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Procedural Fairness Can Guide Court Leaders

Judge Kevin S. Burke

Former Congresswoman Barbara Jordan once said what the people want is an America as good as its promise. Courts play a vital role in achieving that promise. Being a court leader is not always easy, but it is a privilege and gives the opportunity to make a difference in people's lives: the people with whom you work and the people courts serve. Studies of the courts show that although the objective quality of the justice system has improved over recent decades, those improvements have not been matched by significantly higher levels of trust and confidence. This is especially true of minority group members. So, to achieve a justice system as good as the American promise, more is needed. We need remarkably good court leadership.

TRADITIONAL JUDICIAL ROLE AND PROCEDURAL FAIRNESS

There has always been criticism of judges. While some may focus on President Trump's tweets attacking judges by name, in Trump's defense, President Jefferson did the same thing (okay, Jefferson used a quill pen). Jefferson attacked Chief Justice Marshall with such intensity that Marshall wrote letters to the editor under assumed names to defend himself. Criticism, hotly contested elections or the confirmations process, tweets, and social media postings have reached such a decibel level that the legitimacy of judicial decision making is fractured. For example, 75 percent of the public now think judges' decisions are to a significant or moderate extent influenced by the judge's political or personal views. Virtually the same percentages of people believe judges make their decisions influenced by a desire to be appointed to a higher court.¹

Procedural fairness is not something new. For decades judges have listened to litigants and treated them respectfully. The study of procedural fairness has fostered a more robust understanding about how judges should act in the courtroom. Voice, appropriate understanding of neutrality, respect, and trust are values more and more judges embrace. The modern era judge understands that getting the rule of law correctly is not enough. The use of power has a place in the arsenal of a judge, but judicial intimidation, more often than not, will be ineffective. Procedural fairness leads to greater compliance with court orders and builds trust in the courts.

New judge training in many states as well as the federal judiciary teach the importance of procedural fairness. Some courts measure procedural fairness. In a few states, judicial performance commissions are firmly rooted in procedural fairness principals. However, not every perception of courts is driven by a litigant or lawyer's experience in a courtroom. People interact with court staff in a myriad of ways. If the interaction of court staff and the public is not rooted in procedural fairness principles, a lot of peo-

ple are going to leave the courthouse dissatisfied. But if the staff does not feel the court leadership leads by adhering to procedural fairness principles, you have a courthouse with a big problem. We therefore need to think of procedural fairness as a leadership skill in addition to how judges conduct ourselves in a courtroom.

NEEDS AND CHALLENGES OF COURTHOUSE LEADERSHIP

In a crassly simplistic way, management thinking says, "Find the source of the pain and stop it." Effective court leadership calls for a deeper understanding of things. While managers may do an effective job of fixing problems, leaders stay in the chaos long enough to discover chronic patterns and find creative new approaches to perennial problems. Dr. Warren Hoffman, a noted leadership coach, puts it this way:

Management is responsible for managing the manageable, fixing the fixable, securing the securable, and protecting resources. That's not very risky. Authentic leadership, however, is dealing with surprises, describing the unknown, predicting the unpredictable, anticipating the nameless and anonymous, organizing chaos, and stepping in places where angels fear to walk, speaking with authority from a dusty crystal ball, staying positive and hopeful while everyone else is going insane. Now that's risky.

Courts desperately need risk-taking leaders. Whether they are public or private, organizations that thrive have one common bond: they are spirited and not afraid to take calculated risks. It is not always easy to be a leader of public institutions and take risks. Not every new court initiative will be a success. However, fear that a failed initiative will generate bad news coverage or, worse yet, public criticism from the other branches of government is chilling. Just as fear in a courtroom inhibits the voice of litigants or understanding of the process, fear inhibits courts from learning and trying new ways to serve their communities.

There are multiple reasons why courts find it hard to take calculated risks. Debate within courts about alternatives is sometimes not always as vibrant as it should be. Voice is the first tenant of procedural fairness in the courtroom and it is the first tenant in building an effective courthouse work environment. Judges who practice procedural fairness in the courtroom know that intimidation can inhibit the voice of litigants. Power relationships between judges over the rest of the courthouse staff can inhibit their voice and ultimately their creativity. Litigants need to understand why a judge makes a decision and that is equally true if you aspire to be a good court leader.

