

JUDICIAL EDUCATION AND TRAINING

Journal of the International
Organization for Judicial Training



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Journal of the International Organization for Judicial Training

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Manuscripts should be submitted to the editors:
amnoncarmi@gmail.com

NEVO LTD.
P.O.BOX 108
SRIGIM, ISRAEL 99835
Tel. (02)9950700
Fax: (02)9992088
nevo@nevo.co.il

Website:
<http://www.nevo.co.il>

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JUDICIAL EDUCATION AND TRAINING (JET)

JOURNAL OF THE INTERNATIONAL ORGANISATION FOR JUDICIAL TRAINING

For a number of years the IOJT has wanted to publish its own journal. There have been attempts at publication but, for whatever reason, the journal has not materialised. About two years ago, however, a concept manuscript drafted by Justice Hall and myself enabled the IOJT General Assembly to reach a decision about the commencement of its journal.

There do not appear to be any existing publications that focus on judicial education or training. Our Journal will try to fill the lacuna in that area. Its scope will include the pedagogy of training judges, the educational effectiveness and the craft of educating judges. It will also aim to address wider national concerns and give a wide and broadly based overview of the way in which the rule of law is applied by judges in various parts of the world.

Since the IOJT exists for members of serving judiciaries, the main target audience of the Journal will be sitting judges, especially those who carry out training. The Journal will focus on this primary target audience and provide them with the tools that they need in order to educate their judiciaries. The Journal will also focus on developing an interdisciplinary partnership between judges and academic educators.

Justice Hall and I indicated in our concept paper that a few principles should guide those responsible for the commissioning, preparation and publication of the Journal. This was to ensure that the Journal will be an effective tool, possessing the required gravitas and commanding respect from the judicial and professional community at which it is directed. The Journal should aim to be authoritative, in the sense that it will contain articles of substance which are properly researched, and provide a working tool that might assist those responsible for training of the judiciary and help them to carry out their functions in a better way. In addition, the Journal should promote academic research, theoretical analysis and practical solutions. It should be dedicated to the study and dissemination of judicial education issues and experience, reflections as well as practice, through essays, articles and research. The editorial policy will be to combine professional materials from judges, judicial educators and academics.

JUDICIAL EDUCATION AND TRAINING

Following the decision of the IOJT authorities, an Editorial Board was established, a call for papers was distributed, and several judges from various countries expressed their wish to join it. Four leading members undertook the mission of producing the first issues: Justice Glazebrook, Dr. Armytage, Justice Smith and Judge Cotter.

The first issue of the IOJT Journal has been launched at last. It gives me great pleasure to express the appreciation and thanks to our former IOJT President, Justice Levin, to our present President, Justice Rivlin, to the guest editor of the first issue, Justice Glazebrook, and to the members of the Editorial Board.

Judge (ret.) Prof. Amnon Carmi, Editor-in-Chief.

INTRODUCTION

By

Justice Susan Glazebrook*

The idea of a journal dedicated to the topic of judicial education would have puzzled the judges of the mid 20th century. The concept of ongoing judicial education is a relatively recent phenomenon, at least in common law jurisdictions. It used to be thought that any type of training for judges was a threat to judicial independence. Now in most jurisdictions it is seen as a necessity.

This shift in attitude can be attributed to a number of factors. Other professions, including the legal profession, had recognised the need for continuing education and ongoing education programmes had become commonplace. It was therefore natural for newly appointed judges to expect that opportunities for ongoing education would continue after their appointment to the bench. There had also been more specialisation within the legal profession. This meant that it was no longer true, if indeed it ever was, that new appointees to the bench came ready equipped with the general skills needed to perform their role. Further, the task of judging had become more complex with the emergence of new and difficult social and technical issues. Judges were also working in a climate where their work was being scrutinised more closely. Finally, it had been recognised that judge-led judicial education programmes could enhance rather than threaten judicial independence.

Once the value of judicial education is recognised, the need for a journal, where issues relating to judicial education and the particular challenges it raises can be ventilated, is obvious. The articles in this issue identify and discuss various aspects of the construction and provision of judicial education, highlight best practices and recommend techniques for resolving the issues that inevitably arise. The wealth of experiences contained in this first volume of the International Journal of Judicial

* Judge of the Supreme Court of New Zealand. Justice Glazebrook is also the immediate past Chair of the New Zealand Institute of Judicial Studies, the body responsible for judicial education in New Zealand.

Education is a testament to the skills of the authors and to the growing significance of judicial training programs and institutions globally. It has been a privilege to edit it.²

The journal has been structured around a number of broad themes. Namely: the general foundations that should form the basis of any judicial training programme; judicial education from a contextual perspective; the methodology used in the construction of judicial training courses; and, finally, lessons from specific courses carried out in the authors' own jurisdictions.

The first two articles, by Chief Justice Ivor Richie and District Judge Thian Yee Sze, discuss the general foundations that should form the basis of any judicial training programme. Chief Justice Archie's article explores this theme through the notion of "legitimacy". As he notes, public trust and confidence requires judges to demonstrate a standard of legitimacy that is grounded in something more substantial and credible than the caprice of an individual judge hearing a case. Chief Justice Archie explains that the objective of judicial training therefore is to locate, articulate, communicate and ultimately to apply those principles of rectitude to which judges' personal preferences, desires and emotions must be subordinated. He then explains how this construction of the rule of law can be maintained by those in the judiciary and identifies key areas that should form the focus of judicial training programmes. These key areas include: impartiality; efficiency through effective management; listening and responding to the community's legitimate complaints; and competency in relevant non-legal subjects, such as science and psychology.

District Judge Thian Yee Sze's article highlights both the need to structure training programmes in a way that facilitates sharing, discussion and mentoring, and the importance of judicial participation in the planning and development of programmes. She then explains how Singapore's Judicial Education Board has used these principles as a systematic and structured basis for the development of a culture of learning within the Subordinate Courts of Singapore. The valuable insights of these two authors provide an excellent starting point for the discussions contained in the articles that follow.

2 I am grateful to the clerks who assisted me with the editing of this journal, Claire Brighton, Elizabeth Chan and David Bullock. I am also grateful to my Associate, Heather Nordstrom, for co-ordinating communications with each of the contributing authors and to Ms Grimpel for her administrative assistance. Finally, I would like to thank Professor Carmi for his support throughout this process.

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The second group of articles explore judicial education from a contextual perspective. Justice Lennox and Natalie Williams' joint article examines the impact that social and demographic change has had on judicial training in Canada. The authors describe how social context education programmes have developed and grown over the years, eventually leading to the establishment of the novel national Social Context Education Project (SCEP). In the view of the authors, social context education should be guided by three professional groups: judges, community leaders and legal academics. The balance between these "three pillars" of social context education ensures that programmes are diverse and grounded in experience. The authors' evaluation of the effect that the SCEP has had on future judicial education in Canada highlights the value of such programmes and provides food for thought, especially for those of us who are involved in devising programmes in our own jurisdictions.

Dr Rainer Hornung's article focuses on non-judicial aspects of judicial training, and how these aspects have been incorporated into the German Judicial Academy's programmes. He begins by pointing out the importance of tailoring training programmes to their audience. Programmes that are aimed at adult learners need to challenge and actively engage with participants. This is especially so for judicial participants. Dr Hornung then turns to a discussion of the framework, organisation and success of three forms of non-judicial training programmes. The first, interdisciplinary courses, aim to give participants basic knowledge in other disciplines and to sharpen their humanistic skills and capacities. Second, behavioural seminars focus on providing judges and prosecutors with well-built human capacities and social competencies, and finally, modular management courses teach skills and techniques for carrying out day to day management tasks. Dr Hornung's comprehensive and informative article is an important reminder of the role of non-judicial judicial training.

The third group of articles focus on the methodology used in the construction of judicial training courses. This is explored in an article written by Professor Brettel Dawson and Natalie Williams, which uses the Canadian National Judicial Institute's "Preventing Wrongful Convictions" programme as the framework for a discussion of the process leading up to, and following, a successful judicial training course. The NJI's multistep, circular programme design-process builds on the successes and difficulties experienced by previous programmes. This is based on the NJI's "three-dimensional" learning philosophy which focuses on: the core knowledge judges require (in terms of cases, statutes, etcetera); the judicial skills and tasks involved; and how social context dimensions interact with judicial processes.

Professor Brettel Dawson and Natalie Williams emphasise, however, that in adult education, course design begins rather than ends once content and learning objectives are identified. Courses must facilitate different interactive learning styles to ensure that information is absorbed and retained. Small group work, for example, encourages participants to take part in the teaching of a subject, which in turn assists their own learning. Each programme seeks to achieve certain objectives, and is then evaluated on how well those objectives were achieved. “Preventing Wrongful Convictions”, like many other successful programmes, focuses on a combination of interactive and informative teaching. The success of “Preventing Wrongful Convictions” is a testament to the NJI’s thorough and finely tuned development and evaluation process.

The fourth group of articles in this volume focus on specific courses carried out in the authors’ own jurisdictions. They provide helpful insights into how those programmes have been constructed. The first article, by Judge Murrell, discusses the National Judicial College of Australia’s (NJCA) experiences in delivering a solution focused judging (SFJ) programme for the first time. Judge Murrell explains the concept of SFJ and how the NJCA Programme Planning Committee translated the key themes of SFJ into a workable programme. She then sets out the outcomes from the programme’s evaluation and identifies a number of areas in which the programme could be improved. These reflections will likely be invaluable to anyone intending on establishing a similar training programme in their own jurisdiction.

Mrs Van den Broeck’s article provides an interesting insight into the Belgian Judicial Training Institute’s management training programmes for magistrates. The training programme is divided into three levels, each catering to a different level of the judiciary. The programme aims to provide practical management tools and a platform for the sharing of experiences and the development of collaboration between participants. The accessibility of the trainers, coupled with the tangible outcomes from each course, have contributed to the programme’s success. This article highlights the need for targeted and practical judicial management training.

In “Assessing Witnesses”, Justice Lynn Smith and I discuss the approaches taken to judicial training on this topic in Canada and New Zealand. While there are clear similarities, there are also differences in the approaches in the two jurisdictions. These differences have both their advantages and disadvantages. We conclude, both in light of our own experiences and the results of this comparison, that judges can be taught about the fragility of human memory and the difficulties involved in detecting deception. Through practical exercises, judges can gain a greater understanding of the potential pitfalls inherent in witness assessment. While there is no way of ensuring that the

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“truth” is discovered in every case, these practical experiences, combined with an understanding of current research, means that judges will be more effective and accurate in their assessments.

The final group of articles focus on the evaluation of judicial training programmes. In her article, Mary Edwards argues that without effective and accurate evaluation, programmes cannot be refined and improved following each iteration. Her discussion follows Kirkpatrick’s four-level evaluation model, highlighting difficulties that might arise in obtaining accurate results under each level. Mrs Edwards then uses experiences from a programme on the new Civil and Criminal Procedure Codes held in Mongolia to demonstrate how the model can be used to overcome these difficulties. She, however, warns that frank evaluation may be inhibited if participants are hesitant, or even unable, to provide honest criticism because of cultural reasons. Similarly, practical issues such as cost, time and response rates will necessarily influence what evaluations techniques are most effective for a specific course, within a specific area, with a specific audience. Once again, the insights and recommendations contained in this article will be of great assistance to other judicial training institutes in the construction of their own programme evaluations.

In the last article in this volume, Professor Ann O’Connell and Joy Edington discuss how the Ohio Judicial College, in partnership with the Ohio State University, constructed new judicial education curricula to meet the needs of Juvenile Court judges in Ohio. The article sets out the development process beginning with a comprehensive discussion of the process taken to evaluate the efficacy of the existing training programmes for juvenile judges and, in doing so, identifying which elements were successful and unsuccessful and what needs that were not being addressed. It concludes by setting out a number of recommendations for best practice in professional development. These authors’ work provides an excellent tool for future programme development and highlights the value of careful and analytical evaluation and planning based on established research.

The role of a judge is ever changing and, like other professions, must be supported by continuing educational programs providing targeted and varied training. This first volume of the International Journal of Judicial Education provides interesting reading both for those developing judicial training programmes and those who will benefit from them. This is an excellent first volume and, I hope, one that will be followed by many more.

“JUDICIAL TRAINING AND THE RULE OF LAW”

By

Mr Justice Ivor Archie*

I am pleased to be a part of this distinguished gathering today to deliberate on a topic which I hold to be fundamental to our role as Judicial Officers: the issue of training. I am intrigued by the choice of our theme: trust, confidence and legitimacy. It neatly encapsulates the image we must foster and maintain in the eyes of our societies if Judges and Judiciaries are to remain relevant as the sustainers of balance and the bulwark against the spread of disorder and anarchy. Today I want to take the time allotted me to explore this notion of “legitimacy”.

When persons access the courts, they are not merely seeking a resolution of their disputes. They are in pursuit of a broader notion of “justice”, which is located in some general societal consensus about what is fair, right or morally acceptable. To the extent that individual perceptions about rightness differ, our challenge is to demonstrate some standard of legitimacy that is grounded in something more substantial and credible than the caprice of the individual Judge hearing a case, and that attracts public trust and confidence. The objective of judicial training therefore is to locate, articulate, communicate and ultimately to apply those principles of rectitude to which our personal preferences, desires and emotions must be subordinated. We call it the rule of law.

* The Chief Justice of the Republic of Trinidad and Tobago. Paper delivered at the conference of the International Organisation for Judicial Training held in Bordeaux, France, from 31 October to 3 November ,2011. Delivered in the Plenary session on Judicial Training, Confidence and Legitimacy.

Where do we get this notion of the rule of law?

I come from an Anglophone common-law jurisdiction. Like many similar jurisdictions, we trace our legal roots back to Magna Carta. We see there the seeds of what we might today call fundamental human rights or “charter rights”:¹

First, We have granted to God, and by this present Charter have confirmed, for Us and our Heirs for ever, That the Church of England shall be free, and shall have her whole Rights and Liberties inviolable. We have granted also, and given to all the Freemen of our Realm, for Us and our Heirs for ever, these Liberties underwritten, to have and to hold them and their Heirs, of Us and our Heirs for ever

And what were some of those underwritten liberties?²

No Freeman shall be taken, or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any otherwise destroyed; nor will We pass upon him, nor condemn him, but by lawful Judgment of his Peers, or by the Law of the Land. We will sell to no man, we will not deny or defer [delay] to any man either Justice or Right.

Some 560 years later in the American Declaration of Independence we see those ideas developing in something closer to their modern form:³

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. - That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed ...

By contemporary standards, the England of Magna Carta was not a particularly “just” society. The rights and freedoms that it spoke of did not extend to all men or to women. Many centuries later, they still bought and sold slaves. Even the notion of what constitutes a crime was different, so one could be prosecuted for committing adultery. And yet, they evolved.

1 Magna Carta (1297) 25 Edw 1, cl 1.

2 At cl 29.

3 United States Declaration of Independence (1776).

The reason that notions of crime and justice were able to evolve is because we were not so much societies bound by laws as we were societies governed by ideals and principles. And it is we, as interpreters of our constitutions, who give life to those principles. We are not merely reflectors of popular opinion, we must sometimes help to shape it.

We often forget that many of the most important advances in the law that we now regard as self-evident and normative from a moral standpoint were made by court rulings that were widely unpopular at the time, not by Parliaments. Judge-made law is only accepted as legitimate if there is some first order claim to legitimacy. No society would cohere for very long if the only justification we could offer for requiring people to obey laws and rulings of the courts was the fact that they are laws and rulings of the courts.

The point of all this is that, whatever our school of jurisprudential philosophy, there is undeniably a moral component to the task of judging. One of the tasks of the judicial educator is to sensitize judges to the danger of assuming that their personal sensibilities or prejudices are normative, to raise their awareness of social and economic realities of fellow citizens that may be outside the scope of their personal experience, to educate them concerning current international norms and best practice and to equip them with the tools of argumentation that would make the articulation of their reasoning processes in their judgments both sound and transparent.

I can do no better at articulating the challenge that faces us than a quote from the distinguished Honourable Chief Justice of Western Australia and Chair of the National Judicial College of Australia, the Honourable Wayne Martin, who is with us today, he has said that:⁴

Public confidence depends upon Judges doing our jobs well and efficiently. It also depends upon judicial officers being sensitive to the needs of the communities which we serve and upon our ability to effectively communicate to those communities, what we do and why. It depends on us being sensitive to the social context in which we perform our duties, and it requires us to perform them in a way which is relevant to the communities which we serve. If we do all that, we will enhance the public confidence of the community in the judiciary, and that is

4 Wayne Martin “Future Directions in Judicial Education” (Supreme and Federal Court Judges’ Conference, Wellington, 2011) at 3–4.

ultimately the vital protection of our independence. And of course, the purpose of judicial independence is not to provide a benefit to the judiciary, but to enable the judicial system to function fairly with integrity and impartiality.

Most of our countries have written constitutions. When we adopted our Constitutions, we did two very profound things. The first was that, by declaring them to be the Supreme Law, we placed all other laws in a context by which their legitimacy is to be judged.

The second and equally important thing was that we tied the legitimacy of our national institutions, including the Courts, to their ability to deliver 'justice' in that broader sense that includes consideration of social and economic rights (and here I distinguish providing 'justice' from providing a 'legal remedy or procedure'). The courts as the institutions charged with the responsibility of interpreting and applying the constitutions became the final arbiter of what is just and 'constitutional'.

And what is this “justice” of which we speak?

I like the definition from the Nuremberg Declaration on Peace and Justice which hearkens back to Magna Carta and states:⁵

“Justice” is understood as meaning accountability and fairness in the protection and vindication of rights, and the prevention and redress of wrongs. Justice must be administered by institutions and mechanisms that enjoy legitimacy, comply with the rule of law and are consistent with international human rights standards. Justice combines elements of criminal justice, truth-seeking, reparations and institutional reform as well as the fair distribution of, and access to, public goods, and equity within society at large.

Legitimacy, in so far as it is measured by general respect for and compliance with lawfully constituted authority, requires that citizens remain confident that they will be protected from injustice by whomever perpetrated, including organs of the state. That is what, as judges, we are trained, and obliged, to preserve. It goes without saying that the

5 The Nuremberg Declaration on Peace and Justice A/62/885 (2008).

traditional legal education most of us would have received 20 or 30 years ago simply did not equip us to fully discharge that responsibility in a contemporary context.

Dear colleagues, the lives of the people we serve on a daily basis are affected by never ending and increasingly rapid changes that continue to sweep the entire world. This has been the most fundamental characteristic of the early part of the 21st century. While it can generate promises of hope and of new beginnings, it also presents unprecedented challenges, especially for a profession whose existence and sense of stability and dependence on precedent has relied primarily on an unchanged world order. It is our task to lead the response.

In the words of two Australian legal scholars:⁶

This process of globalisation is part of an “ever more interdependent world”, where political, economic, social and cultural relationships are not restricted to territorial boundaries or to state actors, and no state entity is unaffected by activities outside its direct control. Developments in technology and communications, the creation of intricate international organisations ... and the changes to international relations and international law since the end of the Cold War have profoundly affected the context within which each person and community lives, as well as the role of the state [and by extension the Courts].

The fact is that new and emerging technologies have spawned litigation in areas of law that did not exist 20 years ago. New forms of social media have dramatically transformed the way in which we interact and altered expectations about everything from how markets work to notions of privacy.

In order to maintain relevance and consequently, legitimacy, we have to keep pace. We must be able to understand the context in which disputes that are brought for our adjudication arise.

As much as we may think it obvious, I do not believe we can overstate the need for us to be prepared to exist and serve in the changing environment. Judicial training and continuing education is at the heart of that preparation. Training and continuing education of our judges and judicial officers must transcend traditional curricula and go further to forge an intimate connection with the social context in which it is to be applied. This connection is what will inspire public trust and confidence, and more than

6 Robert McCorquodale and Richard Fairbrother “Globalization and Human Rights” (1999) *Human Rights Quarterly* 735 at 735–736.

that, truly legitimise our institutions and our practice in the eyes of the communities we serve.

Knowledge of the law is only one item in a judge's tool kit. The judge of tomorrow must be an efficient manager versed in case management techniques and litigation support technology. He or she must be reasonably knowledgeable about emerging science and technologies.

One of the things that I love about being a Judge is that I am constantly learning. Each new case that pertains to a previously unfamiliar area of human activity forces me to take a crash course in the relevant learning. In recognition of this, I would like to take my few remaining minutes to offer, for your consideration, some areas upon which we might focus as we plan our future education programs. For convenience I will refer to the internationally recognised ICEE acronym.

First, Impartiality – the required judicial character and state of mind. This requires not merely an absence of conscious corruption, high moral standards and a desire to be fair. There must be a deeper self-analysis and contextual education to root out unconscious bias. Particular challenges will have to be faced with respect to gender and sexuality issues, HIV aids and discrimination law generally. Only education can bridge that gap.

If we accept the definition of justice that I postulated earlier, competency implies a basic level of understanding of science, economics, sociology and psychology as well as written and procedural law. It is all contextual. We may have studied these subjects at university but that was a long time ago. I doubt you would take your car to a mechanic who has only studied the technology of the 1980's. With the threat of global warming for example, environmental issues, especially local and international disputes over basic needs like potable water, will become frequent subject matter for our courts.

Efficiency in the age of online commerce requires quicker response times and more user friendly procedures to meet the expectations of an increasingly sophisticated and demanding clientele, in which the number of self-represented litigants is rising. Mastery of litigation support technology is a must. Increasingly, the judge is being seen as the manager of a team that co-ordinates all the resources made *available* through court administrators to ensure the most timely, just and efficient disposition of cases. We cannot assume that all of us come to the bench with the kind of management skills needed for the modern court or courtroom.

Finally, on the question of effectiveness, one aspect of judicial effectiveness is the collective responsibility of listening and responding to the community's legitimate complaints about the justice system and using our influence to effect change. Concerns

about *effective* access to justice and enforcement of judgments are very much our business. I am delighted that one of the major themes of this conference is the role of judiciary-based applied research centres. I am grateful for the opportunity to have co-authored a paper on this subject and I look forward to the discussions that will follow later this week.

I can speak to our own experience in Trinidad and Tobago. All of these considerations that I have mentioned underpin our training efforts. When we set about creating our Judicial Education Institute eight years ago we undertook the task with the firm understanding that:

- (a) a comprehensive strategy of judicial education provides an essential and viable means to strengthen the Judiciary's capacity to dispense justice and meet its responsibilities for judicial governance;
- (b) the unique nature of judicial and court administration requires special training and skills tailored to provide what is needed to strengthen institutional capacity and administer judicial services;
- (c) judicial education must be led by Judicial Officers and function under judicial control, so as to ensure not only that the independence and impartiality of the Judiciary is preserved, but also that members of the Judiciary are accepting of the relevance and value of programmes; and
- (d) the judiciary must be committed to being a learning organization able to respond to change, embrace new ideas, encourage learning growth, development and innovation, facilitate excellence, value all members and encourage communication and sharing, if it is to discharge its responsibilities to society.

These guiding pillars enabled us to build a solid case for such an establishment. They have inspired the implementation of over 170 specific training and education programmes covering a wide range of topics as part of a high quality of service to the Judiciary of Trinidad and Tobago and its stakeholders. Given the successes we have had, we hold them still highly relevant today, and are eager to share our experiences and exchange lessons learned with all of our international colleagues so that we can help each other to serve our societies better.

BUILDING A LEARNING COMMUNITY OF JUDICIAL PRACTICE - THE EXPERIENCE OF THE SUBORDINATE COURTS OF SINGAPORE

By

District Judge Thian Yee Sze*

INTRODUCTION

All courts strive to advance excellence in the administration of justice and the provision of court services. Fundamentally, this is about meeting the needs of the public, particularly in providing an accessible and effective system of justice which inspires public trust and confidence. Achieving this requires a continuous journey of improvement and development; improvement and development of not just our systems and processes but also of the people who work within and through those systems and processes.

This paper focuses on the Subordinate Courts of Singapore's response to various challenges. In particular, the need to build and strengthen the culture of community learning and sharing in our courts.

WHAT EXACTLY IS A LEARNING COMMUNITY OF JUDICIAL PRACTICE?

In the Subordinate Courts, we have always had different forms of training and learning, including lectures, seminars and small group discussions. Refreshers and lectures are regularly organised to provide updates and generate interest among the judges on important issues and developments within the law and the wider socio-economic environment. Small group discussions are also organised where there is a need for

* Secretary, Judicial Education Board of Singapore.

deeper or critical thinking. Judges receive daily electronic updates on important legal and non-legal matters. In addition to putting a learning structure that provides for different modes and channels of learning in place, it is essential that this structure facilitates a culture of learning and sharing among judges.¹ This is because judges are the “specialists” in the area of their judicial work and they learn best from one another when it comes to judicial knowledge and skills.

The Subordinate Courts’ concept of a learning community of judicial practice within the Subordinate Courts pertains to this aspect of judicial learning. In a nutshell, it aims to build an environment (through various training programmes and platforms for the sharing of knowledge and experience) where judges are encouraged to teach, share and learn from each other by being part of the community. By building a strong sense of community amongst the judges, we hope to develop a learning culture that will facilitate the sharing of judicial knowledge and expertise to better the administration of justice.

WHY DO WE NEED JUDICIAL TRAINING AND DEVELOPMENT PROGRAMMES?

A number of reasons underlie our need for a more institutionalised and structured training framework. First, a significant challenge lies in the diverse background of individuals appointed as judges. Many come from prosecution or other government legal posts, others come from private practice, and occasionally, some come in from academic posts. The age and experience of individuals appointed to the bench also vary widely. This challenge is compounded by the fact that there is no single annual judicial intake. Rather, new judges come in as they are recruited or when they become available.

Second, given judge’s busy trial and work schedules, it is not possible for them to keep abreast of all relevant developments on their own. The Subordinate Courts lack a

1 See Chief District Judge Tan Siong Thye, “The Journey towards Court Excellence: Integrating Quality Management into Judicial Education - Quality Management Education and the Subordinate Courts of Singapore” (paper presented to the International Organisation of Judicial Training Conference, Sydney, October 2009).

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THE EXPERIENCE OF THE SUBORDINATE COURTS OF SINGAPORE

dedicated judicial training institution to develop and run judicial training.² It is therefore necessary to ensure that learning programmes provided are able to motivate judges to keep themselves updated and continue learning. The third reason underlying the need for a new training framework is that the public has become ever more demanding and exacting in its expectations of the quality not just of judgments but of how cases are conducted.

ESTABLISHMENT OF THE JUDICIAL EDUCATION BOARD IN SINGAPORE

It was in response to these challenges that the Judicial Education Board (JEB) was set up in 2010 by bringing together expertise from the Supreme Court, the District Court Bench in the Subordinate Courts, the Bar, the Attorney-General's Chambers and academia, to provide guidance and direction regarding the development of judicial training for the district and magistrate's courts in Singapore. The primary objective of the JEB is to ensure that judicial training takes place on a systematic and structured basis, and that it addresses not just present challenges but those that lie beyond the horizon.

Assisting the JEB in its work is a dedicated training unit within the Strategic Planning and Training Division (SPTD) of the Subordinate Courts. Led by district judges, and staffed with well-trained professionals, the Division charts and oversees the judges' training roadmap to ensure that their individual potential is maximised through a holistic learning and development framework.

The main framework for judicial training and education put in place by the JEB identifies three main focus areas:

- (a) an induction programme for new judges;
- (b) continual training throughout the career of judges; and
- (c) building a learning community of judicial practice.

Building of a learning community of judicial practice is a critical component of the training framework because it is accepted that traditional methods of training may not be adequate in ensuring that all judges are trained effectively and in a timely manner. The training framework will enable learning to take place in different ways, through different modes, when it is needed and most importantly, in a sustained manner. In

2 This is mainly due to the relatively small number of judges appointed to the District Court and Magistrate's Court Bench.

particular, the framework will ignite a culture, not just of learning, but, as importantly, but of sharing and capturing useful knowledge for the benefit of all. That is why the concept of building a “learning community of judicial practice” has been emphasised in the JEB’s framework for judicial training. As expounded by Peter Senge in his famous book: *The Fifth Discipline: The Art and Practice of the Learning Organisation*³, to be a Learning Organisation, it is necessary to foster the right approach to knowledge and training by emphasising and developing a culture of learning and sharing.

