Enhancing the Decision-Making Process: Key Ingredients for Effective Judging

Dr. Pamela Casey
Judge Steve Leben
IOTJ Conference
November 4, 2013
What people want is an America as good as its promise.

- Barbara Jordan
Making Better Judges®

• What can we do as judges to improve our performance so as to give people a justice system as good as the promise of justice?
Making Better Judges®

• What can we do as judges to improve our performance so as to give people a justice system as good as the promise of justice?

• The AJA’s two-step plan:
  – Improved procedural fairness
  – Better decision making
• AJA White Papers
  – 2007: Procedural Fairness
  – 2010: Judicial Elections
  – 2012: Judicial Decision Making

[The papers in red were recently noted in a CCJ/COSCA resolution urging courts to promote procedural-fairness concepts.]

• The 2012 White Paper
  – A collaboration between AJA and the National Center for State Courts
  – On the web: http://goo.gl/8lWQn2
Making Better Judges

• Today’s Presentation
  – What the public thinks of us
  – A quick tour through procedural fairness
  – Thoughts on how we make decisions—and how we can do better in approaching decision making
  – Putting this all together in the courtroom—and how to follow up on this back in your courthouse
PUBLIC OPINION
Current Climate: Public Distrust

As of Oct. 2013, lowest approval ever on this question (since 1971).
Current Climate: Public Distrust

Trust in Three Branches of U.S. Government
Figures are percentages with a great deal/fair amount of trust in the branch

GALLUP®
But some good news

Trust in State and Local Government

Figures are percentages with a great deal/fair amount of trust in the level of government

GALLUP
Public Attitudes Toward the Courts

• Consider:
  – Depth of knowledge
    • Only about half of people are aware that the United States Supreme Court can declare a statute unconstitutional.
  – Views of our legitimacy as an institution
    • Ratings of all branches of government are lower than normal.
In your opinion, to what extent do you think a judge’s ruling is influenced by his or her personal political views—to a great extent, moderate extent, small extent, or not at all?

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
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<tbody>
<tr>
<td>Great extent</td>
<td>33%</td>
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<tr>
<td>Moderate extent</td>
<td>42%</td>
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<tr>
<td>Small extent</td>
<td>16%</td>
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<tr>
<td>Not at all</td>
<td>5%</td>
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<tr>
<td>Don’t know</td>
<td>3%</td>
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Source: Princeton Survey Research Associates International Poll for the Annenberg Public Policy Center

www.annenbergpublicpolicycenter.org
In general, to what extent do you think a desire to be promoted to the next higher court would affect a judge’s ability to be fair and impartial when deciding a case—to a great extent, moderate extent, small extent, or not at all?

<table>
<thead>
<tr>
<th>Response</th>
<th>Percentage</th>
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<tbody>
<tr>
<td>Great extent</td>
<td>35%</td>
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<tr>
<td>Moderate extent</td>
<td>40%</td>
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<tr>
<td>Small extent</td>
<td>9%</td>
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<tr>
<td>Don’t know</td>
<td>3%</td>
</tr>
<tr>
<td>Refused</td>
<td>1%</td>
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</table>

Source: Princeton Survey Research Associates International Poll for the Annenberg Public Policy Center

www.annenbergpublicpolicycenter.org
U.S. Supreme Court Approval: The Partisan Divide since *Bush v. Gore*
Weak Numbers on Some Key Principles

Thinking about the (STATE) court system, please tell me whether, in your opinion, each of the following words or phrases describes the state’s courts very well, well, not very well, or not well at all.

<table>
<thead>
<tr>
<th>Perception</th>
<th>Very Well</th>
<th>Total Very Well / Well</th>
</tr>
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<tbody>
<tr>
<td>Fair and impartial</td>
<td>18</td>
<td>57</td>
</tr>
<tr>
<td>Provide equal justice to all</td>
<td>19</td>
<td>54</td>
</tr>
<tr>
<td>A good investment of taxpayer dollars</td>
<td>13</td>
<td>49</td>
</tr>
<tr>
<td>Provide good customer service to people dealing with the courts</td>
<td>12</td>
<td>44</td>
</tr>
<tr>
<td>Overwhelmed</td>
<td>28</td>
<td>59</td>
</tr>
<tr>
<td>Inefficient</td>
<td>19</td>
<td>47</td>
</tr>
<tr>
<td>Underfunded</td>
<td>16</td>
<td>45</td>
</tr>
<tr>
<td>Intimidating</td>
<td>17</td>
<td>39</td>
</tr>
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Source: NCSC/Justice at Stake survey, June 2012 (MOE ± 3%).
Judges v. The Public
Rating the Courts in Your State

![Bar chart showing ratings of the courts by judges and the public.]

