Answers are found on page 6.

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The Resource Page



NEW BOOKS

ADAM BENFORADO, *UNFAIR: THE NEW SCIENCE OF CRIMINAL INJUSTICE*. Crown Publishing, 2015. 400 pp. (\$17.43).

The unseen forces that make our criminal-justice system less fair than we would like is the topic of the debut book by law professor Adam Benforado. As an introductory backdrop, Professor Benforado compares 12th-century ordeals of water and fire to our current justice system. Will our ancestors 900 years from now look back on our current system with similar shock? Benforado thinks they will. Interweaving real cases and events with research findings from psychology and neuroscience, this book examines the underlying—often unconscious—unfairness throughout the criminal-justice system.



This unfairness stems from a number of sources, such as our automatic emotional responses, the way we label victims, neural deficits that can lead to criminal behavior, our desire for retribution, the fallibility of even DNA evidence, and situational influences on behavior. Many of the described empirical findings are the classics from research on psychology and law (e.g., eyewitness unreliability, false confessions, and false memories), but Benforado masterfully describes them in a way that provides a compelling argument for change. Although the book is relatively light on solutions to the inherent unfairness of our system, Professor Benforado does provide some notable suggestions, such as relying more on technology than human faculties. Overall, *Unfair* encourages its readers to take notice of potential injustices that undermine a truly fair legal system.



RESOURCES ON PROCEDURAL JUSTICE

ProceduralFairness.org
www.proceduralfairness.org

This website is entirely devoted to collecting materials related to procedural justice. The site focuses primarily on courts but also includes materials related to law enforcement.

Since January 2014, the website has been posting quarterly summaries (under the “Resources” tab) of new research, along with links to books, articles, presentations, and other materials available on the web. Several podcasts with researchers whose work was included in the quarterly reports can be found at the Procedural Fairness Blog (www.proceduralfairnessblog.org) part of the website. The blog also has suggestions on how to use video to improve a judge’s performance on the bench (www.goo.gl/906eze) and on specific courtroom behaviors that promote perceptions of fairness (www.goo.gl/4VVzSS).

Center for Court Innovation
<http://www.courtinnovation.org/topic/procedural-justice>

The Center for Court Innovation has been another key player in the procedural-justice movement. The website has links to research articles as well as interviews with a number of experts in the field. Under the “Publications” tab, you’ll find a recent publication that will be of interest to most judges: *Procedural Justice: Practical Tips for Courts* by Emily Gold LaGratta. The site also includes an evaluation toolkit that individual courts can use to gauge their procedural-justice performance.

National Center for State Courts
www.ncsc.org

In addition to its contributions to the ProceduralFairness.org website, the National Center for State Courts also has

many other useful resources. On its main website, under the “Information & Resources” tab, you’ll find materials related to “Public Trust and Confidence.” There’s also the Center on Court Access to Justice for All, found at www.ncsc.org/atj. That site includes a webinar on procedural fairness and the self-represented litigant, along with materials for a judicial-engagement curriculum designed to teach neutral engagement with self-represented litigants. In addition, the National Center offers CourTools, a set of performance-measurement tools found at www.courttools.org. The measures on “Access and Fairness” target procedural-fairness issues, and the National Center offers the courthouse-visitor surveys in both English and Spanish.



CONFERENCES OF INTEREST

Kern-Medina Seminar on Science and the Humanities
www.kernmedinaseminar.org

One of the more interesting educational programs specifically for judges is the Kern-Medina Seminar, held each June on the campus of Princeton University. This year’s conference is scheduled for June 9 to 14 and is open to both state and federal judges in the United States, as well as judges in other countries. (Canadian judges have attended.) The seminar is cosponsored by Princeton University and the Federal Judicial Center.

Programs cover a broad spectrum, such as world history, the human genome, the music of Beethoven, the European Union, and molecular biology. Each session includes a question-and-answer period with the expert presenter. The cost of the conference is \$625 per attendee, and judges often bring spouses (for an additional fee).

More information can be obtained at the conference website or by contacting retired judge B. Paul Cotter, Jr. (tcotter1@verizon.net), who coordinates the conference.