BUILDING A LEARNING COMMUNITY OF JUDICIAL PRACTICE

Under the JEB’s strategic plan, training must fulfil two objectives: (i) to assist the judges in their professional development and (ii) to build a healthy and vibrant learning community of judicial practice within the Subordinate Courts. In order to do this effectively, training must be provided to those who need it, when it is needed. At the same time, the training framework must facilitate a sustainable culture of learning and sharing. To achieve this, we made several improvements to the training framework in the Subordinate Courts. Our goal was to inspire a positive attitudinal change towards training and continual professional development amongst the judges, not just for themselves, but for the organisation as a whole.

(a) Improvement No.1 - Judges taking charge of their own training

Under the old training framework, the design and delivery of training programmes was usually carried out by a training unit in consultation with senior management. Very often, however, the specific training needs of the judges were not fully met. It was for this reason that when the JEB’s training programmes were implemented, a deliberate decision was made to increase the involvement of the judges at the planning stage. Judges from the Justice Divisions are now appointed as training representatives or “champions” because they are best placed to understand the training needs of the judges in their Division. In addition to the appointment of divisional judicial training representatives, judges are also encouraged to get involved in organised group learning and sharing sessions.

3 Peter Senge *The Fifth Discipline: The Art and Practice of the Learning Organisation* (Random House, London, 2006).

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By getting involved in the planning process and managing their own interactive discussion sessions, judges are able to self-direct both their training and the on-going development of their judicial skills and knowledge. More importantly, their involvement allows them greater control over their training and enables to take charge of their own professional development.

(b) Improvement No.2 - Layered objectives of judicial training

Traditionally, most training programmes involve centralised large group seminars, refreshers or workshops and, to a certain extent, self-development on the part judges. While this approach is often effective in updating and keeping judges informed, it does not encourage any interaction and sharing among judges. Consequently, all the JEB training programmes addressing important developments in case law or legislation, or teaching bench skills, are now designed in several “layers”. In addition to the learning of new material, they aim to achieve the following training objectives (i) reinforce the learning experience and (ii) facilitate interaction amongst the judges.

As an example of this new approach, a layered educational programme was designed by the JEB in 2011. This was in response to a proposal that specific training be provided to: improve judge craft, assist judges in dealing with litigants in person and to assist judges in understanding the different backgrounds and needs of parties to court proceedings. The programme involved the following training activities:

- (a) centralised big group seminars;
- (b) “*Court Craft Excellence Programme*” - A panel of experienced members of the legal fraternity⁴ observed the judges’ bench skills and trial management during proceedings. Then, at the end of the session, the observers provided confidential feedback to each judge for developmental purposes;
- (c) small group interactive and scenario-based discussions to encourage deeper understanding and critical analysis;
- (d) development of training videos on key aspects of the work of the judge - the role of a judge, managing difficult litigants-in-person, managing difficult counsel and conducting a plea of guilty. The scripts of these videos were written by judges and since judges learn best from each other, the judges also acted in the various role-plays;

4 The panel consisted of a retired senior District Court Judge, the ex-Chief Prosecutor of the Attorney General Chambers and Senior Counsel of the Bar.

- (e) “*Judicial Mentorship Programme*” - All new appointees are mentored by experienced colleagues for a period of 6 months. During this period the mentor will guide the new judge on his duties, how to cope during the transitional period to the Bench and attend some of hearings presided by the new judge and provide feedback;
- (f) e-alerts to reinforce the earlier training sessions; and
- (g) providing training materials on the electronic judicial resources repository: The Jurist Resource & Information System (JURIST).

(c) Improvement No.3 - Introduction of Judicial Practice Forums

In light of the complex and dynamic nature of judging, it is not always possible to plan and implement court craft training programmes to assist judges in all aspects of their work. Judges tend to consult other judges or refer to relevant research materials which may be accessible to them. Most judges find consulting and tapping into the expertise of their fellow colleagues helpful. Many also look to their peers in addition to consulting senior judges. In order to encourage this informal learning and sharing among judges and to ensure that all judges will benefit from it, practice forums have been established in the Criminal and Civil Justice Divisions. Each forum consists of rotating panels of experienced judges who are available for consultation by other judges about problematic issues or novel points of law arising in their cases. The panels do not, of course, decide the case for the judge or offer views on the outcome, but instead assist in giving pointers and guidance for the judge to consider and explore.

(d) Improvement No.4 - Harnessing technology to enhance sharing of knowledge

A strong learning, sharing and collaborative culture is critical to facilitating an active and open exchange of information and knowledge within the organisation. In order to cultivate such a learning and sharing culture at the Subordinate Courts, it is also necessary to provide various tools for the judges to acquire, capture, learn and share knowledge and experience. The effective use of technology is critical in achieving this as it can enhance access to and sharing of knowledge.

There are several electronic judicial information repositories containing essential institutional knowledge. From these repositories judges are able to access bench manuals, practice directions, judicial workings papers, compendiums, guidelines on best practices and other training materials. We recently launched a comprehensive

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electronic one-stop judicial resource repository (JURIST) containing all the information a judge needs to know for his day-to-day work. A dynamic and user-friendly interactive knowledge portal to replace the current intranet portal is being developed. This will not only house valuable institutional information and knowledge, but will also allow judges to share, learn and collaborate online through virtual Communities of Practice. At the same time, we will also be exploring the use of Wikis and other social media tools to provide a platform for judges to add and edit information to build up an online encyclopaedia of best practices and expertise in substantive and procedural law. To encourage effective and timely sharing within the organisation, it is always necessary to connect judges who need to know with those who do know. In this regard, we are working to develop our own “Yellow Pages” to highlight subject matter experts in different areas of law and judicial practice.

(e) Improvement No.5 - Encourage learning exchanges with counterparts both locally and abroad

The world is our oyster and there are no physical boundaries to learning and sharing. We recognise the importance of learning from our leading counterparts in the world, as well as from our local legal community. By expanding our international networks and forming collaborative working relationships with international partners, our judges are able to learn and share knowledge and experiences from this wider learning community of judicial practice. In addition, the JEB will be exploring the possibility of greater collaboration between the judiciary and the local legal community in common areas of professional development.

The Subordinate Courts also know that it is essential to engage stakeholders in the administration of justice regularly in order to keep the pulse on the ground and to tap on their knowledge and experience. This is because apart from keeping up with legal developments, judges also need to keep pace with changes outside their immediate areas of interest. Towards this end, we have multiple channels of communication to deliberate on issues, and have regular dialogues with our key stakeholders such as the practising Bar and the Attorney General's Chambers. Active engagement with stakeholders to better understand their needs and concerns is the new normal in Singapore. This will strengthen the fair administration of justice in Singapore.

CONCLUSION

Nurturing a culture that prizes training, development and sharing is a real, but not necessarily elusive, challenge. It takes time, sustained effort and passionate commitment. Mindsets have to be changed, it is not easy, but it is not impossible either. Be that as it may, the incontrovertible truth is that learning is intricately connected to performance as a judge. If we are to have an effective, responsive, accessible and fair judiciary, it is crucial to have our judges constantly and effectively engage in the process of learning and sharing.

SOCIAL CONTEXT AND JUDICIAL EDUCATION IN CANADA

By

The Hon. Justice Brian W. Lennox and Natalie Williams*

Once, not so long ago, the vast majority of people finished their lives where they were born. No longer. Everywhere in our globalized world, people are on the move. And as the pace of demographic change accelerates, so people find themselves living in countries and communities quite different from those to which they were born. Canada's first "citizens" were the populations we now call our First Nations. To these were added settlers from France, the United Kingdom, the present United States and most recently, people from all races and all parts of the world. The 2006 Census reported that one in every five Canadians was born in another country,¹ and that nearly half of the population of urban centres such as Toronto and Vancouver came to Canada as immigrants.² This "deep diversity" obliges courts and society to adapt to meet the needs of all Canadians. Managing diversity in a way that is positive for society raises issues that inevitably find their way to

* The Hon. Justice Brian W. Lennox is Executive Director of the National Judicial Institute; Natalie Williams was Communications Officer of the National Judicial Institute at the time that this paper was written but has since retired. The authors wish to thank the persons listed below for the use of the background material drawn from their essays prepared for the 20th Anniversary of the National Judicial Institute: *NJI's Bold Moves: Collaboration and Progressive Pedagogy*, Justice Donna J. Martinson *Pioneering Efforts: NJI's Social Context Education Project*, Justice John F. McGarry *Sustaining Social Context Education: phase I of the Social Context Education Project*, 2000-2004, Justice Donna J. Hackett and Professor T. Brett Dawson.

1 Susan Crompton, "Census Snapshot - Immigration in Canada: A Portrait of the Foreign-born Population, 2006 Census" (2008) Canadian Social Trends 85.

2 Ibid.

the courts. It requires members of majority and minority groups to make reasonable compromises or “accommodations” with each other on issues like language, religious practices and cultural traditions. Lines must be drawn on a case to case basis, and determining what is reasonable in a particular case is often difficult. There can be no more delicate or important judicial work than this. The peaceful coexistence of the nation's people depends on it..... judges whose duty it is to make these decisions, cannot confine themselves to looking back to how things once were, nor allow themselves to be blinded by sentimental visions of a society that seemed simpler and better than the one they now confront. They must accept and understand the present reality of the actual diversity of their communities and countries and render decisions that are just in the context of that reality. They must seek fairness for all, even those who have come recently or carry a different race, ethnicity or religion. They must judge in the present with a view to the future peace of the nation.³

The Canadian National Judicial Institute (NJI) was created in 1988 at the initiative of the Right Honourable Brian Dickson, then Chief Justice of the Supreme Court of Canada. Its mandate was to: produce and deliver excellent judicial education programs and resources; uphold Canadian Charter of Rights and Freedoms values, judicial independence and rule of law; and act with integrity, reliability and consistency in fulfilling this mandate. The mission statement of the NJI declares it to be an independent institution building better justice through leadership and the education of judges in Canada and elsewhere in the world.

One of the main challenges facing the NJI following its creation in 1988 was the increasing importance and impact of fundamental changes in Canadian demographics and in Canadian society, frequently captured under the heading "social context". Dealing with social context both as a practical reality and as a subject of judicial education has had a significant impact on the manner in which judicial education is delivered in Canada.

3 The Right Honourable Beverley McLachlin, P.c., Chief Justice of Canada. Remarks on the Opening of the Twentieth Anniversary Seminar of the National Judicial Institute, April 23, 2009.

Perhaps the most recent example of social context is the kind of diversity of which Chief Justice McLachlin speaks in the introduction to this article. From the beginning of the European settlement in Canada in 1608 (and thereafter for a period of almost 350 years) Western Europe was the principal source of immigration to Canada. A significant portion of that original European settlement of Canada consisted of immigrants from the British Isles and France. In 1900, 96.3 per cent of the Canadian population had its roots in Europe, with 58 per cent from the British Isles and 31 per cent from France (Only 0.004 per cent of Canadians had roots in Asia and 0.003 per cent in Africa). As a result, the Canadian immigrant population was visibly and physically homogenous in its appearance, with any diversity being found not in race, but in language, culture and religion. The dominant languages were English and French and the dominant religion was Christian (albeit divided between Catholic and Protestant).

With the important exception of its Aboriginal peoples, Canada has always been a nation of immigrants, but it is the shift in the countries of origin of those immigrants that has led to increasing and accelerating diversity. In 1971, almost 62 per cent of the recent immigrants to Canada came from Europe and 12 per cent from Asia.⁴ A short 35 years later, in the 2006 census, Europe and Asia had traded places.⁵ Almost 54 per cent of recent immigrants to Canada in 2006 came from Asia (including the Middle East) and only 16.1 per cent from Europe.⁶ In contrast to the 1900 census results, the 2006 census found that just over 2 per cent of recent immigrants to Canada came from the United Kingdom and 1.5 per cent from France.⁷ If current population trends continue, it is estimated that the current visible minority populations of Toronto (Canada's largest city) and Vancouver (Canada's third city) will become the visible majority in those

4 Statistics Canada, census of population, 1971.

5 Statistics Canada, census of population, 2006

6 In 1971, 9 per cent per cent of recent immigrants came from Central and South America and the Caribbean, 3 per cent per cent from Africa. In 2006, the percentage of Immigrants from the Americas and the Caribbean had remained roughly the same, while African immigration increased from 3 per cent per cent to almost 11 per cent per cent.

7 The largest single source of immigrants currently is the People's Republic of China, followed in order by India, the Philippines and Pakistan, together making up almost 38 per cent per cent of total immigration.

cities by the year 2017. In the whole of Canada, the visible minority percentage of the population will increase from 13.4 per cent in 2001 to 20.6 per cent in 2017.⁸

This growing diversity in the nature of the Canadian population represents a fundamental shift in the national demographic. It is now and will continue to be a source of growth and of strength. At the same time, it has also created an imperative of adaptation for the whole of Canadian society and in particular for our justice system.

Although population diversity is one of the most significant changes in Canadian society in the 20th and 21st centuries, social context in judicial education was first addressed through an issue that had been of much longer-standing significance, that of gender. Canada has always been viewed and has viewed itself as a generous and progressive country. Like many other nations, however, it had been slow to recognize the inequitable manner in which it had treated its female population. By way of example, the right to vote was not granted to women until the 1st World War, and then only on a conditional basis. That right was not fully available throughout Canada until the second half of the 20th century. There were numerous other examples of gender inequities, many relating to areas of employment and property rights or to criminal law. It was the coming into force of the equality rights provision of the Canadian Charter of Rights and Freedoms in 1985 that provided the formal recognition that gender equity required priority treatment in Canadian society and in Canadian courts. That provision, section 15 of the Charter, provided for equality before and under the law and the equal protection and equal benefit of the law without discrimination. The Federal Parliament had previously enacted the Canadian Bill of Rights in 1960 and Canada already had both federal and provincial human rights legislation, but the application of those laws was not uniform and none of them had constitutional status. Section 15 of the Charter formed part of Canada's Constitution and had a broad reach. It provided that:

8 Belanger, A. and E. Caron, Malenfant "Population projections of visible minority groups, Canada, provinces and regions: 2001-2017" (Statistics Canada Catalogue No. 91-S41-XIE). The distribution of immigrant populations in Canada is also interesting. In the 19th century, Canada's population was largely rural and agrarian: even in 1900, over 60 per cent per cent of the population still *lived* on farms. Now, 81.8 per cent per cent of Canadians live in a metropolitan area, with 34.4 per cent per cent of the Canadian population living in one of Canada's three largest metropolitan areas, namely Toronto, Montreal and Vancouver. This same pattern is reflected in the immigrant population. Of the immigrants who arrived in the 10 years preceding the 2006 census, 81 per cent were living in one of Canada's six largest urban areas, with 70 per cent of recent Immigrants living in Toronto, Vancouver or Montreal, and 41 per cent in Toronto alone.

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

In the area of judicial education, the Western Judicial Education Centre (WJEC) had, by the late 1980's, begun to prepare what would then appear to be a revolutionary way of educating judges on social context issues. The WJEC was an institution created by the Provincial Courts of Canada's Western Provinces. It was headed by Judge Douglas Campbell, then of the Provincial Court of British Columbia. The WJEC developed and presented a series of major judicial education programs focusing on social context, including a significant emphasis on gender and Aboriginal issues. Its programming was original and innovative and required an extensive process of planning and preparation. Large planning committees involved not only members of the judiciary but academics and representatives of the public. Seminars were intensive and used modern adult education pedagogy, including well-documented materials, videotapes, panel discussions, small group discussions and plenary reports. The Canadian judiciary had the benefit of this original education programming until 1995 when the mandate of the WJEC came to an end.

Prior to the pioneering work of the WJEC, judicial education in Canada had largely focused on substantive legal issues and its principal method of delivery had been lengthy lecture sessions to large groups of judges. Social context issues clearly required a different approach. In the first instance, social context did not lend itself readily to group lectures: it was not simply a subject area that could be presented through lecture. The traditional case study model was also not available, since in the late 1980's and early 1990's, there was a dearth of reported cases in the area of social context. Social context subjects could not themselves be discussed without significant discomfort in large groups and it was imperative that meaningful discussions be conducted in small group sessions. In order to have such sessions, it was also necessary that they be facilitated by judges or others who had been trained in facilitation skills. Finally, it proved impossible to deal with social context issues without involving, not only judges, but at a minimum, academics and members of the Bar. One of the key innovations of social context programming was the involvement in all phases of the process of representatives of the broader community and civil society.

While the WJEC was planning and presenting its social context programming, the NJI was itself undergoing a significant period of growth from its modest origins in

1988 as a secretariat with three or four staff members. By the early 1990's, the NJI had become an important national judicial educator and had quickly turned its mind to social context education. In a paper prepared to commemorate the 20th Anniversary of the NJI, Chief Justice Beverley McLachlin remarked on the meaning and importance of social context education. The Chief Justice noted that social context education: “stresses that good judging requires an appreciation of the social context from which the matter before the court arises and the varying perspectives of the people before the court ... In a world marked by pluralism and cultural diversity, the judge stands as the interpreter of difference, the one who listens to every voice, and understands it. We are not judges of this community or that community; we are judges of everyone in every sector of society, high and low, rich and poor ... We are independent, and hence impartial. The National Judicial Institute, through education for judges, led by judges, will prepare the Canadian judiciary to meet these challenges.”

Recognizing the fundamental importance of social context education for judges, in 1994, the Canadian Judicial Council (CJC) (the national body of Chief and Associate Chief Justices responsible for federally appointed judges) passed a resolution calling for social context education that would be “comprehensive, in-depth, and credible,” and that would include race and gender.

It was under that strong mandate that the NJI created its national Social Context Education Project (SCEP). The initiative was co-chaired by Judge Donna Martinson, then of the Provincial Court of British Columbia, and Justice John F. McGarry of the Superior Court of Justice (Ontario). As Justice Martinson⁹ later stated, the SCEP represented a “bold shift in the approach to national judges’ education in two key ways”. The first change was the recognition that all judges, whether provincially or federally appointed, could benefit from the joint development and presentation of educational programming in areas of common interest.¹⁰ The second change has become fundamental to judicial education in Canada and involved moving from the traditional approach to judicial education – which involved judges teaching other judges about legal doctrine, often using the large-group, lecture style – to an innovative approach, employing adult learning techniques and incorporating perspectives from legal academia and the wider community.

9 Donna Martinson, now retired, was subsequently appointed to the Supreme Court of British Columbia.

10 In Canada, provincial court judges are appointed by provincial governments, while superior court judges are appointed by the federal government.

The NJI invited judges from all courts across the country to a National Judicial Consultation on social context education. This consultation was unprecedented (judges from the different levels of court had never met together at the national level) and it led to joint programming in provinces where this had never happened before. This cooperative approach ensured that all judges would have access to social context education programming, something that continues to pay dividends in Canada's justice system.

The SCEP also introduced what has become one of the guiding principles of integrated social context education: the “three pillars” principle. This principle provides that, while judges (pillar one) would lead the development of judicial education, community leaders and legal academics would serve as the other two pillars in creating the foundation for well-rounded programming. Justice Donna G. Hackett of the Ontario Court of Justice and NJI Academic Director Brettel Dawson have stated: “[s]ocial context education is generally about what judges do not know, or have not experienced. While judicial education must always be led by the judiciary ... experts on issues of diversity, disadvantage and difference must be relied upon to help identify social context issues and be involved at all stages of development, design and delivery of judicial programs and curricula.” Community leaders provide direct experience of social context issues which “legal academics can then help to filter and translate into relevant legal concepts and issues. Finally, judges can mould and focus these experiences into the act of judging.”

The SCEP was divided into two phases. The first phase provided for a multi-disciplinary Social Context Advisory Committee, with members drawn from across the country, from the judiciary, academia and the community. It also included the development and presentation of pilot social context programs in three superior courts in different provinces. For the purpose of developing the academic and pedagogical aspects of the pilot programs, the NJI retained the services of law professor Rosemary Cairns Way of the University of Ottawa. As Justice McGarry later noted, “[t]his was one of the first of many innovations that the NJI pioneered through the SCEP - retaining a legal educator and curriculum development expert to complement the leadership role of judges in judicial education.” The major breakthrough for the project came after a half-day presentation to the Canadian Judicial Council, following which the Council and its members strongly endorsed the project.

By the end of phase I, the SCEP had developed and delivered some 20 programs to more than 1,000 judges. As an incidental by product, the process also led to the establishment of permanent education committees within a number of Canadian courts,

committees which had not existed when the project began. “The secrets to the success of phase I lie in the strongly collaborative approach taken,” noted Justice McGarry. “At all times, the SCEP worked as a partner to the courts and court education committees, which themselves shaped the programs to the particular experience of their jurisdiction.”

The NJI began phase II of the Social Context Education Project with a consultation intended to discuss the achievements of phase I and to set the priorities for the next phase. The consultation concluded that the SCEP had successfully introduced adult learning techniques to many courts and had established new networks to ensure that social context education would continue at a local level. The goals identified for phase II were:

- 1) to find ways systematically to integrate social context issues into all forms of judicial education and planning, and
- 2) to sustain ongoing social context education into the future.

The most important element in achieving those goals was the initiation of a faculty development and curriculum design program. This five-stage program brought together judicial leaders and educators from all courts to work with a diverse faculty of community and academic leaders. That program, which lasted several months, had the following components:

- 1) a three day skills development course that included instruction on adult learning methods;
- 2) design and development by judge participants of a social context education program for their own court, including the use of a needs assessment and an *advisory* committee;
- 3) presentation of the program design to other phase II participants and SCEP faculty, with feedback;
- 4) presentation of the program or seminar to colleagues at local courts (programs developed included sessions on poverty, literacy, aboriginal issues, disability, self-represented litigants and domestic violence); and
- 5) a report containing court feedback from the program together with an evaluation of the process and suggestions for program improvement. Upon completion, a certificate was received signed by the Chief Justice.

This *five-stage* program was repeated on four separate occasions to groups of up to 25 judges over a two-year period between 2001 and 2004. Through the program, some 100 judges from all courts across Canada enhanced their skills as judicial educators and subsequently delivered approximately 40 integrated social context education sessions

to their colleagues. Some of these programs became NJI modules of education, which were then made available to other courts for social context seminars beyond Phase II.

As the SCEP was concluding, the NJI hosted the International Conference on the Training of the Judiciary (with the International Organization for Judicial Training (IOJT)) in the fall of 2004. The conference devoted two days to social context education and attracted nearly 200 judicial educators from over 60 countries. It showcased Canada's SCEP project and other similar initiatives around the world, providing valuable opportunities for dialogue and networking. Since the conclusion of the Social Context Education Project, the NJI has continued to develop and present social context education both in independent programming and as a component of education in substantive law, judicial skills or judicial career programs. The lessons learned have been incorporated into the *Ten Principles of Social Context Education* (attached as Appendix 1). Perhaps more importantly, those principles and the practices that have been developed from them, together with the lessons learned through the SCEP, have fundamentally altered the nature of judicial education in Canada.

The Social Context Education Project, which continues to exert an important influence on judicial education in Canada (and in NJI projects abroad) has significantly increased the awareness of the value of integrating social context issues into all judicial education curricula and has created new resources and networks for doing so. It has led to the development of truly adult education pedagogy and a disciplined and structured approach to judicial education. This approach includes an intensive process of design, planning and delivery; a comprehensive overview of curriculum, the extensive use of planning committees, recourse to academics, the bar and members of the wider civil society; the ongoing identification and training of judicial faculty; the identification of learning needs and the development of specific program objectives; the use of the "learning circle" pioneered by Professor David Kolb: recognition of different learning styles by the use of different and varied methods of instruction, skills-based, experiential education; a commitment to continuous review and improvement; and *above all*, an emphasis on judicial leadership in practical and useful education that is judge-led and judging-focused.

The impact of social context on judicial education in Canada has been remarkable. It has both left a legacy and created a path for future judicial education. We conclude this essay where it began, with the words of Chief Justice Beverley McLachlin:

[J]udges whose duty it is to make these decisions, cannot confine themselves to looking back to how things once were, nor allow

themselves to be blinded by sentimental visions of a society that seemed simpler and better than the one they now confront. They must accept and understand the present reality of the actual diversity of their communities and countries and render decisions that are just in the context of that reality. They must seek fairness for all, even those who have come recently or carry a different race, ethnicity or religion. They must judge in the present with a view to the future peace of the nation.¹¹

APPENDIX 1

Ten Principles of Social Context Education - National Judicial Institute

One important enduring outcome of Phase II of the National Judicial Institute's Social Context Education Project was the evolution and solidification of the following ten principles of judicial social context education. These principles were found to be essential in phase II, and now serve as a model for sustaining and integrating social context education throughout all forms of judicial education. It should be noted at the outset that these ten principles do not operate in isolation and, when applied together, have a synergistic effect.

1. Judicial Leadership

An initial and sustained commitment to social context education from chief justices and chief judges, education committees and local judicial leaders is critical.

2. The Three Pillars of Integrated Social Context Judicial Education

Social context education is generally about what judges do not know, or have not experienced. While judicial education must always be led by the judiciary, judges alone cannot develop, design and deliver effective social context education programs or integrate social context issues into all programming. Experts on issues of diversity, disadvantage and difference must be relied upon to help identify social context issues and be involved at all stages of the development, design and delivery of judicial

11 The Right Honourable Beverley McLachlin, P.c., Chief Justice of Canada. April 23, 2009. Remarks on the Opening of the Twentieth Anniversary Seminar of the National Judicial Institute.

programs and curricula. This expertise is best found in well-respected community leaders (pillar one) who have direct experience with these issues. Legal academics (pillar two) can then help to filter and translate these experiences into relevant legal concepts and issues. Finally, judges (pillar three) can mould and focus these experiences and issues into the act of judging. In this interactive way, the Three Pillars of social context education provide the best foundation for structuring the development, design and delivery of integrated social context judicial education curricula and programming.

3. Sustained Social Context Integration

Equality and social context issues are so diverse, pervasive and ever-changing, that an effort must be made to systematically and continually identify them in all judicial education topics, programs, and curriculum planning. Structuring this input by means of institutionalizing the participation of the Three Pillars at each stage of program development is the most efficient and effective way to achieve and sustain integration.

4. Local Input and Relevance

Integrated social context programs require planners to identify and include social context elements that are relevant for the work of the targeted judicial audience. Consequently, seeking input specifically from the participants' jurisdiction is critical in order to identify and address relevant issues, priorities and resources from conceptualization through to delivery.

5. Needs Assessment

The identification of the education needs of judges when formulating both curriculum and programs should be done in consultation not only with judges, but also with those affected by the work of judges, particularly those in situations of disadvantage and those with diverse backgrounds and experiences. The involvement of the Three Pillars is therefore important in the initial needs assessment.

6. Focus on the Judicial Role

In order for equality and social context issues to be understood as relevant and important in all forms of judicial learning, their presentation has to be connected to legal and factual issues faced by judges on a daily basis. This grounded and practical

approach will link judicial education to judicial tasks and roles. The interaction of the Three Pillars facilitates linkage and balancing between judging and access to justice issues.

7. Skilled Planners and Faculty

Social context education explicitly engages values and attitudes, and touches upon assumptions and world views. It connects legal principles with lived realities. As such it is not like other forms of judicial education and requires a broader array of learning approaches. Those who plan social context programs need a skill set that encompasses knowledge of equality and social context issues, the pedagogy of adult learning and effective program design. Optimally, planning committees and faculty members, including facilitators, will have the opportunity to develop their skills in support of social context program design and delivery through participation in a pre-program session involving the Three Pillars.

8. Effective Program and Curriculum Design

Social context issues require a skilful balancing of social and legal issues to address the experience of disadvantage, and to connect to the unique characteristics and responsibilities of judges. As such, programs must be carefully designed to foster a learning process that touches upon the emotional, perceptual, intellectual and behavioural capacities of judges. More so than in other forms of judicial education, an “experiential model” of program design is particularly useful, with a focus on clear learning objectives and varied learning methods. The latter include problem-based exercises that require them to share and apply their own judicial experience to social context issues using the pedagogy of adult learning.

