

2015

Listening from the Bench Fosters Civility and Promotes Justice

Paula Lustbader

Seattle University School of Law

Follow this and additional works at: <https://digitalcommons.law.seattleu.edu/sjsj>



Part of the [Legal Ethics and Professional Responsibility Commons](#)

Recommended Citation

Lustbader, Paula (2015) "Listening from the Bench Fosters Civility and Promotes Justice," *Seattle Journal for Social Justice*: Vol. 13 : Iss. 3 , Article 13.

Available at: <https://digitalcommons.law.seattleu.edu/sjsj/vol13/iss3/13>

This Article is brought to you for free and open access by the Student Publications and Programs at Seattle University School of Law Digital Commons. It has been accepted for inclusion in Seattle Journal for Social Justice by an authorized editor of Seattle University School of Law Digital Commons. For more information, please contact coteconor@seattleu.edu.

Listening from the Bench Fosters Civility and Promotes Justice

Paula Lustbader*

INTRODUCTION

Civility, defined as acting with respect for self and others, enhances the practice of law, benefits the parties involved in the legal system, and supports the pursuit of justice. Justice Sandra Day O'Connor states that "[p]ersonal relationships lie at the heart"¹ of lawyers' work and this "human dimension remains constant[.]"² "[C]ivility can only enhance the effectiveness of our justice system, improve the public's perception of lawyers, and increase lawyers' professional satisfaction."³ Justice Steven González makes an important distinction between what he calls "true civility" and "false civility."⁴ He explains that because true civility depends on "the context, cultural factors, and on so many other things that there cannot be one rigid definition of civility."⁵ Apparent politeness alone—for example, using polite words with a patronizing or insincere tone—does not

* Professor of Law, Seattle University School of Law; President, Robert's Fund-Fostering Civility in the Legal Profession. Professor Lustbader is particularly indebted to her research assistant, Teresa Koza, M.S.W. and current J.D. student, who made significant contribution to this article. Professor Lustbader is also grateful for the feedback she received from the following people regarding this paper: G. Andrew H. Benjamin, J.D. Ph.D. ABPP; Justice Mary E. Fairhurst, J.D.; William Galloway, J.D.; Timothy Jaasko-Fisher, J.D., M.A.; and Justice Mary I. Yu, J.D., M.A.

¹ Sandra Day O'Connor, *Professionalism*, 78 OR. L. REV. 385, 386 (1999).

² *Id.*

³ *Id.* at 387.

⁴ Steven González, *True Civility Requires More Than Being Polite*, WASH. BAR NEWS, Sept. 2012, at 25, available at http://www.wsba.org/News-and-Events/Publications-Newsletters-Brochures/~media/Files/News_Events/Publications/Bar%20News/2012%20Full%20Issues/201209SeptemberBarNews.ashx.

⁵ *Id.* at 26.

necessarily indicate respect. “It is the substance that brings dignity and true civility to our courts and to our system.”⁶ True civility, Justice González argues, is not only fair to all parties involved and serves the interests of justice, but it also has professional benefits for the lawyer: it enhances the lawyer’s reputation “as a true officer of the court[.]”⁷

Similarly, Judge Harry J. McCarthy maintains that the “very best attorneys, well-versed in the traditions of civility, can conduct an important cross-examination, even one of a hostile witness, and do so in such a productive and respectful manner that the goals of the cross are met while simultaneously maintaining a high standard of professionalism.”⁸ He asserts that lawyers can and should be courteous, remain respectful, and act with integrity at all times in order to achieve success and to uphold the time-honored traditions of the legal profession.⁹

An integral component of civility is listening. Effective listening requires empathy, attention, focus, and open-mindedness; it conveys to the communicator that he or she has been heard. When court actors—most importantly, judges—listen effectively, they heighten the public’s perception of fairness and confidence in the system. Although judges understand the importance of listening, numerous factors present challenges to their ability to listen effectively. Among these are excessive workloads and inadequate skills-training for simultaneously managing the courtroom and listening. Perhaps the two most significant challenges are judges’ underestimation of how vicarious trauma impacts them, and of how cross-cultural communication and implicit bias influence their behavior. Judges can address these challenges and improve their listening by developing

⁶ *Id.*

⁷ *Id.* at 28.

⁸ Harry J. McCarthy, *The Value of Civility in the Legal Profession*, WASH. BAR NEWS, Aug. 2011, at 44, available at <http://www.robertsfund.org/2011-wsba-articles/2011/5/1/the-value-of-civility-in-the-legal-profession.html>.

⁹ *Id.* at 44–45.

civility strategies to remain conscious, creative, and community-oriented and by employing specific listening strategies.

I. EFFECTIVE LISTENING INCREASES CONFIDENCE IN THE LEGAL SYSTEM

Communicating with respect, even when dealing with strongly held or opposing viewpoints, is paramount to civility. Authentic and effective listening is a crucial aspect of communicating with civility. Listening from the bench increases the public's perception of fairness and confidence in our legal system. Although judges and lawyers believe that justice is served when they consider the *outcome* fair, the public believes that justice is served when they consider the *process* is fair, even in the face of an adverse outcome.¹⁰

Furthermore, when participants find the process to be fair, they feel greater satisfaction with lawyers, the court, and the justice system generally.¹¹ Perceptions of fairness enhance the legitimacy of the courts and thus can increase compliance with court orders and reduce recidivism.¹² Research demonstrates that when defendants in criminal proceedings “perceive their treatment to be fair, they are more likely to accept the decisions of the court, comply with court-imposed sanctions, and obey the

¹⁰ DAVID B. ROTTMAN, NAT'L CTR. FOR STATE COURTS, TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS: A SURVEY OF THE PUBLIC AND ATTORNEYS, PART I: FINDINGS AND RECOMMENDATIONS 25 (2005), available at http://www.courts.ca.gov/documents/4_37pubtrust1.pdf.

¹¹ Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871, 886 (1997).

