

ELIMINATION OF BIAS 2012

Richard P. Clem Continuing Legal Education
www.richardclem.com

I. Elimination of Bias: The Rules

Minnesota General Rules of Practice for the District Courts

Rule 2.02 Role of Judges

(a) Dignity. The judge shall be dignified, courteous, respectful and considerate of the lawyers, the jury and witnesses. The judge shall wear a robe at all trials and courtroom appearances. The judge shall at all times treat all lawyers, jury members, and witnesses fairly and shall not discriminate on the basis of race, color, creed, religion, national origin, sex, marital status, sexual preference, status with regard to public assistance, disability, or age.

Rule 2.03 Role of Attorneys

(d) Non-Discrimination. Lawyers shall treat all parties, participants, other lawyers, and court personnel fairly and shall not discriminate on the basis of race, color, creed, religion, national origin, sex, marital status, sexual preference, status with regard to public assistance, disability, or age.

Minnesota Rules of Professional Conduct

RULE 8.4: MISCONDUCT

It is professional misconduct for a lawyer to:

(g) harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status in connection with a lawyer's professional activities;

(h) commit a discriminatory act prohibited by federal, state, or local statute or ordinance that reflects adversely on the lawyer's fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including:

- (1) the seriousness of the act,
- (2) whether the lawyer knew that the act was prohibited by statute or ordinance,
- (3) whether the act was part of a pattern of prohibited conduct, and
- (4) whether the act was committed in connection with the lawyer's professional activities

II. Elimination of Bias: An Ongoing Process

In 1993, The Supreme Court's Task Force on Racial Bias in the Courts released its final report. A copy of this 355-page report is available on the Court's website at the following link:

http://www.mncourts.gov/documents/0/Public/Court_Information_Office/Race_Bias_Report_Complete.pdf

Recognizing that the elimination of bias is an ongoing process, the Court also created the Implementation Committee on Multicultural Diversity and Racial Fairness in the Courts, now known as the Racial Fairness Committee. Most recently, that committee has conducted a series of community dialogue sessions to learn how the communities view racial and ethnic fairness in the Minnesota Court system. Since June 30, 2008, several community dialogue sessions have been conducted, in St. Paul, Columbia Heights, Rochester, Eagan, Chaska, Hinckley, and at the Dakota County Jail. Full reports of these Sessions can be found at the Racial Fairness Committee's website:

<http://www.mncourts.gov/?page=3249>

Each of these sessions had as its purpose:

Create a public forum for community members to describe their experiences and discuss ideas for advancing racial equality and fairness in the courts.

Here are excerpts from the suggestions made by participants in these sessions:

**EDUCATE AND TRAINING EMPLOYEE TO BE MORE UNDERSTANDING,
“HUMBLE” AND TOLERANT OF RACIAL AND SOCIETAL DIFFERENCES**

Along with hiring staff from diverse communities, staff should be regularly trained in appreciating and dealing with culturally diverse clients. [Eagan]

CULTURAL UNDERSTANDING IN COURT PROCEDURES

Band members reported that they, their family and others such as community members are more likely to be permitted to speak in tribal court proceedings than when involved in state court matters where generally only attorneys speak to the judge. [Hinckley]

LITIGANTS NOT UNDERSTANDING COURT PROCEEDINGS

A Band member noted that many defendants in criminal court matters (or juveniles in delinquency matters) don't really understand the terms set forth on the conditions for pre-trial release or sentencing/juvenile disposition forms. These matters are not clearly explained prior to the hearing, and not covered in detail during the hearing. As a result, Band members are arrested for probation violations for such things as failing to report to the probation office prior to leaving the courthouse following sentencing. [Hinckley]

One small group reported that they believed that there would be better understanding of the terms of probation if the defendant and the judge were looking eye-to-eye when these terms were placed on the record; often they are covered too quickly. [Hinckley]