9. Adult Learning Principles for Judges

Judges are a unique group of learners. Like other adult learners, judges have a wide range of skills and experiences that are important resources in the teaching and learning process. Judicial education is thus most effective when it draws on these experiences and is based on learning activities where they can be shared. Several attributes and concerns of judges as adult learners need to be taken into account. Learning spaces and approaches must respect confidentiality and uphold judicial independence. Relevant knowledge and skills must be provided prior to undertaking problem-solving or

practice activities. Particular attention must also be paid to a balance between non-prescriptive approaches while advancing Charter values, including equality.

10. Evaluation and Feedback

Effective judicial social context education and curriculum development require ongoing feedback and evaluation at all stages of planning and delivery. As in other areas, ensuring that feedback is received from members of each of the Three Pillars helps to ensure that judicial education can continually evolve to meet our ever-changing judicial needs and social context.

TAKING INTO ACCOUNT NON-JURIDICAL ASPECTS MATTERS IN JUDICIAL TRAINING PROGRAMMES FOR JUDGES AND PROSECUTORS

By

Dr. Rainer Hornung*

INTRODUCTION

Training is everything. The peach was once a bitter almond; cauliflower is nothing but cabbage with a college education.²

Mark Twain's metaphor seems to me a very good illustration of the importance and positive effects of training and, specifically, of post secondary school initial and continuous training.

In any developed society, the law that judges or prosecutors have to apply changes at an often breathtaking speed. Life-long-learning therefore is, or at least should be, a matter of course for judges and prosecutors. The European Civil Forum within the European Judicial Training Network (EJTN) has identified what it describes as a "regulation frenzy" at both the national and European level.³ Any judge or prosecutor who wants to be up-to-date must therefore be aware that he or she has to undergo regular training to keep in touch with current legal developments.

But adult learning/training cannot merely focus on broadening the professional *knowledge* of the trainee. Rather, training has to be understood as effecting "relatively

* Director of the German Judicial Academy (GJA). The GJA is responsible for the ongoing training of judges from all jurisdictions and of public prosecutors. It organises nearly 150 conferences and seminars per year for some 5,000 participants.

2 Mark Twain *The Tragedy of Pudd'nhead Wilson*, 1894.

3 European Judicial Training Network "European Civil Forum Handbook" (Barcelona 2010), available at www.ejtn.net, at 9–10.

permanent change in *behaviour* or knowledge” including “observable activity and internal processes such as thinking, attitudes and emotions”.⁴ Adults differ from children as they “bring a vast array of history and experience to the learning environment”. They also “have already developed their individual strengths, and have a range of learning experiences behind them”. Consequently, some training experts refer to the theory and practice of adult (problem posing) education as “andragogy” rather than the classical teacher-directed pedagogy.⁵

Australian adult training expert, Caron Egle, has said that adult learners have a range of knowledge and experience (which can be used in the training course). They:

- (a) need to validate the information from their own values and attitudes;
- (b) are responsible (which can be used to let them set goals and help plan the learning steps);
- (c) need to decide for themselves what is important to learn;
- (d) expect that what they are learning can be applied immediately;
- (e) want to be actively involved in their learning;
- (f) need practice and reinforcement;
- (g) need to see the relevance;
- (h) like to challenge and reflect on ideas;
- (i) have increased powers of comprehension; and
- (j) need to feel confident in the learning environments.⁶

Egle’s insight shows that modern working adults who are eager to learn (and in all our countries, I think, judges and prosecutors tend to be particularly critical and challenging adults in their working environments) will not be satisfied by traditional lectures on juridical hard skill topics in which they have a merely passive role.

The aim of this article is to illustrate the kinds of non-judicial courses the German Judicial Academy (GJA) offers, outline the frameworks in which they are offered and provide a number of lessons to assist future training course organisers.

4 Caron Egle *A Guide to Facilitating Adult Learning* (Rural Health Education Foundation, 2009) at 3.

5 Ibid.

6 Ibid.

POSITION IN GERMANY

Even though section 2 of the GJA's Administrative Agreement⁷ pointed out the need to train judges and prosecutors not only on their juridical knowledge, but also concerning "their capacities and their knowledge with respect to political, societal, economical and scientific developments, a real change of mentality within the GJA's Programming Conference⁸ was not observed before the end of the 1990's.

In the last ten to twelve years, the GJA's Programming Conference has progressively developed a new conception in which classical law-related training courses, which were predominant in the first two and a half decades of judicial training organised by the GJA, today, represent only half of the nearly 150 annual training courses. The other half are divided into "interdisciplinary courses" and "behavioural seminars". The interdisciplinary courses aim to give participants basic knowledge in other disciplines and to sharpen their humanistic skills and capacities. They acknowledge that judges and prosecutors, as law appliers, regularly come into contact with other disciplines and other professions. The behavioural seminars on the other hand acknowledge that, in order to be both respected members of the judiciary and also to manage their own day to day workload efficiently, judges and prosecutors need to have well-developed human capacities and social competencies.

Further, it has been realised that the GJA has to acknowledge the roles of chief justices, chief prosecutors and other leading court executives, not merely as the representative heads of their jurisdictions, but as real court or prosecution office managers.

All this led to the Programming Conference's adoption, in 2002, of a new "Resolution 1.1"⁹ which recommends that a typical GJA annual programme should be

7 This is a public law treaty signed by the German Federal Government and the 16 Federal States which have agreed to finance and manage the GJA jointly. It came into effect on 1 March 1993 and replaced the initial 1973 Administrative Agreement, which was only valid for Western Germany.

8 This is the major decision making body of the GJA and includes one representative from the Federal Ministry of Justice, representatives from the 16 regional ministries of judges and from the three major professional unions of the judiciary. The Programming Conference convenes twice a year to plan the programme for the following year.

9 In the last 38 years, the Programming Conference has adopted a 40 page set of "Resolutions" which specify the rules and principles to be used in the construction of the annual programme of the GJA.

composed of (only) 45 per cent of juridical skills courses, 30 per cent of interdisciplinary courses and 25 per cent of “behavioural” (“psychological”) courses.

Whereas the practice of the last five years shows that in reality roughly 55 per cent of GJA conferences and seminars over the last five years have focused on purely juridical topics. It is nevertheless an impressive statement that nearly half of the annual courses offered by the GJA deal with topics which are ostensibly of no direct and immediate use for the everyday work on files. It is perhaps an even bigger surprise that our interdisciplinary courses and our behavioural courses are more sought after by the German judges and prosecutors than the traditional legal courses. The, often enthusiastic, evaluation of GJA courses by participants demonstrates that these courses meet a real need in the judicial population.

In 2005, the GJA’s Programming Conference took another step towards a more modern and comprehensive training programme for judges and prosecutors. It asked a subgroup of five of its members to plan and consolidate a series of modular courses especially for chief justices, chief prosecutors and other court or prosecution office managers/executives. Since then, the GJA annually offers four to seven complementary seminars on typical jurisdiction managers’ knowledge and capacities.

The following three sections will discuss the GJA’s current interdisciplinary courses, behavioural seminars and jurisdiction managers’ seminars. They will also set out what rules must be observed to achieve good training results in all three types of courses and what can be learned from the evaluation of the GJA’s courses.

INTERDISCIPLINARY COURSES IN THE PROGRAMME OF THE GJA

Modern judges and prosecutors do not sit in sequestered offices and write their judgments, orders, indictments or dismissals by merely taking into account more or less theoretical juridical concepts. Quite to the contrary, they are placed in the centre of society because nearly any legal dispute opposes members of the society and their respective personal or institutional interests. It is not uncommon for an academically sound solution to be seen as unsatisfactory by all the parties involved. As a result, any good judge or prosecutor should know that good decision-making and decision-taking has to take into account relevant societal, economical, scientific and political factors.¹⁰ He or she has the obligation to dispense *justice*, and this means much more than the

10 Compare s2 of the GJA’s Administrative Agreement of 1993.

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simple quasi-automatic application of a legal rule. It should be a great compliment when a non-jurist says of a specific judge or prosecutor that he or she is, in the best sense of the term, a “just” jurist.

The acquisition of interdisciplinary knowledge, skills and capacities is an ongoing process. Regular training courses can help judges and prosecutors to broaden and to deepen their interdisciplinary qualifications and thus become “better” jurists.

Topics Dealt with in the GJA’s Interdisciplinary Courses

The GJA’s annual judicial training programmes from 2009 to 2012¹¹ have provided for between 25 and 40 courses on interdisciplinary topics. These have included:

- bookkeeping and fiscal law (basic and advanced modules);
- the society and political extremism, especially right wing extremism;
- personnel development and new instruments of court management;
- the practice of personnel review;
- project management;
- quality management and process management in courts and prosecution offices;
- the handling of domestic violence;
- the protection of children against neglect and abuse;
- methods to professionalise the work of a juvenile court judge;
- the treatment of victims of sexual violence;
- juridical and therapeutic treatment of drug addicts;
- societal aspects of medically assisted suicide;
- the role and the self-image of a modern judge;
- judges’ ethics;
- judicial self-governance;
- judges’ images in Germany and in Europe;
- the independence of the judiciary v. the representation of interests by the advocacy;
- the process of a judge’s decision-taking;
- law and psychology;
- law and psychiatry;
- law and forensic medicine;

11 See www.deutsche-richterakademie.de.

- law and penitentiary medicine;
- law and forensic science;
- law and philosophy;
- law and generation problems;
- law and sports;
- law and arts;
- law and religion (Islam; Judaism);
- law and internet;
- “eJustice”: The digital present and future of the judiciary.

Best Practice

The GJA’s experience of running interdisciplinary courses, including some which were less than successful, has shown that it is not always easy to include both juridical elements and elements from other disciplines and professions within a single conference. Judges and professionals want to understand the direct relevance to their professional practice of content which broadens and widens their horizons on economical, societal, scientific, and economical matters. Presentations that are too abstract or too far-fetched will be criticised by most of the participants. It is therefore best to have presentations by both judicial practitioners and experts on non-judicial topics (university professors, forensic experts, social workers, and so on). One format that has proved to be especially successful is to organise the programme to alternate between juridical and non-judicial lectures. In addition to this, lectures given by foreign speakers, especially foreign judges and prosecutors, have been very successful.

Another format that has proved to be successful is to have guest participants from the other (non-judicial) discipline(s)/profession(s) that are dealt with within the framework of the conference. The traditional GJA’s conference on “Law and Psychiatry”, for example, is typically attended by 30 criminal court judges and prosecutors and ten psychiatrists and psychologists, some of the latter actively contributing to the success of the conference by presentations. This has been more successful than other conferences where only judges and prosecutors have participated without any guest participants from other professions. It can, however, be difficult to find the right balance between judicial and of non-judicial participants, especially as the GJA is essentially a continuous training institution for judges and prosecutors only.

The interdisciplinary courses offered by the GJA are very popular among German judges and prosecutors because they encompass more than just traditional presentation

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techniques such as lectures and discussions. Practical sessions like films or guided visits of penitentiary centres or historical sites that are of relevance to the course are often incorporated.

Lessons to be Learned from the Evaluation of GJA's Interdisciplinary Courses

Attendance rates demonstrate the success of the GJA's interdisciplinary courses. In 2010, the attendance rate of the GJA's interdisciplinary courses was virtually identical to the attendance rate for GJA courses overall. This rate, an impressive 95.5 per cent, demonstrates that interdisciplinary conferences are as popular among our German judges and prosecutors as "classical" conferences on law-related matters. Even though these courses are often not immediately related to the judge or prosecutor's day-to-day work, they are clearly of great professional interest for the German judiciary.

The GJA's substantive evaluation of the interdisciplinary courses also attests to their success. At the end of all GJA courses, participants are asked to fill in evaluation sheets, asking, among other questions, to attribute an overall grade between 0 (extremely poor) and 9 (excellent) for the training course. The overall average grade for the 141 GJA courses in 2010 was an excellent 7.9 out of 9 points. The average grade for the interdisciplinary courses was an almost identical 7.8 out of 9.¹²

**BEHAVIOURAL/PSYCHOLOGICAL SEMINARS IN THE
PROGRAMME OF THE GJA**

One of the weaknesses of university and early post-university legal training is that it is almost entirely focused on the acquisition of *legal* knowledge. The so-called "soft skills" did not play any role in early legal training until the late 1990^s and, even now, this role is very limited.

All experts on judicial training, however, agree that knowledge of sociological, psychological and humanities based issues is an important part of being a good and modern judge or prosecutor. For this reason, compulsory seminars for newly appointed judges and prosecutors in most of Germany's 16 Federal States include lessons on soft skills.

12 None of the 40 interdisciplinary courses in 2010 was rated poorer than 7.0 points. See www.deutsche-richterakademie.de.

Topics Dealt with in the Behavioural / Psychological Seminars of the GJA

The GJA's annual judicial training programmes from 2009 to 2012 have provided for between 32 and 36 seminars on the improvement of judges' and prosecutors' behavioural, methodological and psychological capacities. These seminars, which run for an average of five days, have included topics such as:

- conducting a hearing successfully;
- rhetoric and presentation techniques;
- improvement of health in the judiciary;
- general communication skills;
- intercultural communication;
- how to motivate colleagues;
- techniques for improving mental capacity;
- stress management;
- conflict management and dispute resolution;
- dealing with emotionally challenging situations professionally;
- speaking in court;
- dealing with the media;
- the psychology of testimony evidence;
- mediation techniques;
- understanding children's evidence;
- processes of self-discovery: the human being under the robe;
- how to successfully moderate discussions; and
- how to successfully treat querulant persons.

Best Practice

One of the most important questions to answer when organising a behavioural/psychological seminar is whether to use professional (non-jurist) soft skills trainers or to employ practitioners who have experience in the specific field. On the one hand, while professional soft skills trainers are significantly more expensive,¹³ they are true specialists in their respective fields and entirely focus on adult training. On the other hand, professional soft skills trainers sometimes lack specific and necessary

13 Whereas a judge, a prosecutor, a lawyer, a university professor, a chartered accountant, or a tax counsellor lecturing for the GJA can expect a fee of only €225 to €325 per half-day, a professional soft skills trainer may get up to €600 per half-day.

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knowledge of the judiciary. On more than one occasion I have personally observed professional trainers propose solutions in behavioural seminars that completely fail to take into account the realities of everyday court or prosecution office practice.

It is therefore helpful to recruit highly specialised and experienced legal practitioners to facilitate behavioural seminars, at least when the soft skill topic is closely related to the exercise of judicial tasks.¹⁴ That said, professional trainers are still used in more than 80 per cent of the GJA's behavioural/psychological seminars. This may be a reflection of German judges' and prosecutors' greater willingness to accept a (critical) behavioural input from an external person than to accept the same input from a colleague.

If a behavioural seminar is to be successful, it is important that, prior to registration, all attendees are aware that participation is indispensable. This avoids the embarrassment that can arise when an attendee refuses to contribute actively to parts of the course such as role plays, mock trials, or video-taped auditions.

Good behavioural seminars stand and fall with the number of participants. As a State organiser of continuous training courses for judges and prosecutors in Baden-Wurttemberg from 2004 to 2008, I always limited behavioural seminars to a maximum of 16 to 20 participants. On the national GJA level, the Programming Conference will accept up to 25 participants for behavioural courses.¹⁵ This is aimed at allowing as many judges and prosecutors from as many German Federal States as possible to take part. Previous experience has shown that this number is the absolute limit and that the psychological seminars only work well because the applicants are usually particularly motivated.

Lessons to be Learned from the Evaluation of GJA's Behavioural/ Psychological Seminars

Attendance rates demonstrate the success of the GJA's behavioural/psychological seminars. In 2010, the attendance rate of the GJA's behavioural/psychological seminars was a very impressive 102.1 per cent (meaning that all courses were full and that some of them were overbooked with 26 or 27 participants). This figure

14 For example the psychology of evidence, including the special techniques of hearing children.

15 The normal format is 40 participants per course in Trier (Federal State of Rhineland-Palatinate) and 35 participants per course in Wustrau (Federal State of Brandenburg), the two conference sites of the GJA.

demonstrates the need for interactive training in human, sociological and psychological soft skills within the German judiciary.

As to the substantive evaluation of our behavioural seminars in 2010, the excellent 8.1 point average grade unequivocally indicates that the 35 courses offered met the training needs of Germany's judges and prosecutors.¹⁶ And this is a valid finding even though there is a (comprehensible) tendency of participants in a successful interactive seminar to be perhaps a bit overly enthusiastic.

THE MODULAR PROGRAMME OF THE GJA FOR COURT AND PROSECUTION OFFICE MANAGERS

In the judiciary, the legendary "born leader" is a very rare species, even rarer than in the "normal" world. This is especially true because future jurists are still educated and trained to be unobtrusive members of the society providing juridical knowledge without seeking to attract attention by spectacular public actions. Not surprisingly, a large proportion of Germany's judges and prosecutors have no desire to assume any managerial role.

Notwithstanding this, it is unavoidable that even a first instance judge or prosecutor has everyday management tasks that they must fulfil (for example deciding on the reimbursement of experts' costs, or giving court clerks orders relating to the organisation of the office).¹⁷ These tasks increase and become more onerous higher up the court or prosecutorial hierarchy. Chief justices and chief prosecutors are nearly overwhelmed with management tasks and are left with virtually no time to participate in the court's jurisprudence or practice.

Topics dealt with in the modular programme of the GJA for court and prosecution office managers

The GJA's annual judicial training programmes from 2009 to 2012 provided for between four and seven annual modular training courses for "leaders" (i.e. judges and prosecutors who are charged, to a greater or a lesser degree, with the accomplishment of management tasks). It is strongly recommended that any chosen participant takes

16 For all statistical data, see www.deutsche-richterakademie.de.

17 This has recently been emphasized by the European Judicial Training Network, above n 3, at 10.

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part, within one and a half or two years, in all the eight modules currently offered by the GJA.

The GJA provides for court and prosecution office managers' modules on the following topics:¹⁸

- Personnel development and new instruments of court management
- The practice of personnel review
- Project management
- Quality management and process management in courts and prosecution offices
- How to motivate colleagues (and groups of colleagues)
- Conflict management and dispute resolution
- Dealing with the media
- Mediation techniques.

Organizing Modular Courses for Court and Prosecution Office Managers

Not surprisingly, there is considerably more political influence in the planning of courses for court and prosecution office managers than in the planning of other training courses. There is a certain competition among the 16 Federal States regarding best management practices (the States having, in our federal system, the legislative power for setting rules on the administration and management of jurisdictions). It is therefore important that those designing management modular courses recruit leaders who are as familiar as possible with the everyday court or prosecution office practice of the region in which the course is conducted.

Experience has shown that alternating lectures on “hard” management skills (for example on personnel review or on quality management) with interactive parts on leaders' soft skills (for example on group moderation or on dispute resolution) in a single seminar is not successful. It is better to address each area in a separate seminar. The best is to have the “normal” 35-40 person courses on knowledge of court management, and to have behavioural seminars for 25 participants on specific leaders' human capacities.

18 These same topics were also identified either as generally important interdisciplinary topics or as generally important soft skills.

Lessons to be Learned from the GJA's Modular Courses for Court and prosecution office managers

No specific overall evaluation was carried out of the six modular courses¹⁹ offered in 2010. Individual course evaluations, however, demonstrated that participants of these courses tended to be slightly more critical than their “normal” colleagues were of the other courses offered. They did, however, demonstrate the same tendency to be more generous with their evaluations of interactive courses on soft skills than with their evaluations of hard skills courses.

The success of a court or prosecution office managers' course appears to depend significantly on the homogeneity of the participants. It is therefore the training organizer's responsibility to ensure that first instance judges and prosecutors with nearly no experience in personnel leading (future leaders) are not put in the same group as experienced chief justices or chief prosecutors.

CONCLUSIONS AND RECOMMENDATIONS

In summary, the following conclusions and recommendations are offered:

- (a) Continuous judicial training should not merely focus on the “hard” juridical skills. It is at least as important to organise training courses which focus on either the societal, economical, political and scientific environment of the judge or prosecutor (interdisciplinary courses), or on the improvement of the judge's or prosecutor's behavioural, methodological and psychological capacities/”soft skills” (behavioural/psychological seminars).
- (b) Any national or regional academy, school or institute in charge of organizing continuous training programmes for appointed judges and or prosecutors should plan to have at least 40 per cent of its annual programme focus on interdisciplinary training and behavioural/psychological seminars.
- (c) Interdisciplinary courses should include contributions from both judicial practitioners and experts on non-judicial topics (university professors, forensic experts, social workers, and so on). Course programmes should aim to alternate between juridical and non-judicial presentators, the latter being a kind of mirror to the juridical interventions.

19 Four of which focused on hard skills topics and two on leaders' soft skills.

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- (d) Where possible, experienced and specialised judicial practitioners should facilitate behavioural/psychological seminars as well professional soft skills trainers.
- (e) Prior to registration, all attendees of behavioural/psychological seminars should be made aware that the active participation is indispensable for the success of the course.
- (f) The number of participants in behavioural/psychological seminars should be limited to 25 at the most. The ideal number of participants is no more than 20.
- (g) Those chosen to lecture at court or prosecution office managers' courses should be recruited as much as possible from judicial practice. Controversial or abstract presentations by ministry officials should be avoided.
- (h) When planning the structure of a management course, lectures on "hard" management skills should not be mixed with interactive presentations or segments on leaders' soft skills.
- (i) Participants in management courses should be allocated to groups where there is homogeneity between the participants.

INNOVATIONS IN JUDICIAL EDUCATION: PREVENTING WRONGFUL CONVICTIONS

By

T. Brettel Dawson and Natalie Williams*

INTRODUCTION

Canada's National Judicial Institute (NJI) has earned an international reputation for its highly developed approach to judicial education, that is, judge led, judging focused and skills-based.

The NJI's three day seminar on "Preventing Wrongful Convictions" exemplifies the Institute's innovative approach to programme design and delivery. First presented to Canadian trial judges in 2001 under the name "Frailties in the Criminal Justice Process", the seminar came about following several Commissions of Inquiry into wrongful convictions and requests for education in this area by judges themselves. It is an intensive, skills-based judicial education programme.

Steering clear of long lectures, the seminar employs the most up-to-date adult learning principles. With a focus on skills-based, experiential learning, the programme features thought-provoking videos, problem-solving activities and facilitated small-group discussions. It deals with topics ranging from eyewitness identification and false confessions to overzealous prosecution and expert evidence. The seminar enables participants to hone their courtroom skills and to learn from each other's experiences. The latest "Preventing Wrongful Convictions" seminar took place in St. John's, Newfoundland and Labrador, in October 2010. Another iteration is planned for 2012.

* Professor T. Brettel Dawson is the Academic Director of the National Judicial Institute and Associate Professor, Department of Law, Carleton University. Natalie Williams, B. J., was the Communications Officer for the National Judicial Institute (now retired). The NJI website is at www.nji-inm.ca.

Judging by the evaluations from previous seminars, participants appreciate the skills and knowledge they gained over the three-day programme, and have indicated that the sessions opened their eyes to new ideas and approaches. Judicial participants commented: “[t]his was an excellent programme in all aspects. Every trial judge should take it.” “I have a heightened sense of responsibility to ensure an accused gets a fair trial.” Echoing the sentiments of her fellow judges, one participant reflected that she came away with the need to be “constantly vigilant” in the courtroom, “to recognize and respond to the very critical issues presented at this seminar.”

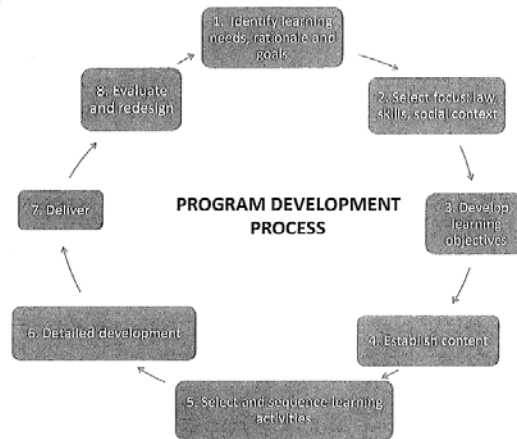
This article will focus on the steps that led to the success of this seminar.

THE APPROACH IN PRACTICE

As with all NJI courses, the design of “Preventing Wrongful Convictions” follows a multi-step process (see Fig. 1.), which includes: forming a planning process, identifying learning needs, selecting the style of course (skills, substantive or social context), establishing learning objectives, clarifying content, selecting and sequencing learning activities, and developing each session in detail with the faculty members involved.

Following the programme, participants fill out a detailed evaluation form, providing feedback that assists in developing future seminars.

Fig. 1.



Planning

All NJI seminars start with a planning committee with a diverse and representative membership. For an intensive, multifaceted, skills-focused programme such as “Preventing Wrongful Convictions”, planning begins at least a year before the seminar is to take place. The committee brings together a group of judges, along with academics from related fields and senior legal counsel. The NJI convenes the process and provides a Senior Advisor - who is a lawyer and an expert in judicial curriculum design - and a programme logistics manager. An articling student provides research and materials development support to the team.

The committee meets regularly (either in person or through conference calls) to plan the substantive programme. Each committee member is assigned to a subgroup that takes responsibility for a portion of the programme, and reports regularly on progress to the full group.

Criminal law expert Justice Marc Rosenberg, a judge in the Court of Appeal for Ontario and a Judicial Associate with the NJI, has played a key role in leading the development of “Preventing Wrongful Convictions”. He notes that the balance of expertise from the judiciary, academia, and the wider community is critical to programme development, both in terms of acquiring the most up-to-date information and in presenting participants with a range of perspectives.

Identifying Learning Needs

Applying the NJI’s “three-dimensional” learning philosophy to each iteration of the seminar, the planning committee’s scan of learning needs attends to: the core knowledge judges require (in terms of cases, statutes, etc); the judicial skills and tasks involved; and how social context dimensions interact with judicial processes. Methods of needs assessment used by the committee include discussions with judges, previous course evaluations, and examination of case law and developments in the legal environment.

When the NJI began planning the original “Preventing Wrongful Convictions” programme, not only did the high-profile Commissions of Inquiry that had been recently conducted provide context and highlight priority content for the seminar, but trial judges highlighted issues they wanted addressed based on their experiences and reflection on the Inquiries’ findings. While much public attention focused on the impact of advances in forensic technology, such as DNA evidence, judges focused on perennial concerns, such as keeping out unreliable evidence. Specifically, these issues

included suspect evidence, eyewitness identification (a factor in more than 80 per cent of wrongful convictions) false confessions and jailhouse informants. Assessing credibility was another major concern. This was due to changes to Canadian law that have resulted in more cases being heard where the complainant's testimony is the main evidence and it is not supported by a broad range of other material (so-called "he-said, she-said" cases). Over the last few years, other issues have gained prominence, including flawed expert evidence, ineffective defence counsel, and an increase in self-represented accused.

Clearly, there was no shortage of potential topics for the course. As Justice Rosenberg noted, the Commissions of Inquiry focused on systemic problems in prosecution and policing. Given the NJI's forum of judicial education, the planning committee decided to focus the seminar on areas that were of interest to judges, with particular attention to the judge's role in helping to prevent miscarriages of justice.

The topics for "Preventing Wrongful Convictions" reflected this choice. The topics were: expert and eyewitness identification, use of suspect evidence in high-visibility cases, suspect witnesses (alibis, paid informants, co-accused), ineffective assistance of counsel, overzealous prosecutions, admissibility of confessions (false confessions and "noble-cause" corruption of procedures), expert witnesses (including pathologist testimony and social science theories), and the judicial role.

Learning Objectives

What is it that the course should achieve? In addition to knowing more about the law and its social context, how can the programme help judges to be better able to apply concepts to the tasks they face in fulfilling their roles? These are the questions that animate the next phase of the planning process. Once learning objectives for both the seminar as a whole and for each individual topic to be included in the programme are defined, the shape of a course will begin to emerge. Planners will be able to define the kinds of learning activities that will achieve these objectives and develop a framework for meaningful evaluation of the programme. Participants will also be able to see more clearly the knowledge, skills, and attitudes they are expected to acquire or improve upon.

With respect to dealing with suspect witnesses, for example, the stated objective in "Preventing Wrongful Convictions" is that "participants will be able to identify problems in relying on stereotypes, unproven assumptions, and demeanour contributing to incorrect or inadequate assessments of credibility and reliability of

witnesses.” This objective forms the starting point for the seminar’s segment on credibility assessment. It recognizes that, while guided by principles of law, identifying potential problems is a daily staple of a judge’s work and requires a range of skills. It is therefore important that the learning activities within the course extend beyond lectures on the law.