¹² Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction (A White Paper of the American Judges Association)*, 44 CT. REV. 4, 7 (2008) (citing Tom R. Tyler, *Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375 (2006)).

law in the future[.]”¹³ Perceptions of fairness can also “lessen the difference in how minority populations perceive and react to the courts[.]”¹⁴ where there is a common perception that “African-Americans, low-income people, and non-English speakers” will receive “worse results[.]”¹⁵

Professor Tom R. Tyler identifies several factors that contribute to perceptions of fairness. He considers that among those, the four most critical factors are trustworthiness, neutrality, interpersonal respect, and voice/participation.¹⁶

1. Trustworthiness

People accept authorities’ decisions when they believe that the authority figure is benevolent and sincerely “cares about them and their problems and is truly trying to find a solution that is good for them.”¹⁷ Authorities demonstrate their sincerity when they listen to the individuals and when they explain or justify their decisions.¹⁸

2. Neutrality

People are likely to think the process is fair when they believe decisions are made on a “level playing field in which no one is unfairly advantaged.”¹⁹ They look for “honesty, impartiality, and the use of facts, not personal opinions, in decision-making.”²⁰

3. Interpersonal respect

¹³ M. SOMJEN FRAZER, CTR. FOR CT. INNOVATION, THE IMPACT OF THE COMMUNITY COURT MODEL ON DEFENDANT PERCEPTIONS OF FAIRNESS iii (2006), available at http://www.courtinnovation.org/sites/default/files/Procedural_Fairness.pdf.

¹⁴ Burke & Leben, *supra* note 12, at 4.

¹⁵ *Id.*

¹⁶ Tyler, *supra* note 11, at 889–90.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 892.

²⁰ *Id.*

“Studies suggest that being treated politely, with dignity and respect, and having respect shown for one’s rights and status within society, all enhance feelings of fairness.”²¹

4. Voice/participation

People want the opportunity to express their ideas and tell their stories. They want to feel that they have been part of the process in shaping the resolution of their case.²²

Although all four factors contribute to perceptions of fairness, the most significant is that of having a voice and participating in the trial, plea bargain, sentencing, and/or mediation proceedings. Voice and participation implies being heard. Judges Kevin Burke and Steve Leben write that

[L]itigants make a strong correlation between the ability to speak and a judge’s respectful treatment of them as individuals; it demonstrates civic competence. After all, from a litigant’s point of view, if the judge does not respect litigants enough to hear their side or answer their questions, how can the judge arrive at a fair decision? The belief that one can go to legal authorities with a problem and receive a respectful hearing in which one’s concerns are taken seriously is central to most people’s definition of their rights as citizens in a democracy. . . . [B]elieving that [if they went to court] . . . they would receive consideration . . . is a key antecedent of trust and confidence in the legal system.²³

In general, participants in the legal system want to give their views, tell their stories, and share in the discourse of the case. Thus, although they might not be pleased with the outcome when they lose, as long as they have been given what they perceive as a real opportunity to speak, participants feel the system was fair.²⁴ For example, in a study of gender differences in

²¹ *Id.* at 891.

²² *Id.* at 887–88.

²³ Burke & Leben, *supra* note 12, at 12.

²⁴ Virgil L. Sheets & Sanford L. Braver, *Gender Difference in Satisfaction with Divorce Settlements*, 45 FAM. REL. 336, 341 (1996).

satisfaction with divorce settlements, women were more satisfied with settlements because, through mediation, they perceived that they had control over the process. This desire to be heard is also true at sentencing; “victims value the opportunity to speak”²⁵ regardless of whether they actually influence the sentencing decision.²⁶

The same is also true for defendants in criminal proceedings. In a study conducted on Red Hook Community Justice Center, where there is an emphasis on collaboration and transparency, 86 percent of the defendants thought the court process was fair, “regardless of [their] race, socioeconomic status or disposition of the[ir] case.”²⁷ The most significant factor in the perception of fairness was that the judge “treated them with respect, helpfulness, and objectivity[.]”²⁸ The next most significant factor was that court actors (judge, attorneys, and court officers) treated them with respect and communicated clearly. The court actors at Red Hook “clearly explained the proceedings, answered questions, and listened to what the defendants had to say.”²⁹ Another factor was that judges and court actors treated one another with respect.³⁰ As previously mentioned, these factors increase compliance with court orders and reduce recidivism.³¹ All of these

²⁵ Tyler, *supra* note 11, at 887.

²⁶ *Id.*

²⁷ Somjen M. Frazer, *Defendant Perceptions of Fairness at the Red Hook Community Justice Center*, CTR. FOR CT. INNOVATION (2006), <http://www.courtinnovation.org/research/defendant-perceptions-fairness-red-hook-community-justice-center?url=research%2F11%2eFall&mode=11&type=all&pag=4> (summarizing M. SOMJEN FRAZER, CTR. FOR CT. INNOVATION, THE IMPACT OF THE COMMUNITY COURT MODEL ON DEFENDANT PERCEPTIONS OF FAIRNESS (Sept. 2006), available at http://www.courtinnovation.org/sites/default/files/Procedural_Fairness.pdf).

²⁸ *Id.* at iii.

²⁹ *Id.*

³⁰ *Id.* at 23.

³¹ Burke & Leben, *supra* note 12, at 4.

factors also reflect civility and are consistent with research findings about how civility positively impacts other work settings.³²

II. THE CHALLENGES OF LISTENING FROM THE BENCH

Judges enhance perceptions of fairness by “protecting the rights and human dignity” of persons who appear in their courtrooms and by treating them with respect.³³ Judges genuinely strive to provide a fair and respectful environment in the various contexts in which they work. They process information in various forms such as written, verbal, and nonverbal communication, and they do so both when they are out of court and when they are in court. They approach listening differently depending on whether they are hearing a bench or jury trial or whether they are engaged with a pro se litigant or with a represented person.

Although they desire to listen effectively, many factors create challenges for judges to listen in these varied contexts. Systemic factors include heavy caseloads, inadequate time to devote thorough attention to each case, and insufficient training for controlling and managing the courtroom and for improving listening skills.³⁴ Personal factors include:

1. Lacking the ability to pay attention through distractions and boredom.
2. Anticipating what a person is saying or going to say and interrupting the other’s process.
3. Thinking about their response instead of focusing on what is being communicated.

³² See Christine Porath & Christine Pearson, *THE COST OF BAD BEHAVIOR: HOW INCIVILITY IS DAMAGING YOUR BUSINESS AND WHAT TO DO ABOUT IT* (2009); see also Mark G. Honeywell, *Civility Is Good Business*, WASH. BAR NEWS, June 2011, at 34, available at <http://www.robertsfund.org/2011-wsba-articles/2011/7/1/civility-is-good-business.html>.

³³ *Id.*

³⁴ *Id.* at 34.

4. Reacting to stressors of public scrutiny and fear of making a wrong decision or making a right decision that goes wrong.
5. Engaging in unconscious non-verbal behaviors that are distracting and dismissive, such as twitching, tone of voice, and not making eye contact.
6. Ignoring and not treating the effects of vicarious trauma.
7. Failing to engage in fairness due to inadequate understanding of cross-cultural communication and implicit bias.³⁵

Judges can address the first three of these personal challenges by looking for something they want to understand from the communicator, by taking a breath and wondering what the communicator is trying to convey, and by allowing themselves to take a minute to respond instead of feeling they have to immediately respond. To address the challenge of the stress of decision-making, as will be discussed further, judges can cultivate support systems so that they are less isolated.