Band members indicated that there are occasions when they feel that often, when a member is in state district court on criminal matters, they indicate agreement when they really aren't clear on the terms of the agreement. The judge seems to be unaware of the differences between the verbal acceptance and the defendant's quizzical facial expression. Another person stated that people need to know what's up before they leave the courtroom. [Hinckley]

Additionally, there are frequent instances when the Band member defendant would rather accept a plea requiring them to enter an admission of guilt to a criminal charge thereby obtaining a known result than to face the possibly more serious result that might occur following a jury trial. [Hinckley]

COMPASSION AND UNDERSTANDING

One [Mille Lacs Ojibwe] Band member, now 59 years of age, provided a written statement in which he indicated that he has been challenged by recurring incidents of stereotyping, discrimination and racist attacks since childhood. He reports that he's found no compassion or understanding when at government offices in Pine City. He asks that more efforts be made by the State government to protect Band members from racism and violence, that all students be taught true Native American and U.S. history and be given materials about state and tribal government treaties and relations. In turn, he noted that the tribes need to protect their members, teach true Native American history and teach principles and values of being honorable and civil. [Hinckley]

Tribal elder Herb Sam spoke in his introductory remarks of problems that the county law enforcement had in their frequent encounters with a certain Band member. Mr. Sam said that he suggested to the deputies that they change their approach to this man; he taught them how to greet the man in the Ojibwe language, saying "Aaniin Boozhoo." Later, Mr. Sam again met the deputies. They reported that they'd again encountered the individual, and offered the Ojibwe greeting. The deputies indicated that the change in approach totally defused the situation. What had previously been tense and hostile became friendly and productive. [Hinckley]

Band members in the small groups reported that they felt there was a lack of courtesy extended to them when interacting with court staff; a lack of respect and sensitivity to the needs of older people. There is a need to clarify the person's understanding, often Band members say they understand although they remain confused. [Hinckley]

EMPLOY PEOPLE OF COLOR

The very first comment offered to the committee members [at one session] was one attendee's

observation that all facilitators appeared to be Caucasians. In fact, of the 43 judges in the 10th Judicial District only one is a member of a minority race. There is one non-white law clerk and a few non-white people employed by court administration at either the district office located in Ramsey, Minnesota, or at one of the eight county government centers. [Columbia Heights]

In order to promote greater trust and comfort with the justice system, more people of color should be recruited and hired in all offices (courts, law enforcement, prosecution, public defense, probations and corrections). If this were accomplished, individuals coming to court would interact with people they identify with. Trust in the system needs to be developed among juveniles before they become “frequent flyers” and adult offenders. [Eagan]

The participants stated that in order to promote greater trust and comfort with the justice system, more people of color should be recruited and hired in all offices (courts, law enforcement, prosecution, public defense, probation and corrections). Court users want to interact with people with whom they identify. The view of the participants is that when a person of color walks into a courtroom he or she is often the only person of color in the room. This leads to a feeling that the professionals collude together to decide the outcome of the case. [Dakota County Jail]

Minority persons should be actively recruited for employment within the judicial system. [Columbia Heights]

The judicial system needs to have persons employed within the system to specifically address minority issues. [Columbia Heights]

More diversity in staff, attorneys, guardians ad litem [Chaska]

We need to move in the direction of the system “players” reflecting the courtroom population [Chaska]

APPOINT MORE MINORITY JUDGES

The consensus among the participants is that the court system is racially unfair. In addition to hiring a more diverse workforce (as addressed above), the participants felt that more diversity on the bench would also help eliminate bias. The participants perceived the lack of diversity within the court system as an example of the courts unwillingness to address issues of fairness. The hope of the participants is that a more diverse bench, in conjunction with other community leaders, will be able to influence government officials to begin improving the court’s diversity. [Dakota County Jail]

MAKEUP OF JURIES

It was noted by one small group that if only adults registered to vote in Pine County elections and having Minnesota driver’s licenses or state issued identification cards indicating a Pine County address were eligible to serve on Pine County juries, while any person with a felony history was eliminated from consideration for jury service, that it appears that many of the Band’s adults will never be summoned for jury duty. They said that it is difficult to believe that

you will be treated fairly when there is no one that looks like you is on the jury. [Hinckley]