In the seminar, the issue of dealing with suspect witnesses is introduced from a judge’s point of view by Justice Rosenberg, and also from the point of view of a forensic psychologist, who discusses the psychology behind credibility assessment. With this legal and social science primer in mind, judges then view a video of simulated testimony in a robbery case. Evidence is given by a co-accused and by an alibi witness, and subjected to cross-examination, through which various inconsistencies emerge. The evidence is diametrically opposed. Judges are then asked to assess the witnesses’ credibility by completing a short questionnaire. The results of the questionnaire indicate that judges, like others who have watched the same demonstration, can come to very different conclusions about the credibility of the witnesses. Using this dilemma as a springboard, Justice Rosenberg and the psychologist then engage the judges in a discussion about the various techniques and tools they can use to counteract variability in credibility assessment.

Objectives for other segments of the course reflect active learning goals, where knowledge is integrated with applications to the tasks judges perform and the social context in which the issues arise. With respect to eyewitness identification, the learning objective is to be able to identify problematic areas and develop tools to reduce the risk of improper convictions based on such evidence; for overzealous prosecutions, the learning objective is to be able to identify the flags or markers of an overzealous prosecutor, along with options and methods for appropriate judicial intervention; finally for expert evidence, the learning objective is to rule correctly on admissibility.

Selecting and Sequencing Learning Activities

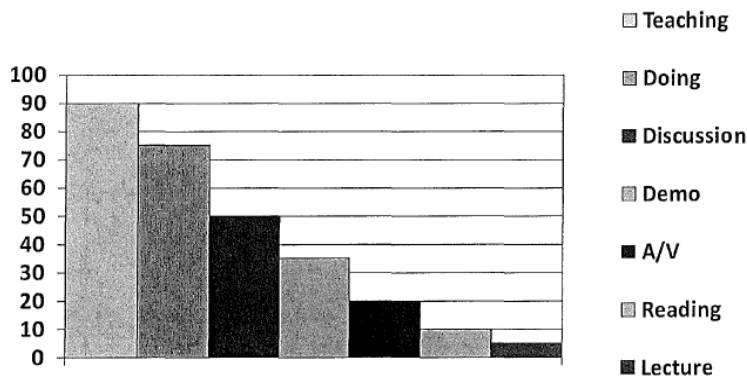
In the judging-focused model of experiential learning, course design begins rather than ends once content and learning objectives are identified (see Fig. 1.). Different methods of instruction yield different levels of engagement and retention. Judges, like all adults, have varied learning styles and preferences. Some prefer to brainstorm and view concrete situations from several viewpoints, others prefer to use analytical models; some are problem solvers, while others prefer to use a hands on, intuitive approach.

This corresponds to the concept of differential learning styles or preferences.² As NJI Senior Advisor Susan Doyle observes, the more involved the person is in the learning activity, the more information they retain. In fact, Ms. Doyle often quotes a Chinese proverb that says, “I hear and I forget, I see and I remember, I do and I understand.”³

Research indicates that material imparted by lecture alone results in limited retention, perhaps as little as five per cent after a short period has elapsed (see Fig. 2.). That percentage increases as learners are asked to read, discuss or apply the information. In fact, the best way to thoroughly learn a subject is to teach it. As such, “Preventing Wrongful Convictions” features a considerable amount of small-group work, with NJI-trained facilitators (many of whom are judges) encouraging and guiding discussion.

Fig. 2.

RETENTION BY TEACHING STRATEGY



Source: Adapted from the *Learning Pyramid* chart with permissions from the NTL Institute for Applied Behavioural Science, Arlington, VA.

- 2 David Kolb *Experiential Learning: Experience as the Source of Learning and Development* (Prentice Hall New Jersey, 1984) 1.
- 3 Robert Andrews, Mary Biggs, and Michael Seidel, eds. *The Columbia World of Quotations* (Columbia University Press, New York, 1996).

In general, the learning model seeks to move around a cycle of learning activities, first connecting learners to their own experience or views on a topic, and then creating an opportunity to reflect with others or to observe performance of a task. To capture participants' attention right from the start, the "Preventing Wrongful Convictions" segment on eyewitness identification begins with a video called "What Jennifer Saw".⁴ This documentary, produced by the Public Broadcasting System in the U.S., highlights the numerous eyewitness identification errors that led to the wrongful conviction of Ronald Cotton, who spent 11 years in prison for a sexual assault he did not commit.

After the video, an eyewitness identification expert explains what went wrong. The expert has the judges do several exercises, including one where she asks them to look at a page of 26 composite photos and identify which one corresponds to the description of the accused. A debate inevitably ensues, with everyone voicing a different opinion. Ultimately, the participants learn that all 26 images are composites based on the same person, and that they are vastly different - bringing home the dangers inherent in using composite photos.

With these elements of experience, reflection and observation completed, the expert then moves to the next phase of the learning cycle: providing concepts and guiding principles based on research. From this foundation, she provides judges with the tools to deal with what may be going on in their own courtrooms, and alerts them to possible frailties in the eyewitness identification procedures adopted by the police in cases before them.

Participants then proceed to the application phase in the cycle. They break into small groups and examine a number of vignettes, from which they then attempt to identify problematic procedures or causes of mistaken identity.

A similar pattern applies to the other topics in the course, with learning activities varying in order to keep up the energy level and interest of the participants.

Detailed Planning with Faculty

Intensive collaboration with faculty members and facilitators in the months leading up to the seminar is a core feature of the NJI planning process. Lecturers work with the committee to develop problems and scenarios, and produce the scripts for videos or demonstrations to ensure a close match between learning objectives, content and application. If it was not for this linking together of people and ideas, a seminar could easily meander away from the main learning focus. For small-group discussions, the

4 "What Jennifer Saw" (Frontline, season 15, episode 3, 1997).

committee and lecturers carefully shape the group tasks and the information the participants will need. They also prepare notes for the facilitators, to guide them in leading the discussion with respect to process and core issues. Given how precious and short judicial learning time is, every effort is made to produce a tightly focused programme.

Another crucial feature of the NJI process is the “pre-programme” faculty meeting, which brings together the planning committee, presenters or panellists, and facilitators, along with the programme manager. This may take place the day or evening before the programme, as people assemble on-site. The meeting addresses substantive content, key knowledge points, the range of options and preferred outcomes. The session reviews the planned activities, sets out goals for each particular session and gets everyone on the same page. Equipment can be pre-tested, facilitators can trial-run their sessions and any final questions can be asked and answered.

Collaboration continues throughout the seminar. At the end of every day, faculty, the planning committee, the Senior Advisor and the Programme Manager meet to review progress and make any necessary adjustments.

Evaluation

The final step in the NJI process is a thorough evaluation of the programme by both participants and the planning committee. At the end of seminars, judges are requested to fill in a detailed form asking them to assess various elements of the course (speakers, format, materials, organization, etc.) and whether they think that the course objectives were met. Suggestions for changes or improvements are also invited.

After the comments are compiled, the members of the planning committee meet to reflect on the feedback. They also ponder the extent to which the seminar could contribute to the enhancement of judicial practice.

The committee looks very carefully at participant evaluations, and uses them to develop and improve the programme. For instance, the first two offerings of “Preventing Wrongful Convictions” included a segment on jailhouse informants. However, following the recommendations of a public inquiry, jailhouse informants were used less and less frequently by prosecutors, and then only when there was solid, independent confirmation of their testimony. Judges noted this development in their evaluations and, as a result, the committee took the opportunity to replace this segment with more current topics.

For the most recent seminars, expert evidence and incompetent defence counsel were two of the issues the planning committee identified as requiring special attention.

This came in response to a series of high-profile disclosures of apparent professional incompetence or overzealousness on the part of health professionals. Judges were keen to discuss these challenging issues, which, unfortunately, will always present themselves. The NJI is likewise committed to addressing these challenges, with a focus on what judges can do to identify and respond to them.

CONCLUSION

The full, three-day seminar on “Preventing Wrongful Convictions” takes place only in Canada. The NJI continues, however, to present elements of the programme, such as Credibility Assessment courses, to judges as far away as Ethiopia, Ukraine, and Russia. In so doing, the Institute is sharing its cutting-edge approach to judicial education with its counterparts around the world. However, the organization neither wants nor intends to lecture others on their own legal systems. Rather, the NJI is keen to show other judicial education providers how we teach so that they can adapt and develop programmes for their own contexts.

Judicial education serves as a core support to law reform and the administration of justice; “Preventing Wrongful Convictions” exemplifies this. The seminar aims to assist judges in their responsibility to prevent future miscarriages of justice, including highlighting, where appropriate, the need for better investigative practices. Justice Rosenberg has observed an interesting and promising back-and-forth dynamic in the dialogue that the seminar fosters between judges, policymakers, academics and lawyers. Many faculty members for the seminar regularly present their research to the police and other key participants in the criminal justice process, often taking what they gleaned from their discussion with judges to these settings. This can have a direct effect on procedures. Partnership with the NJI enhances understanding across the entire criminal justice system.

“Preventing Wrongful Convictions” is a signature course of the NJI. It adopts adult learning methods to create judging-focused education that provides judges with the knowledge, skills, and contextual awareness that are the hallmark of effective judging. The seminar responds to a pressing need in the criminal justice process in our country, and provides relevant and timely education. While judge led, it is also the result of the efforts and collaboration of many experts. The programme is evolving over time, and promises to continue to contribute to judicial excellence in Canada and elsewhere in the world.

TRAINING SPECIALIST JUDGES PROBLEM SOLVING COURTS

By

Judge Helen Murrell SC*

INTRODUCTION

In May 2011, the National Judicial College of Australia (NJCA) delivered a solution focused judging (SFJ) programme for the first time. This paper will discuss a number of aspects of the programme and its outcomes. It will address why the NJCA decided that it was important to run a SFJ course; the topics that were given priority; who was invited to teach; the teaching methods that were used; and the lessons that the NJCA learned from the programme.

This paper has little to do with the debate about whether judges should be trained to specialize in particular areas of substantive law. Specialization in areas of substantive law may result in more efficient use of judicial time and more consistent outcomes, giving rise to a debate about whether such benefits are bought at too high a price. SFJ is not tied to a particular area of substantive law (although some SFJ practitioners do practice in narrow areas of substantive law). Rather, it is a technique or style of judging that may be applied in many areas of substantive law. SFJ aims to deliver better outcomes. In that sense, it is more efficient than conventional judging.¹ However, it does not result in a more efficient use of judicial time. It takes more time and energy than conventional judging. In that sense, it is undeniably inefficient.

* Judge of the New South Wales District Court. Paper presented at 5th International Institute of Judicial Training Conference, Bordeaux, 1 November 2011.

¹ D Weatherburn, C Jones, L Snowball and J Hua, 'The NSW Drug Court: A Re-Evaluation of Its Effectiveness' (2008) 121 C & J; Jacqueline Fitzgerald, 'Does circle sentencing reduce Aboriginal offending?' (2008) 115 C & J.

WHY DID THE NJCA DECIDE THAT IT WAS IMPORTANT TO RUN A SFJ COURSE?

The NJCA considered that it was important to develop a SFJ programme because SFJ is an emerging field of judging that requires techniques that differ fundamentally from those employed in conventional judging. In 1998, the first dedicated solution focused court was established in Australia.² Since 1998, there has been a proliferation of dedicated solution focused courts in Australia, including drug courts, family violence courts and circle sentencing courts that deal with indigenous offenders.

At least within the common law system, the judicial persona often appears to be detached, didactic and coercive. The judge makes legal pronouncements at the end of the case and does not engage with litigants during the case. The position may be somewhat different in the civil law context, where judges may be actively involved in an inquisitorial process.

In contrast to the conventional role of the common law judge, a judge who practices SFJ must engage with litigants for the purpose of motivating them to change their behaviour. Solution-focused (problem-solving) judging works within the theoretical framework of therapeutic jurisprudence. It aims to minimize the negative (anti-therapeutic) impacts of the legal system on litigants/witnesses and maximize the positive (therapeutic) impacts by encouraging positive behavioural change. Therapeutic jurisprudence asserts that litigants often come before courts at times of crisis and vulnerability in their lives (e.g. divorce and family disintegration, or criminal charges associated with drug dependency). A court can seize that moment and guide the litigant towards positive behavioural change.³ Associated concepts include “restorative justice” (which generally involves mediated encounters between victims and offenders) and “procedural justice”, which says that, if litigants/offenders/witnesses experience fair procedures (are given a “voice” and accorded respect), they will see the law as legitimate, they will be more willing to accept legal authority, and they will be more

2 Drug Court Act 1998; for more information see www.lawlink.nsw.gov.au/drugcrt.

3 Michael S King, ‘Should Problem Solving Courts be Solution-Focused Courts?’ (2010) *Revista Juridica Universidad de Puerlo Rico* forthcoming, at www.papers.ssrn.com; Michael S King, *Solution Focused Judging Bench Book* (Australasian Institute of Judicial Administration Inc, 2009); Peggy Fulton Hora, ‘Courting New Solutions Using Problem-Solving Justice: Key Components, Guiding Principles, Strategies, Responses, Models, Approaches, Blueprints and Tool Kits’ (2011) 2 *Chapman Journal of Criminal Justice* 7; De Shazer and others, ‘Brief Therapy: Focused Solution Development’ (1986) 25 *Family Process* June 207.

likely to comply with legal decisions.⁴ SFJ is the practical vehicle by which concepts such as therapeutic jurisprudence, restorative justice and procedural justice may be delivered.

Domestically, SFJ has application both courts that are dedicated to improving the behaviour of particular problem groups (e.g. drug dependant offenders, family violence perpetrators and offenders who have a mental illness) and within mainstream courts (e.g. to minimize the adverse effects of the criminal justice system on crime victims and promote the rehabilitation of offenders). Internationally, SFJ may be relevant in the context of truth and reconciliation commissions established in nations that are emerging from war or confronting pervasive human rights abuse.⁵

WHAT TOPICS WERE GIVEN PRIORITY?

Judges who practice SFJ are invariably well-meaning. However, many lack a considered theoretical foundation for their practice. Judges may apply a “common sense” approach to SFJ, e.g. the “carrot or stick” approach (take the reward or accept the punishment). Others adopt a more idiosyncratic approach. Effective SFJ is not about the judge feeling warm and optimistic that the litigant will change his or her behaviour.

The NJCA wanted to teach a rigorous, evidence-based approach to SFJ. The judge needs to be an effective communicator who understands and applies critical concepts of behavioural psychology. The NJCA set out to design a programme that was directed primarily at judges practicing in dedicated SFJ courts. The secondary target group was judges who were interested in applying SFJ techniques within mainstream courts.

- 4 B Winick and D Wexler ‘Therapeutic jurisprudence as an underlying framework’ in B. Winick and D. Wexler (eds), *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Carolina Academic Press, 2003); Michael King, ‘Therapeutic Jurisprudence’ in Michael King, Arie Freiberg, Becky Batagol and Ross Hyams (eds), *Non-Adversarial Justice* (The Federation Press, 2009); Tom Tyler (ed), *Procedural Justice: Volume 2* (Ashgate, 2005).
- 5 C J N Eisnaugle, ‘An International Truth Commission: Utilizing Restorative Justice as an Alternative to Retribution’ (2003) 36 Vand.J.Transnat’l L. 209; M G Bolocan, ‘Rwandan Gacaca: An Experiment in Transitional Justice’ (2004) 2 J.Disp.Resol. 355; The South African Truth and Reconciliation Commission expressly endorses a restorative justice philosophy in its mandate: see O Lin, ‘Demythologizing Restorative Justice: South Africa’s Truth and Reconciliation Commission and Rwanda’s Gacaca Courts in Context’ (2005) 12(1) ILSA J Int’l L 41.

The skills necessary for SFJ in any court are fundamentally different because: the judge has direct and ongoing communication with litigants; the judge must motivate and support (not coerce) behavioural change; and litigants have a direct “voice” and assume responsibility for outcomes. In addition, in courts dedicated to SFJ: the proceedings are non-adversarial and the judge leads an interdisciplinary team that includes health care professionals.

The Programme Planning Committee identified three high priority (key) topics. These were: the theoretical principles of therapeutic jurisprudence that should inform the practice of SFJ; the communication skills essential for effective SFJ (e.g. persuasion, conveying expectations, maintaining authority and control in a non-hostile way, deliberate calm, the constructive imparting of bad news); and finally, the theory of the stages of behavioural change and the practical techniques necessary to manage change at each of the five stages (pre-contemplation, contemplation, preparation, action, maintenance and relapse).

The Committee identified four medium priority topics. The first focused on the team leadership role played by judges practicing in dedicated SFJ courts, including building and leading a multidisciplinary team. The second focused on how judges practicing in dedicated SFJ courts can deal with personal and professional challenges peculiar to those courts, including novel ethical boundary issues, burnout and disappointment associated with litigant failure, and networking and mentoring between SFJ practitioners. The third focused on SFJ in mainstream courts and the final topic was the special communication issues that arise when judges are dealing with indigenous litigants. Initially, the Committee had considered running this final session on the different ways in which judges should communicate with litigants from a variety of cultural backgrounds. However, because of the cultural diversity within Australia, it was decided that such a session would be too ambitious.

The summary of the programme is attached.

WHO WAS INVITED TO TEACH?

Most NJCA programmes are both planned and delivered by judges. The rationale is that judges know what other judges need, judges have the best command of the relevant information and are therefore best suited to teaching it, and judges prefer to learn from other judges and may resent being taught by non-judges.

For the three key sessions within the SFJ programme, it was agreed that judges should lead the session on the theory OF therapeutic jurisprudence and SFJ. However, the Committee thought that the key sessions on communication skills and engaging behavioural change should be lead by non-judicial experts. The Committee was fortunate that a retired Californian judge, who is a charismatic presenter and a living legend in the fields of therapeutic jurisprudence and “smart justice”, was available to open the programme with a motivational session on the theory and practice of therapeutic jurisprudence. She was supported by an Australian judge and former academic who is a leading figure in SFJ.

For the communication skills session, the Committee engaged a communications expert specializing in mediation and dispute resolution. The expert had no background in therapeutic jurisprudence. To ensure that she appreciated the flavour of SFJ, the Committee arranged for her to observe a dedicated SFJ court in operation (the NSW Drug Court). In addition, she participated in later meetings of the Planning Committee.

For the session on engaging behavioural change, the Committee enlisted the services of a forensic psychologist who has a strong background in the theory and practice of therapeutic jurisprudence.⁶ She has worked in offender rehabilitation and family violence courts and currently manages a prison that provides compulsory drug treatment to repeat offenders who are under the supervision of the NSW Drug Court. The experts participated in later meetings of the Committee and liaised with each other to ensure that their sessions were complementary.

The Committee invited a sociolinguist to lead a session on judicial communication with indigenous people. The expert specializes in inter-cultural communication involving Australian Aboriginal people. A member of the Committee had detailed discussions with the expert, but she did not observe a SFJ court in operation, nor did she participate in meetings of the Committee. With the benefit of hindsight, these were significant omissions.

Judicial officers delivered each of the remaining three medium priority sessions.

6 Dr Astrid Birgden (MForensicPsych, PhD); A Birgden, ‘A Compulsory Drug Treatment Programme for Offenders in Australia: Therapeutic Jurisprudence Implications’(2008) 30 T.Jefferson L.Rev. 367.

WHAT TEACHING METHODS WERE USED?

The NJCA aims to provide interactive teaching. The NJCA has adopted the “experiential learning circle” or ERCAT (experience, reflection, conceptualization, application, transfer) model as its preferred method of teaching.⁷

The object of the SFJ programme was to teach techniques that are fundamentally different from those applied in conventional mainstream judging, and may be difficult for judges to grasp. We wanted to design an interactive programme that maximized the opportunities for participants to “learn by doing”.

Throughout the programme, participants were seated in small groups of six. A facilitator, (who was a member of the Committee) was attached to each small group.

The communications session occupied three hours and 20 minutes (in two segments). It began with a demonstration role-play, showing how not to do it. All participants discussed the faults with the interaction.

After introducing general communication skills that may be useful in SFJ, the session leader delivered five 10-minute talks on particular communication techniques relevant to SFJ. After each short talk, participants were given a courtroom scenario that required a “judge” to utilize the particular communication technique that had been the subject of the preceding talk. For example, following a lecture on “conveying expectations”, participants were given a scenario that required a “judge” to convey the court’s expectations to a litigant who was about to commence a drug court programme. Within each small group, two participants enacted the scenario. The other members of the small group observed and commented on the interaction. At the conclusion of the communications session, there was a general “wrap-up”.

The session on engaging behavioural change occupied 2 hours 25 minutes (in two segments). At the outset, participants were asked to identify a stage of behavioural change at which they currently found themselves: pre-contemplation (no intention to change), contemplation (thinking about change), action (modifying behaviour and environment), maintenance (consolidating gains) or relapse.

Starting with pre-contemplation, the session leader gave a short lecture (10 minutes) about the motivational techniques that can be used to engage a litigant at each stage of behavioural change. Following each short lecture, participants divided into pairs and were given a scenario that involved a litigant who was at that stage of behavioural change. The pairs practiced the relevant motivational technique. After each practice,

7 W Martin, ‘Future Directions in Judicial Education’ (2011) 10 TJR 277.

there was a facilitated group discussion. At the conclusion of the session, there was a “wrap-up” that addressed the question: How can these strategies be applied in your court?

In the other sessions, a variety of interactive teaching techniques was used. For the personal and professional challenges session this included clicker technology; for the team leadership session this included a panel discussion with participant questions; and for the mainstream courts session this included an “interview” of an experienced judge practicing in a mainstream court.

EVALUATION/PROPOSED CHANGES

The programme attracted widespread interest. Participant numbers were limited to 37 participants. Although the programme was targeted primarily at judges working in dedicated SFJ courts, the majority of programme participants came from mainstream courts. Fortunately, most of the mainstream court judges had a background of working in a dedicated SFJ court or a special interest and some background knowledge of SFJ. Consequently, the session leaders were not confronted with a group comprising both beginners and experienced SFJ judges.

It was always going to be a challenge to teach fundamentally new skills within a two day programme. It was important to undertake a rigorous evaluation to determine whether the programme delivered improved judging, or merely warm feelings and good intentions.

The programme was evaluated at two stages. At the conclusion of the programme, there was a facilitated discussion about the strengths and weaknesses of the programme and participants were asked to complete an evaluation form. Then, three months later, participants were asked to complete a survey on the programme.

A number of key recommendations, informed by the facilitated discussion, initial evaluation and the observations of the Committee, were identified. First, the introductory session on the principles of therapeutic jurisprudence should remain a high priority. Second, it is essential that the programme devote adequate time to the key topics of communication and engaging behavioural change. To allow sufficient time, some topics of medium priority may have to be abandoned. Third, as there was an unexpectedly high level of interest from mainstream judges, it is important to develop the mainstream judging session. Fourth, that it is important that judges who have not seen a dedicated SFJ court in operation do so before participating in the programme.

Finally, it is vital that session leaders with limited knowledge of SFJ observe an SFJ court in operation. Key session leaders should participate in some meetings of the Planning Committee so that they appreciate the teaching methods preferred by the NJCA and to ensure that their session fits well with other sessions.

The Committee may offer optional meditation or yoga sessions in conjunction with the next SFJ programme. It is considered that the practice of meditation or yoga may enhance the well-being of judges working in SFJ, and that such judges may welcome an introduction to such practices.

To date, the NJCA has received only three responses to the survey undertaken three months after the programme. The responses confirmed a high level of satisfaction with the programme, particularly the sessions on communication and engaging behavioural change. Respondents indicated some post-programme change in the manner in which they communicated with litigants; that they sought to be less authoritarian and more persuasive, and were more confident about using motivational techniques.⁸

8 Further reading: Michael S King 'Judging, Judicial Values and Judicial Conduct in Problem-Solving Courts' (2010) 19 JJA 133; Problem-solving Courts *Australasian Therapeutic Jurisprudence Clearinghouse*, www.aija.org.au; Kathy Mack, Sharyn Roach Anleu 'Performing Impartiality: Judicial Demeanour and Legitimacy' (2010) 35 L.& Soc.Inquiry 137; Gervase R. Bushe Ph.D., *Five theories of change embedded in Appreciative Inquiry* in Cooperrider, D. Sorenson, P., Whitney, D. & Yeager, T. (eds.) *Appreciative Inquiry: An Emerging Direction for Organization Development* (Stripes Publishing LLC, Illinois, 2001); Steve de Shazer, Yvonne Dolan and others 'Doing What Works: More than miracles' www.solutionfocusedchange.blogspot.com; Michael S King *Solution Focused Judging Benchbook*, www.aija.org.au; S Goldberg, *Judging for the Twenty First Century: A Problem-Solving Approach* (National Judicial Institute of Canada, 2005); Astrid Birgden, Luke Grant 'Establishing a compulsory drug treatment prison: Therapeutic policy, principles, and practices in addressing offender rights and rehabilitation' (2010) 33 Int'l J.L.& Psychiatry 341; Astrid Birgden 'Therapeutic jurisprudence and responsivity: Finding the will and the way in offender rehabilitation' (2004) 10 Psychology, Crime and Law 283; Alison Churchill, Interview with Astrid Birgden, Director, Compulsory Drug Treatment Programme, Corrective Services NSW (no date given); K Auty 'We Teach All Hearts to Break but Can we Mend them? Therapeutic Jurisprudence and Aboriginal Sentencing Courts' (2006) E-Law 101'; Marchetti E and Daly K 'Indigenous Sentencing Courts: Towards and Theoretical and Jurisprudential Model' (2007) 29 Syd LR 415; Joanna Kalowski 'Managing Courtroom Communication: Reflections of an Observer', National Judicial College of Australia Communication in the Court Room Conference Sydney (2007).

POSTSCRIPT

Changes were incorporated into a second SFJ programme, which was conducted in 2012. Despite the absence of retired Californian judge Peggy Hora, the opening session on the theory of therapeutic justice was well received. The time devoted to the key topics of communication and engaging behavioural change was extended. The same presenters were used. Their earlier experience of working together and close liaison prior to the second programme resulted in co-ordinated presentations of a high standard. More time was allocated to the session on using SFJ in mainstream courts. The session was successful, but it is a large topic that requires the allocation of yet more time. The yoga sessions were poorly patronised. Further consideration needs to be given to the best way in which to meld a well – being component into future education workshops.

THE PROGRAMME

Session 1: What is Solution Focused Judging?

Session description: Facilitated discussion by participants of a video drawing out the differences between solution focused judging and the traditional process. Dr Michael King and Judge Peggy Fulton-Hora speak on their views on solution focused judging.

Dr Michael King introduced these therapeutic based course programmes while a Geraldton Magistrate and later served as Perth Drug Court Magistrate. He is the author of the Australian solution-Focused Judging Bench Book and adjunct senior lecturer at Monash University. Judge Hora retired in 2006 from the California Superior Court while, among other tasks, she presided over the Drug Treatment Court. She is a former dean of the Judicial College of California and is a Senior Judicial Fellow of the National Court Institute.

Session 2: Communication Skills

Session description: An expert on communication leads a session looking at the communication skills which a judicial officer needs to preside in a solution focused court – how to build trust; how to build motivational commitment; how to engage defendants in the process, who is the audience (offender, community?) active listening techniques, empathy not sympathy, personality types, persuasion, conveying expectations, courtroom dynamic, deliberate calm.

Session 3: Communicating with members of particular groups in the community

Session description: An expert on language in the legal process (courtroom speech) leads a session looking at how a judicial officer in a solution focused court might deal with difficulties in communicating with members of particular groups in the community and in particular indigenous people. How do you respond to silence? Lack of eye contact? Participants will have the opportunity to learn skills to better communicate with indigenous people.

Session 4: Engaging Behavioural Change

Session description: What is behavioural change? Why ought judicial officers engage defendants in change? When motivational approaches can be used to engage defendants in change? Applying motivational techniques to identified stages of change.

Session 5: Using solution focused judging techniques in main stream courts

Session description: The use of solution focused judging techniques in mainstream courts; interacting with agencies, resourcing, mentoring, and networking.