To address the challenge of the impact of unconscious behaviors, judges need to be aware that they are engaging in such behaviors.

Studies indicate that nonverbal behaviors “account for 60% to 65% of the meaning conveyed. Significantly, when non-verbal cues conflict with what is actually being said in words, people are more likely to believe what is being conveyed to them non-verbally. . . . [Further,] nonverbal communication is the main means for expressing or experiencing emotion.”³⁶ A study of Fourth Judicial District Judges in Hennepin County, Minnesota, found that 89 percent of the judges “believed their behavior in the courtroom affected the litigants’ satisfaction with the outcome of their case.”³⁷

³⁵ *Id.*; Isaiah M. Zimmerman, *Helping Judges In Distress*, 90 JUDICATURE 10, 10 (2006), available at http://www.judicialfamilyinstitute.org/pdf/Zimmerman_90JudgesDistress.pdf.

³⁶ Burke & Leben, *supra* note 12, at 13.

³⁷ *Id.* at 14.

However, this same study revealed that about one-third of judges exhibited counterproductive, nonverbal behaviors such as “failure to make eye contact, focusing on a cup of coffee, and the use of a sarcastic, neutral, or exasperated tone of voice.”³⁸ In addition, judges exhibited “actual displays of negative emotions, such as anger or disgust, sighing audibly, kicking feet up on the table, and ‘using self-oriented gestures such as rubbing, scratching, picking, licking, or biting parts of the body (to excess).’”³⁹ Like most people, because these are unconscious behaviors, judges were unaware they were doing anything that could signal they were not engaged or listening. Thus, one way judges can increase a perception of fairness in their courtrooms is to improve their nonverbal communication. They can do so by creating opportunities for neutral, honest, and specific feedback from colleagues and making space in their schedules to reflect on and make use of that feedback. Judges Burke and Leben suggest that judges have themselves videotaped to learn how others are perceived them.⁴⁰

In addition to addressing the systemic factors and aforementioned personal factors that create challenges to effective listening, judges can improve their listening by focusing on two critical factors that create possibly the greatest challenges to listening: the impact of vicarious trauma and the understanding of cross-cultural communication and implicit bias.

A. Vicarious Trauma

People, including judges and other legal practitioners, who work with victims, survivors, and perpetrators of traumatic events are susceptible to the effects of vicarious trauma (also referred to as compassion fatigue or secondary trauma). Vicarious trauma is “the experience of a helping professional personally developing and reporting their own trauma

³⁸ *Id.* at 13.

³⁹ *Id.*

⁴⁰ *Id.* at 18.

symptoms as a result of responding to victims of trauma.”⁴¹ According to a 2003 study, authored by two clinical psychologists, an attorney, and a circuit court judge, a majority of judges experience vicarious trauma.⁴² People who suffer from vicarious trauma experience a variety of symptoms and challenges:

1. They often measure their self-worth by how much they help others;
2. They have unrealistic expectations and are perfectionists;
3. They are concerned that expressing their feelings will be viewed as a weakness;
4. They are unable to give or receive emotional support;
5. They allow work to interfere with their personal life;
6. They can exhibit symptoms such as feeling cynical, angry, and irritable, as well as feeling numb and emotionally detached; and
7. They can suffer from depression, sleep problems, isolation, a sense of futility, diminished self-care, and increased use of alcohol and/or drugs to relax.⁴³

Workers’ vicarious trauma negatively impacts the worker and the organization because such trauma can impair judgment. It also can decrease motivation, productivity, quality of work, willingness to assume more work and responsibility, and compliance with work requirements. Further, it results in “increased absenteeism,” friction among staff, and staff turnover.⁴⁴

⁴¹ Peter G. Jaffee et al., *Vicarious Trauma in Judges: The Personal Challenge of Dispensing Justice*, 54 JUV. & FAM. CT. J. 1, 2 (2003).

⁴² *Id.* at 4.

⁴³ *Id.* at 4–5.

⁴⁴ Joy D. Osofsky et al., *How to Maintain Emotional Health When Working with Trauma*, 59 JUV. & FAM. CT. J. 91, 94 (2008).

Vicarious trauma is exacerbated by isolation that results in not feeling connected to others and not having people with whom to share their emotional reactions.⁴⁵ Dr. Isaiah Zimmerman writes that in his 20 years of working as a consultant and psychotherapist with state and federal judges, approximately 70 percent of judges that he has interviewed have expressed spontaneously that they feel isolation, without being asked about it.⁴⁶ The demanding workload contributes significantly to this isolation, as the average judge works evenings and weekends.⁴⁷ They have limited time for family, friends, community service, and engaging in other interests.⁴⁸ In addition, the Code of Judicial Conduct requirement to maintain an appearance of fairness contributes to the isolation.⁴⁹ Judges explain that they keep their distance at social and professional gatherings and are careful about their comments generally.⁵⁰ The role of judge itself contributes to the isolation, as well. Once one becomes a judge, “former lawyer colleagues immediately begin to show deference[,]” and this barrier between judges and lawyers is reinforced by the formalities of the courtroom and wearing robes.⁵¹ Over time, judges can experience greater difficulty shedding their “robes,” even in close personal settings. Another result is a reduction in “honest and robust dialogue” that furthers the isolation.⁵² These systemic factors that contribute to isolation are exacerbated by the fact that a majority of judges tend toward introversion,⁵³ thus making it even a greater challenge to avoid isolation. All of this combines to create greater interpersonal

⁴⁵ See Isaiah M. Zimmerman, *Isolation in the Judicial Career*, 36 CT. REV. 4 (2000).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Jaffee et al., *supra* note 41.

⁴⁹ Zimmerman, *supra* note 45.

⁵⁰ *Id.* at 5.

⁵¹ *Id.* at 4.

⁵² *Id.* at 5.