Footnotes

1. Annenberg Public Policy Center of the University of Pennsylvania, 2007.

Embracing dissent in a courthouse is not easy for a lot of court leaders. To say court leadership is like “herding cats” sometimes seriously understates the challenge. Occasionally, one of these cats is not a cute kitten, but a feral cat that bites. Dissenters can be obstructionists and a pain to deal with, but dissenters can also provide a different perspective. As such, they need to be protected from pressure to remain silent. Effective court leaders view dissent as an opportunity for feedback — and essential if candor and risk taking are courthouse values. A leader never can afford to become isolated and among the challenges for all judges is how to avoid being isolated.

“Groupthink” is a term first used by social psychologist Irving L. Janis. Groupthink occurs when well-intentioned people make irrational decisions spurred by the urge to conform, or by the discouragement of dissent. Groupthink is minimized by trust. As Robert Shaw said,

A high level of trust allows people to say what is on their minds and not feel that it will come back to hurt them. A sufficient level of trust ensures that lines of communication are open and that no one is hiding information or wasting time trying to decide the political implications of his or her views. (Shaw, 1997).

Just as people have personality, organizations have a culture which is another way of saying a court has a personality too. Courts are strange organizations. For the most part, someone else picks the judges. No law firm could survive if an external source picked the law firm’s partners with no input from the existing partners, or sometimes without even a decent insight into the firm’s needs. Courts do select their staff, and there are many highly skilled court administrators on a courthouse staff. They do a lot of things that judges may not even know about. Many of the people who work in the court may not know what judges do. Ask your courthouse staff, “How many of you have seen a jury trial or understand what a motion for summary judgment is?” and you are likely to find a lot of puzzled looks.

It has almost become trite to talk of the inherent conflict in professional organizations as a clash of cultures: the organizational culture, which captures the commitment of managers, and the professional culture, which motivates professionals. Judges identify with their profession. Ask them what they do and they will respond, “I am a judge.” The rest of the court staff identify with their organization. Ask them what they do and they will respond, “I work for the court.” Each of us play an important role in the courthouse and in explaining to our neighbors what the court does. The best run courts have less clash and more blended court leadership drawing upon the strengths (and minimizing the weaknesses) of judges and court staff.

BUILDING YOUR LEADERSHIP SKILLS

Taking over as a new court leader or even just trying to improve your skills as a court leader is not easy because no court starts from scratch. There is a history in every courthouse. Frederick Douglas once said, “It is easier to build strong children than to repair broken men.” Change is not an easy task but just because something is not easy does not mean it is not the right thing to do. A new leader can be confronted with “this is the way we always have done it” attitude. Change with no purpose is silly

but so is rigid adherence to old or outdated ways of doing things. The author Mandy Hale once wrote, “Change is painful, but nothing is as painful as staying stuck somewhere where you don’t belong.”

Change may involve the use of a power. Power is not a term many are comfortable using, but it is real and it drives decision making in a positive or negative way. In a courtroom there is a strong power atmosphere. It may start with: “All Rise! The Honorable Judge Hang’m High Presiding.” But power in court leadership is there, too. Reflecting on the word “power” may help. For example, a judicial colleague is fellow worker in the same profession. Our bench socializes—we get along. Colleagues are important, but not as important as collegiality, which is the sharing of authority and power among colleagues. Sharing power is often not easy, and for some, is downright uncomfortable. An effective court leader fosters the creation of an atmosphere conducive to sharing power.

Values are part of any organization. Discussion about the values that are present in a court frustrates some, but every organization (and courts are an organization) has values. Building a strong set of healthy values in the courthouse may be the most important legacy any leader can have. Loyalty is an important organizational value. “Do my colleagues have my back?” If you are a judge under unfair attack it can be a lonely existence. But the existence of a judge under attack can also be true for court employees.