IMPROVE ACCESS WITH PUBLIC TRANSPORTATION TO COURT FACILITIES-COURT, PROBATION

Public transportation to court facilities, probation agents and detention facilities was seen as problematic in making it to court hearings, reporting to probation offices and going to and leaving county correctional/ detention facilities. At least with regard to Community Correction offices, providing neighborhood reporting and testing offices could serve to reduce probation revocation hearings for failure to make timely contact with probation agents. [Eagan]

A poor public transportation system in Dakota County makes it difficult for people to make it to hearings and meetings at court facilities and probation and detention locations. Another issue that worsens this problem is that forty percent of the Dakota County jail population are not Dakota County residents. Many of the participants shared that they had missed court hearings because they had no way to get to the Dakota County facility.[Dakota County Jail]

Persons in the court should be mindful of the order in which cases are called; many Band members have difficulties with transportation and the uncertainty of how long it will take for a hearing to be completed increases the difficulty. It was noted that Pine County is taking steps to establish a public transit system that would be available to county residents. The Band offers transportation, but the existing needs exceed the availability.

A Band member suggested that there should be more efforts to utilize community policing practices so that greater trust and rapport could develop between law enforcement officers and tribal community members. [Hinckley]

AFFORDABILITY OF COURTS

The cost of the justice system is often beyond the means of the minority client. The need to raise revenue to fund justice system programs is all too often falling on defendants and their families in the form of fees, surcharges, assessments and fines. Often defendants get into the repetitive cycle of failing to pay their financial obligations to the system, having a warrant issued or a drivers license suspended, being arrested, losing work time or their jobs and committing additional crimes to make ends meet. [Eagan]

STUDY BAIL SENTENCING PRACTICES TO ENSURE NON-DISPARATE IMPACT

This topic was strongly identified as an area within the court system that seems to result in the most obvious form of bias. The participants shared their own numerous experiences which depicted this to be a serious problem in Dakota County. [Dakota County Jail]

One group reported a discussion of how the Band members use a different and more expansive definition of family. They asked if it was possible to think of all of the persons considered by the Band member to be family when making sentencing and bail determinations thereby showing an appreciation of the larger cultural definition. They reported that it is likely that the Band

member's flight risk would be diminished when the court is more aware of the actual family support given to a defendant.

It was also noted that although a Band member may be receiving a per capita payment from the Band, who he or she provides financial support to with these funds and other income cannot be assumed. Having a more expansive definition of family means that many individuals may be relying, at least partially, on that person to make ends meet. [Hinckley]

COMMUNITY AND/OR SCHOOL LIAISON OFFICERS

Concerns were expressed about the language barriers that exist between Somali parents and their children, the result of the children having a better understanding and being more fluent in the English language than their parents. Parents indicated they often times feel left out or ignored when their children have interactions with law enforcement and because they do not always understand what is being said, they feel they are unable to adequately advocate for their children.

A community liaison officer would be helpful in an effort to bridge this gap.

Similar issues were also expressed regarding the school system. It was suggested that in addition to a school liaison officer, it would be helpful for teachers and schools to be educated on the Somali culture to have a better understanding of Somali students and their backgrounds and perspectives.

Concerns were voiced within one small group that there is also inadequate orientation and introductory training for the largely refugee population regarding coming to America. [Rochester]

EDUCATION AND COMMUNITY OUTREACH

All small groups expressed a need for education within the Somali community about the laws and the justice system in general. Concerns were voiced that many in the Somali community lack the education and knowledge about what is legal and what is illegal and feel that with an education about the legal system, they could stop problems before they arise.