- **Excellent**: Judges: 35%, Public: 8%
- **Good**: Judges: 61%, Public: 50%
- **Just Fair**: Judges: 4%, Public: 33%
- **Poor**: Judges: 0%, Public: 6%

A QUICK TOUR:
PROCEDURAL FAIRNESS
What Does Fair Mean?

• Outcome favorability: Did I win?
• Outcome fairness: Did I get what I deserved?
• Procedural fairness: Was my case handled through fair procedures?
Lawyers vs. the Public: Predictors of Confidence

Relative importance of significant factors on overall court approval

Attorneys

- Fair procedures
- Fair outcomes

Public

- Fair procedures (most important)
- Fair outcomes

Source: California State Courts study, 2005.
Components of Procedural Fairness

• Voice
• Neutrality
• Respect
• Trustworthy Authorities
Voice

• People want the opportunity to tell their side of the story and have their stories told to a judge who listens carefully.
Neutrality

• Decision maker is transparent and open about how decisions are being made.
• Gives an explanation in terms understandable by a lay person.
• Cites to relevant statutes, rules, or court policies.
Respect

• Taking people’s concerns seriously
  – Shows respect for them as people and as citizens who have the right to address the court about their issues.

• People come to court about issues that are important to them, irrespective of whether they have a strong legal case.
  – Judges need to explain why those concerns can or cannot be accommodated in a legal setting.
  – The same concerns apply to court employees.

• Respect for their rights
  – Give people information about what their rights are. Tell them how to complain to higher authorities.
Trustworthy Authorities

- Studies of legal authorities constantly show that the central attribute influencing public evaluations of judges is an assessment of the character of the decision maker (sincere, caring).
  - Are you listening to and considering people’s views?
  - Are you trying to do what is right for everyone involved?
  - Are you acting in the interests of the parties, not out of personal prejudice?
MINDFUL DECISION MAKING
What Are You Doing Right Now?

How We Process Our World
Making Decisions: Traditional View

Careful Deliberation
How Are Bail Decisions Made?

“[T]he situation...depends on an enormous weight of balancing information, together with our experience and training.”

“[W]e are trained to question, and to assess carefully the evidence we are given.”

Magistrates to Researchers

Dhami & Ayton (2001)
Making Decisions: Another View

Quick & Automatic
Dual System of Information Processing

- Reflective (Deliberate)
  - Analytic, slow, conscious
  - Limited capacity

- Reflexive (Intuitive)
  - Automatic, rapid, unconscious
  - Always working
A Demonstration of Limited Capacity
Reliance on Automatic Processing

“Most of the time we solve problems without coming close to the conscious, step-by-step analysis of the deliberative approach. In fact, attempting to approach even a small fraction of the problems we encounter in a full, deliberative manner would bring our activities to a screeching halt. Out of necessity, most problem-solving is intuitive.”

Brest & Krieger (2010)
How Do We Process So Fast?

- Reliance on Schemas (recognized patterns)
- Use of Heuristics (rules of thumb)
Schemas Based on Associations Learned Over Time
But Schemas Can Also Be Problematic

• Based on incomplete information -- stereotypes

• Resistant to change – confirmation bias

• Applied incorrectly
Example of Faulty Schema: Implicit Bias

• Implicit attitudes and stereotypes about social groups (e.g., age, gender, race)
• Operate below the radar—not aware of them
• Can affect behavior even by those who consciously strive to be fair and objective
Measuring Implicit Bias: Reaction Time

Time 1

Old (Picture)
OR
Good (Word: Joy, Happiness)

Time 2

Young (Picture)
OR
Good (Word: Agony, Failure)

Old (Picture)
OR
Bad (Word: Ugly, Failure)
Implicit Bias Research

• Project Implicit: Implicit Association Test (IAT)
• Review of 2.5M IATs taken from 2000 to 2006: Pervasiveness of implicit preferences for socially privileged groups
• Implicit bias can influence decisions such as
  – Employers hiring job applicants
  – Police officers deciding to shoot
  – Healthcare workers providing medical treatment
  – Voters making candidate choices
What About Judges?

Rachlinski, Wistrich & Guthrie (2009)

• White judges showed a strong white preference.
• Black judges showed no clear overall preference.
• Some evidence suggested effects on sentencing.
• Key finding: “[W]hen judges are aware of a need to monitor their own responses for the influence of implicit racial biases, and are motivated to suppress that bias, they appear able to do so.”
More on Implicit Bias

www.ncsc.org/ibeducation

http://goo.gl/ze035A

www.projectimplicit.net

Addressing Implicit Bias in the Courts

Project Implicit investigates thoughts and feelings that exist outside of conscious awareness or conscious control. Visit the research or demonstration websites to try out some tests and learn more about the research and yourself!
How Do We Process So Fast?

