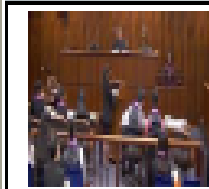
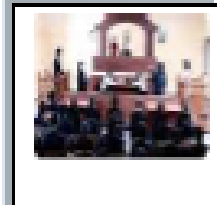
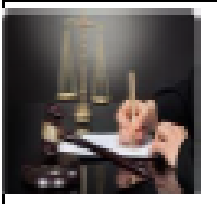


June 17,  
2019



دائرة القضاء  
JUDICIAL DEPARTMENT

Abu Dhabi Judicial Academy



Workshop on:

## Excellence in the Management of Court Hearings

A Comparative International  
Perspective with focus on the US  
Experience

Speaker

Judge/ **Oran Fresno Whiting**



# **THIS IS YOUR JUDICIARY! YOU WILL BRING IT TO THE ULTIMATE LEVEL!**

Presentation To The Emirati Judges

By: HON. ORAN F. WHITING (RET.)

Thank you for the opportunity to address you today. I am so pleased and honored to be here and to be speaking to you.

After having the opportunity to observe and shadow several Court of First Instance proceedings, I was reminded of my days on the bench in the equivalent court in Chicago, my conversations with the Chief Judge of the United States District Court for the Northern District of Illinois, and my judicial training.

I want to share some of the lessons imparted on me and the knowledge gained during my more than 20 years as a lawyer representing entities the UAE seeks to attract. These lessons and this knowledge are relevant because they coincide with ADJD's objectives.

**ADJD's objective:** An efficient and independent judicial system based on excellence that provides world class judicial services.

UAE/Abu Dhabi want to make potential investors, litigants, and businesses comfortable and confident in the judiciary and in the country.

**These objectives are achievable.**

We American judges were honored by having our arrival chronicled in several newspapers. The day after the articles appeared, *The National* published an editorial titled "American judges can take courts to the next level." Though everyone is entitled to his or her own opinion, I respectfully disagree with this editorial.

YOU, not us, the American judges, WILL take the court to the next level. This is YOUR court and YOUR judicial system. You judges are young, smart, talented, professional, hardworking, and willing, open, and eager to improve. I am so excited to be a part of your development and hope to be for a long time.

After I was appointed to the bench by the Illinois Supreme Court, I sought advice from the many judges whom I befriended during my legal career.

My most poignant conversation was with the Chief United States District Judge of the United States District Court for the Northern District of Illinois.

He provided invaluable wisdom and advice.

Transparency and independence of the judiciary are crucial to its existence. I would be working for the people.

Ethics and conduct, both on and off of the bench, were paramount. My duty to all citizens who appeared before me would be to apply the law to the facts, without bias or prejudice. Neither

outside factors, opinions, relationships, nor intimidation could influence my decisions. Though I could only consider the evidence presented by the parties, I must use common sense when exercising the considerable discretion the position bestows.

Finally, the courtroom would be my responsibility. As the judge, I would manage the courtroom, and I would make and be responsible for all final decisions. I could and should establish my own courtroom orders; however, these orders must not contradict the applicable practice rules. Though I would be working for the people, I, not the litigants, the experts, the witnesses, nor anyone else would control my courtroom.

**ADJD's target clients, audience, customers, consumers, investors, and business are risk adverse. Certain elements are crucial for their comfort and confidence. The court system and its judges must either be, or at least perceived as:**

### **Independent**

Judicial independence is the concept that the judiciary should be independent from the other branches of government. That is, courts should not be subject to improper influence from the other branches of government or from private or partisan interests.

Several factors can be taken into consideration when considering independence: constraints on government powers; absence of corruption; openness of government; fundamental rights; order and security; regulatory enforcement; civil justice; and criminal justice systems.

### **Transparent**

Transparency is considered by many as a fundamental characteristic of modern democracies. It helps ensure the citizens' control of and participation in public matters. In practice, transparency should include the ability of citizens to request access to public information and the government's duty to generate information and make it broadly accessible to citizens.

Empowering citizens to hold governments accountable to these obligations is another crucial pillar of transparency. The open operation of justice systems creates an increased flow of information from the judiciary to society, enabling the public to learn about its performance and rulings.

