

dissent, but reading about your failures as a court leader on the Internet can be a bit unsettling. A court leader cannot totally eliminate displaced dissent, but the failure to pay attention to courthouse morale can increase displaced dissent (see Burke, 2011). That unflattering Facebook posting may well be preventable.

Latent dissent occurs when employees perceive that a judge or supervisor is unreceptive to their concerns. The disagreement, however, is communicated not to the judges or supervisors, but to ineffectual audiences, such as fellow coworkers. All organizations have it. Ignorance of latent dissent is not bliss. Latent dissent may signal that leaders are not approachable or open to important concerns or issues. One goal is to reduce latent dissent by increasing articulated dissent.

Articulated dissent is constructive dissent expressed upward or directly to a supervisor or judicial colleague. It is not “in your face,” and it is respectful. Articulated dissent can have a positive influence on organizational change. Professor Kassing determined that employees who communicated dissent upward to supervisors were perceived as having influence and possessing high levels of organizational commitment and job satisfaction. Court leaders who encourage articulated dissent build credibility and respect for decision-making processes.

Court culture, as well as the size of a court, makes a difference as to how dissent is dealt with. A deferential court culture, where many staff work at the pleasure of judges, may have a chilling effect on dissent. Small courts can be plagued by judges who are petty and vindictive in their dealings with each other—like scorpions in a battle (see Feldman, 2011). The court culture in that atmosphere often puts staff in the middle and makes dissent (speaking up) risky and problematic. Bigger courts may have just as many scorpions, but there are more places to hide. Large courts have different dissent challenges. Size can drown out dissent and so, for larger courts, creating a court culture that values dissent might be accomplished through structured channels for dissent.

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The Dissent Channel was created in the U.S. State Department to ensure leaders hear dissenting views. Everything submitted through the Dissent Channel is distributed to the secretary of state and other senior State Department officials. Employees who express their opinions through the channel will not face disciplinary action or retaliation, but the program is far more robust than simply a program to protect whistleblowers.

A structural approach to creating a court culture that values dissent may be alluring to courts, but perhaps more than structure (or an anonymous suggestion box) is needed. What if a court actually rewarded dissent? What if a court gave cash bonuses to dissenters? Sound preposterous? Each year, the American Foreign Service Association gives four Dissent Awards to members of the Foreign Service who object to official U.S. foreign policy or working conditions, and who “work constructively through the hierarchy through the chain of command to advocate for change.” AFSA president Susan Johnson said, “Allowing for constructive dissent is a critical ingredient for healthy and successful institutions. We wanted to recognize the courage and professionalism of people who have stepped forward.” The awards recognize individuals who have demonstrated the courage to challenge from within, questioned the status quo, and taken a stand. To get an award, the issue can involve a management or foreign-policy issue. Recipients receive a trophy and a \$4,000 cash prize.

Rewarding dissent may seem outlandish, but even if court leaders are committed to open channels of communication, encouraging dissent in a courthouse—not steeped in that tradition—is not easy. New courthouse leaders sometimes have a short window of opportunity to introduce a fresh approach to dissent, but it is also possible for established court leaders to make a difference—to change the court culture—to improve how their courts deal with dissent.

Too often, individuals agree in private about the nature of the problem and plausible solutions, yet when they gather as a group, they fail to communicate their views. Predictably, that silence leads to frustration, anger, and irritation with each other. Effective court leaders know this and do something

to avoid “groupthink” (see “Creating a Team of Individuals,” 1995; Esser, 1998; Janis, 1989, 1983; “Groupthink,” 2015). Groupthink can occur when a consensus emerges too quickly and any suggestion of an alternative is then summarily rejected. The groupthink pioneer was psychologist Irving Janis. He analyzed the decisions made by Presidents Kennedy, Johnson, and Nixon to extend the war in Vietnam. Groupthink, he argued, explained why they had become locked in their course of action, unable to explore alternatives. Subsequent psychological research supports Janis’s arguments. Experiments show that people are quick to adopt the majority position and, crucially, they ignore all the potential alternatives and all the conflicting evidence (see Dean, 2009).

There are two elements of group conversations: 1) advocacy for an idea and 2) questions about an idea someone else is advocating. A court culture that values constructive dissent encourages honest, respectful, freewheeling discussion about both. In trying to understand why people conform to majority views, even when they may privately have reservations, two factors stand out: First, people assume that truth lies in numbers and so assume the majority is probably correct. Second, people worry about “sticking out” should they maintain a differing point of view.