⁵³ *Id.* at 2.

isolation, resulting in a “withdrawal from intellectual and community involvement.”⁵⁴

Doctor Zimmerman writes that a significant number of judges suffer from psychological distress, such as anxiety, depression, substance abuse and addiction, marital and family issues, and mid-life crises.⁵⁵ These conditions “can underlie a reduction in productivity, tardiness in opinion writing, clashes within the judicial administration and hierarchy, and intemperate and inappropriate behavior on or off the bench.”⁵⁶ However, judges do not commonly seek assistance from Bar Association-sponsored assistance programs offered for judges, because of concerns for privacy and confidentiality, as well as fear of stigmatization for having “possible mental illness, diminished capacity of judgment, and the charge of malingering to evade misconduct charges.”⁵⁷ All of these factors are exacerbated in states where judges are subject to an electoral process for obtaining or retaining their position on the bench.⁵⁸ Moreover, when they do seek psychological treatment, their need for privacy and confidentiality limits some treatment options—most significantly, group therapy, which often, as in the case of treatment for addictions, may be the most effective and expeditious treatment modality.⁵⁹ Even though addiction-oriented group therapy may be characterized as anonymous, the anonymity and confidentiality offered is voluntary, not mandatory, and therefore risky for judges.⁶⁰

Although “isolation is an inherent part of the role judges must play in society[,]”⁶¹ Doctor Zimmerman writes that judges can take the following measures to mitigate the isolation:

⁵⁴ *Id.*

⁵⁵ Zimmerman, *supra* note 35, at 10–13.

⁵⁶ *Id.* at 11.

⁵⁷ *Id.*

⁵⁸ *Id.* at 11–12.

⁵⁹ *Id.* at 11, 14.

⁶⁰ *Id.* at 14.

⁶¹ Zimmerman, *supra* note 45, at 6.

1. “[A]ggressively” preserve life-long friendships;
2. Maintain a supportive group of family and friends with whom they can share an open and “honest mutual appraisal and dialogue”;
3. Engage in activities that are unrelated to the “legal and judicial world” and form friendships with people not related to these fields;
4. Manage stress; and
5. Mentor new judges.⁶²

Judges’ isolation and their reluctance to seek psychological treatment compound the impact of vicarious trauma. Additionally, judges feel under-trained to address trauma. A 2007 survey of 45 judges who worked in

areas including dependency, delinquency, domestic violence, and divorce/custody [revealed that] . . . 53 [percent] had not received training about child trauma, its assessment and treatment. Judges reported feeling overwhelmed by the prevalence of trauma in the courtroom, the magnitude of the needs of the children and families, lack of resources, placement concerns related to best interest of the child, coordination with other service systems, and confidentiality issues[.]⁶³

Judges expressed interest in obtaining more information and resources to help them understand, evaluate, communicate, assess intervention strategies, and support “resilience in response to trauma[.]”⁶⁴ They wanted more training on how to communicate and listen to children; furthermore, they wanted “[i]ncreased information about vicarious traumatization and compassion fatigue including personal and institutional prevention and intervention strategies.”⁶⁵

⁶² *Id.* at 5.

⁶³ Osofsky et al., *supra* at 44, at 98.

⁶⁴ *Id.* at 99.

⁶⁵ *Id.*

Because vicarious trauma is a normal reaction to hearing cases involving trauma, judges could benefit from more training about the causes and symptoms of vicarious trauma, as well as how to listen and respond appropriately to people who have experienced trauma.⁶⁶ Judges also need to learn to practice self-care and take time off. It can be very helpful, as well, for judges to share their feelings and experiences with judges from jurisdictions other than their own because they may feel less vulnerable when “there is less competition among those present who may be seeking election or appointment to positions in their respective communities.”⁶⁷

Personal coping strategies to address symptoms of vicarious trauma include self-assessment, physical activity, rest, socializing, peer support, and continuing education.⁶⁸ Overall preventative measures include “enjoying your job,” “moving on” after decisions have been made, maintaining a healthy balance between work and life outside work, and cultivating positive relationships with people inside and outside the legal profession.⁶⁹

In a 2007 informal focus group, in addition to concerns over their ability to manage large caseloads consistently, judges stated that they were concerned about their stress levels; their difficulty talking about personal issues or saying they need help; their frustration, anger, hopelessness, and depression; and their experience of isolation.⁷⁰ Many of these concerns are related to vicarious trauma. The above discussion and suggestions for ways that judges can mitigate the impact of vicarious trauma and address their own wellness and isolation issues ought to be useful in addressing the

⁶⁶ *See id.*

⁶⁷ *Id.* at 100.

⁶⁸ CHILD WELFARE TRAUMA TRAINING TOOLKIT: SELF-CARE INVENTORY, THE NATIONAL CHILD TRAUMATIC STRESS NETWORK 125, 128 (2008), http://www.nctsn.org/nctsn_assets/pdfs/cwt3_sho_inventory.pdf.

⁶⁹ *See* Jaffee et al., *supra* note 41, at 7.

⁷⁰ *See* Osofsky et al., *supra* note 44, at 98.

challenges these factors create for effective listening. Moreover, in that 2007 informal focus group of judges, judges also expressed concern regarding their challenges to being impartial.⁷¹ This concern relates directly to the factors of cross-cultural communication and implicit bias that create challenges to effective listening.

B. Cross-Cultural Communication and Implicit Bias

Engaging in cross-cultural communication requires all parties to be patient, open, and willing to continue the conversation. It asks all parties to not just tolerate or respect different perspectives, but to actually value and be curious about them. Justice Mary Yu⁷² calls upon us to be compassionate and empathetic:

An active and civil engagement about a difficult topic such as race would also permit us to reveal our own biases, share our unfamiliarity of traditions and practices, and expose our ignorance of certain facts without causing personal pain to another. And when we inadvertently cause pain to another, civility requires an apology and a request to rewind and start over. At the same time, the practice of civility also requires vulnerability; it means that some of us must take the risk of sharing the pain of being on the receiving end of bigotry, both real and perceived, with the hope that the listener might better understand its impact.⁷³

She explains that members of minority communities need to practice “patience and restraint: patience in having to repeat what has been said by others so many times before and in having to share once again; and restraint

⁷¹ *Id.*

⁷² At the time she wrote this article, Mary I. Yu, was a judge in King County Superior Court, Seattle, Washington. She was appointed to the Washington State Supreme Court in May 2014.