- Reliance on Schemas (recognized patterns)
- Use of Heuristics (rules of thumb)
Heuristics

• Mental shortcuts, approximations, rules of thumb used to make judgments quickly and efficiently
• Rely on only some of the information available
• Often work (sometimes are better)
• Like schemas, sometimes lead us astray
Examples of Heuristics

• Anchoring
• Reliance on small samples
• Framing
• Hindsight
• Egocentric
Are judges immune from common heuristic errors?

A Theory: Judges have been specifically trained to follow procedural rules designed to minimize the influence of irrelevant information. So maybe they aren’t subject to common heuristic errors.

“I still say it’s only a theory.”
What About Judges?

Englich & Colleagues (2006):
• Judges influenced by randomly determined anchors (journalist’s question, prosecutor’s random sentence demand, judge’s throw of dice)

Guthrie, Rachlinski & Wistrich (2001):
• Judges exposed to anchor of $75,000 awarded damages of almost 30% less ($882,000 average v. $1.25 million)
Recap

• Behaviors and decisions result from a combination of both reflexive and reflective processes
• Both are necessary (default-intervention model)
• Bring awareness to the extent of automatic processing
Mindful Attention Awareness Scale

• I find it difficult to stay focused on what’s happening in the present.

• I tend to walk quickly to get where I’m going without paying attention to what I experience along the way.

• I find myself listening to someone with one ear, doing something else at the same time.

• I do jobs or tasks automatically, without being aware of what I'm doing.
Some Factors Affecting Awareness and Mindful Decision Making

• Fatigue
• Depleted resources
• Multitasking
• Mood
• Fluency (ease of processing information)
Fatigue

• Sleep deprivation leads to lack of innovation, inflexibility of thought processes, excess attention to distractions, over-reliance on past strategies, unreliable memories, loss of empathy, and inability to deal with unexpected events.

• These effects can occur when sleep is reduced to 6 or fewer hours over a 14-day period, which caused problems equal to those caused by 2 full nights of sleep deprivation.
Depleted Resources

• Glucose levels important for (and depleted by):
  – Maintaining self-control
  – Maintaining attention
  – Coping with stress

• Rely more on reflexive processes when glucose levels are low; reflective processes take more energy.
Multitasking

• Brain “multitasks” by rapid task switching, not actually multitasking.

• Almost universally (97% of people), multitasking has a cost in performance.

• Practice does not make perfect. High media multitaskers were worse at task switching.

• Crash risk of using “hands-free” cell phone while driving comparable to DUI.

• Why we do it: It feels good.
Multitasking: Are you really among the 3%?

Watson & Strayer (2010):

Indeed, our studies over the last decade have found that a great many people have the belief that the laws of attention do not apply to them (e.g., they have seen other drivers who are impaired while multitasking, but they themselves are the exception to the rule). In fact, some readers may also be wondering whether they too are supertaskers; however, we suggest that the odds of this are against them.
Multitasking on the Bench: Norway
Stroop Test Part 1

• On the next slide:
  - Name *the color* of each word that you see as it appears
Stroop Test Part 1
Stroop Test Part 2

• On the next slide:
  – Name the color of each word that you see as it appears
Stroop Test Part 2

Blue  Purple  Green

Red  Orange  Blue

Red  Green
What’s going on?

• Functional interference – our ability to read overrides our ability to abstract

• There is a finite number of things we can concentrate on – The rest is below the radar, but active

• In this case the reflective function is overridden by the reflexive function

➤ Sometimes you have to consciously engage in the (reflective) decision-making process.
Strategies to Check Automaticity

• Focus on purpose
• Be mindful and read the dials
• Use decision aids
• Seek feedback and foster accountability
• Formalize and critique decision heuristics
Focus on Purpose

• Do you ever feel like this:

  Instead of cans of peas, you’ve got cases. You just move ’em, move ’em, move ’em. One of my colleagues on the bench said: “You know, I feel like I work for McJustice: we sure aren’t good for you, but we are fast.”

  (Former Minn. Chief Justice Kathleen Blatz)
Focus on Purpose

• Those who see purpose in work likely to experience greater levels of meaningfulness.
• Don’t let press of business overwhelm big picture.
• Why did you become a judge?
  – Justice & fairness are the goals.
  – What do these people expect and deserve from their justice system?
  – How can you contribute to a justice system that is fair and just—and to a fair and just result that the parties to each case understand and consider to be fair?
Be Mindful & Read the Dials

• Am I getting easily distracted?
• Am I multitasking?
• What’s going on in the environment (e.g., background noise, temperature)?
• Is it time for a break or a snack?
• Is my mind wandering?
The Wandering Mind

HARVARD gazette

Wandering mind not a happy mind

About 47% of waking hours spent thinking about what isn’t going on

November 11, 2010

By Steve Bradt, Harvard Staff Writer
Mindfulness: Overcoming Mind Wandering

“If one's purpose is to make better, more effective decisions, one must be self aware. There are tools and practices that one can use to improve their self awareness and mindfulness is one of them. Most of us either are unaware of these tools and practices, or they have been inaccessible.”