It was suggested that one venue in which to provide this training would be the cable TV channel where the Somali community currently airs programs nightly. It would be most beneficial to have a variety of members from the justice community provide this education – law enforcement, public defenders, prosecutors and judges. [Rochester]

Scholarships should be offered to students who want to pursue equal justice. There should be outreach efforts to international student organizations. [Columbia Heights]

The court needs to be re-organized to encourage greater multi-cultural acceptance. The judicial system needs to develop contact people with the various communities. [Columbia Heights]

Social service programs and churches can assist in outreach efforts. [Columbia Heights]

The judicial system needs to do a better job of disseminating information. Traditional media outlets don't work with minority populations. Minority newspapers, church bulletins, outreach to community centers and ethnic organizations would be more effective. [Columbia Heights]

It was noted that there is a lack of understanding about how the court system works. For example, two defendants can be charged with identical crimes and receive greatly differing sentences. There is a lack of knowledge about what factors are considered in such matters as bail determinations and sentencing. The judges from the Pine County area indicated that they follow a bail evaluation prepared by court services staff when making determinations about the pretrial release of a defendant in criminal matters. It was suggested that perhaps a pamphlet could be prepared that gave an overview of these matters. [Hinckley]

IMMIGRATION AND OTHER COLLATERAL CONSEQUENCES

Band members indicated that they felt persons in the state court system weren't fully aware of the collateral consequences they incurred because of court proceedings including the loss of housing, jobs, family break ups, loss of eligibility to vote and the loss of licensed driving privileges. It was requested that diversion programs be more readily available in order to permit the opportunity to avoid such consequences, which have a greater impact in an economically challenged community. [Hinckley]

Criminal matters have a cumulative impact on the defendants. One person asked if it were possible to exclude the guilty pleas that had been made because of a defendant's perception that there was no way they would receive fair treatment. She said that convictions resulting from pleas entered because of such a perception should be excluded in the event of a subsequent arrest. That defendant should not face the increased sanctions in bail and release determinations and in sentencing matters when the prior convictions were based on a sense that true justice was not available to him or her. [Hinckley]

There were many comments about the unfairness of the immigration system. While immigration law is governed at the federal level, it has frequent interplay with persons in state court. There is a disconnect between the things that happen in our state courts and the consequences that flow from a federal immigration deportation proceeding. [Columbia Heights]

The legal system needs to do a better job of educating judges, staff, prosecutors, defense and others about matters relating to immigration and deportation. It has an obligation to inform and

educate both the public as well as individual defendants on these issues. [Columbia Heights]

Additional training about the impacts of immigration matters could be developed and offered to members of the bench and bar. The judicial system doesn't recognize the problems that are faced constantly by a non-citizen. [Columbia Heights]

It was suggested that the district court judges should write a letter to immigration court judges explaining that their actions affect perceptions in the state court and this dialogue should reach across the federal/state court line of division. [Columbia Heights]

Concern was expressed about the unfairness of returning a person to the country of their birth, from which they may have emigrated many years earlier, or even as a child, simply because of a relatively minor criminal conviction, making what appears to be a very reasonable plea negotiation into an extremely harsh consequence. The criminal justice system should take these extra-judicial sanctions into account when making prosecutorial, defense and judicial determinations. [Columbia Heights]

RACIAL PROFILING

Many comments were received from non-white attendees indicating their belief that police make traffic stops of minority individuals more readily than of white drivers. One person stated that he was faced with the decision to either just pay the fine or lose time from his work in order to contest a ticket for a burned out taillight. He stated that he felt that if he'd been a white driver with a burned out taillight (unaware that it was needing replacement) he would have been let go by the police officer with just a warning.

Another person spoke of loaning a car with a broken taillight to a white female for two years. She was never stopped by law enforcement. He then loaned this vehicle to an African male. That very day the man was pulled over for a traffic stop.

A white male attendee stated that he's had friends (persons of color) who have been stopped in Columbia Heights for no apparent reason. Another person stated that the random checks at the airport are "difficult to stomach." One person expressed the view that it's the entire American system, not just the judicial system.

One man stated that he and friends (all immigrants) were playing soccer at a local public park. The police came and shut down the soccer game stating they had not completed the required field registration and paid the permit fee. No registration or fees were required for the non-immigrants playing basketball on courts in the same park near the soccer field.