⁷³ Mary I. Yu, *Civility in Our Conversations about Race and Culture*, WASH BAR NEWS, May 2011, at 47, available at http://www.wsba.org/News-and-Events/Publications-Newsletters.Brochures/~/media/Files/News_Events/Publications/Bar%20News/MAY%2011/15-RaisingTheBar.ashx.

from reacting at an emotional level to what we think we heard.”⁷⁴ While it might seem like “a lot of work” to have this sort of cross-cultural conversation, she points out, for example, that the different experiences of African Americans and European Americans with the criminal justice system continue to make the conversation necessary.⁷⁵ Despite progress over the past decades in achieving equality for all, there still exists “a massive racial chasm” in the perception of whether justice will be delivered fairly.⁷⁶ “We must ‘bother’ with listening and learning about the many forms of racial injustice experienced by communities of color and find ways we can move forward together.”⁷⁷

Effective legal reasoning requires us to see the situation from the perspectives of all involved, to convey the human, personal, and emotional experience of the client, and to anticipate all of the parties’ issues.⁷⁸ Effective listening requires us to be aware of our own biases, assumptions, and emotional responses, in addition to being open to another’s experience. Julian Treasure, a leading expert on sound and how to interpret sound in all of its complexity, notes that “listening is our access to understanding. Conscious listening always creates understanding.”⁷⁹ How we listen and for what we are listening is substantially impacted by filters of our culture, language, values, beliefs, attitudes, expectations, and intentions. To be a better listener, he suggests that we listen with an awareness of our filters and adjust them to fit the context.⁸⁰ Roger Crockett, Harvard Business

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Jeff Tolman, *Looking at the World Through Other People’s Eyes*, WASH. BAR NEWS, Mar. 2011, at 24, available at <http://www.wsba.org/News-and-Events/Publications-Newsletters-Brochures/NWLawyer/Bar-News-Archive/Bar-News-Mar-2011/Mar2011Tolman>.

⁷⁹ Julian Treasure, *5 Ways to Listen Better*, TED (July 2011), http://www.ted.com/talks/julian_treasure_5_ways_to_listen_better.

⁸⁰ *Id.*

Review blogger, writes that “[c]ommunicating well across different cultures requires listening closely enough to not only hear the words but to grasp true meaning. By doing so, you enhance productivity and add to your ability to communicate without conflict or misunderstanding.”⁸¹ He contends that embracing and positively responding to diversity in the workplace requires people to listen with empathy (i.e., refrain from knee-jerk reactions that are often based in previously held cultural assumptions).⁸² One example of such a knee-jerk reaction is assuming that when someone doesn’t make eye contact, he or she has something to hide, when it may be that in that person’s culture, making direct eye-contact is a sign of disrespect. Another example could be assuming that members of the professional class do not engage in domestic violence, which could influence how one treats and interprets communications from a defendant who appears articulate and organized and presents as being from a professional class.

Building on the concept that court actors’ awareness of personal bias and cross-cultural context is essential to increasing positive perceptions of our justice system, Judge Leben writes that the judge who is concerned with procedural fairness does not act “out of personal prejudices,” but instead will “listen carefully to the views of the parties, letting them speak directly when possible, which often will suggest a perspective beyond the judge’s. . . . [This judge] will work hard to avoid bias and provide clarity about how the decision was made[.]”⁸³ He goes on to assert that the ability to remain impartial is paramount to procedural fairness, yet many times factors that influence decision-making operate at an unconscious level.

⁸¹ Roger O. Crockett, *Listening is Critical in Today’s Multicultural Landscape*, HARVARD BUS. REV. BLOG NETWORK (Mar. 14, 2011, 2:15 PM), <http://blogs.hbr.org/2011/03/shhh-listening-is-critical-in/>.

⁸² *Id.*

⁸³ Steve Leben, *An Expectation of Empathy*, 51 WASHBURN L.J. 49, 51 (2011).

Judges must be vigilant in increasing their awareness of factors that influence their decision-making.⁸⁴

While, in theory, acting without bias to ensure procedural fairness is a laudable goal, having the desire alone to act without bias does not necessarily ensure that one will successfully act without bias. Consider, for example, that the very notion of what constitutes procedural fairness betrays a cultural bias. Our cultural experiences influence what we believe to be procedurally fair. For many of us, our cultural bias suggests that everyone should or would be able to speak directly and freely to the judge. Moreover, no one can possibly gain a full understanding of another's cultural context during a brief encounter. Perhaps the better approach is to realize that our notions of procedural fairness (like everyone else's) are biased and rooted in our perceptions of what is fair and just. In fact, it may be that when we try to act "prejudice-free," we ironically give ourselves leave to act with more prejudice. In their article, "Implicit Bias in the Courtroom," Professor Jerry Kang et al. report that believing yourself to be objective may license you to act on bias, particularly if you have been primed to think you are not biased.⁸⁵

Professor Kang et al. explain that human behavior is influenced by an array of biases, many of which are not rational.⁸⁶ Many of these biases function below the conscious level.⁸⁷ Much of the work in the anti-discrimination arena focuses on attitudes and stereotypes about social groups. The conventional conceptualization has been that such biases "are explicit, in the sense that they are both consciously accessible through introspection *and* endorsed as appropriate by the person who possesses them . . . [and they] are relatively stable, in the sense that they operate in the

⁸⁴ *Id.* at 49.

⁸⁵ Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1173, 1184 (2012).

⁸⁶ *Id.* at 1128.

⁸⁷ *Id.* at 1129.

same way over time and across different situations.”⁸⁸ However, “attitudes and stereotypes may also be implicit, in the sense that they are not consciously accessible through introspection. Accordingly, their impact on a person’s decision making and behaviors does not depend on that person’s awareness of possessing these attitudes or stereotypes.”⁸⁹ As a result, these implicit biases “function automatically, including in ways that the person would not endorse as appropriate” if he or she were consciously aware of them.⁹⁰

The majority of judges view themselves as being objective. One study showed that 97 percent of judges “believed that they were in the top quartile in ‘avoid[ing] racial prejudice in decision making.’”⁹¹ Another study showed that 97.2 percent of administrative agency judges “put themselves in the top half in terms of avoiding bias[.]”⁹² In both instances, it is mathematically impossible for 97 percent to be in the top quartile or top half, so the judges’ self-perception is necessarily suspect.

Instead of trying to act without bias, we ought to acknowledge that we all act with implicit bias. The key is to consider whether that prejudice or bias is justified or avoidable. This requires us to be clear about how and why we are making the decisions we make. For instance, a judge might have a bias that if people are telling the truth, they will speak openly and directly to the judge in court when under oath. However, this expectation might be greatly at odds with a litigant’s culture that tells him he should always defer to authority and not question authority. Or in a domestic violence situation, a litigant’s procedurally fair opportunity to “tell her story” could get her

⁸⁸ *Id.* (emphasis in original).

⁸⁹ *Id.* at 1129.

⁹⁰ *Id.*

⁹¹ *Id.* at 1172 (alteration in original) (quoting Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1225 (2009)).