Session 6: Boundaries and ethical dilemmas, stress and burnout

Session description: A facilitated discussion of a scenario raising issues about professional and personal challenges faced by judicial officers in solution focused judging; independence and impartiality; the legal framework under which the court functions, principles of natural justice or due process, emotional demands (rewarding aspects v stress, burnout, vicarious traumatisation, compassion fatigue).

Session 7: Working with teams

Session description: the role of a judicial officer in working with the “team” in a solution focused court; do some leadership styles fit solution focused judging better than others? What does best practice team leadership look like? Dealing with conflict in a team; training in leadership skills.

Session 8: Wrap up session

Facilitator leads discussion by whole group: lessons learned.

MANAGEMENT TRAINING FOR MAGISTRATES: THE BELGIAN EXPERIENCE

By

Edith Van den Broeck*

The Judicial Training Institute² (JTI) is a young Belgian institution that was set up in 2007.³ It follows the path of other countries in the European Union (EU) which have had specific institutes carrying out professional training for magistrates and staff members of the judiciary for years. In order to provide magistrates with the vital justice management tools, the JTI has taken several initiatives in the domain of management training. This paper will discuss these changes.

INITIATIVES TAKEN BY THE BELGIAN JUDICIAL TRAINING INSTITUTE (JTI) IN THE DOMAIN OF MANAGEMENT TRAINING FOR MAGISTRATES

The JTI has only been operational since January 2009. Setting up the JTI required some time. This process included: installing an official body (director, administration council and scientific committee); finding premises; recruiting staff; organizing departments and services; and developing work procedures. All of which had to coincide with the organization of training sessions, as required by the Belgian Judicial Code.

There were numerous challenges in this process. One such challenge was to identify and analyze the training needs of the JTI's target audience. To effectively meet demand, it was imperative to carry out this analysis before conceiving and developing training programs. It is obvious that a young institute such as the JTI cannot do everything at once. While the training needs of the magistrates and judiciary staff members are huge, both the financial and material means and the available personnel of

* Director of the Judicial Training Institute. In collaboration with Jos De Vos, Counsellor.

2 See www.igo-ifj.be.

3 Though the JTI did not become operational until 2009.

the JTI are limited. The JTI therefore had to be realistic about predicted time frames and spread its efforts over a period of time.

Taking into account this uncertain time frame and the urgent specific demand for training programs, the JTI developed management training sessions on three different levels:

- a) "basic" or "classical" management training (which was continued from previous training initiatives);
- b) management training for starting chief judges and chief prosecutors; and
- c) training in "coaching in management".

BASIC MANAGEMENT TRAINING

The aim of this basic training is to teach participants to clearly identify the management techniques they are using already and to provide them with new ones. At the end of the training, participants will be able to use adequate management tools for both human and material resources which should optimize the functioning of jurisdiction.

The training consists of 11 consecutive one-day sessions. Participants must commit to attend all sessions to receive a training certificate from the JTI. An absence from one session (for whatever reason), however, is allowed. If one cannot participate in a session, he or she can also attend a corresponding session in another group (participants are only allowed to do this twice).

The management training program is as follows:

- a) Introduction
- b) The role and responsibilities of a magistrate / manager within the frame of management of jurisdiction
- c) Communication
- d) Morning:
 - i. Types of optimal leadership
 - ii. Determining aims and helping collaborators to achieve them
- e) Afternoon:
 - i. Motivating efficiently
- f) Procedures for efficient management
- g) Teamwork
- h) Time and stress management
- i) Negotiating techniques and conflict control

- j) Organizing efficiently and motivating meetings
- k) Managing changes
- l) Evaluating accomplishments
- m) Presentation of final essays by the participants

To receive a certificate of completion, the participants must also write an essay. The purpose of this essay is explained at the beginning of the training and the result should be a practical application of the theory presented in the program. Throughout the training sessions a trainer is available to give advice or orientation concerning the essay. At the 11th and last session, each participant is invited to present his colleague magistrates and the trainer with his essay, after which a discussion may follow. The trainers read the essays beforehand and offer feedback to the participants.

The participating magistrates are divided in four different groups of 15 persons maximum. These groups are:

- a) leading magistrates of the bench;
- b) leading magistrates of the prosecution service;
- c) non-leading magistrates of the bench; and
- d) non-leading magistrates of the prosecution service.

The different groups receive the same certificate. The aim of dividing the participants into different groups is to allow them to exchange experiences and best practices presented by colleagues who have a similar function.

The magistrates who attend these sessions are encouraged to participate actively and to give concrete examples from their own professional practice. In this way, the basic management training isn't a series of theoretical sessions but a coherent entity rooted and usable in each participant's professional practice.

Finally, to ensure coherence between the techniques chosen to be covered in the course and the realities of professional practice, one person in each group acts as an intermediary between participants, trainer(s) and the JTI. In this way, throughout the training, whenever it is necessary, there are informal intermediary evaluations. Certain aspects can be reconsidered with the trainers (more particularly concerning the functioning of justice in general or of specific jurisdictions).

In 2010-2011, 95 magistrates (45 magistrates of the bench and 50 of the prosecution) have taken part in this training. For the legal year 2011-2012, 71 magistrates (41 magistrates of the bench and 30 of the prosecution) have enrolled in this training. Throughout the years, it appears that more and more magistrates who want to apply for a vacant position of chief judge or chief prosecutor have been attending basic management training sessions before applying.

Finally, we should mention that a similar training, with a slightly different program, is also organized for clerks of the court and secretaries of the prosecution service.

MANAGEMENT TRAINING FOR STARTING CHIEF JUDGES AND CHIEF PROSECUTORS

This training was offered for the first time at the beginning of 2012. It is strongly advised that leading magistrates, clerks of the court and secretaries of the prosecution service attend this training course within a year of their appointment. If places are limited, this can be extended to two years. If there are sufficient places, the training of certain modules will also be open to more experienced chief judges, chief prosecutors, chief clerks of the court and chief secretaries of the prosecution service.

The aim of this training is to offer the participants theoretical and practical competences in different domains attributed to chief judges, chief prosecutors, chief clerks of the court and chief secretaries.⁴ After the training, participants will be able to manage and control the functioning of their services. The training consists of three, three-day modules with each module addressing a different form of management.

Administrative management

The first module focuses on administrative management and is divided into four parts. The first part, “knowledge of the work environment”, provides a broad overview of the various actors, partners and administrative services that can contribute to all aspects of an efficient daily management (for example: human resources management, logistics and budget). The second part, “knowledge of the international judicial environment”, covers the different organizations of judicial expertise and the European Commission for the Efficiency of Justice (CEPEJ) and its instruments. Both these sessions take half a day.

The third part, “financial management”, takes all of the second day. During this session, participants: learn about notions of accountancy in resources management; learn how to manage challenges in budgetary organization (together with the

4 We should mention that two modules are the same for chief judges and chief prosecutors and for chief clerks of the court and chief secretaries.

ASSESSING WITNESSES: CAN THE SKILLS BE TAUGHT?

By

Lynn Smith* and Susan Glazebrook**

INTRODUCTION

Many cases are won or lost on their facts. Assessing witnesses' evidence is a vital part of the judicial task and it is increasingly recognised that judges may require training in this area. Research, that has been fairly widely disseminated among judiciary in both Canada and New Zealand has shown that even professional investigators, lawyers and judges detect lies by little more than chance. This research has also highlighted issues with the reliability of memory and with eye witness testimony. Judges are well aware of instances where witness error or deception has resulted in the legal process going awry, even leading to wrongful convictions. Judges are therefore interested in learning about new research findings and what they can do to avoid error.

This article describes courses in Canada and New Zealand designed to assist judges with the task of assessing the credibility and reliability of witnesses. The objectives for these courses have been modest. They aim to assist judges to avoid the error of over-emphasizing demeanour and to learn better ways to think through and state credibility findings and raise awareness of the issues and to suggest strategies to avoid undue reliance on fallible human memory. While no assessment can guarantee that the "right" answer, our overall goal has been to assist judges in making credibility and reliability assessments as robust as possible, within those limits.

* Retired Judge of the Supreme Court, British Columbia and former Executive Director of the Canadian National Judicial Institute, Chair of the NJI Evidence Workshop Planning Committee.

** Judge of the New Zealand Supreme Court and immediate past Chairperson of the Institute of Judicial Studies (New Zealand).

CANADIAN CREDIBILITY ASSESSMENT MODULE

The Canadian National Judicial Institute has, in various ways over the years, addressed the topic of credibility assessment in its programmes for Canadian judges. For example, it has offered programmes in which judicial participants watch a videotape of a trial with two main witnesses and then discuss their views about the credibility of those witnesses. The participants are sometimes surprised to find that colleagues who have watched the same testimonial evidence have come to quite different conclusions about its credibility. Programmes have also included presentations on social science research regarding deception detection, particularly in the context of the “Preventing Wrongful Convictions” programme.¹

Most recently, in 2010, a half-day programme on credibility assessment was introduced as part of the five-day intensive Evidence Workshop. The credibility assessment unit has now been offered annually on three occasions.

Evidence workshop

The Evidence Workshop, first presented in 2003, is available to judges from all levels of Canadian courts.² The workshop is meant to provide judges with a refresher on fundamental principles in the law of evidence and an overview of recent developments, as well as practice in dealing with concrete evidentiary problems.

The Evidence Workshop begins with an overview on the foundational principles of the law of evidence, followed by a small group session called “What Would You Have Done?” in which the participants are asked to discuss specific evidentiary issues in rulings they have made. It ends with an overview of very recent developments and trends for the future. The body of the course addresses the central topics of: relevance and inference drawing; similar fact and character evidence; hearsay; opinion evidence; confessions; and credibility assessment.

- 1 The “Preventing Wrongful Convictions” programme is a three-day seminar that focuses on skills-based, experiential learning and addresses topics such as eyewitness identification, false confessions and expert evidence. The seminar was first presented in 2001, and came about after a number of Commissions of Inquiry on wrongful convictions took place in Canada.
- 2 Both in English-speaking, common-law jurisdictions, and the French-speaking, civil-law jurisdiction of Quebec.

Under each of those topics, after an overview presentation, participants are asked to discuss evidentiary problems, either depicted in the prepared videotapes or presented in other ways (for example, through brief written scenarios and mock submissions by counsel on each side of the issue.) After the facilitated discussion in small groups, participants return to the plenary session where the presenters on the topic comment and provide suggested solutions to the problems.

Two fairly detailed scenarios have been devised for the workshop, one criminal and one civil. The civil scenario involves a wrongful dismissal action against a small, family-owned company.³ The employer is alleging cause for dismissal, saying that the employee misused his computer to look at pornography, stole petty cash, sexually harassed other employees and was disloyal. The criminal scenario involves charges of sexual interference and sexual assault by a camp counsellor against young girls, allegedly committed a number of years previously. Videotaped enactments of scenes from the trials of the two cases are used to present evidentiary problems.⁴

After watching the videos, participants are asked to consider what they would do if presented with the evidentiary problem, and to discuss the issues in small groups. A pair of facilitators, drawn from the faculty for the course,⁵ work with small groups in their discussions. Ideally, each group has one criminal and one civil specialist, and at least one of the facilitators is a judge. One or more of the small groups works in the French language.

Credibility assessment

The module on credibility assessment is drawn from the civil scenario and placed near the end of the overall Evidence Workshop programme so that participants will have had the maximum possible exposure to the witnesses in the videotaped civil trial, enhancing the realism of the exercise.

The goal of the credibility assessment component is to provide judges with information and tools for the central and difficult task of credibility assessment. In order to present a credibility assessment scenario that would have some of the depth and complexity of a real-life problem, two of the key witnesses in the civil scenario

- 3 The civil scenario was also adapted for use in the New Zealand programme (discussed below).
- 4 The videotapes were made in a courtroom, in each case with an actual judge and counsel. Professional actors played the witnesses.
- 5 Including judges, legal academics or senior members of the Bar.

were examined and cross-examined in some detail on videotape, regarding an issue about which there is a direct conflict in the evidence. The actor who played the key witness was instructed to decide for himself in advance of the taping whether he was telling the truth or lying on particular issues, and to be consistent in his approach. During the taping, various versions of his answers were filmed, with some versions deliberately including popular “cues to deception”.

Questionnaire

Early in the week, the participants are asked to complete a brief survey regarding their views as to cues of deception and their own confidence in their ability to detect deception.⁶ It is similar to a questionnaire used with an earlier group of Canadian judges by Stephen Porter, in 2002.⁷

The questionnaire is designed to get the judges thinking about the methods they use to assess credibility and then provide them with an opportunity to compare their methods with those supported in the research about deception detection. It also provides a platform for discussion with the expert presenter and among judges where views differ. The responses to the questionnaire show that judges tend to be cautious about behavioural and verbal cues, but still take them into account to some extent. Interestingly there was considerable variation between responses given to the questions concerning behavioural cues. Although the majority of judges do not endorse the inferences that might be made about deception from the popular cues to credibility (e.g. gaze aversion, use of “ums” or pauses), about a third endorsed at least one of the cues. However, the cues the judges found helpful differed.⁸

6 The questionnaire is administered by Dr Don Read, of the Psychology Department at Simon Fraser University, British Columbia, who later gives a presentation on the research regarding deception detection. We do not discuss the results of the questionnaire as judges were promised privacy but note that the questionnaire results will provide a tool for ongoing comparison to see if over time there is more awareness of the issues involved.

7 The Porter questionnaire was designed for a study to identify potential factors related to the ability to detect deceit. For a discussion of this study, see Stephen Porter, Mary Ann Campbell and Jennifer Stapleton “The Influence of Judge, Target, and Stimulus Characteristics on the Accuracy of Detecting Deceit” (2002) 34 Canadian Journal of Behavioural Science 172.

8 Similar findings have been made with respect to investigators, who tend to have different favourite cues that they think are reliable.

Deception detection⁹

The credibility assessment module, on the final morning of the programme, begins with a presentation by Dr. Read. He describes the results of a preliminary analysis of the participants' questionnaire responses, and then gives an overview of what is known from research into detection of deception.

As is well known, the research suggests that there are no reliable universal signs, either physical or verbal, of truth-telling or deception.¹⁰ Though the "illusion of transparency" means that we tend to believe that others can tell when we are lying, in fact people are very good at telling lies in social situations, where the stakes are low. At the same time, in most day-to-day situations, people are inclined to believe that what others tell them is true -- a "truth bias".¹¹ When people are asked about occasions when they have been lied to, they only rarely state that they detected the lie at the time (about 2 per cent).

Observable differences in behaviour during deceptive communications are not normally detectable without previous knowledge of the individual.¹² Dr. Read makes the interesting point that the research suggests that there is no positive correlation between confidence about credibility assessment and correctness in performing that task. In a courtroom, witnesses are often seen for only a brief period of time, thus greatly reducing the chances of detecting and correctly interpreting behavioural cues. In addition, most witnesses have undergone some preparation for testifying and many have given their evidence before, whether at an examination for discovery or in a previous hearing.

9 For a review of deception detection in the context of judicial credibility assessment, and an overview of the social science research on deception detection, see L. Smith, "The Ring of Truth, the Clang of Lies: Assessing Credibility in the Courtroom", 2012 *University of New Brunswick Law Journal*.

10 Dr Aldret Vrij, in *Detecting Lies and Deceit: Pitfalls and Opportunities* (2nd ed, John Wiley and Sons Ltd, England, 2008) at 4, notes that "not a single nonverbal, verbal, or physiological response is uniquely associated with deception. In other words, the equivalent of Pinocchio's growing nose does not exist."

11 Some groups, such as police officers and judges, tend to have the opposite bias and are inclined more to disbelieve than to believe what they are told

12 There is surprisingly little consistency as to behavioural changes when an individual is lying, although the research indicates that in many cultures there are common beliefs about behaviours that signal deception. The research supports the validity of a few behavioural cues, but only at a low level.

After describing the types of experiments social scientists have conducted, and their results, Dr Read discusses some of the practices recommended by researchers.¹³ For example, it appears that signs of deception may be more readily apparent when the focus is on analysis of the content of a statement rather than on the behaviour of the witness. Further, some research suggests that when the “cognitive load” is increased on a witness, it will be more difficult to maintain a lie. Techniques of cross-examination may have the effect of increasing cognitive load. Paying attention to multiple cues is recommended, along with sensitivity to cultural differences.¹⁴

Expression of credibility findings

After the presentation on social science research, Justice Lynn Smith does a presentation on the law relating to credibility assessment and the articulation of reasons for judgment on credibility. She suggests that Canadian courts have become more sceptical of relying on witness demeanour in credibility assessments. At the same time, Canadian jurisprudence has continued to acknowledge the privileged position of the

- 13 Some approaches that are being actively explored include complex protocols for evaluating the truth of statements (known as “statement validity analysis” or “content-based criteria analysis”). See issues with these discussed in Vrij, *ibid*, at 200–259. Professor Ekman advocates the observation of “micro expressions”. See (for scepticism on this approach) Vrij, *ibid*, at 64–66. Another method being explored is based on the theory that liars labour under an increased “cognitive load”. In other words, a liar has to work harder to keep his or her story straight, in order to fill in details from invention rather than from memory, and to conceal both the deception and possibly the feelings of guilt. This means that it may be important to observe when a witness has to “think hard” about an answer. It also means that questioning aimed at increasing the cognitive load may be effective in revealing deception.
- 14 It is important to note that much of the research has focused on best practices for investigators. What pertains to interviews of possible suspects or witnesses by investigators does not necessarily assist in the courtroom where conditions are different and the witness is often experienced in relating the events. However, learning about the research is of interest to judges, and may help them to avoid some common pitfalls in assessing credibility. Stephen Porter and Leanne ten Brinke suggest, for example, that the “reading” of a defendant’s demeanour and emotional expressions play a major role in initiating a series of ‘dangerous’ decisions concerning his/her credibility and should be avoided. See Stephen Porter and Leanne ten Brinke “Dangerous Decisions: A Theoretical Framework for Understanding how Judges Assess Credibility in the Courtroom” (2009) 14 *Legal and Criminological Psychology* 119.

trial judge who, unlike appellate courts, hears all the evidence and has the opportunity to observe the witnesses.

Canadian law regarding the requirement to give reasons has become fairly elaborate. Findings of fact are the province of trial judges, and appellate courts are not to interfere with findings of fact in the absence of palpable error. Notwithstanding this, the Supreme Court of Canada has stated that there is a duty on trial judges to give reasons that are sufficiently clear to provide the basis for meaningful appellate review of the correctness of the trial judge's decision. This includes providing reasons for credibility findings.¹⁵ It is recognised, however, that precise articulation of reasons for assessment of credibility can be difficult. In general, reasons for judgment do not have to be so detailed that they amount to "watch me think"; rather, reasons will suffice if they show the path to the conclusion. Reasons must accomplish three purposes. They must: communicate to the parties the reason the decision was made; provide public accountability; and permit effective appellate review. With particular reference to credibility conclusions, a judge should, at a minimum, explain why a witness' evidence on a material issue is rejected in favour of that of a different witness.¹⁶

In her presentation, Justice Lynn Smith suggests a number of "best practices" in analysing credibility and stating credibility findings. These include:

1. State conclusions about credibility clearly and specifically (e.g., "I find X was not a credible witness [as to point A] and reject his/her evidence [on that point], or "I find X was a credible witness...and accept his/her evidence because..."). Try to indicate why you make the credibility finding. Avoid conclusory reasons ("This witness's evidence has the ring of truth.").
2. Show that you have noted relevant concerns and how you have resolved them (for example, if there has been evidence that a witness made a previous inconsistent statement or has a motive to support one party).
3. Recognise and examine alternative possibilities, rather than focusing only on the evidence that is consistent with a plausible "story". Do not fill in the blanks so that the story makes sense. Avoid tunnel vision.

15 *R v Sheppard* [2002] 1 SCR 869 at [55]; *R v REM* [2008] 3 SCR 3 at [11], [55]; *R v Dinardo* [2008] 1 SCR 788 at [27]–[29].

16 *R v REM* at [42] and [49]. The Supreme Court of Canada notes, however, that while it is useful for a judge to attempt to articulate the reasons for believing a witness and disbelieving another in general or on a particular point, the fact remains that the exercise may not be purely intellectual and may involve factors that are difficult to verbalise.

4. Examine the evidence from the perspective of all parties; show that you heard and understood the position of all parties, especially the unsuccessful ones. Avoid slipping into the application of a double standard as to credibility assessment.
5. Include the amount of detail appropriate to the context – more detail is needed, for example, where:
 - a) The issue is difficult;
 - b) The evidence is conflicting or confused; or
 - c) A key witness’s evidence has significant inconsistencies.
6. List the key circumstances that lead you to believe or disbelieve *this* witness about *this* issue.
7. If you reject A’s evidence because you have accepted B’s evidence, at a minimum say why you have accepted B’s evidence.
8. Do not rely on demeanour alone.
9. Question how you know what is plausible or implausible.
10. Use plain, clear language especially, but not only, with self-represented litigants. Harsh language should be avoided except when clearly called for.
11. Identify (at least in your own mind) the underlying generalizations or commonsense propositions upon which you are relying in your credibility assessment and consider whether they are valid in this case (e.g. “Estranged spouses may wish to take revenge”; “witnesses who have a motive to lie are likely to be lying”; “memories don’t improve over time”).
12. Where special scrutiny is required by law, advert to that fact (e.g. eye witness identification, unsavoury witness).

It is recommended, overall, that judges look primarily to confirmatory and disconfirmatory evidence and the inherent plausibility or implausibility of the witness’s account, rather than to observations of the witness’s demeanour, in reaching conclusions about credibility.¹⁷ Judges should also identify the underlying assumptions in their own reasoning and examine whether these assumptions are valid in the particular case. They should be aware of the risks of tunnel vision and of the human tendency to fill in “gaps” in a narrative from their own experience and expectations.

¹⁷ As was suggested by Justice O’Halloran in *Faryna v Chorny* [1952] 2 DLR 354 (BCCA) at 357 and endorsed in numerous cases.

ASSESSING WITNESSES: CAN THE SKILLS BE TAUGHT?

Next, the participants are told that they are about to be shown videotaped extracts from the examination and cross-examination of two of the witnesses in the wrongful dismissal trial. They are told that they will later be asked to craft and present reasons for their conclusions about credibility. They are advised to take notes as if they were in court.

The participants are given some time to work on their own in crafting a decision regarding their assessment of the credibility of the key witnesses in the wrongful dismissal case (civil scenario). They then present and discuss their reasons in small groups, with facilitators.¹⁸ This is consistent with the view that the discipline of formulating and expressing reasons about credibility promotes self-reflection and careful analysis and is one way to achieve more accurate conclusions about credibility.

Wrap-up session

At end of the credibility assessment component, the presenters comment on the exercise and ask for an indication from the group as a whole as to their findings. This is done through instant audience response technology (“clickers”). There is usually a significant division of opinion.

The evaluations to date have indicated that the credibility assessment module was useful and effective in the views of those who responded.

CANADIAN EYEWITNESS MODULE

The Canadian “Preventing Wrongful Convictions” programme mentioned above has a component on eyewitness reliability. This is obviously an important issue as it has been credited as a factor in more than 80 per cent of wrongful convictions.¹⁹ To capture participants’ attention from the outset, the course’s segment on eyewitness identification often begins with a video called “What Jennifer Saw”. This documentary, produced by the Public Broadcasting System in the U.S., highlights the numerous eyewitness identification errors that led to the wrongful conviction of Mr. Ronald Cotton, who spent 11 years in prison for a sexual assault he did not commit.

18 The facilitators are well briefed beforehand so that the discussion is productive.

19 See T Brettal Dawson and Natalie Salat, “Innovations in Judicial Education: the NJI’s Preventing Wrongful Convictions Seminar” in National Judicial Institute *20 Anniversary Essays* (2009 National Judicial Institute).

After the video, an eyewitness identification expert explains what went wrong. The expert has the judges do several exercises, including one where she asks them to look at a page of 26 composite photos and identify which one depicts the accused. A debate inevitably ensues, with everyone voicing a different opinion. Ultimately, the participants learn that all 26 images are composites based on the same person, and that they are vastly different – bringing home the dangers inherent in using composite photos.

The expert then moves to the next phase of the learning cycle: providing concepts and guiding principles based on research. From this foundation, she provides judges with the tools to deal with what may be going on in their own courtrooms, and alerts them to possible frailties in the eyewitness identification procedures adopted by the police in the case before them. Participants then proceed to the application phase. They break into small groups and examine a number of vignettes, from which they then attempt to identify problematic procedures or signs of mistaken identity.

NEW ZEALAND COURSE ON ASSESSING WITNESSES

The New Zealand Institute of Judicial Studies (IJS) has developed a course on assessing witnesses, which was first presented on 10 and 11 February 2011. The course begins with a brief introduction covering the definitions of credibility and reliability and the objectives of the course. The overarching objective of the course is to assist judges with integrating the latest research on memory, eye witness identification and credibility assessment into their work in the courts. In particular, it aims to assist them in the process of making robust credibility and reliability findings in their judgments.

Observation exercise

The participants are asked to view a clip of an armed robbery.²⁰ They are asked to view the clip from the perspective of a customer who is sitting at a table to the side of the bank counter opposite a bank officer. During the course of the robbery, the gun carried by the bank robber goes off and a teller is shot.

20 This clip was prepared for police training purposes and was filmed after hours in an actual branch of a local bank, with some of the bank workers present (as well as some actors).

After the video is played, the participants are split into four groups. One of the members of each group is interviewed about the incident by an experienced police interviewer, using the cognitive interviewing techniques that the police now use.²¹ The new style of interview begins with open questions designed to elicit a description of the incident and only when that has been done does the interviewer move on to more explicit questions.²²

Following completion of the interview, the participants discuss (facilitated by faculty members) whether or not they agree with the description of the incident, the offender and the firearm that was given during the interview.²³ There is then a brief discussion about the implications of any observational or recollection difficulties that may have been experienced. In the first course,²⁴ the issue that struck the participating judges most was the incomplete memory they had of the event, despite having watched the video clip with the expectation that they would be asked questions about it. The differences in recollection among the members of the group as to crucial details was also noted. The real benefit of the exercise is to allow judges to experience for themselves the fallibility of observation and memory. This makes them more open to the material to be presented in the following sessions.

Memory research

The observation exercise is followed immediately by an interactive session that provides a general introduction to memory and memory research by a research

21 For an article setting out the theory and practice of cognitive interviewing see Ronald Fisher “Interviewing Cooperative Witnesses” (2010) 15 *Legal and Criminological Psychology* 25. We initially suggested that the police could train the judicial faculty members in the new interviewing techniques and we could then conduct these interviews but the police politely (and with some embarrassment) said that they considered us untrainable in the time available. The new techniques are apparently very difficult to learn and even more difficult to practise properly and consistently.

22 The interviews are recorded and transcribed over night.

23 Discussion of this kind would of course be very definitively discouraged in practice, given the possibility of distorting memory. However, we encourage it in this course to give participants the experience of hearing different observations from different observers and also to see possible distortions of memory arising (unless of course our participants turn out to be super human!).

24 In February 2011.

psychologist.²⁵ This covers the three stages of memory (acquiring, storing and retrieving) and the circular and iterative nature of the second and third stages. The session covers the general difficulties with eye witness observation at the acquisition stage, as well as the distortions that can occur in the second and third stages (including by the use of leading questions).²⁶ There is also a discussion on the creation of false memories, finishing with general recommendations on best practice for how evidence should be collected to maximise retrieval and to minimise false memories.

In brief, it is clear that memory diminishes and is more susceptible to distortion with time. Witnesses tend to remember central details better than the peripheral details. Further, while some people may have better memories than others, memory strength is directly related to how much attention people pay to an event and what they expect to occur.²⁷ Evidence collection mechanisms should take account of these factors.

Interviewing techniques

Following the memory segment, the police deliver a presentation on current police practice in interviewing, which, of course, the participants experienced in the course of the armed robbery observation exercise. The New Zealand police have been systematically training the officers responsible for interviewing witnesses and victims in cognitive interviewing techniques.²⁸ These techniques were introduced in response to research that revealed the generally poor quality of police interviewing techniques,

25 For a fuller discussion of memory issues see Matthew Gerrie, Maryanne Garry and Elizabeth Loftus “False Memories” in N Brewer and K Williams (eds) *Psychology and Law: An Empirical Perspective* (Guilford, New York, 2005) at 222–253. See also British Psychological Society *Guidelines on Memory and the Law: Recommendations from the Scientific Study of Human Memory* (Revised April 2010).