PROCEDURAL FAIRNESS AND COURTHOUSE LEADERSHIP

In many respects procedural fairness is simply a set of strongly held values that drive our conduct as judges. Voice is an important value. “Do people in my court feel free to speak up?” Respect is an important value. Respect for the role judges play in our democracy is vital. But respect is just as vital for everyone who works in the courthouses. Once an issue becomes about respect, or lack of it, the facts are more or less irrelevant. Trust is an essential value for a courthouse. Author Stephen Covey says, “Simply put, trust means confidence. The opposite of trust—distrust—is suspicion.” Judges need to trust colleagues, managers need to trust staff, line staff needs to understand the direction of the court, have a sense of participation in it, and trust that court leaders care about their welfare, too. Trust allows us to share power and information. Trust is a prerequisite for those who are asked to follow.

We serve at a time of eroding confidence in institutions. Trust is not a given in a courthouse. Trust is earned. There can be a reservoir of it (e.g., give him or her a break). But, if you are not careful, trust can be quickly dashed. Trust, in part, is a willingness to be vulnerable to the actions of others. Trust requires some degree of faith that positive expectations will be met, and trust is a belief in the goodwill of the people with whom you work. For court leaders to achieve courthouse trust, they need to perform competently. They need to communicate honestly and openly. They need to share and delegate control. Above all, they need to show genuine concern for others. Trust enhances the first value of a good court: loyalty.

The difference between a vision and an hallucination is simply the number of people who can see it. A good court leader, there-

“Embracing dissent ... is not easy for a lot of court leaders.”

fore, needs to be a skilled communicator. We live in an age where too much information can be as discouraging as too little. Do you know anyone who says “I didn’t read the email,” or “I just get too many emails”? So, if you want to be a good communicator you need to learn the skill of writing good emails—and the wisdom to know when that form of communication is not appropriate. A good email sent to everyone leads to a plethora of individual discussions and reactions to what you wrote. Humor, for example, is a tool that might achieve that goal.

If people conclude that court leaders do not really care what they think if they are not speaking “the company line,” they stop saying what they really think (or, worse yet, they stop thinking), and then the court is doomed. Preventing this dysfunction begins with an honest assessment of the court’s present culture: the values and behaviors that contribute to the unique social and psychological environment of a court. There are times when a leader needs to set a vision and get buy-in, but not every decision requires a leader to influence the decision from the onset. One way for leaders to limit their influence and bias is to ask open-ended questions like: “What do you think we should do?” “Why?” and “How?”

While there are times when court leadership is hard, no one puts a gun to your head and says, “You’re our court leader!” Being a court leader is a privilege, which can be fun almost all of the time. Good morale created by a court leader who enjoys the job is infectious. It helps if you are secure enough not to insist you get your way with your methods. Leadership often requires setting a vision and then getting people to buy into that vision. But, setting the tone for dialog is perhaps just as important. Dale Lefever says, “[I]n the business of trust, the leader needs to ante up first. It is a lot easier for a subordinate to speak freely, if the model for speaking freely has been demonstrated and encouraged by the court leader.” So, how do you do that? Court leader-

ship should not be reduced to a bullet point. But, if it were:

Share All the Information; Build Trust. The failure to be transparent destroys trust. Effective courthouse leadership starts with relationships. If trust does not exist, then neither does the possibility of a court culture that values constructive dissent.

Listen First; Talk Second. Precisely how much time do you put directly into courthouse communication? If your answer is, “I’m not sure,” it is not enough. Each month, how often do you have lunch with colleagues you frequently disagree with? Nitin Nohria, Dean of the Harvard Business School, says communication is the real work of leadership. One effective leader meets with five randomly selected employees each month. That leader is a facilitator of discussions prompted by open-ended questions. Another effective leader randomly calls several employees every month—just to talk.

Don’t Shoot the Messenger. The best leaders do not foster personality conflict, but embrace task conflict. The worst leaders make task conflict into personality conflict. Hearing alternative viewpoints does not mean you are weak or ineffective.



Judge Kevin Burke is a district court judge for the Hennepin County District Court, appointed in 1986. He was the chief judge for eight years divided into two terms. Judge Burke is a frequent contributor to the improvement of the judiciary as a writer and speaker as well as faculty member for the University of Minnesota Law School and the University of St. Thomas Law School.

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