Janis analyzed how groupthink works. First, the group does not sufficiently discuss the objectives and the values implicated by a decision about to be made. Second, discussions are then limited without full discussion of the range of alternatives. Third, the group fails to periodically reexamine the course of action initially preferred. Finally, warnings are ignored. Set in their way, the group fails to have a contingency plan when trouble develops. This lack of dissent results in what Janis described as an “illusion of unanimity.” If any difference does occur, group pressure is applied to bring the dissident into line. Janis also warned of “the emergence of self-appointed mindguards—members who protect the group from adverse information that might shatter their shared complacency” (see “Groupthink,” 2015).

Being a court leader is not always easy. It helps if you are secure enough not to insist you get your way with your methods. Leadership often requires setting a vision and then getting people to buy into that vision. But setting tone for dialog is perhaps just as important. Dale Lefever says, “[I]n the business of trust, the leader needs to ante up first. It is a lot easier for a subordinate to speak freely, if the model for speaking freely has been demonstrated and encouraged by the court leader.”

There are four simple tips to foster constructive dissent (or ante up first).

1. **Share All the Information; Build Trust.** The failure to be transparent destroys trust. Effective courthouse leadership starts with relationships. If trust does not exist, then neither does the possibility of a court culture that values constructive dissent. The unwillingness to share information, the “is-there-a-need-for-them-to-know-attitude,” underestimates what hoarding and coveting information does to reduce trust.

2. **Listen First; Talk Second.** Precisely how much time do you put directly into courthouse communication? If your answer is, “I’m not sure,” it is not enough. Each month, how often do you have lunch with colleagues you frequently disagree with? Nitin Nohria, dean of the Harvard Business School, says communication is the real work of leadership. One effective leader meets with five randomly selected employees each month. That leader is a facilitator of discussions prompted by open-ended questions. Another effective leader randomly calls several employees every month—just to talk. To solve a problem effectively, you have to understand where the other person is coming from before defending your own position. Peter Drucker has a simple rule: “If you have quick consensus on an important matter, don’t make the decision. Acclamation means nobody has done their homework.” If a decision is important and risky, it should be controversial.

3. **Don’t Shoot the Messenger.** The best leaders do not foster personality conflict, but embrace task conflict. The worst leaders make task conflict into personality conflict. Hearing alternative viewpoints does not mean you are weak or ineffective. To the contrary, the greatest leaders have great advisors. Different communication styles can lead to misunderstandings between judges, employees, or both. Lack of communication drives conflict underground. Avoidance is easy. “Hiding our head in the sand” and hoping the conflict will go away is natural but almost always fatal.

4. **The Devil’s Advocate.** This concept comes from an official position within the Catholic Church. A canon lawyer, the “devil’s advocate,” argued against the canonization (sainthood) of a candidate to uncover any character flaws that might undermine the case for sainthood. It may seem odd, but you could assign an individual or group to advocate positions regardless of their personal point of view. This approach was tested by Edward R. Hirt and Keith D. Markman (1995), who encouraged experimental participants to generate multiple solutions. The results showed that these participants demonstrated lower susceptibility to group bias. The devil’s advocate is not a panacea, though, and has unfortunate limits. The devil’s advocate can easily be ignored because people do not take him or her seriously. Better, then, is someone who really believes in his or her criticisms. When compared with a devil’s advocate, authentic dissenters were more likely to provide a

greater quantity and quality of effective solutions (see Nemeth, Brown, and Rogers, 2001).

Former Congresswoman Barbara Jordan once said what the people want is an America as good as its promise. Courts play a vital role in achieving that promise. Being a court leader is not always easy, but it is a privilege and gives the opportunity to make a difference in people's lives: the people with whom you work and the people courts serve. Effective leadership requires being secure and setting a vision for your court. A healthy court culture is one where leaders hear other voices. Hearing other voices strengthens a court leader and strengthens the court. Not every dissenting voice merits a change, of course, but being willing to reflect and perhaps even change after hearing the voices is important. Tony Judt, the British historian, put it this way (see Moyn, 2015): "When the facts change, I change my mind. What do you do?" ◀

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