26 The concept of leading questions is more subtle than might be thought. For example, estimates of speed have been found to be higher in witnesses asked how fast the cars were going when they “smashed” into each other than in witnesses asked how fast the cars were going when they “hit” each other. See Gerrie, Garry and Loftus, *ibid*, at 223–224. For further discussion of the significance of the way in which witnesses are questioned see Louise Ellison and Jacqueline Wheatcroft “Could You Ask Me That in a Different Way Please? Exploring the Impact of Courtroom Questioning and Witness Familiarization on Adult Witness Accuracy” (2010) 11 *Crim L Rev* 823.

27 See Gerrie, Garry and Loftus, *ibid*, at 226–227.

28 See Fisher, above n 21.

which resulted in witnesses not giving all the information they should have given, or worse, which distorted the witness' evidence.²⁹

The core principles of cognitive interviewing³⁰ are:

- (a) developing rapport with the witness;
- (b) asking primarily open-ended questions;
- (c) asking neutral questions and avoiding leading or suggestive questions;
and
- (d) funnelling the interview, beginning with broader questions and narrowing down to more specific questions.

Cognitive interviewing is a neutral tool designed to gather more reliable information. The goal of the investigation is to make the correct decision based on that information.³¹ The principles of cognitive interviewing are organised around three psychological processes: cognition, social dynamics and communication. A number of principles arising from general cognitive theory are used to enhance memory retrieval, including: context reinstatement (recreating the context of the crime at the time of recall); the recognition of limited mental resources (minimising distractions and refraining from asking questions while witnesses are searching their memory); witness-compatible questioning (avoiding asking a standard set of questions); discouraging guessing (instructing witnesses to say that they do not know or do not remember when they are unsure of something); and minimising constructive recall (warning witnesses not to expose themselves to discussion from other witnesses or the media).³²

The police are proposing that their initial interviews of witnesses be videotaped and that these interviews be shown as the evidence in chief of witnesses. They promote this idea in their session.

Overall message

The overall message presented by the police and by the psychologist is that as much care should be taken to avoid contamination of eye witness evidence during the process of retrieval as is taken with physical evidence.

29 Fisher, *ibid*, at 25–26.

30 And a number of other scientific interviewing techniques. See Fisher, *ibid*, at 26.

31 Fisher, *ibid*, at 35.

32 For a fuller discussion see Fisher, *ibid*, at 27–29.

The participants in the first course were unsettled at the fallibility of witness testimony in light of the fact that such testimony is (and must be) relied upon in our courts and the implications of that in the courts' search for "truth". They were then comforted somewhat by the steps being taken by the police to improve the collection of witnesses' evidence and to minimise the distortion of that evidence.

Group discussion

Small group discussions of a number of topics follow the police session.³³ The outcomes of these discussions were documented,³⁴ with a view to using them for the following year's course and also for starting a dialogue on possible reform of practice and/or legislation.

Each group was given a different topic. One group discussed the advantages of the police proposal to use the videotaped interviews of witnesses and complainants as evidence in chief, while another discussed the disadvantages. The third group discussed the techniques that could be used in court to enhance memory retrieval if the police proposal relating to video interviews was not accepted. The fourth group discussed how the courts could take account of memory research in their work.

Identification

The next section of the course relates to eye witness identification. This section is again presented by a research psychologist, who starts with a demonstration of a line-up procedure. Participants view a short video of an incident and then pick out the offender from a photo montage line-up.³⁵ In our first course, there was a wide range of opinions in audience regarding which of the photographs was of the culprit. It turns out, however, that the culprit is not in the montage and so those who have picked out a culprit from the photo montage have definitely identified an innocent man.³⁶

This exercise allowed the judges to experience first-hand the real problems with identification evidence and particularly that made by strangers after a "fleeting glance".

33 The discussions are facilitated by a faculty member and the presenters are part of each group as well so that judges have the opportunity for less formal interaction with those from different disciplines.

34 Each group had flip charts where they recorded the main points of the discussion and the facilitators also noted down the main points arising from the feedback sessions.

35 There were eight photographs in the line-up for participants to choose from.

36 Or at least one innocent of that particular crime.

This is important as otherwise judges could have a tendency to underestimate the difficulties with such evidence.

Following this, the psychologist outlines the decision processes that occur when a witness is choosing from line-ups, including the possibility that witnesses choose a subject most like the actual culprit, rather than actually recognising the culprit. He then moves to a discussion of the sources of error in line-ups, both outside the control of the criminal justice system and within the control of the criminal justice system. A number of recommendations are discussed³⁷, which will diminish (but not eliminate) inaccurate identifications. They include that line-ups should contain only one suspect, that, double-blind line-up administration should be preferred³⁸ and that, immediately after the identification decision, a (independent) record of the witness' exact identification response, the confidence in that decision, the witness' decision latency,³⁹ and other perceptions that witnesses had of the encoding and identification experiences should be made. Research has shown that confidence in the identification, provided it is measured immediately, provides some measure of the accuracy of the identification.⁴⁰

The course then moves again to a police presenter, who outlines current police practice on collecting identification evidence and, in particular, highlights the fact that this evidence is treated as only one small aspect of the evidence. The police speaker also provides a demonstration and explanation of the new electronic photo visual system for setting up photographic line-ups.

Issues for the courts

The last session of day one contains a presentation from a legal perspective by Dr Yvette Tinsley of Victoria University Law School on the issues that could arise in relation to police proposals for interviews being used as evidence in chief, including the limitations on the use of prior consistent statements.⁴¹ Dr Tinsley also discusses overseas experience with both video interviews (including in Western Australia and

37 Neil Brewer and Matthew Palmer "Eyewitness Identification Tests" (2010) 15 Leg. Crim. Psychol 77 at 90.

38 This is where the administrator of the line-up does not know who the suspect is.

39 Time taken to decide.

40 Courtroom confidence is not, however, an accurate measure of reliability. See at (i) below.

41 See s 35 of the Evidence Act 2006 (NZ) which provides (with certain exceptions) that prior consistent statements are inadmissible.

Europe) and modified questioning styles and procedures in court (in particular for child victims of sexual abuse).⁴²

Justice Susan Glazebrook then assesses the New Zealand Evidence Act 2006 identification procedures and warnings in light of the best practice guidelines. In brief, the conclusion is that the Act and police practice measure up relatively well against best practice in this area. As to jury directions, the message is that these should be tailored to the individual case insofar as the legislation allows this.⁴³

Credibility questionnaire

The first day ends with the administering of a modified version of the questionnaire on assessing credibility which was developed for the Canadian National Judicial Institute. This enables comparisons to be made between the attitudes and understanding of New Zealand and Canadian judges over time. The questionnaire is conducted through audience participation devices (clickers),⁴⁴ which allow graphs setting out the spread of answers to the questions to be shown immediately after each question. On the next morning, participants can also assess the accuracy of their current views against those set out in a presentation on credibility.

42 As also explored by Ellison and Wheatcroft, above n 26. See also Kirsten Hanna and others “Child Witnesses in the New Zealand Criminal Courts: A Review of Practice and Implications for Policy” (Institute of Public Policy, Auckland, 2010). See also (for the UK) *The Stern Review: A Report by Baroness Vivien Stern CBE of an Independent Review into how Rape Complaints are Handled by Public Authorities in England and Wales* (prepared for the Government Equalities Office and the Home Office, 2010) and H Westcott and S Kynan “Interviewer Practice in Investigative Interviews for Suspected Child Sexual Abuse” (2006) 12(4) *Psychology, Crime and Law* 367 and (for Western Australia) Hal Jackson “Child Witnesses in the Western Australia Criminal Courts” (2003) 27 *Crim LJ* 199.

43 The Evidence Act 2006 (NZ) provides some compulsory warnings which militate against full tailoring.

44 The New Zealand judges very much enjoyed using this technology. We understand the Canadian judges do too.

Presentation on credibility

On day two, the presentation on credibility is given by Professor Aldert Vrij⁴⁵ by video conference link from the United Kingdom. Professor Vrij deals with what signs are not indicative of deceit and what signs may in some circumstances provide some indication of lying. His presentation stresses that there is no evidence that liars look away, fidget, speak with a high pitched voice⁴⁶ or that they are likely to be more nervous than truth tellers. There is, however, no universal sign of lying like Pinocchio's nose and inter and intra personal differences must be taken into account (though this may be difficult in the courtroom setting where there may be limited opportunities to employ these techniques).⁴⁷

The content of the evidence is more diagnostic than is behaviour. Liars tend to be less detailed, providing less temporal and spatial information and fewer sensory details. Professor Vrij also touches on how police interviews should be conducted and outlines methods for credibility assessment, such as increasing cognitive load,⁴⁸ a creative use of evidence⁴⁹ and playing the devil's advocate.

Suspect interviews

After Professor Vrij's session, there is a presentation on current New Zealand police practice in conducting suspect interviews, including the techniques used to avoid false confessions. The presentation touches on dealing with vulnerable suspects. The new suspect interviewing techniques are similar to the cognitive interviewing techniques for witnesses but modified to accommodate protections for suspects and also to take into account the fact that suspects may not be co-operative. The aim of the interview is to get as full an account as possible through the use of open questions. Further probing

45 See Aldert Vrij *Detecting Lies and Deceit: Pitfalls and Opportunities* (2nd ed., John Wiley and Sons Ltd, England, 2008). We are very grateful to Justice Lynn Smith for recommending Professor Vrij to us.

46 At least not so as to be detectable in ordinary circumstances.

47 For further details see the discussion on the Canadian course.

48 For example, by asking the person to repeat the story background.

49 For example, delaying confronting the suspect with evidence until after the suspect has been invited to give his or her version of events.

then occurs to resolve queries arising from inconsistencies of account and with physical evidence.⁵⁰

Group discussion on credibility

The police session is followed by small group discussions on the issue of credibility. The groups tended to identify different issues with judge alone trials than with jury trials. With the latter, it is not appropriate for judges to enter the “dust of the arena”. Meaning that there is less possibility for judges to intervene in questioning. It was therefore important that counsel were made aware of the credibility research.

As to jury instructions, the groups considered that, at the least, all judges should stop instructing juries to rely on their view of a witness’ demeanour.⁵¹ It was not clear, however, how much further judges should go, particularly in the absence of any expert evidence at the particular trial.⁵² It was suggested that a committee of judges be set up to deliberate on this topic or that the Court of Appeal might give some guidance on the topic.

Return to armed robbery exercise

After the group discussions, we revisit the armed robbery scenario.⁵³ We subject a person interviewed by the police on day one to a mock examination in chief and cross-examination. This shows participants how interviews are translated into evidence in court. We decided not to have the cross-examination follow straight after the interviews as there would always be a gap in real life. Further, we wanted to see if any

50 Participants are referred to the following articles, which provide some background: Dave Walsh and Ray Bell “What Really is Effective in Interviews with Suspects? A Study Comparing Interviewing Skills against Interviewing Outcomes” (2010) 15 Leg. Crim. Psychol 305 and Julianne Read and others “Investigative Interviewing of Suspected Sex Offenders: A Review of What Constitutes Best Practice” (2009) 11 Int. J. Police Sci. Manag. 442.

51 It has been some years since that instruction has been removed from the Criminal Bench Book but some judges still direct on this.

52 There was not a great deal of enthusiasm for expert evidence on this topic, however, except where there were particular issues with a witness, for example, suggestibility or vulnerability.

53 We did not herald in advance this return to the armed robbery scenario but the person to be subjected to examination in chief and cross-examination was warned about an hour before.

distortions of memory had arisen overnight as a result of discussions with the other participants or the witness “filling in the gaps” for himself or herself.⁵⁴

It was interesting that the person who was subjected to questioning on day one actually found that responding to questions was much easier than the cognitive interview. This seems at odds with the experience of giving evidence in court reported by complainants in sexual abuse cases in particular. Complainants often find it frustrating to have to respond to questions and not be able to tell their story in their own way. It may be that our participant was more comfortable with answering the questions because, being a judge (and before then a lawyer), the process was more familiar to her. However, it is true that remembering an event (even directly afterwards) is difficult and takes concentration. The fact that our participant had gone through the exercise of the cognitive interview no doubt helped her cope with the questioning better in any event.

Next, we ask all participants a series of “clicker” questions to highlight the continuing variations (and possible distortions) of memory. We then play the armed robbery tape again so participants can see how the reality matched up with their recollections. This re-viewing is interesting for participants as it confirms just how much of the incident they had not observed the first time and also how many of them had completely false recollections of what occurred.

Case scenario

The afternoon of the second day is taken up by a case scenario. This was adapted from the Canadian civil case scenario (discussed above),⁵⁵ although we could not use that in its entirety because the Canadian scenario was related to an employment dispute. As most judges will never have to deal with such disputes,⁵⁶ we changed the dispute to a dispute over a contract for services. The allegations of breach of contract include allegations of sexual harassment (including sexual assault), thus making the scenario relevant to those judges who operate in the criminal and family jurisdictions.

54 No particular distortions arose in the evidence in the first course but this may have been in part due to the focus of the cross-examination which was on the gaps in recollection rather than possible distortions.

55 The IJS is very grateful to the Canadians for their generous support and provision of materials for this session and more generally for this and other courses.

56 In New Zealand, all employment disputes are undertaken by a specialist tribunal so the bulk of the judges will never deal with one.

In New Zealand civil cases operate on briefs on evidence. A written scenario (effectively equating to briefs of evidence) is therefore distributed to the participants. The participants then see clips of cross-examination⁵⁷ relating to particular issues that need to be decided in the case. The cross-examination of particular witnesses is split into the various issues that have to be decided rather than a sequential viewing of the cross-examination of one witness on all issues followed by cross-examination of another witness on all issues. This allows participants to compare what each relevant witness says on the particular issue, and may raise questions in participants' minds as to whether this might be a more logical way of running court cases rather than through rigid procedural rules. In order not to tire out the participants, the cross-examination is fully scripted and is short and snappy. This makes it less realistic but again may raise questions as to the (arguably unreasonable) attention span we expect of juries (and ourselves) during trials.

At the end of each issue, the participants are asked to make their decision on that issue and write brief reasons. These are collated for use and preparation for the following year's course. The court cases are designed to be as evenly balanced as possible to allow decision makers to legitimately come to a decision for either side. The split, however, was about 70/30 overall on the case in the first course.⁵⁸ This divergence of views on the issues has generated continued heated discussion after the course.

After having had an opportunity to discuss their view, the participants are given a "model judgment" for each side that was drafted by the facilitators. These model judgments attempt to avoid all the pitfalls of judgment writing in this area: for example, avoiding conclusory statements and attempting to ensure that there is no reliance on false cues of deception.⁵⁹

Despite the difficulties in reaching a conclusion, it is necessary to come to a decision on a case and to make credibility and reliability assessments. Here, research on the subject should be taken into account and caution should be exercised. The exercise shows that differences of opinion as to credibility and reliability will exist. While there

57 The cross-examination was filmed professionally. Some of the Court of Appeal law clerks were the witnesses. Counsel were kindly supplied by the Crown Law Office and Justice Susan Glazebrook and the IJS educational officer, Janine McIntosh, had fun directing.

58 The split as regards particular issues was much more even.

59 See below for a discussion of a "checklist" which suggests avoiding further pitfalls when undertaking credibility and reliability findings.

is a “right” answer in terms of the truth, the court process will not always be able to find it due to the fallibility of witnesses’ memory and the difficulties in assessing who may be lying. No system can be perfect. We can, however, do our best. It is important in this context that judgments explain the thought processes involved in witness assessments and that these assessments be as robust as possible, within the limitations of the system and human fallibility.

Tying the threads together

Day two ends with two presentations. The first relates to the effect of judicial instructions and expert evidence on juries. The (rather depressing) conclusion is that the research is not clear that either judicial instructions or expert evidence help dispel popular stereotypical beliefs.⁶⁰ However, there is evidence to suggest that directions given early in a court case are more effective than those given after jurors may have already made up their mind. In addition, properly tailored instructions may have more effect than standard directions.

The same applies to expert evidence. The dangers, however, of having a “battle of the experts” which can tend to make jurors sceptical of all expert evidence were also outlined.⁶¹ It was also suggested that there could be more creative ways of using experts, for example, in educating counsel and other professionals.

The last presentation provides a brief checklist on how best to undertake credibility and reliability findings.⁶² Participant’s evaluations have indicated that this checklist material has been very helpful.

DIFFERENCES BETWEEN THE NEW ZEALAND AND CANADIAN APPROACHES

The Canadian course on credibility is embedded in a general evidence course. As a result the credibility assessment case study can be intertwined with the evidential issues

60 In this context, incorrect beliefs such as “liars are nervous” or “liars avert their eyes”.

61 For example, see Lora Levett and Margaret Kovea “The Effectiveness of Opposing Expert Witnesses for Educating Jurors About Unreliable Expert Evidence” (2008) 32 *Law and Human Behav* 363.

62 This was adapted from the Canadian material discussed above.

that arise. The same scenario spans the whole of the course, rather than having it merely for the last afternoon as in the New Zealand course. This makes it more realistic.

Similarly, the elements of the Canadian course dealing with reliability have been embedded in the wider topic of wrongful convictions.⁶³ Faulty eyewitness testimony, for example, clearly fits well in such a course, given the role played particularly by misidentification of suspects in criminal cases.

An advantage of the New Zealand programme is that it covers the assessment of witnesses generally, including both credibility and reliability. It thus concentrates the participants' minds on both aspects of assessing witnesses. Issues of reliability and credibility can be intertwined in one witness. Having the course spread over two days (rather than being a module of another course) also enables judges to experience the failings of human observation and memory for themselves and to get insight into modern police procedures and methods of evidence collecting.

Both the Canadian and New Zealand courses are, however, incomplete. Neither course covers the decision making heuristics that can affect the assessment of witnesses, including confirmation bias anchoring, hindsight bias and matters of that kind.⁶⁴ The Canadians include some discussions of these issues in other courses, and will be offering for the first time in 2012 a programme wholly focussed on judgment ("Good Judgment"), to be offered in December 2012). In New Zealand, the IJS has developed a two-day course covering decision-making more generally. This concentrates on the hidden aspects of decision making, as well as covering pure legal method.

CONCLUSION

Addressing the question posed in the title of this article, its authors believe that judges can be informed about the fallibility of human observation and memory, and about what research reveals regarding the human ability to detect deception. Judges can be given some assistance in avoiding pitfalls in credibility assessment and in identifying possible indications of deceit in certain circumstances. Education programmes can

63 As noted earlier this course has also in the past touched on credibility assessments.

64 See brief discussion in Aldert Vrij, Pär Granhag and Stephen Porter "Pitfalls and Opportunities in Nonverbal and Verbal Lie Detection" (2010) 11 *Psychological Science in the Public Interest* 89 at 98-99 and Chris Guthrie, Jeffrey Rachlinski and Andrew Wistrich "Blinking on the Bench: How Judges Decide Cases" (2007) 93 *Cornell L Rev* 1 at 19-27.

allow judges to experience first-hand the fallibility of observation and memory and the difficulty of lie detection, and to compare their experiences and insights with fellow judges. Judges can learn to integrate the process of assessing witnesses into their decision-making processes generally, and to be aware of their own assumptions and preferences.

The task of reviewing evidence and assessing witnesses is central to the judicial role. Thus, any assistance that can be given to judges in performing this task has to be welcomed. One dilemma, however, remains: it is impossible to know if, as a result of the programmes, the judges' credibility and reliability findings in court have become more accurate. The impossibility stems from two main factors: (a) the difficulty in ascertaining with certainty the "ground truth" (that is, whether a given witness in court was actually lying or mistaken); and (b) confidentiality and privacy issues.

The authors remain optimistic, however, that judges will be more effective the better informed they are of the risks and pitfalls inherent in assessing witnesses' evidence, and the more self-reflective they can be about their own fact-finding processes.

EVALUATION OF CONTINUING JUDICIAL EDUCATION PROGRAMMES: REACTION, LEARNING ACQUISITION/RETENTION & BEHAVIOUR CHANGES*

By

Mary Frances Edwards**

Continuing judicial education (CJE) providers presume that CJE is valuable if presented well. However, the “if” in this statement is significant. Without evaluation of the educational experience, we cannot be sure that it was worthwhile.

The US National Association of State Judicial Educators² (NASJE) has promulgated the “NASJE Standards for Judicial Branch Education” (JBE), which are published by the International Organisation for Judicial Training (IOJT) on its website.³ The NASJE Standards were designed for a common law system in which new judges and court staff receive brief orientation courses and then attend on-going

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** Ms. Edwards is an international expert on continuing legal and judicial education with over 30 years of experience. She has worked in Ukraine, Kosovo, Sudan, Iraq, Kyrgyzstan, Romania, Mongolia, and Egypt, as well as the United States, where she was Academic Director of The National Judicial College for six years. She currently lives in Country Sligo, Ireland. This paper is based on her presentations on evaluation of judicial education courses at the International Organisation of Judicial Training’s conferences in Sydney, Australia, in 2009, and Bordeaux, France in 2011.

2 www.news.nasje.org.

3 www.iojt.org, available under the “library” tab.

training courses throughout their careers. The NASJE Standards do, however, raise important issues that all CJE providers should consider in assessing both initial and on-going judicial branch education. Training evaluation is one such issue.

“NASJE Standard 4.5” states that “[t]he evaluation method should determine, both during and after the activity, whether the learning activity achieved the stated learning objectives and met the participants’ expectations.” The accompanying commentary to standard 4.5 points out that “[e]valuation during a programme allows faculty to adjust the programme when needed to meet objectives. Impact and follow-up evaluations conducted at intervals following education programmes often reveal more learning and reinforce the learning.” In addition, “NASJE Standard” 5.4 says that “Faculty should engage in regular and ongoing evaluation of their JBE programmes and their teaching techniques and objectives to ascertain that they are meeting the needs of their participants.”

Livingston Armytage describes education evaluation as “making informed judgments on the overall value of a learning programme and whether or not the programme accomplished what it set out”.⁴ Evaluation helps the programme administrator to decide whether to repeat the programme, how to improve it and, in particular, which presenters to invite again. If a programme has received outside financial assistance, the funder may require evaluation reports. Positive evaluation results may be crucial to secure future funding. Programme designers and presenters deserve praise for their successes and need constructive criticism for their mistakes. Evaluating the efficiency of continuing professional development (CPO) programmes is key to securing ongoing support from the courts and funders, as well as enthusiastic repeat attendance by participants.

A variety of evaluation models exist, such as “CIRO: Context, Input, Reaction & Output”; “CIPP: Context, Input, Process & Product”, and “Kaufman’s Five Levels: Inputs and Reactions, Competencies, Application in Workplace, Organisational Outputs & Societal Outcomes”.⁵ One that is frequently used in continuing judicial

4 L Armytage, *Educating Judges Towards a New Model of Continuing Judicial Learning* (Kluwer Law International, The Hague, 1996), at 184.

5 For a detailed discussion, see Conner, Maureen. *Conducting Impact Evaluation for Judicial Branch Education*, pages 3 - 4. JERITI Monograph Eleven. East Lansing, MI: Judicial Education Reference and Technical Transfer (JERITI) Project (2002) [Available on line: <http://jeritt.msu.edu/monographs.asp>].

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education (CJE) programming is “Kirkpatrick’s Four Levels of Evaluation: Reaction, Learning, Behaviour, and Results”⁶:

- (a) Kirkpatrick’s Level One, “Reaction Evaluation”, is the most familiar to us. Usually, participants get a form at the end of a course or educational event, asking them to tick off little boxes, often on a five point scale, to solicit their immediate reaction to a course or event. Often, there is also a place in where participants can write specific comments. The form usually includes questions about what other courses and topics the learner would find useful.
- (b) Level Two, “Learning Evaluation”, tries to measure what knowledge or skills participants have acquired and retained. This can be done through a test (either at the end of the course or days or months afterwards) to measure what knowledge or skills they acquired and kept or alternatively through a post-course evaluation asking the participants what they have retained.
- (c) Level Three, “Behaviour Evaluation”, assesses whether there have been any behavioural changes as a result of the education programme. This is done by observation or interviewing.
- (d) Finally, Level Four, “Results Evaluation”, tries to identify whether the education generated change in the recipients’ organisation.

This article will now shift to a more detailed discussion of each of the levels.

LEVEL ONE

Level One evaluations are usually written and getting participants to return the form can be very difficult. This is especially so where the programme did not meet expectations. After a disappointing programme, the audience is sometimes too demoralised to stay later to fill out a form; they feel that they have already wasted enough time. On the other hand, sadly, people are generally more likely to take time to complain than to praise. A “captive” audience taking a required course will also invariably be more critical of presenters, materials, and the learning environment than a voluntary group.

Participants’ oral comments during a course also fall under Level One of Kirkpatrick’s evaluation model. While oral feedback is harder to capture and record, it

6 Kirkpatrick, Donald L. *Evaluating Training Programmes: The Four Levels*. 2nd Ed. San Francisco: Barrett-Koehler (1998); and Conner, above, pages 7 -15.

is also more immediate and sometimes the CJE presenter can take remedial action before a course ends. Oral feedback is the most helpful way to identify ineffective learning environment issues such as the facility being too hot or too cold, the chairs uncomfortable, tea breaks too late, food inadequate, sound system not strong enough or audio visual aids not visible at a distance. Although these issues sound superficial, if they are not cured immediately, they can have a negative effect on even the best educational event.

Judicial education providers should always monitor programmes by ensuring that someone from the presenting organisation is in the audience. This may be crucial to putting written comments in context. The monitor may, for example, be able to explain a specific interaction that soured the audience or may simply disagree with the audience assessment of the training.

Cultural attitudes can make the Level One “Reaction Evaluation” difficult or can skew its results. In the United States where freedom of speech is a basic right, a professional audience assumes it has the prerogative to comment on course content, speakers’ presentations, written materials and learning environments. These judicial education providers take for granted the participants’ right to comment critically on a course or presenter, especially if they or their court have paid a fee to attend. This view, however, is not universally accepted. Furthermore, what is accepted by professional participants and presenters may not be considered appropriate when judges are teachers or participants.

Participants from cultures that are very respectful or kind may be hesitant to say or write down anything negative. It is even harder for participants from very protocol driven cultures to convey negative reactions, and it may, in fact, be programme impossible for them to do anything but praise their superiors. This is often the case when judges speak, and is especially so when they are speaking to other judges. Former students are also very loathe to criticise their law professors or mentors. In a dictatorship, participants are afraid to criticise or complain. In a racist or sexist society, however, minority and female speakers may receive undeserved criticism.

Obtaining accurate Level One evaluations of courses that are held in developing countries can be difficult, especially if the course has received foreign funding or been presented by a foreign presenter. Participants consider it an honour that a foreign speaker has travelled to their country, and feel they would be bad hosts if they were to criticise the speaker. In some developing countries, a course paid for by a foreign funder may be the only continuing judicial education available. Even if a course does not meet their needs, an audience will not want funding to be cut off. Similarly, if a

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delegation is funded to attend a programme abroad, they are usually so happy to be there that they will not voice criticism. They want to be sent again or be sure that the programme is repeated for their colleagues.

In non-democratic countries, written feedback may even be influenced by concern that it will be passed on to or accessed by the government. Therefore, if a foreign audience rates a speaker low, the presentation was probably seriously flawed, unless there was cultural dissonance, like the making of derogatory comments about local ethics or violations of the participants' cultural mores, for example if persons present were dressed immodestly by local standards.

These cultural hurdles aside, the simplest way to increase feedback within Level One evaluations is to give audiences plenty of time to fill out their evaluation forms. In a multi-day course, participants should be given daily forms. Most of the form can then be filled out during breaks with additional time left at the end of the course so the final segments are not neglected. Making time to fill out the evaluation form, however, is not a solution in and of itself. An effective way to increase candour in evaluation forms is to assure the audience that their comments are anonymous. It is also good to provide a box into which participants can put their forms so that there is no way to know who wrote what.

CJE providers should make sure participants understand that their comments are needed to make the next iteration of the course even better, and that presenters welcome feedback that will assist them to improve their performance. It is also important to emphasise that, although constructive criticism is welcome, the received speakers deserve positive feedback for their efforts.