⁹² *Id.* at 1173.

killed later that day. If judges focus on being procedurally unbiased, they may well find themselves in a situation where they are providing an equal, yet unfair process. If, however, they are open to their own biases and prejudices, they can possibly be more flexible, not think in absolutes, and inquire as to ways that within the bounds of their discretion they can best accommodate the witness or litigant's culture context.

Although judges cannot eliminate implicit biases, judges can mitigate the impact of such biases on decision-making and behavior. To do so, Professor Kang et al. recommend that judges learn more about diverse groups; doubt their own objectivity; learn more about implicit bias; slow down and improve conditions of decision-making; and reflect on decision-making.⁹³

1. Learn More About Diverse Groups

To decrease implicit bias in general, judges can associate with people from groups with whom they have formed a negative stereotype; thus, through changing their experience of people from such groups, judges can change their implicit attitudes about members from different groups. By actually engaging in-person with people from different groups, and by increasing their understanding of different groups through books, films, and other media that offer examples beyond the stereotypes, judges can be more sensitive to their potential bias and counter such stereotyping.⁹⁴

2. Doubt One's Objectivity

Studies indicate that people are more prone to act with implicit bias when they believe they are objective,⁹⁵ as the judges described above did. But being skeptical about one's lack of bias is the first step in addressing it.

⁹³ *Id.* at 1172–79.

⁹⁴ *See id.* at 1169–71.

⁹⁵ *Id.* at 1173.

3. Learn About Implicit Bias

Through formal judicial education channels and self-study, judges can be internally motivated to address the impact of implicit bias, once they become aware of the problem and the science underlying it. In a judicial training session in California, judges viewed “a documentary on the neuroscience of bias.”⁹⁶ Before and after viewing the film, they were asked on a scale from “rarely-never” to “most-all,” to what extent they thought “a judge’s decisions and court staff’s interaction[s] with the public can be unwittingly influenced by unconscious bias toward racial/ethnic groups.”⁹⁷ Before the film, 30 percent chose “most-all,” compared to after the film when 79 percent chose “most-all.”⁹⁸ Using the same scale, they were asked whether implicit bias could “impact behavior even if a person lacked explicit bias.”⁹⁹ Before the film, 45 percent chose “most-all,” compared to after the film, where 84 percent chose “most-all.”¹⁰⁰ After this training, when asked if they would apply the course content to their work, 90 percent of the judges “agreed or strongly agreed.”¹⁰¹

4. Slow Down and Improve Conditions of Decision-Making

Judges are under pressure of high caseloads and the need to respond quickly. Evidence suggests “that certain elevated emotional states, either positive or negative, can prompt more biased decision-making.”¹⁰² Even happiness “increase[s] stereotypic thinking Of greater concern might be feelings of anger, disgust, or resentment toward certain social categories. If the emotion is consistent with the stereotypes or anticipated threats

⁹⁶ *Id.* at 1175.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 1175–76.

¹⁰¹ *Id.* at 1176.

¹⁰² *Id.* at 1177.

associated with that social category, then those negative emotions are likely to exacerbate implicit biases.”¹⁰³

5. Reflect on Decision-Making

When judges are aware of their biases, although it can be difficult, they can take corrective measures. However, if they are unaware of their own biases, it is impossible for them to try to take corrective measures. Therefore, judges need to reflect on their own decision-making to uncover their biases. Judges should regularly analyze and assess patterns in their decisions. In this way, they may be able to recognize an implicit bias that would not necessarily be evident by reflecting on a single decision.¹⁰⁴

III. DEVELOPING CIVILITY STRATEGIES OF CONSCIOUSNESS, CREATIVITY, AND COMMUNITY

As indicated earlier, judges strive to provide a fair and respectful environment inside and outside of their courtroom. They want to be impartial, give parties a voice, and have court actors and parties all feel they have been heard. However, judges encounter many obstacles, both systemic and personal, in being able to listen effectively. The civility strategies of consciousness, creativity, and community can form the basis for a solid foundation in listening.

A. Consciousness

Consciousness fosters civility in two ways. First, people must be conscious of their filters, emotional responses, and overall well-being.¹⁰⁵ People who are psychologically healthy generally have a more positive outlook on life and tend to be more proactive and less reactive. Second,

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 1178.

¹⁰⁵ *See generally* DANIEL GOLEMAN, EMOTIONAL INTELLIGENCE (Bantam Books 10th ed.1995).

people must be conscious of the impact that their actions—both intended and unintended—have on others. This concept of conscious listening¹⁰⁶ embraces the idea of emotional intelligence. Dr. Daniel Goleman explains that emotional intelligence is the ability to perceive, understand, and manage one's own emotions, as well as to understand and respond to others' emotions.¹⁰⁷ He argues that the traditional view of intelligence—as measured by the standard IQ tests—is far too limiting, suggesting instead, that it is not the people with the highest IQs, but rather, those with higher emotional intelligence who thrive professionally and personally.¹⁰⁸

Judges can increase their consciousness by engaging in some form of contemplative or mindful practice such as meditation or simply stopping to pay attention to one's breath. Although he doesn't call it "meditation," Justice Stephen Breyer sits quietly for 10–15 minutes, twice a day, thinking about nothing or as little as possible; he says it makes him "more peaceful, focused and better able to do [his] work."¹⁰⁹ Mindfulness is a process where a person must mentally and physically slow down enough to become aware of movement within and around them.¹¹⁰ A regular practice of reflection and meditation supports emotional intelligence skills, enhances listening

¹⁰⁶ Treasure, *supra* note 79. Julian Treasure envisions "transform[ing] the world in one generation to a conscious listening world—a world of connection, a world of understanding and a world of peace." *Id.*

¹⁰⁷ See Goleman, *supra* note 105.

¹⁰⁸ *Id.*

¹⁰⁹ Amanda Enayati, *Seeking Serenity: When Lawyers Go Zen*, THE CHART (May 11, 2011, 11:15 AM), <http://thechart.blogs.cnn.com/2011/05/11/seeking-serenity-when-lawyers-go-zen/>.

¹¹⁰ Charles Halpern, *The Mindful Lawyer: Why Contemporary Lawyers Are Practicing Meditation*, 61 J. LEGAL EDUC. 641 (2012); Leonard Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and their Clients*, 1 HARV. NEGOT. L. REV. 1 (2002); Robert Zeglovitch, *The Mindful Lawyer*, GPSOLO MAGAZINE, Oct.–Nov. 2006, available at http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/mindfullawyer.html.

skills, improves attention in complex situations, and enables an empathetic connection with others.¹¹¹ In addition, it helps reduce stress.

