



Judging the Courts

States consider performance standards for courts

By Judge Kevin Burke

For many court leaders these are interesting times; indeed, for some courts, times of danger. There is danger fostered by attacks on courts allegedly populated with activist judges. There is danger fostered by the radical restriction of judicial discretion. Securing adequate funding for courts surely is a challenge in these interesting times. On the other hand, even legislators who are the most sympathetic to the judiciary see danger in bewildering court arguments to justify budgets competing for scarce dollars that are critically needed for education and health care.

Neither the judiciary nor the other two branches of government can afford the temptation to follow the easy path or to rest in the comfort of old ways of viewing our courts. Our times demand the creation of a new paradigm to assess court performance accurately.

All of us—in the courts, legislative and executive branches

and the community at large—pay a price for misunderstanding the judiciary. While there is far more trust and satisfaction with the court system than critics might lead one to believe, it is easy for those of us in the judiciary to feel a bit under siege at times.

Put in perspective, however, our nation has always been critical of the judiciary. Chief Justice John Marshall, who today is revered, was nearly impeached in an effort led by President Thomas Jefferson. Marshall, without the benefit of a court public information officer, responded to critics by writing a series of letters to the editor in his own defense, using a pseudonym. Nearly a century later President Theodore Roosevelt, upset with a ruling from the Supreme Court, said he could carve out of a banana a judge with more backbone than the backbone of Justice Oliver Wendell Holmes. Billboards populated the nation demanding the impeachment of Chief Justice Earl Warren. Former President Ford at one time wanted to impeach Justice William Douglas. Every state has a similar story of conflict regarding some aspect of its own judicial history.

“There is a Chinese curse which says ‘May he live in interesting times.’ Like it or not, we live in interesting times. They are times of danger and uncertainty; but they are also the most creative of any time in the history of mankind. And everyone here will ultimately be judged—will ultimately judge himself—on the effort he has contributed to building a new world society and the extent to which his ideals and goals have shaped that effort.”

—Robert F. Kennedy

Court Performance

There will always be debate and occasionally tension between the branches of government. Although those debates strengthen our democracy, we should never mistake activity for accomplishment. To ensure that the debate between the branches is directed toward accomplishment, not just activity, the judiciary needs to adopt and to be held accountable for understandable, meaningful performance standards. Courts can ensure their future independence by accepting the notion of public accountability for their performance.

The late congresswoman Barbara Jordan of Texas once said that what the people want is an America as good as its promise. A court as good as its promise looks at fairness and respect as well as efficiency. Fairness, respect and efficiency should be the foundation of court performance standards. If courts adopt standards of performance based on fairness, respect and efficiency, the dialogue among the branches of government will improve and, more importantly, the people who use our courts will be better served.

Legislatures and the executive branch use performance standards. Many states, for instance, have become more and more interested in performance standards in education. To list just a few examples, Georgia, Illinois, Arizona, Colorado and Kentucky have enacted educational performance standards.

The states that have established these educational performance standards did so to close the gap of achievement and to provide for a well-rounded educational experience. More fundamental, the premise of educational performance standards is to rationalize the response to the question, “Are our schools doing well?” Intuitively we all know that social promotion in education poorly serves children. If high school graduates cannot read, the answer to the question, “Are our schools doing well?” is simply no.

Similarly, in health care, we intuitively understand that discharging the hospital patient in record time, although efficient, is not a desired option if the patient promptly dies at home. Courts are in the same position as education and medicine, but arguably are even more vulnerable to criticism because of the ill-defined way the judiciary frequently responds to the question, “Are our courts doing well?”

State Courts Initiative

Courts around the country have on their own initiative increasingly adopted performance standards tailored to them. Recently the National Center for State Courts developed the Court Tools Performance Measures, which embody a lot of the best thinking regarding court performance. (See box)

Court leaders as well as policy-makers outside the judiciary can easily understand the NCSC’s or similar performance measures. Most of the measures adopted by courts have focused on

court efficiency and timeliness. In part, this is because it is easy to measure and timeliness is important. The adage “justice delayed is justice denied” in fact can understate the importance of timeliness. In family law, timeliness allows a fifth grade child to know which parent they will live with permanently before they reach the eighth grade. Timeliness in family law is a major factor in ensuring that parents don’t spend their child’s college education savings on their divorce lawyer’s child’s college education. Timeliness in criminal law is the singular most important contribution the judiciary can make to reduce recidivism. In civil law, timeliness and efficiency in courts, because of more certainty in trial dates, allows business to contain litigation costs.

But how do courts measure fairness?

What you measure is what you care about, and while all of us express the commitment to a fair justice system, few courts measure it. Those courts that do not measure fairness fail themselves and contribute to the unfortunate rhetoric of some court critics.

Listening to the People

People do not have a right to win in court. They do have a right, however, to be listened to in every case. They do have a right to leave the courthouse in every case understanding the court order. The combination of these two concepts is what fairness is about. People need to be heard and to understand court orders. The first answer to the question of “Are our courts doing well” should therefore be, what percent of people who come to our courts leave feeling they were heard? The second response should be what percentage of people who leave our courts understand what the court ordered? Anything less than a desire to get a 100 percent is the judicial equivalent of social promotion, which we intuitively know has not worked in education.

Last year the state courts of our nation had more than 100 million cases. Two decades of social science research tells us a lot about those litigants. Those millions of people who came to court had expectations that the court would “get the right result” and, for the most part, courts do get the right result. Moreover, what the social scientists tell us is that those people knew they might not win, and although disappointed, can accept and obey court orders with which they disagree. Their willingness to comply with orders, however, is driven by their perception of how they were treated in



court, whether they were heard and whether they understood the order or expectations of the court.

Measuring the performance of courts, particularly the court's fairness, is an achievable goal. Frankly, it might even be easier to achieve than the ambitious tasks on which education and health care have embarked. As Robert F. Kennedy said, we live in interesting times and we will be judged on our contributions and our ideals in building a new world society.

Today, one of the tools to help us gauge our contributions is available, so that when we look back we can definitively say that by listening and making sure court participants understood what happened in court, we contributed to shaping a better court system.

—Judge Kevin Burke of the Hennepin County district court in Minneapolis was selected by Governing magazine as one of eight Public Officials of the Year in 2004. Burke was recognized for developing performance measures that made the Hennepin County courts more efficient. He is a CSG Toll Fellow, Class of 1996.



The National Center for State Courts

10 Core Performance Measures: Access and Fairness

- Clearance Rates (the number of outgoing cases as a percentage of the number of incoming cases)
- Time to Disposition of Cases (the percentage of cases resolved within established timeframes)
- Age of Active Pending Caseload (another way of looking at timeliness)
- Trial Date Certainty (a court's ability to hold trials on the first date they are scheduled)
- Reliability and Integrity of Case Files (the accessibility, organization and completeness of court files)
- Collection of Monetary Penalties (percentage of monetary penalties collected and distributed within established timelines)
- Jury Yield and Utilization (the number of citizens who are summoned, report for duty and are not needed)
- Court Work Force Strength (court employees' ratings of their knowledge, motivation and preparedness)
- Cost per Case (the average cost of processing a single case, by case type)

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