LEVEL TWO

Level Two of the evaluation model measures impact. The most typical measure of learning is to ask participants to fill out a test either at the end of the course or event or to test what knowledge has been retained a few days or months later. The results will reveal what knowledge or skills the audience acquired and retained, and will provide more objective data than simply asking participants whether they learned anything and whether they have retained that learning. The test results will also highlight what more needs to be learned.

Testing is easier to do if you have a baseline from a pre-course test/or assessment of the participants' knowledge of the relevant topic. Some CJE providers use a simple multiple choice self-assessment to determine acquisition of learning.⁷ Some providers even use the same test both before and after. Giving a quick Level Two test at the end of a course, simultaneously with a Level One Reaction evaluation, is low cost and not time intensive. However, it is more effective to test learning or skills retention some time after a course is over as part of a post-course evaluation. In most cases, this will have to be done by mail or e-mail because the participants have dispersed; that makes the process more time consuming and expensive: if not in postage, in staff time taken to implement the evaluation. Further, there is no way to ensure that the trainees are not looking up answers, and the response rate is unlikely to be as high as that of a test handed out at the end of the course.

Testing is culturally sensitive. Adults tend not to like being tested, and judges in most countries resent being tested and potentially embarrassed. It is human nature that the older people get, the more consider being tested as an affront to their dignity. One of the characteristics of adult learners is concern over being able to learn new things. The prospect of being tested could therefore even frighten participants and discourage them from participating in continuing education. In countries with a history of dictatorship or repression, course participants may be afraid that there will be severe repercussions for poor test results. In the State judges' college (the National Judicial College) in the US, only judges taking courses for credit in the Master of Judicial Studies degree programme co-sponsored with the University of Nevada and National Council for Juvenile & Family Court Judges take tests.

LEVEL THREE

Level Three of the evaluation model also measures impact. It assesses whether there have been any behavioural (skills or attitudes) changes as a result of the education programme. This is usually measured by observing or interviewing the participants or asking third parties about the participants' behaviour.

Observation is difficult because adults, especially adult professionals, do not like to be watched. In addition to this, there are security and privacy considerations in observing judges at work. In many cultures, rules and social conventions prevent

⁷ This can be anonymous.

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individuals from criticising high ranking officials or elders, and in some countries, observers may be afraid that any perceived criticism of government officials may be conveyed to or accessed by the government. Observation or interviewing is time consuming, staff intensive, and expensive. It is also more subjective than a quantifiable Level Two test.

Level Three evaluation does assist, however, in both validating the success of the educational experience and assessing what more needs to be learned. It can also identify which presentation methods were the most successful during the educational experience.

LEVEL FOUR

The fourth and final level of Kirkpatrick's evaluation model, "Results Evaluation", is aimed at assessing whether the education programme has generated change in the participant's organisation. This can be done by analysing written decisions, and comparing the number of appeals decided and the average amount of time taken in reaching a decision with data taken prior to the course. As the Level Four, "Results Evaluation" level can be highly time consuming, difficult, and expensive to perform, it will not be discussed in any greater detail.

EXAMPLE OF AN EVALUATION PROCESS

In 2002, the Mongolian Judicial Reform Programme (JRP), a US Agency for International Development funded activity, Programme cooperated with the German aid provider, GTZ (Society for Technical Cooperation),⁸ to present courses for all judges, prosecutors, and advocates in the Republic of Mongolia on the country's new Criminal and Criminal Procedure Codes, including ethical issues. Although the Mongolian legal community was very small (at this point there were fewer than 500 judges in the entire country), they were spread over a huge geographic area. JRP presented courses for judges and advocates; GTZ presented parallel courses for prosecutors and police officers. In six months, courses were held in each of 21

8 then Deutsche Gesellschaft für Technische Zusammenarbeit, now part of GIZ, Deutsche Gesellschaft für Internationale Zusammenarbeit GmbH.

provinces. Although the Level One Reaction evaluations were very positive, JRP and GTZ wanted to do at least a Level Two Learning evaluation as well, despite the chance that the results would be heavily subjective.

Being only a decade away from authoritarian Communist rule, the Mongolian participants were nervous of testing and hesitant to criticise members of government. Mongolians also have a deep respect for elders which precluded them from criticising most CJE faculty members. One of the most endearing national Mongolian characteristics is their willingness to help each other. Unfortunately, the converse of this was that it was difficult to solicit candid feedback on continuing education course evaluation forms from participants because they were afraid that CJE faculty members would be fired if their teaching was criticised. Therefore, JRP Level One reaction forms had only obtained the participants reactions to the topics the course as a whole, not their reactions to individual faculty members.

Due to cultural sensitivities and the geographic spread of the participants, it was not feasible to carry out Level Two Learning Retention Testing of professionals who were already appointed as judges, admitted as advocates or appointed as prosecutors or high ranking police. Administering a Level Three evaluation form by mail to centralised locations in the provinces was, however, logistically and financially feasible.⁹ JRP and GTZ jointly sent surveys to the provincial courts, advocate societies and prosecutors' offices. The judges and court officials had a nearly 100% response rate; the prosecutors' response rate were lower, and the advocates' rate was only around 50%.

The Level Three survey was subjective and was based on a 5-point scale (1 being the lowest and 5 the highest score). Part A was a Level One follow-up and asked for the participant's personal reactions to the course in retrospect. Part C was a Level Three inquiry into behaviour change. This included a more revealing section asking each of the judges, prosecutors and advocates to assess each other. For example, in addition to asking judges whether their own job performance had changed based on the courses, the survey also asked whether they thought that the job performances of the prosecutors and advocates had changed. The prosecutors were asked about the judges and advocates, and the advocates were asked about the judges and prosecutors.

The JRP 2003 Annual Report to USAID stated:

9 The forms were all the same except for mirrored questions on the behaviour changes of other branches of the justice system.

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Results from a JRP and GTZ jointly solicited post-course evaluation of the long-term effectiveness of their 2002 courses were very encouraging. The 2002 courses were still rated highly for their usefulness. The usefulness of the course materials after the programme ended was rated particularly high. Out of 499 respondents, 46.5% used the materials daily and 31 % weekly. Equally important, *62% of respondents said their daily job performance had changed, and almost 25 % said it had changed weekly based on what they had learned in the courses. This was confirmed by respondents from the other branches of the legal profession. 84.5% said that the job performance in other the branches had changed.* These results are encouraging since they confirm that the courses had long-term effects.¹⁰ [Emphasis by author.]

The data yielded by the survey was incredibly helpful and assisted the JRP and the GTZ in reporting to their funders and planning future activities. The results justified ongoing funding for continuing education.

This response rate of the Mongolian survey was unusually high for a post-course survey. The small Mongolian legal community was very excited about having access to continuing legal and judicial education. As a result the participants were cooperative and enthusiastic audiences during the courses, and months later they were still committed enough to fill out surveys to assist in the development of future courses. In addition to this, the General Council of the Courts, the Prosecutors Office, and Advocates Society were all willing to distribute and collect the surveys. Not all continuing education providers can count on such cooperation.

SUMMARY

Level One evaluations are simple to administer, summarise, and analyse. The reactions and comments contained in Level One evaluations are essential to the revision and replication of a course, as well as to assessment of future educational needs. While Level Two and Three evaluations can be time and cost intensive, they enhance the overall CJE programme by identifying future training needs and providing long term feedback on success. This is particularly important for institutions who may need to

¹⁰ *Mongolia Judicial Reform Programme Annual Report to USAID 2003*, page 17.

justify their funding to the government, private and/or international donors, the media or the public.¹¹

- 11 See Armytage, Livingston. *Educating Judges Towards a New Model of Continuing Judicial Learning*, Chapter 8, Educational Evaluation. The Hague/Boston/London: Kluwer Law International. (1996); Conner, Maureen. *Conducting Impact Evaluation for Judicial Branch Education*, JERITT Monograph Eleven. East Lansing, MI: Judicial Education Reference and Technical Transfer (JERITT) Project (2002) [Available on line: <http://jeritt.msu.edu/monographs.asp>]; Hudzik, John K. *Judicial Education Needs Assessment and Programme Evaluation*. JERITT Monograph One. East Lansing, MI: Judicial Education Reference and Technical Transfer (JERITT) Project (1991) [Available on line: <http://jeritt.msu.edu/monographs.asp>]; Kirkpatrick, Donald L. *Evaluating Training Programmes: The Four Levels*. 2nd Ed. San Francisco: Barrett-Koehler (1998); Renner, Peter. *The Art of Teaching Adults*. Vancouver, Canada: PFR Associates (2005).

IMPACT EVALUATION OF JUDICIAL COLLEGE EDUCATION FOR JUVENILE COURT JUDICIAL OFFICERS

By

Ann A O'Connell and Joy Edington*

The Judicial College is an office within the Supreme Court of Ohio. It was established in 1976 to give judges and magistrates continuing education that would enhance their knowledge and skills, and in so doing, help to improve the administration of justice. In early 2010, the Judicial College adopted a principled approach for identifying the needs of juvenile judges in Ohio in order to design curricula to meet these needs. In addition to designing new curricula, the Judicial College was interested in better understanding the impact of its existing judicial education courses as such information would be critical for improving its programmes. Consequently, a partnership was established with the Ohio State University to evaluate judicial education courses. The Ohio Supreme Court's Court Improvement Project (CJP) provided funding to support this evaluation.

It was decided that the evaluation efforts should focus on the Abuse, Neglect & Dependency (A/N/D) courses, which are commonly attended by juvenile judges and magistrates. Thus, the overall goal of this partnership was to contribute to the design of

* School of Educational Policy and Leadership College of Education and Human Ecology at the Ohio State University. This article is based on a much longer paper which was prepared for the Ohio Judicial College in July 2011. The work presented here was supported through Court Improvement Funds from the Department of Justice. We could not have completed this evaluation study without the vision, dedication and support of M Christy Tull, and W Milt Nuzum, III. Thank you to Steve Hanson, Brian Farrington, as well as to the Judicial College staff and the Judicial College Board of Trustees.

effective, useful, comprehensive and relevant education that would meet the needs of participating judges throughout different stages of their judicial careers.²

BACKGROUND

The National Association for State Judicial Educators (NASJE) has published the “Principles and Standards of Judicial Branch Educators.” This identifies eight goals relevant to the education of judges. These goals have been endorsed not only by judicial education committees and organisations at federal and state levels, but also by Chief Justices, judges, and state court personnel. The NASJE goals aim to:³

- a) help judicial branch personnel to acquire the knowledge and skills required to perform their judicial branch responsibilities fairly, correctly, and efficiently;
- b) help judicial branch personnel to adhere to the highest standards of personal and official conduct;
- c) help judicial branch personnel to become leaders in service to their communities;
- d) preserve the judicial system’s fairness, integrity, and impartiality by eliminating bias and prejudice;
- e) promote effective court practices and procedures;
- f) improve the administration of justice;
- g) ensure access to the justice system; and
- h) enhance public trust and confidence in the judicial branch.

Although it is recognised nationally that there is a need for high-quality and effective judicial education courses, measures of relevant knowledge, skills, and attitudes are not readily available. As part of this evaluation project, we undertook a comprehensive review of the literature on judicial education, which revealed that such measures are more likely to be incorporated into evaluation studies when the objectives for judicial education are nationally initiated⁴ or when there is a state-mandated

2 The juvenile judges’ Curriculum Advisory Committee, comprising current Ohio juvenile judges, played an active role in identifying the needs of juvenile judges and shaping the direction of this evaluation.

3 National Association of State Judicial Educators *Principles & Standards of Judicial Branch Education*, NASJE, 2001 at 4.

4 As was the case for the domestic violence (L Post, J Oehmke and E Hayse “Domestic Violence Prevention Training: Technical Report and Project Evaluation Internal Report

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judicial performance evaluation programme in place.⁵ In the absence of those two factors, assessments of state-level judicial education rely more on measuring participants' satisfaction⁶ and reactions⁷ rather than on evaluating growth in participants' knowledge and any consequent changes in their behaviour.⁸

There are a number of underlying and causal reasons to explain why judicial professional development evaluations may tend to rely on participants' satisfaction or reactions to the courses. First, states may lack the funds to support more rigorous data collection methods for each course.⁹ Secondly, there may be vested interests at district levels for maintaining independence of the judiciary, which could hinder state-wide

(2001) <<http://myprofile.cos.com/lapost>>.); hard core drunk driver (The National Association of State Judicial Educators and the Century Council "Hardcore Drunk Drinking Judicial Education: A Workshop Evaluation Report" (Arlington, Virginia, 2008); and Court Management Programme trainings (M Sammon "The Court Management Program: Impacts & Outcomes" (Masters project: EEPL 599, National Center for State Courts, Institute for Court Management, April 2006).

5 D Brody "North Carolina Judicial Performance Evaluation Pilot Program Phase 2 Final Report April 2009" (prepared for the North Carolina Bar Association, 2009); David C Brody "The Use of Judicial Performance Evaluation to Enhance Judicial Accountability, Judicial Independence, and Public Trust" [2008] 86 Denv U L Rev 1; D Brock "New Hampshire Judicial Performance Evaluation Revised Program Report" (New Hampshire Supreme Court, 2002) <www.courts.state.nh.us>; S Colbran "A comparative analysis of judicial performance evaluation programs" (2006) 4 Journal of Commonwealth Law and Legal Education 35.

6 M Connor "Conducting Impact Evaluation for Judicial Branch Education" (The Judicial Education Reference, Information and Technical Transfer Project, Monograph No 11, Michigan, 2002); S Gatowski, S Dobbin and A Summers "Guide to Conducting Effective Training Evaluations, An Implementation Guide for Dependency Court Improvement Program Managers" (National Child Welfare Resource Center on Legal and Judicial Issues, National Council of Juvenile and Family Court Judges, 2010); and Donald Kirkpatrick *Evaluating Training Programs: The Four Levels* (2nd ed, Berrett-Koehler, San Francisco, 1998).

7 Conner, above n 6; and Kirkpatrick *Evaluating Training Programs: The Four Levels*, above n 6.

8 Connor, above n 6; Gatowski Dobbin and Summers, above n 6; J K Hudzik "Judicial Education Needs Assessment and Program Evaluation" (The Judicial Education Reference, Information and Technical Transfer Project, Michigan State University, Lansing, Michigan, 1991, 1999); and Kirkpatrick *Evaluating Training Programs: The Four Levels*, above n 6.

9 J Dimas "Saving the State Justice Institute, National Centre for State Courts, Court Review" (2002) 38 Journal of the American Judges Association 4.

efforts to collect data.¹⁰ Thirdly, it may be necessary to have more effective communication between course presenters (typically judges and attorneys) and judicial branch education (JBE) administrators in regards to setting objectives for the established course topics in a timely manner. Fourthly, there are various personal and professional incentives for judges to attend professional development programmes or courses, which may influence the levels of participation in continuing professional development.¹¹ Finally, motivation levels are likely to vary depending on the type of course evaluation form. Simple, satisfaction-type questionnaires impose less of a burden on participants to complete than longer, more comprehensive surveys.

Causal reasons for focusing on satisfaction and reaction assessment include, but are not limited to, demonstrating the effectiveness of project/judicial branch administration¹² and generating interest in the courses offered.¹³ This could perhaps be due to the relative newness of judicial branch education, compared to forms of legal education traditionally available. For example, the American Bar Association (ABA) began informally offering continuing legal education in 1899 and more formally in 1946.¹⁴ By comparison, the National Judicial College has only been in existence since 1965¹⁵ and the Ohio Judicial College only since 1976.¹⁶

- 10 L Armytage "The need for continuing judicial education" (1993) 16 UNSWLAWJI 356; and *Basic Principles on the Independence of the Judiciary* endorsed by GA Res 40/32 and 40/146 (1985).
- 11 D Catlin "An empiric study of judges' reasons for participation in continuing professional education" (1982) Just Sys J 7236.
- 12 L Toomey "Measuring the Impact of Judicial Training: INPROL Consolidated Response (07-004)" (International Network to Promote the Rule of Law, United States Institute of Peace, 2007).
- 13 Gatowski, Dobbin and Summers, above n 6.
- 14 American Bar Association "Continuing Legal Education" (2010) <www.americanbar.org>; and American Law Institute "About ALI" (2011) <www.ali.org.nz>.
- 15 The 'Lectric Law Library "Information about the National Judicial College" (1995) <www.lectlaw.com>.
- 16 The Supreme Court of Ohio and the Ohio Judicial System "Judicial College" (2010) <www.supremecourt.ohio.gov>.

EVALUATION QUESTION AND OVERVIEW

The evaluation was centred on the following “principal evaluation question”: What impact does participation in the Ohio Judicial College education courses have on the knowledge, attitudes, and behaviour/skills of juvenile judges and magistrates in Ohio?

Our efforts to address this question were multifaceted and guided by the belief that evaluation can and should be transformative in some way.¹⁷ The methods we chose were an attempt to move beyond familiar satisfaction or participant reaction surveys at the end of a training or workshop. Instead, we focused on linking professional development content to the knowledge, attitudes, and behaviour/skills of judges and magistrates.

We began with the results of a needs assessment from June 2010 that used a Delphi survey to prioritise areas for improved curricula. We undertook a comprehensive literature review on the history and background of judicial education and evaluation programmes. We developed an evaluation plan to investigate our evaluation question based, in part, on the national implementation guide, “Conducting an Effective Training Evaluation”. This guide was developed by researchers at the National Council of Juvenile and Family Court Judges in collaboration with four additional funders and partners.¹⁸ Quantitative as well as qualitative methods were used in this evaluation, which spanned one year from June 2010 to June 2011.

We collected data based on our review of Judicial College historical records, workshop/course observations, courtroom site visits, focus groups with juvenile court judges, course and workshop evaluation forms, and a final end-of-year survey of juvenile judges. This data helped us to answer the evaluation question with specific emphasis on the impact of Judicial College education courses on juvenile judges and magistrates. Based on our evaluation findings, we have developed a series of Judicial Education *Best Practice* guidelines. These guidelines are a set of principles designed to assist the Judicial College in maintaining and furthering leadership in professional development for judicial education in Ohio and nationally.

In the following sections, we detail the evaluation methods used in this investigation. We then present the results of our evaluation, broken down by evaluation method (e.g. records review and focus group results). Next we synthesise our findings

17 H Preskill and RT Torees *Evaluative Inquiry for Learning in Organizations* (Sage, Thousand Oaks, California, 1999).

18 Gatowski, Dobbins and Summers, above n 6.

and discuss the specific evidence regarding impact of judicial education courses. Finally, we present our proposed *Best Practice* model, which is based on our evaluation of the data and review of the literature.

EVALUATION METHODOLOGY

Conceptual Framework

Our evaluation methodology centred on multiple modes of data gathering to support evidence of changes to participants in relation to three areas: knowledge, attitudes and behaviour/skills. These changes were considered to be attributable to participation in the Judicial College professional development courses. We drew on Schrader and Lawless¹⁹ and Alexander²⁰ to provide definitions for these essential aspects of learning and the development of competence:

- a) *Knowledge*: Knowledge refers to information that was acquired or actually learned as a consequence of the professional development. Knowledge is often expressed in three forms. Declarative knowledge refers to content; procedural knowledge refers to knowing how to do something; and conditional knowledge refers to knowing when or why to do something.
- b) *Attitudes*: Attitudes can refer to personal and often subjective dispositions, an internal philosophy or belief, and a state of readiness that can then lead to a specific behaviour. Thus, attitudes represent a predisposition towards action.
- c) *Behaviour/Skills*: Behaviour and skills represent the integration of knowledge and attitudes into actual practice. Behaviours and skills are observable, rather than internal actions.

In this evaluation, we relied on empirical data as well as participants' reflection and self-reporting in order to investigate the impact of judicial education courses on

19 PG Schrader and KA Lawless "The Knowledge, Attitudes & Behaviors Approach: How to Evaluate Performance and Learning in Complex Environments" (2004) 43 Performance Improvement 8.

20 PA Alexander "The Development of Expertise: the Journey from Acclimation to Proficiency" (2003) 32 Educational Researcher 10.

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developing their knowledge and affecting changes to their attitudes and behaviour/skills.

Our data collection methods included reviewing Judicial College records (including curricula and agenda reviews), observing the professional development courses/workshops, considering course evaluations and summaries of previous years' course evaluations, as well as conducting focus groups, courtroom site visits, and an end-of-year survey.

We worked from a modified version of Kirkpatrick's evaluation model,²¹ which is the model most commonly applied to evaluations for training and professional development. In our modification, we represented "learning" as encompassing both knowledge and attitudes.

Logic Model

We developed a logic model to clarify the connection between the activities and inputs associated with the delivery of the Judicial College's continuing education programmes. It also provided an additional guide for our evaluation efforts and intended results of training. A logic model provides a convenient visualisation of both short-term and long-term expected outcomes of the professional development courses. It also helps to clarify and define the resources put into the design and delivery of the professional development training, as well as the desired outcomes of that training. Our logic model was developed collaboratively by the evaluation research team and the Judicial College manager of curriculum development.

Short-term outcomes included improved quality of professional development offerings, which may be reflected in higher workshop evaluation ratings. Another desirable outcome, as a consequence of excellence in professional development training, involved improved case-flow management. However, we were not able to directly assess improvements in case management under the constraints of a one-year evaluation. Other short-term objectives of the Judicial College education programmes included improved tracking of juvenile judges' knowledge, attitudes, and behaviour/skills related to attended courses; suggestions for improved evaluation methods for the Judicial College's continuing education programmes; strong

21 Donald Kirkpatrick *Evaluating Training Programs* (Berrett-Koehler, San Francisco, 1975); and Kirkpatrick *Evaluating Training Programs: The Four Levels*, above n 6.

evaluation scores for faculty presenters in Ohio; and improved alignment of course content and course objectives.

Long-term outcomes included contributing to and supporting training models and practices for effective Judicial College education courses, as well achieving lasting gains in Ohio juvenile judges/magistrates' knowledge, attitudes and behaviour.

Professional Development for Juvenile Judges — Towards Best Practices

Designing and maintaining effective and useful professional development educational programs for the judiciary may be conceived as both a long-term and a short-term objective. To contribute to sustained excellence, one of our short-term outcomes was the identification of *Best Practices* for the design, delivery, and evaluation of professional development for juvenile judges. Below are the six characteristics we felt were essential in determining utilisation-focused *Best Practice* recommendations:

- a) Strengths-based: Recommendations build on the strengths of Judicial College staff, faculty and the judges themselves.
- b) Effective: Recommendations meet intended goals and objectives for training.
- c) Responsive: Recommendations meet the needs of AIN/D courses and juvenile judges/magistrates in Ohio.
- d) Adaptive: Recommendations can be adapted to different kinds of training delivery and other audiences.
- e) Meaningful: Recommendations provide a match between expectations and desired competence (i.e. the reason why judges selected a particular course for their professional development).
- f) Engaging: Recommendations move beyond passive delivery of content.

METHODS USED

Below we describe each of the methods used in this evaluation.

Records Review

We reviewed Judicial College records for past courses, including curricula review and agenda review. We collected these records to identify any specific objectives that were included or identified for participants. We also reviewed the records for summary data

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regarding the number of attendees, the existence of any agendas and learning objectives, as well as any course ratings that may have been collected. Only summary-level information was available for past courses. We could not derive means and standard deviations from this information as detailed (participant) level information regarding modification was not available. We understood “learning” to include both knowledge and attitudes of the participants.

We recommended several changes to the existing course evaluation tool used by the Judicial College. Earlier tools used by the Judicial College were based on “overall” evaluation of the workshop, but we felt that this overall assessment might be imprecise in situations where there are multiple presenters or multiple sessions. We included additional demographic information to investigate any correlations between responses and courtroom size or county size, for example. Finally, we used the opportunity for developing new course evaluations to include questions relating to the impact of participation in the courses on participants’ knowledge, attitudes and behaviour/skills.

The written course evaluations were anonymous, and included questions regarding participants’ satisfaction with course content and the presenters. Several sessions had multiple presenters, and summary results were adjusted accordingly. On the course/session evaluations, participants were asked for specific examples of new knowledge that they had gained from the course. They were also asked to indicate any intention they had to apply or integrate this new material or knowledge into their court practices. We summarised these responses to examine the impact of professional development participation on judges and magistrates.

We also convened two focus groups of judges based on the number of years of judicial experience. One group was for judges with fewer than seven years of experience; the other group was for judges with more than seven years’ experience. We took into consideration diversity in terms of county size and level of experience in determining the composition of the focus group panels. For consistency in time-frame, judges were also asked to focus on changes in knowledge, attitudes, and behaviour/skills that resulted from A/N/D courses attended by participants during the previous two years.

The topics of the focus groups included the perceived effectiveness of current A/N/D courses offered by the Judicial College; suggestions on gaps or topics for continuing education that the judges may have wanted to see offered; specific examples on how their Judicial College education has been used and/or incorporated into their courtroom or judicial practice; any changes in the personal beliefs, philosophies, or

behaviours/skills that the judges could trace back to a Judicial College course; and reflections on facilitators of and barriers to the incorporation of new content into actual court practice.²²

Observations and Site Visits

We completed around five workshop observations. We used these observations to support our understanding of the context of the A/N/D courses being offered to juvenile judges throughout the State and to familiarise ourselves with typical session structures. In addition, we conducted two courtroom site visits to observe A/N/D hearings in various courtroom settings. We selected one medium-sized county and one large-sized county juvenile courtroom for site visits. The courtroom site visits provided a sense of the different juvenile courts and A/N/D hearing types that are in existence in Ohio, as well as some insight into the daily role of the judge in court.

In addition to these observations and site visits, the evaluation team participated in a mock trial, which historically is part of New Judge Orientation (NJO).

End-of-Year Survey

Finally, an end-of-year evaluation survey²³ was administered, in-person, at the Annual Juvenile Judges Association Meeting on 9 June 2011, which was attended by the majority of juvenile judges in the State. In addition to session/workshop evaluation information (see above), we asked three additional questions to ascertain the impact and reach of A/N/D courses. Judges were asked to identify the Judicial College A/N/D courses that they had attended over the past 12 month period, and then to indicate whether attendance in that course positively impacted them, personally and/or professionally.

- 22 Judges were also asked to consider how well the current American Bar Association core competencies (American Bar Association “Model Code of Judicial Conduct” (2007) <www.americanbar.org>) were represented in their continuing education experiences within the Judicial College.
- 23 The end-of-year survey also asked judges to provide specific examples of these impacts, and barriers to implementing information they had learned through any of the specific A/N/D Judicial College courses. However, only three comments were provided to each of the open-ended questions, so these are not summarised further.

Judicial College Records Review

We reviewed Judicial College course evaluations over a span of four years, from 2006 to 2009. We focused on workshops and conferences designed to address content in A/N/D for juvenile judges. To make comparisons more meaningful, we narrowed the courses reviewed to those attended by four or more judges. Against these criteria, we identified fourteen specific sessions across twenty-eight potential days of training.

On the course evaluation forms, respondents used a five-point scale to indicate their overall rating of satisfaction with the course; their “likelihood of applying new content”; as well as ratings on the effectiveness of the presenters. Attendees tended to give courses favourable results. All ratings were at 4.0 or above. For overall satisfaction, five out of eight juvenile judge course evaluations reviewed had an average rating of above 4.5. Average presenter effectiveness ratings varied across courses, however, from a low average of 3.15 to a high average of 5.0.

Three trends are evident from the course evaluations review. (However, these views should be understood subject to the fact that only a limited number of courses, workshops and conferences actually had data available for summarising.) First, there is a clear trend towards the use of evaluation to examine course quality. Four out of four professional development courses in 2009 contained course evaluations. Secondly, there is a trend towards including course objectives for participants, on either the course agenda or the evaluation tool. In 2010–11, questions about whether or not course objectives had been met were included on each of the re-tooled evaluation forms for the five courses sampled as part of this evaluation, plus the end-of-year survey. Requiring course participants to reflect on whether the course objectives had been met was an excellent way to ensure that the needs of participants were being met. Courses designed with specific objectives in mind and for which those objectives are clearly articulated to the audience were more likely to have evaluation data that could be used to improve that course — specifically with regard to meeting judges’ and magistrates’ needs.