Having consciousness of self and others can also help address the effects of vicarious trauma and issues of cross-cultural communication and implicit bias. For example, consider whether you are suffering from vicarious trauma or compassion fatigue, stress, lack of proper nutrition, or insufficient self-care. Then consider your own implicit biases. Understand your own ingrained traits and tendencies that are rooted in your lived experience, attitudes, and beliefs. Accept that you have implicit bias because the more you think you are unbiased, the more likely that you will act with unconscious bias.¹¹² Remember the study in which 97 percent of judges polled believed themselves to be in the top quarter of their peers in avoiding racial prejudice in decision-making.¹¹³ Take measures to address those symptoms, as suggested earlier in this paper.

Awareness of others and developing cross-cultural understanding is also a key to effective communication from the bench. For many, going to court can be an intimidating and frightening experience. Regarding her first courtroom experience a social worker said, “I felt like I was a piece of meat and the sharks were swimming around me and taking little pieces out of me. . . . [At] a break . . . one of the attorneys said, ‘I don’t know why you’re taking this personally.’”¹¹⁴ In the same way that you may be tired, stressed, pressed for time, or just simply running out of patience, realize that the

¹¹¹ Leslie A. Gordon, *Law Prof Teaches Meditation Techniques for Lawyers*, A.B.A. J.D. (Feb. 1, 2014), http://www.abajournal.com/magazine/article/law_prof_teaches_meditation_techniques_for_lawyers/.

¹¹² Note that our brains have a hardwired negativity bias. See RICK HANSON, *BUDDHA’S BRAIN: THE PRACTICAL NEUROSCIENCE OF HAPPINESS, LOVE & WISDOM* (1st ed. 2009).

¹¹³ See Kang et al., *supra* note 85, at 1172.

¹¹⁴ Frank E. Vandervort et al., *Legal Ethics and High Child Welfare Worker Turnover: An Unexplored Connection*, 30 CHILD. & YOUTH SERV. REV. 546, 546 (2008).

litigants and lawyers before you are likely experiencing many of these same challenges to civil communication. In fact, there is a high likelihood that the litigants before you are experiencing being in court as a stressful—if not traumatic—event and there is a high probability that they have previously suffered significant trauma.

B. Creativity

Consider the ways in which judges can be flexible in dealings both in and out of court to be more responsive to the needs of the parties. Creativity fosters civility because it provides a vehicle for mindfulness, stimulates whole brain activity, enables us to see situations from a variety of perspectives, and supports effective problem solving. Effective listening requires the listener to be creative and open to hearing what the speaker seeks to communicate, rather than what the listener expects to hear.

Daniel Pink, a recognized expert on motivation and work, argues that increasing our aptitudes for high concept and high touch—both of which involve creativity—helps people find deeper meaning and purpose in their lives.¹¹⁵ High concept is the ability to create artistic and emotional beauty, to detect patterns and opportunities, to craft a satisfying narrative, and to create inventions the world didn't know it was missing. High touch involves the capacity to empathize, to understand the subtleties of human interaction, to find joy in oneself and to elicit it in others, and to stretch beyond the quotidian in pursuit of purpose and meaning.¹¹⁶

Engaging in a variety of creative processes could help judges increase their creative aptitudes and to listen with a more open mind. These processes could range from more formal forms of art, such as drawing,

¹¹⁵ Daniel H. Pink, *Revenge of the Right Brain: Logical and precise, left-brain thinking gave us the Information Age. Now Comes the Conceptual Age - ruled by artistry, empathy, and emotion*, WIRED, Feb. 2005, available at <http://www.wired.com/wired/archive/13.02/brain.html>.

¹¹⁶ *Id.*

painting, playing music, and writing poetry or non-fiction, to less formal forms such as cooking, gardening, knitting, and flower arranging. Creative processes can help judges listen with the desire to understand the context of the communicator and can help them see each case anew instead of trying to “fit each case into a preexisting pigeonhole.”¹¹⁷ Judges can find creative tools to help them listen attentively, such as writing notes, drawing pictures, making diagrams, or looking at the speaker.

Creative processes can also help judges realize ways in which they can be flexible to accommodate the needs of attorneys, litigants, witnesses, colleagues, and staff—for example, judges could order special procedures for child witnesses or consider where the victim in a domestic violence case sits in the courtroom.

C. Community

Community fosters civility by reviving our sense of civic humanism, promoting psychological well-being, and building positive social relationships to stave off isolation. This building of community is especially significant for judges, because, as mentioned previously, the majority of judges suffer from isolation. Such isolation from peers (both other judges and lawyers) stems from judges’ concern over potentially violating the Code of Judicial Conduct, appearing weak or vulnerable to their peers, being re-elected, and undermining their appearance of being wise and strong. They also are isolated in their personal lives because they have demanding workloads that limit the amount of free time they have to cultivate other communities. In addition, judges are treated with a high level of deference, and they are reluctant to “take off their robes.” When we engage with others, we increase our ability to understand different

¹¹⁷ Leben, *supra* note 83, at 54.

perspectives, to be compassionate, and to be empathetic, all of which are essential to effective listening.

1. Specific Listening Strategies

Practicing civility through consciousness, creativity, and community provides general strategies to enhance communication and fosters effective listening. Specific strategies to improve effective listening skills are the subject of countless articles and books. The most common strategies suggest that the listener:

1. focus on the communication,
2. stay present,
3. find something to be interested in about what is being communicated,
4. avoid distracting thoughts or events,
5. be aware of his or her own biases, assumptions, and feelings,
6. consider the cultural context of the communicator,
7. keep an open mind and not predetermine what is being communicated,
8. pay attention not only to what is being said or written, but also to what is not,
9. observe the non-verbal communication,
10. ask clarifying questions, and
11. summarize to ensure accuracy and to demonstrate that he or she really heard the communication.

Other experts weigh in with their particular lists. For example, Julian Treasure provides a five-component strategy to better listening:¹¹⁸

¹¹⁸ See Treasure, *supra* note 79.