Jon Kabat-Zinn (1990)
Justice Stephen Breyer

For 10 or 15 minutes twice a day I sit peacefully. I relax and think about nothing or as little as possible. And that is what I’ve done for a couple of years. . . . And if you are under stress, meditation—or whatever you choose to call it—helps. Very often I find myself in circumstances that may be considered stressful, say in oral arguments where I have to concentrate very hard for extended periods. If I come back at lunchtime, I sit for 15 minutes and perhaps another 15 minutes later. Doing this makes me feel more peaceful, focused and better able to do my work.
Some Thoughts on Mindfulness

• Prof. Amishi Jha, University of Miami
  – [www.amishi.com](http://www.amishi.com)
  • The Jha Lab: Exploring the Stability and Mutability of Attention and Working Memory
  • On her website, she provides an overview and tells how mindfulness training improved the mental faculties of Marines training for deployment.
    – Mind Fitness Training
Mindfulness Decision Making

“The main business case for meditation is that if you’re fully present on the job, you will be more effective as a leader, you will make better decisions and you will work better with other people.... I tend to live a very busy life. This keeps me focused on what’s important.”

William George to *FT Magazine* reporter David Gelles (8/24/2012)
Physician’s Mindfulness Skills Can Improve Care for Patient and Provider
STOP Meditation

• **Stop** what you are currently doing
• **Take** a deep breath and focus on the sensation of breathing
• **Observe** what you are thinking, feeling, and doing, and
• **Proceed** with new awareness
Mindful Decision Making Strategies

• Use decision aids (checklists, risk assessment instruments, benchcards)
• Seek feedback and foster accountability
• Formalize and critique decision heuristics
Putting These Concepts into Daily Work

IN THE COURTHOUSE
Let’s Put This Into Practice

• Courtroom situations
• Improving individual skills
• Measuring fairness performance and improvement
• The courthouse environment
Procedural Fairness in a Nutshell

• Was the person listened to?
• Were litigants treated with respect?
• Do they understand:
  – What the decision was?
  – Why the decision was made?
  • Neutral principles
A Real-World Example

• [Video of judge on bench; DV hearing.]
Another Real-World Example

• [Video of judge on bench; small-claims hearing.]
Improving Individual Skills

• Evaluate the way you come across on the bench
  – One option: videotape
  – Another option: have a colleague observe you
  – Another option: have a communications professor observe you

• Work on mindfulness and decision-making skills
Measuring Fairness

• Many courts (or judges) use the CourTools survey prepared by the National Center for State Courts (Measure 1: Access and Fairness)
  – Sample questions (rate agreement on 1 to 5 scale):
    • The way my case was handled was fair.
    • The judge listened to my side of the story before he or she made the decision.
    • The judge had the information necessary to make good decisions about my case.
    • As I leave the court, I know what to do next about my case.

[Note: Earlier, the suggested strategies for “checking automaticity” included seeking feedback and fostering accountability.]
PLEDGE OF FAIRNESS

The fundamental mission of the Alaska Court System is to provide a fair and impartial forum for the resolution of disputes, according to the rule of law. Fairness includes the opportunity to be heard, the chance to have the court process explained, and the right to be treated with respect. The judges and staff of the Alaska Court System therefore make the following pledge to each litigant, defendant, victim, witness, juror, and person involved in a court proceeding:

We will LISTEN to you

We will respond to your QUESTIONS about court procedure

We will treat you with RESPECT
The Courthouse Environment

• Make your goals clear.
  – Everyone who comes to court should go away feeling that they have been listened to and treated fairly.

• Adopting fairness measurements—and repeating them over time—shows the priority.

• Work on skills improvement together with staff.
  – HRDQ has a “Learning to Listen” program (available on the web or in a booklet) that could be done by judges, staff, or both together.
  – What courthouse couldn’t use better listeners?
Biggest Room for Improvement Is in High-Volume Dockets

Relative Public Approval Levels
By Court Case Type

Civil
Criminal
Small Claims
Family
Traffic

Source: California Survey (2005).
For More on Procedural Fairness . . .
Another way to follow up

• Before you leave this conference, or on the way home, make a plan that will engage your staff and others in your courthouse.
To Be A Leader:
All You Need Is Commitment

“Very good. Now go out there and convince others.”

To contact us: pcasey@ncsc.org or sleben56@gmail.com.
Three Questions

1. What is the one thing I learned and most want to remember?
2. What is one thing I’d like to commit to action?
3. What would you like more information about?