Some people raised the issue of whether there is in fact one system of justice. Rather it seems there is street justice versus courtroom justice. It appears that police have their own version of justice as demonstrated by racial profiling matters. Is there any accountability of police? Being charged, even if the charges are later dismissed, has significant consequences to individuals, families and communities. [Columbia Heights]

Several Band members indicated that they feel that law enforcement initiate traffic stops of vehicles driven by Band members without justifiable driving conduct. They indicated that they felt that law enforcement routinely stopped known vehicles or drivers without good cause. [Hinckley]

Band members stated that they chose to not get license plates for their vehicles issued by the tribal government as having these would target them for traffic stops by law enforcement. [Hinckley]

A Band member reported that another member is stopped repeatedly and questioned about his sobriety – apparently because this man has a staggering walk due to a physical limitation. This is disrespectful. [Hinckley]

One woman provided the details of an incident involving her adult son that occurred about a week before the Community Dialogue Session. She said her son was in a family owned business, working on refinishing the floors, when he was tapped on his shoulder, turned around and faced a Pine County deputy. The deputy indicated he'd received a call that someone was smoking marijuana on the premises. Her son reported that he was smoking a cigar because of the odors caused by the products or work he was doing. He said that he was then asked if he was a member of the Native American gangs – he believed the only possible reason was because he was wearing a headscarf because of the flooring work. Her son felt insulted and targeted, but tried to not demonstrate any such emotion. A call made to the County's dispatch office revealed that there had not been any call made to them reporting any person smoking marijuana at that address. She indicated that this occurrence was an example of the nature of law enforcement activity faced by Band members every single day. The present Pine County sheriff was present at the forum. He stated that this band member should be proud of how her son reacted to law enforcement, and that he hoped people would be comfortable reporting such inappropriate actions by members of his department to him. A Band member indicated there is reluctance to report such matters to the County's law enforcement because of concerns of retaliation. [Hinckley]

LANGUAGE BARRIERS AND CULTURAL UNDERSTANDING

One attendee commented that in cross cultural matters there is often a need not only for a language interpreter, but also for a “cultural broker” to provide assistance in the translation of the differing views and beliefs of the parties. For example, in the predominant American culture, it is felt that a person who is speaking the truth looks into the eyes of the listener when speaking. This is contrasted by the views of several minority groups in which the cultural rules state that it is disrespectful to look directly into another person's eyes as sustained eye contact signifies contempt or confrontation. [Columbia Heights]

There is a need for greater recognition about the burden of interpreting. It isn't solely a

courtroom need. There is a need from more help at court administration counters; we need greater sensitivity to language barriers. It would help if people were allowed to schedule or request an interpreter at the counter and not just have to rely on family and friends. In response to a question about whether there is bilingual staff it was stated that there is one Spanish speaking person employed in Anoka. [Columbia Heights]

It is necessary to critically review what the judicial system is doing to provide understandable written documents and to provide interpreter services beyond its current scope of courtroom services. [Columbia Heights]

Having interpreters available is important [Chaska]

The courts need to increase its number of bilingual staff. [Columbia Heights]

Materials on the court's websites should be translated. [Columbia Heights]

It would be helpful to have interpreters available for court administrations in blocks of time, such as every Monday from 2-4 p.m. having a Spanish language interpreter available, every Wednesday from 10-12 p.m. having an Arabic interpreter available, etc. [Columbia Heights]

GREATER USE OF TRIBAL RESOURCES

Band members requested that court services probation officers and corrections officials consider tribal community service options rather than standard sanctions when conducting pre-sentencing investigations – perhaps a dispositional advisor from within the Band could be utilized. [Hinckley]

One Band member reported that there is no effort to provide mediation in situations of alleged domestic violence; indicating that the mediation could occur either at the scene or later at the courthouse. She indicated that it appears that there is no attempt made to listen to members of the family; or of the impact such situations have upon the family such as breaking families apart and causing people to lose their employment. She noted that the services of others are available to assist and provide advocacy. [Hinckley]