1. Be silent. Spend three minutes a day in silence. This “is a wonderful exercise to reset your ears and to recalibrate so that you can hear the quiet again.”
2. Hear. Listen to the individual sounds that contribute to the mix of sounds in a noisy place. Ask yourself “how many channels of sound can I hear? How many individual channels in that mix am I listening to? You can do it in a beautiful place as well, like in a lake. How many birds am I hearing? Where are they? Where are those ripples? It’s a great exercise for improving the quality of your listening.”
3. Savor. Find the joy in mundane sounds; they can be really interesting. For example, listen to the rhythm of the dryer or coffee grinder. Listen to the mundane sounds “the hidden choir. It’s around us all the time.”
4. Adjust. Change “your listening position to what’s appropriate to what you’re listening to.” Be conscious of the filters (culture, language, values, beliefs, attitudes, expectations and intentions) through which you are listening and make adjustments.
5. Receive, Appreciate, Summarize, and Ask (RASA). “Receive, which means pay attention to the person; Appreciate, making little noises [of acknowledgment] like ‘hmm,’ ‘oh,’ ‘okay’; Summarize, the word ‘so’ is very important in communication; and Ask, ask questions afterward.”¹¹⁹

In his blog, *4 Unusual Listening Tricks for Lawyers* on the Legal Productivity website, Mike Moore provides suggestions to help lawyers listen more effectively.¹²⁰ First, he urges lawyers to stay quiet while listening to a colleague or client.¹²¹ Next, he suggests lawyers stay focused

¹¹⁹ *Id.*

¹²⁰ Mike Moore, *4 Unusual Listening Tricks for Lawyers*, LEGAL PRODUCTIVITY (July 23, 2012), <http://www.legalproductivity.com/practice-management/a-lawyers-recipe-for-better-listening/>.

¹²¹ *Id.*

on what words are being said, rather than attempting to “think ahead” or predict what the person is going to say next.¹²² Third, Mr. Moore suggests lawyers wait until the speaker confirms that he or she has completed his or her thought.¹²³ These techniques allow the speaker to feel more at ease if he or she is nervous or uncomfortable.¹²⁴ Last, Mr. Moore suggests that lawyers explain the speaker’s point back to him or her.¹²⁵ This is a practical technique that is effective when confirming understanding of complicated concepts. Evidencing “receipt of the speaker’s point or perspective can be an implied statement of respect and consideration.”¹²⁶

In her article, “Listening to Listen, Listening to Be Heard,” Donna Howard, a psychotherapist, argues that good listening is achieved through the strengthening of interpersonal skills.¹²⁷ Although she addresses lawyers, the same ideas apply to judges. She emphasizes that lawyers need to focus on what makes each client unique, no matter how many similar cases he or she may have heard over the course of their career.¹²⁸ Good listening, Ms. Howard posits, happens when a person is tuned into his or her own feelings and circumstances.¹²⁹ This attunement better allows a lawyer to understand how he or she responds to clients.¹³⁰ Ms. Howard also argues that, for lawyers in particular, it is important that good listening be supplemented with clear communication, including confirmation that the lawyer’s and client’s understanding of the communication is the same.¹³¹ Clear

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *See id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Donna F. Howard, *Learning to Listen, Learning to Be Heard*, GPSOLO MAGAZINE, Apr.–May 2006, available at http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/learningtolisten.html.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *See id.*

¹³¹ *Id.*

communication requires a lawyer to pay attention to verbal and nonverbal cues and helps ensure that the client is being treated with professional care as well as sensitivity.¹³²

In their white paper, “Procedural Fairness: A Key Ingredient in Public Satisfaction,” Judges Burke and Leben suggest ways in which judges, their courtroom staff, court administrators, researchers, judicial educators, and court leaders can improve public perception of fairness in the courts.¹³³ They recommend that judges “[l]earn how to listen better. Listening is not the absence of talking.”¹³⁴ They encourage judges to use understandable language to explain the process and what to expect, as well as to ensure everyone understands their orders.¹³⁵ “At the start of a docket, explain the ground rules for what will happen. For example, explain why certain cases will be heard first or why what litigants or defendants can say is limited in time or scope.”¹³⁶

In his blog, after noting the general lack of listening training for judges, Judge Leben states that he and Judge Burke encourage judges to take a listening-skills assessment test either from Human Resources Development Quarterly (HRDQ) or Psychology Today.¹³⁷ He summarizes the HRDQ listening method as follows:

- *Staying Focused*: Sometimes we’re our own worst enemy when it comes to listening—we have lots of other things on

¹³² *Id.*

¹³³ See generally Burke & Leben, *supra* note 12.

¹³⁴ *Id.* at 18.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ These tests are easily accessible online. The HRD has a listening test for purchase, while psychology today offers a free, in-browser test. See HRDQ, http://www.hrdqstore.com/Learning-To-Listen-Online-Assessment-Individual-Registration_p_1501.html (last visited Apr. 24, 2015); *Listening Skills Test*, PSYCHOLOGY TODAY, http://psychologytoday.tests.psychtests.com/take_test.php?idRegTest=3206 (last visited Apr. 24, 2015).

our mind. The careful listener prepares to give the speaker full attention, monitors whether attention strays, and corrects the situation if it does.

- *Capturing the Message:* We need to be open-minded to capture the message the speaker is trying to send rather than our preconceived notion of what is being said. This can be especially true for judges who hear (or think they hear) the same stories day after day. Offering a summary of what you've heard so that the speaker can confirm you've got it right can help.
- *Helping the Speaker:* Not every speaker can handle a judge's interruptions or distracting verbal comments. If you're really trying to listen to what the speaker wants you to hear, you'll be willing to make the environment conducive for good communication.¹³⁸

Judges can demonstrate they have heard by asking clarifying questions, by responding to questions, and by including a statement of the parties' positions in their opinions and orders. When judges include the perspectives of the parties and explain their reasoning for their decisions, the parties feel heard, even when the judge decides for the opposing party.¹³⁹

CONCLUSION

Judges seek to provide fair, civil, and respectful processes within the various contexts in which they work. The public's confidence in the legal system is influenced by whether the court actors, especially judges, comport themselves with impartiality, listen, and demonstrate that they heard the

¹³⁸ Steve Leben, *Good Judging Often Starts with Good Listening*, PROCEDURAL FAIRNESS FOR JUDGES & COURT BLOG (May 26, 2012), <http://proceduralfairnessblog.org/2012/05/26/good-judging-often-starts-with-good-listening/> (emphasis in original).

¹³⁹ SUSAN GOLDBERG, NAT'L JUDICIAL INST., JUDGING FOR THE 21ST CENTURY: A PROBLEM-SOLVING APPROACH 7 (2005), available at <http://www.joasa.org.za/articles/Judgingfor21stcenturyDe.pdf>.

communicator. Judges face significant systemic and personal challenges that impede their ability to listen effectively. They can mitigate these challenges by increasing their awareness of potential issues created by vicarious trauma, cross cultural communication, and implicit bias. When judges engage in the general civility strategies of consciousness, creativity, and community, and apply specific listening strategies, they enhance the experience of all who participate in the process, promote justice, and increase confidence in the legal system.