A final trend that is evident from this review is the increasing number of courses devoted to educating those within the juvenile courts. Between 1998 and 2009, the number of juvenile-focused courses nearly quadrupled. The total number of courses also increased, but in recent years there has been a heightened commitment to offering topics for juvenile court judges and their staff. The number of courses offered in the

juvenile track has grown considerably over time and represents the largest proportion of total courses offered through the Judicial College during these years.²⁴

Course Session Observations

The goal of the observations was to better understand the impact of course structure and delivery of course content and teaching strategies, as well as to obtain some indications of audience engagement during the sessions. Overall, the courses were run quite smoothly. Even in cases where glitches did occur, Judicial College faculty and/or staff were mindful of the audience's needs, and readily resolved any issues. All participants were provided with course materials. The majority of the faculty were peers with substantial credentials. Having strong presentations was an important issue for presentation to an élite audience, and to judges in particular. Our research has shown that judges do not want instructors drawn from outside the bench.²⁵

The teleconference format seemed to work well for the audience. This observation is relevant in relation to a number of positive issues that came up in focus group discussions. Generally speaking, judges are interested in teleconference or online courses. Strategies for running the teleconference may transfer well to other teleconferences or online formats. The use of hand-held responders was an engaging tool for the audience. For all sessions, the observer reported that the course faculty were engaging, that they allowed sufficient time for questions, and that faculty were able to appropriately redirect time spent on particular topics as the need arose. This redirection allowed ample time for participants to share their own experiences and to network with their peers. As noted in the literature review, and supported by evidence collected through this evaluation (i.e. the focus groups), judges in Ohio are eager to communicate with and learn from their peers. The faculty and presenters at these few observed courses were able to accommodate this type of learning environment.

Course/session observations are an excellent strategy for capturing conversation that may not show up on end-of-session evaluations or through later reflection by a

24 Other examples of this emphasis are found in the emerging design of new curricula for juvenile judges and for which topics were informed by the detailed needs assessment completed in the summer of 2010, as well as the commitment to funding the current impact evaluation to focus on course outcomes specific to A/N/D for juvenile judges/magistrates.

25 S Oxner "Judicial Education: Excerpt from Sandra Oxner's report on Judicial Education and the State of the Philippine Judiciary" (June 1999) The World Bank Group <<http://siteresources.worldbank.org>>.

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judge/magistrate on topics or problems of interest. In addition to the networking piece mentioned above, other conversations were had regarding the importance of using different ways to handle situations for larger versus smaller counties or for single versus multi-jurisdictional duties.

Collectively, these observations provide support for a respected and knowledgeable teaching faculty, adequate Judicial College support for a wide variety of course topics, course materials, content delivery (e.g. powerpoint, overheads, responders, paper/pencil needs and internet access), and thought-provoking speakers and panel presenters.

Some limitations that were noted via the observations included gaps in the completion of evaluation forms within each session, agendas that may lack learning objectives (although it was noted in one instance that these may have been stated verbally), and evaluation forms that did not specifically include an item asking participants whether or not course objectives had been met. These limitations transfer directly to limitations in understanding whether and how well a programme or session is contributing to changes in the knowledge or behaviours of the participants.

COURSE EVALUATIONS

Course Evaluation Content and Revisions for the Impact Evaluation

There were five courses that were sampled for this evaluation, and a revised course evaluation form was prepared. The evaluation forms were designed to capture the following information from participants:

- a) Demographics, including the type of respondent, experience, and jurisdictional duties;
- b) Other courses attended in previous 12 months;
- c) Ratings on the usefulness of each session (1 to 5, with 5 indicating an “excellent” rating);
- d) Ratings for the effectiveness of each presenter (1 to 5 with, 5 indicating an “excellent” rating);
- e) Indication of how likely the participant will apply the information presented in the session (1 to 3, with 3 being very likely to apply);
- f) What has the participant learned that they did not know previously (open-ended);

- g) What barriers they perceived to exist regarding the implementation of material from the session (open-ended);
- h) Total overall rating for the course (1 to 5, with 5 being excellent);
- i) Rating of whether expectations regarding course were met (1 to 3, with 3 indicating very much so);
- j) Rating of the degree to which learning objectives were met (1 to 5, with 5 indicating an “excellent” rating);
- k) Request for any additional comments (open-ended); and
- l) Targeted questions for specific courses regarding format or delivery (i.e. use of technology for video-conference).

Qualitative Comparisons for New Knowledge and Barriers to Implementation

For each workshop, participants were asked to clarify and describe the new knowledge they had learned during the course, as well as the barriers to implementation that they anticipated. These responses help to clarify reasons for differences in mean ratings across the courses.

These open-ended questions asked participants what new knowledge they gained as a result of each session and whether they anticipated there would be any barriers to actually implementing their new knowledge in practice.

Although new knowledge is clearly linked to the specific topic of each session, respondents generally indicated that there was some reinforcement of previous knowledge and that session materials provided a new or different perspective on the topics. Specifically, respondents seemed to value information on new legislation or legislative initiatives. Respondents mentioned especially that they gained new knowledge in the areas involving dealing with children in court and child support issues, sexual orientation issues regarding parents and/or foster parents, and working with or appointing attorneys for abused children. Overall, most of the sessions could be described as providing new material and knowledge, and the high overall ratings for these evaluated courses support this description.

Barriers, in addition to pending legislation noted for a few of the sessions, included budget issues, the co-operation of others (for example, lawyers, children’s services, other states or counties), docket size, and time concerns in looking up other cases to find answers.

FOCUS GROUPS

We also convened two focus groups as part of this impact evaluation, with one group consisting of seven experienced judges, each serving more than seven years on the bench; and the second group comprising six new judges, having between one and six years of service on the bench. Both groups of judges were asked eight questions regarding their perceptions of course effectiveness; examples of how their knowledge, attitudes, or behaviours/skills may have changed as a consequence of participating in Judicial College courses; and other general questions about their experiences with judicial branch education in general and the Judicial College in particular. We achieved a balance in terms of county size within the representation of both focus groups.

The discussions of the focus groups were transcribed. We sought to find common themes among the responses to each question. In order to draw attention to similarities and differences across the two experience levels of the judges, we have presented the results in side-by-side tables, with grey highlighting to indicate areas of commonality across the two groups.

Effectiveness and Content of Judicial College Courses

Overall, both groups of judges felt that the Judicial College courses were effective, responsive to their needs, and prepared them for their professional roles as juvenile judges. There was general agreement regarding the quality of Judicial College courses across both groups.

Both groups said that aspects such as networking and exchanging information with other juvenile judges, the quality of speakers, case-law updates, and benchcards were excellent activities and materials that enhanced the effectiveness of Judicial College courses. Experienced judges appreciated being able to easily obtain copies of any previous training through the Judicial College, and newer judges appreciated the mentoring programme through NJO.

Alignment of Judicial College Courses with Core Competencies

Desired judge competencies can be summarised into five core areas:

- a) Integrity and impartiality;
- b) Legal ability;
- c) Communication skills;

- d) Professionalism and temperament; and
- e) Administrative skills.

During the focus groups, we specifically asked participants how well these core competencies were aligned with content of courses offered through the Judicial College. Reflecting across all their experiences with the Judicial College, participants affirmed that the courses, seminars, workshops, and activities such as the mock trial during NJO did indeed touch upon all of these competency areas at one time or another. Participants thought it was critically important to be up to date with legal knowledge and developments and so were key components of Judicial College courses. Judges felt that the updates provided by the courses improved the way they handled cases. But in addition to legal knowledge, it was conveyed that these judicial competencies formed part of all courses at the Judicial College. Judges provided many examples of how Judicial College course materials or course content reflected these core competencies.

Thus, while some places for improvement exist, there is strong evidence that the focus group judges agreed that Judicial College courses are aligned with expected standards for judicial education.

Changes in Knowledge

We also obtained evidence to observe growth in knowledge attributable to participation in Judicial College courses for both experienced and new judges. In general, it was felt that the orientation courses provided an excellent introduction to the role of a juvenile judge. Judges also recognised the need for professional development to clearly inform them about the law or changes in the law. Overall, case law updates provided the greatest change in knowledge, but child development courses and discussions about the impact of abuse and neglect on children were also mentioned as important areas of knowledge gain.

However, not all focus group comments were positive. Some judges felt that additional courses in court administration, DNA evidence, impact of alcohol and substance abuse, and several other topics, as well as offering updates or refreshers to the orientation course, would contribute more to additional knowledge change. One of the experienced judges pointed out the importance of completing an item on the course evaluation surveys typically distributed during Judicial College trainings on “what other courses would you like to see presented?” Despite some gaps in course topics, there was a general sense that the Judicial College was attentive to judges’ needs and was improving its development and delivery of courses to order to meet these needs.

Changes in Attitudes/Beliefs

Attitudes represent a predisposition towards action. During the focus groups, we specifically asked how Judicial College courses helped to develop a personal behaviour, philosophy, or belief. The focus group judges reported that the Judicial College courses had an impact their sense of integrity, impartiality, fairness, and their perception of judges' role within their communities; these were salient topics for both experienced and new judges.

Some specific issues mentioned included the importance of the ethics course and how that course helped judges to reflect on their reputation and actions in public; how the Judicial College courses helped to strengthen their thinking regarding the importance of treating people with respect and emphasising the need for tolerance; and how many of the courses contributed to a change in their thinking about what it means to be a judge. In general, the focus group judges felt that the Judicial College courses offered more than just knowledge of case law or issues of factual concern, and were effective in helping judges to improve their perspectives and enhance the quality of their service to the public.

Changes in Behaviour/Skills

Changes in behaviour and skills can occur through the application of new knowledge, or through an improved understanding of the effect of trauma on a child, for example, or a greater awareness of issues facing adolescents, parents or others in the courtroom. Judges in the focus groups were asked to provide examples of how new knowledge or a change in attitudes or perceptions resulting from participation in Judicial College courses were incorporated into their judicial practice.

The child development and impact of trauma courses were mentioned as being particularly relevant to judges in terms of providing better understanding of the background and needs of children. Both experienced and newer judges mentioned the use of benchcards as a frequently used reference tool. Other actions taken by the judges and linked to the Judicial College courses included the benefits of record-keeping, the Judicial College's provision of course materials whenever requested, and encouragement of local speakers to develop seminars on topics covered by the Judicial College.

Evidence for the Importance of Networking

Judges also use peer networking as well as the mentoring program for new judges to obtain feedback or information on difficult or unfamiliar issues. The existence of this peer network and the collegiality among the judges that this network fosters appear to be an unintended but significant benefit of participation in Judicial College courses. Effective networks provide opportunities for non-judgmental and reciprocal problem-solving, which is a critical aspect of high quality adult professional development.²⁶

During the focus group for experienced judges, several judges remarked on the isolation that judges typically feel in their role, and the stress that can result from this isolation. Thus, opportunities for networking with other juvenile judges, particularly from a similar-sized county, might help to alleviate this sense of isolation. Newer judges did not use the term “networking” as often as experienced judges, but they did comment on the mentoring programme and the benefits of being able to contact other judges for information. In addition, the newer judges were considerably more vocal regarding the need for courses and experiences tailored to county size.

SYNTHESIS OF FINDINGS

In this section, we summarise the findings presented in the previous “results” section. Following this summary, we present the *Recommended Best Practice for Judicial College Impact*, which is based on the evaluation results and a (previously submitted) literature review of judicial education and professional development.

Knowledge Impact

Judicial College courses are successful in providing new knowledge and information not previously known by attendees. Through this evaluation, we recognised that knowledge change occurred in several areas. This was often course-specific. We were able to generalise the findings in relation to the new knowledge gained through the

26 K Hara “Formal and Informal Learning: Incorporating Communities of Practice into Professional Development: CSI Working Paper WP-02-04” (2002) <<http://scholarworks.iu.edu>>.

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Judicial College courses by looking at the focus group summaries. Topical areas for knowledge change included:

- a) Legal issues, case law, and knowledge regarding new or pending legislation;
- b) Child and human development, consequences of trauma, and outcomes for children;
- c) Information on issues relevant to working with marginalised groups in court processes (for example, transgender persons, or LGBT persons); and
- d) Management of the court, administration issues and courtroom processes (the NJO was particularly effective for dealing with these issues).

Based on the overall positive course evaluation ratings, juvenile judges and magistrates found that the Judicial College courses were effective in providing new knowledge.

It should be noted, however, that not all course participants completed the course evaluations, and especially, not all respondents completed the open-ended items asking about new knowledge.

Focus group data also provided evidence for knowledge impact through the Judicial College courses. Judges agreed that the Judicial College courses were meeting the goal of informing the judiciary about new law or changes in the law. Newer judges pointed to the orientation as an excellent introduction to the many aspects of their new role as a juvenile judge. Overall, the focus group judges found the Judicial College to be effective and responsive to their needs. Example quotes from the focus groups reviewed in the previous section strongly demonstrated the presence of knowledge gains resulting from participation in Judicial College professional development.

Attitude Impact

Judicial College courses are effective in changing judge/magistrate dispositions, attitudes, philosophy, or beliefs of attendees, supporting likelihood of actual changes in behaviour. Evidence for attitude change was observed through several domains, including:

- a) Inclination to translate new content into judicial practice (predisposition to action);
- b) Appreciation of and perspectives on treatment and inclusion of children in courts and during hearings;

- c) Recognition of need for patience and sensitivity during court processes;
- d) Awareness of potential unfair treatment of marginalised groups (e.g. transgender and LGBT people);
- e) Understanding of the need for tolerance and respect for all individuals and groups; and
- f) Strengthened understanding of ethics and the importance of judges' reputation, including actions in public, and the importance of public perspectives on impartiality and judges' role.

Open-ended items from the course evaluations revealed additional evidence for changes in attitudes or beliefs. Several of the responses to the course evaluation item asking "what was learned" were, in fact, dispositional in nature.

During the focus groups, we specifically asked how Judicial College courses helped to develop participants' personal behaviour, philosophy or beliefs. Issues that were mentioned included the importance of the ethics courses and how that helped judges to reflect on their reputation and actions in public; the importance of treating people with respect and need for tolerance; and changed their thinking about what it means to be a judge.

Behaviour/Skills Impact

Judicial College courses are effective in developing behaviour/skills of juvenile judges through integration and incorporation of new learning into actual judicial practice. Evidence for the integration of knowledge and attitudes into actual judicial practice demonstrated that the courses had an impact on participants' behaviour and/or skills. In the focus group data and the course evaluations, there were many examples showing that participants changed their behaviour and gained new skills as a result of participation in Judicial College courses. These examples included:

- a) Frequent use of benchcards or judgment entries, and other course-related materials obtained through the Judicial College;
- b) Reported improvements in record-keeping, case disposition timing, and other administrative tasks;
- c) Use of different kinds of referral programs based on new knowledge of childhood trauma;
- d) Improved on-the-job behaviour and skills based on mock-trial experiences (New Judge Orientation);

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- e) Soliciting course materials from Judicial College as needed (and which the Judicial College provides upon request); and
- f) Overall agreement that American Bar Association competencies and Ohio Code of Conduct standards are met through Judicial College courses (integrity and impartiality, legal ability, communication skills, professionalism and temperament, and administrative skills).

Focus group data provided most of the evidence for the impact of the Judicial College's educational programmes on changing the behaviour of and up skilling juvenile judges. This aspect is arguably one of the more challenging evaluation stages for which to obtain outcome data. We asked judges to share specific examples of how they used Judicial College course materials or content in practice or otherwise incorporated them into their judicial activities. Judges said especially that the child development and impact of trauma courses helped them to better understand the background and needs of children. Both experienced and newer judges mentioned that they used benchcards frequently as a reference tool. Other actions that can be linked to participation in one or more Judicial College courses included improved record-keeping, improved communication to parents and children in the courts, requesting Judicial College course materials when needed, and innovative activities such as encouraging local speakers to present seminars on topics that were learned about through a Judicial College course.

Other than the focus group data, the self-reporting by individual judges of actual integration of content into professional practice was limited. This was primarily because when the evaluations were completed at the end of a course, none of the participants would have had any opportunity for implementation. However, we produced a summary of perceived barriers to implementation that were provided by participants for each course/session they attended. Such barriers to implementation included resource concerns (e.g. cost and time), potential resistance from a child's family members or other court personnel or judges, and the need for co-operation of other community or state agencies or personnel. Overall, however, while some areas for improvement in behaviour/skill changes and application of new knowledge or content were identified, there is strong evidence that Judicial College courses do establish a willingness and awareness among juvenile judges for behaviour/skills change, which in turn results in actual self-reported improvement in their judicial practice.

Professional Development through Juvenile Judge Community of Practice

An important — and unexpected — area in which Judicial College courses positively affected the knowledge, attitudes/beliefs and behaviour/skills of juvenile judges and magistrates in Ohio involves the consideration of Ohio juvenile judges as forming a *community of practice*. Communities of practice can be defined as follows:²⁷

Communities of practice are groups of people who share a concern or a passion for something they do and learn how to do it better as they interact regularly.

For adults, learning within and from their own peer community is a powerful and influential process that results in sustained learning, shared solutions to problems, and progression towards common goals. Evidence from our Judicial College evaluation indicates that the existence of a juvenile judge community of practice is both an impact (result) and a mediator of Judicial College education. In professional development, a mediator provides a mechanism through which the effects of a shared experience or course are enhanced.

Historically, the concept of communities of practice has evolved over the past two decades or so, and grew out of initial studies of the learning experiences of novices and experts, and how apprentices learn a skill or profession.²⁸ Since 1998, the phrase “community of practice” has been used to characterise the socialisation process through which community members learn from and contribute to their own community’s knowledge base. Communities may comprise members of a government organisation, teachers within a district or school, participants in workplace training programs, or — as we have learned through this evaluation — juvenile judges within Ohio. There has been a lot of interest recently in strengthening professional development for educators, in enhancing learning for students through communities of practice, as well as in establishing communities of practice for online learners. But to this evaluator’s knowledge, the concept has not yet been utilised to explain or describe outcomes of judicial education.

27 E Wenger “Communities of Practice: A Brief Introduction” (2006) <www.ewenger.com>.

28 J Lave and E Wenger *Situated Learning: Legitimate Peripheral Participation* (Cambridge University Press, Cambridge, 1991).

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There are three characteristics of communities of practice²⁹ that make such learning experiences particularly relevant for the professional practice of a juvenile judge.

First, members of a community of practice cultivate collaborative relationships that tie together the social body referred to as the community. That is, juvenile judges in Ohio are bound together by their common practice, and through *mutual engagement* strive to enhance that practice. Secondly, community members draw on their mutual engagement in order to arrive at a shared understanding of what their community represents — this is called *joint enterprise*, or sometimes the community's *domain*. As a group, juvenile judges understand the overall domain represented by their community, although they may not be an expert in every aspect of that domain (i.e. not all juvenile judges practice within all potential dockets).

The third characteristic of a community of practice is the notion of *shared repertoire*. Through their experiences, judges become stewards of knowledge related to the practice of being a juvenile judge, sharing their knowledge and expertise with other members of the community and learning from others as well. This shared repertoire is part of what makes existing and experienced juvenile judges effective at leading professional development workshops or seminars for their community. Given that judges expect credible faculty drawn from the bench for course or session leadership rather than from someone outside their community, their skills, knowledge and expertise are likely to be greatly enhanced through opportunities that capitalise on networking, sharing, critical discussion, and a coherent view of the goals and obstacles their practice is confronted with.

Related aspects of learning communities for adults have been described by Stein and Imel.³⁰ For example, learning often tends to be situated within social contexts and related to the daily life of members of the community. Communities are by nature homogeneous, due to a shared purpose or practice. An excellent facilitator — often a peer or co-learner — can enhance the learning that occurs within a learning community and, as mentioned above, judges expect credibility in their faculty, with faculty drawn from the bench, not (typically) external to their group. Through a learning community, knowledge is shared or co-created, and can occur remotely or in face-to-face groups.

29 E Wenger *Communities of Practice: Learning, Meaning, and Identity* (Cambridge University Press, New York, 1998).

30 DS Stein and S Imel “Adult Learning in Community: Themes and Threads” (2002) 95 *New Directions for Adult and Continuing Education* 93.

Finally, learning communities reflect or are impacted by the power and politics of the larger society in which it forms a part or to which it is responsible.

Our findings on juvenile judges' community of practice are as follows:

- a) The community of practice for juvenile judges may be a platform for enhancing knowledge, attitude and behaviour change, as well as a being consequence of Judicial College efforts aimed at achieving such change. That is, the community of practice supported by and generated through the Judicial College acts as a catalyst for development of judicial expertise among juvenile judges in Ohio.
- b) The many focus group quotes and participants' comments on networking and wanting to connect with other judges to hear how their peers solve/address similar issues directly support the concept that a community of practice can be an effective model for strengthening and supporting core competencies of the judiciary.
- c) While the name given to this process may be new, we found that judges want to learn with and through their peers, thus establishing or building off an existing learning community. In being part of such a community, they contribute to each others' learning as well as their own. Consequently, they contribute to the greater good of their own community as well as the community they serve.
- d) Judges have a strong desire to learn from their peers, especially in similar sized counties or with similar jurisdictional duties, and to discuss with their peers how to respond to different situations that many judges face.

Conclusion

Overall, we found sufficient evidence through this evaluation to support the effectiveness of Judicial College courses in contributing to changes in knowledge, attitudes, and skills/behaviour of juvenile judges/magistrates in Ohio. Of particular importance was the recognition of a community of practice for juvenile judges.

As part of this evaluation project, we also sought to build a *Best Practice* model for the Ohio Judicial College that would outline strategies for maintaining and furthering leadership in professional development for judicial education locally as well as nationally. The following section presents our best practices model, and is based on our literature review (previously submitted) and the evaluation findings.

RECOMMENDED BEST PRACTICE FOR JUDICIAL COLLEGE IMPACT

Below we present our recommendations for *Best Practice* for professional development of juvenile judges/magistrates through the Judicial College. These recommendations are drawn directly from our evaluation findings and through the research literature on judicial education. It is our expectation that adhering to the broad goals inherent in the *Best Practice* model will enable the Judicial College to ensure long-term, high-quality and effective continuing education for juvenile judges in Ohio.

Earlier in this report, we established six desired criteria for the recommendations contained in our *Best Practice* model. These criteria comprise essential elements of what we hope will be utilisation-focused recommendations for the Judicial College. Briefly, our recommendations are:

- a) Strengths-based: building on the strengths of JC staff, faculty, and judges themselves;
- b) Effective: meeting intended goals and objectives for training;
- c) Responsive: meeting the needs of Ohio juvenile judges;
- d) Adaptive: generalizing to various kinds of training delivery and other audiences;
- e) Meaningful: linking expectations and desired competence; and
- f) Engaging: moving beyond passive delivery of content.

Each recommendation is explained below. For each guideline in our *Best Practice* model, we briefly outline the sources supporting our recommendations, and where necessary we provide some strategies or options to consider in order to meet the guidelines.

Recommended Guidelines

1. Align desired courses and curricula with organisational and national objectives, and with individual or group standards and needs whenever possible.
 - (a) Literature review supports such alignment with objectives standards.
 - (b) This recommendation was supported by the focus groups, which also suggested matching courses with the American Bar Association, other established judge competencies. There was also support for the Judicial College responding to judges' needs.
 - (c) This recommendation is further supported through ongoing curriculum development and needs assessment.

- (d) Continue to review and respond to types of courses and content suggested from open-ended evaluation items and focus group suggestions.
- 2. Customise and tailor training and assessment/evaluation to county size and other demographics such as number of years' experience.
 - (a) Literature review supports customised training and evaluations.
 - (b) This recommendation is supported by course evaluation results — open-ended remarks on customising content or structure based on needs.
 - (c) This recommendation was identified by the focus groups — there was very strong concern particularly for both experienced and newer juvenile judges, who wanted content and participant/breakout groups to be tailored to county size when possible.
 - (d) This recommendation is further supported through statistical differences in the likelihood of applying and the usefulness of content by years of experience for some sessions.
 - (e) Participant demographics should be consistently collected during course evaluations, and perhaps even before the course is begun, so that courses can be tailored appropriately for particular demographics.
- 3. Design and deliver professional development courses and sessions to incorporate a variety of techniques. Emphasise the importance of networking and engaging in a *community of practice*.
 - (a) Literature review supports the engagement of adult learners through multiple techniques and learning communities/communities of practice.
 - (b) Teaching methods can be reviewed for principles of andragogy — understanding how adults learn.
 - i. Include teaching strategies that capture (a) networking and collaborative problem-solving aspects of the training; (b) the various types of content, such as substantive law and mandated topics; and (c) techniques that capture a variety of learning and presentation styles (e.g. responders, small group discussions, Q&A and case examples).
 - ii. Teleconference is an acceptable strategy for professional development courses, for certain types of course content.
 - iii. Listening and learning from others/ other counties is effective.
 - (c) Presenters must be credible (and preferably not from outside the bench).
 - i. This recommendation is supported by data gained from focus groups, literature review, as well as comments on course evaluations (“he was obviously not a juvenile judge”).

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- ii. Presenters are critical to successful delivery of content. Judges are a distinguished and influential group of professionals. They desire to be involved in continuous learning with peers as instructors and co-learners and they want to learn/network with their peer-judges.
- (d) Updates on substantive law are critical.
 - i. Focus groups and course evaluations suggest the Judicial College is effective in providing legal criteria/law/updates.
- (e) Incorporate emphasis on judicial competencies into big-picture curriculum and/or each course.
 - i. Focus group data showed support for American Bar Association competencies met through Judicial College courses. This excellent practice should continue.
- (f) Judges are motivated to improve their practice, both personally and professionally.
 - i. This view is supported by our literature review on the reasons participants have for attending professional development.
 - ii. This view was also supported by the focus groups, which had suggestions for renewing the orientation programme for experienced judges.
 - iii. This view is further supported by open-ended items on course evaluations reflecting interest in improving practice/knowledge.
- (g) Judges are invested in improving outcomes for children.
 - i. This view was supported by the focus groups.
 - ii. This view is further supported by open-ended items on course evaluations
- 4. Assess courses using course-specific and objectives-based methods.
 - (a) Learning objectives for each course should be prepared and shared with participants to improve focus and outcomes of courses.
 - i. Empirical data from course evaluations showed variability in the degree to which learning objectives were met.
 - ii. Objectives can be aligned with broader curriculum goals.
 - iii. Knowledge-based objectives can be tested before or after the course, or through use of responders, if tracked and used for this purpose. Responders can be used show whether earning objectives set prior to the professional development have been met.

- iv. Consider yearly assessment of impact based on participants' self-reflection.
 - v. Case-processing tracking may be one way to examine some judge proficiency goals.
 - vi. Overall tracking of objectives covered in courses would be ideal, and could be matched to overall curriculum goals.
 - (b) Develop and utilise a process for consistent collection and storing of data from course evaluations that ensures individual item-level data are logged and can then be tracked over time at the course level.
 - (c) Ensure that responses are kept confidential, and that participants understand and appreciate the need for course evaluation data and assessments.
 - (d) Ensure that course evaluations capture participants' opinions/ratings of overall content of courses/sessions, separately from evaluation of particular speakers.
 - (e) For multiple session courses, ensure that course evaluations capture content usefulness and effectiveness for any individual sessions, as well as for the overall course.
5. Follow-up is essential for examining the outcomes of professional development and establishing real-time corrections for optimal professional development outcomes.
- (a) An annual end-of-year assessment could be utilised to gain overall perspective on judge outcomes and alignment with curricular goals.
 - (b) Effectiveness is best ascertained by the recipients and users of course content i.e. the judges themselves, as well as by the users of the system of which the judiciary is a part.
 - i. Literature review confirms that community confidence in the judiciary is a critical component of how professional development for judges is perceived.
 - ii. Focus group data supports the view that judges want to make the best decisions possible.
 - iii. Share successes of the judiciary and judicial education with the broader community/society being served.
 - (c) Evaluation with emphasis on impact and how it is defined is essential to secure professional excellence of judges as well as excellence in design,

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delivery, and outcomes of the professional development courses provided to them

- i. Focus group data strongly support that the Judicial College is effective at meeting judges' needs.
- ii. Evaluation results established evidence of impact on juvenile judge/magistrate knowledge, attitudes, and behaviours/skills.
- iii. Through funding support and its goals for this evaluation, the Judicial College is successful at examining its professional development offerings and delivery, and in working towards continued improvement for juvenile judge education.