One small group reported that there is a need for greater use of restorative justice efforts and rehabilitation activities involving the Band's resources. The present system is too punitive. [Hinckley]

GENERAL IMPROVEMENTS TO INTER-CULTURAL RELATIONS

Many suggestions spoke to improvements of race relations in society at large as well as within the judicial system. One person stated that high school age people should be sensitized to racial issues. [Columbia Heights]

One man noted how personally painful it was for him, having been involved in the past as a financial officer for the Band, to overhear a conversation between non-native persons in a local restaurant in which it was stated that Band funds were being used to pay bail and allow Band member defendants to be released from jail. He noted that the Band provides members with per capita payments. These funds are the property of the recipients to use as they deem appropriate. The Band itself has never paid any member's bail in order to secure release. [Hinckley]

GENERAL IMPROVEMENTS TO ADMINISTRATION OF JUSTICE

Citizen described feeling "proud of the American system", but recognized that lack of resources is a weakness and results in "unfairness". [Chaska]

There is a need for greater understanding that regardless of race, people are scared and apprehensive about going to court. They don't know what to expect. [Columbia Heights]

If you are arrested and found innocent, should be a way to remove it. [Chaska]

Important for judge to take time, so participants feel like they have been heard. [Chaska]

Judge could use more time to make decisions [Chaska]

Need more resources in the justice system. Need more time spent on cases. Cases are at risk, because public defenders do not have enough time. Legislature needs to recognize they need to designate funds for the justice system. [Chaska]

The most important issue concerning fairness may be the shortage of public defenders. [Columbia Heights]

Some attendees expressed a view that public defenders should make greater efforts to know their clients as individuals rather than "just as a number." [Columbia Heights]

Continue to promote Self-Help Center, interpreters, timely access to justice [Chaska]

Citizen suggested that court could use more citizen volunteers like "guardians" for children [Chaska]

Legislative changes that could be made to remove small or menial items (ex. barking dog and traffic charges) from the court calendar and workload, which would allow the court more time to focus on larger and higher priority issues. [Chaska]

The process and policies concerning expungement of criminal records needs review. [Columbia Heights]

One facilitator believed the most important single step we could take is to communicate and take any other actions that would increase the funding of public defenders in the State of Minnesota. This addresses many of issues raised about racial unfairness, economic unfairness, immigration awareness, as well as other issues relating to a criminal defendant being able to understand his or her individual rights and be able to act accordingly. [Columbia Heights]

The judicial system should continue to look for ways to create fairness in the civil litigation arena as well. This certainly involves self help services that are provided and could be expanded. It also involves considering the so-called “Civil Gideon” issue of having public defenders appointed in these matters, or at least expanding pro bono representation. [Columbia Heights]

Efforts need to be taken to raise the comfort level for people in court proceedings – to decrease apprehension and fear of the process. [Columbia Heights]

In his comments Pastor Kim noted there are four types of justice: 1) retributive, 2) procedural, 3) restorative and 4) distributive. All of these require fairness. The American criminal justice system is an example of retributive justice. [Columbia Heights]

We need to recognize issues of fairness based on disparities of wealth, economics, etc. How do we level the playing field? [Columbia Heights]

The issue of criminal records and their accuracy was raised. It was also discussed that there are problems relating to expungement as these records prevent people from getting employment. [Columbia Heights]

The juvenile code should be reviewed; juveniles should be released from probation sooner. This might have a positive effect of breaking the cycle. It was also noted that there is no structured activity available for juveniles when they are on probation. [Hinckley]

Band members brought up issues of organized Native American gangs, headquartered in the metro area with affiliations in outstate tribal communities, which are involved in criminal matters including drug related activities. They indicated that the gangs are having a serious negative impact within their community and there is a need for collaborative efforts with law enforcement and prosecution to address these concerns. [Hinckley]