Transparency is particularly important in judicial institutions because it promotes accountability, combats corruption, and helps eliminate arbitrariness. In this way, it facilitates greater judicial independence and enhances public confidence.

A policy of transparency and access to public information fundamentally enhances the level of trust and the legitimacy of judges and others operating in the justice system by providing information enabling society to understand its operation, challenges, and limitations. Transparency fundamentally reassures society that justice is served.

## Key International Best Practices For Judicial Transparency

The first is access to internal information about the judiciary, including judicial selection and appointment, financial disclosures, and court statistics.

Second is the importance of publishing judicial decisions, which facilitates access to the courts by citizens and the press, promotes adherence to decisions, and enhances consistency in judicial decision-making.

### Access To Internal Information About The Judiciary

#### Judicial Selection And Appointment

The process used to appoint judges has long been identified as a critical element in promoting the principle of judicial independence. Using transparent and open processes for appointment helps protect judges from undue external influences that may be exerted by the other branches of government or from interest groups. Likewise, transparency helps ensure the selection of candidates who meet the basic international standards for qualifications, including high professional standing and the necessary legal skills and experience.

While there is no single mechanism for the selection of judges, the process should - at a minimum - reflect certain basic principles: appointments should be clear, merit-based and objective, transparent to the public, and satisfy requirements for legal qualifications. It is also important for the process to be open to the input of civil society groups, including professional associations related to judicial activities, so that they may provide opinions on the merits of the candidates. Greater involvement by civil society in the judicial appointment process also enhances public confidence in the judiciary.

#### Judicial Financial Disclosures

Another tool which is widely used to build trust in public administration, including the judiciary, is the requirement that public officials file asset and income disclosure statements. Such disclosures have been a key element of anti-corruption efforts worldwide. In conjunction with the right to access public information, these disclosures allow for oversight of members of all government branches, including the judiciary. By monitoring financial assets and transactions, these statements help identify and prevent potential conflicts of interest as well as crimes such as bribery and illicit enrichment.

The identification of potential conflicts is particularly relevant for members of the judiciary, who may be asked to rule on matters of significant public and commercial significance involving a variety of parties. Knowing where government officials - even judges - may have conflicting personal or financial interests helps all officials avoid situations where they have their actions questioned and helps the public maintain trust that these officials are acting in the best interests of the public.

## Publication Of Court Statistics

The gathering, analysis, and sharing of statistical information is another important way of increasing judicial transparency. Such information makes it possible to analyze performance, identify achievements, detect problems, and design strategies to solve them. It is therefore important to both collect and share some basic information on court performance.

Making such statistical information available to citizens contributes not only to improved transparency of justice systems but also increases the interaction between the courts and civil society. It also allows citizens to learn about the operation and workload of judges.

## Access To Substantive Work Of The Courts

The second category of international best practices for judicial transparency is related to increasing public access to and awareness of the cases placed before the courts and their results. Fostering such access is an important way to address the double challenge of making the work of the courts known as well as strengthening citizen trust in judicial institutions. It includes access to court proceedings and publication of judicial decisions.

## Access To The Courts By Citizens And The Press

Public access to the courts, including through the media, is important to publicizing the work the judiciary is doing. Such access can include the recording of court sessions by video, audio, or transcription. The press also has a fundamental role to play in informing citizens about the important work of the courts, particularly with respect to cases with broad public significance, because citizens do not typically go to the courts to attend a trial. Thus, access by the press to courtrooms - whether in person or remotely - is one way to facilitate public awareness of these processes and their results.

## Publishing Judicial Decisions

Additionally, the principle of open justice is recognized as a vital element in preventing perceptions of secrecy and lack of accountability, which can in turn generate distrust and confusion among the public. Such perceptions can be avoided by public access to the decisions made by the judiciary.

Access to decisions of the Court of Cassation is particularly relevant since those decisions transcend the cases at issue and affect government institutions and actions more broadly. Such decisions may address matters relating to the rights of individuals or the obligations of the state and thus have a critical influence on the ways in which citizens' rights are understood and protected. Additionally, the decisions made by such bodies are vitally important since they establish guidelines for the operation of the lower courts.

Furthermore, by making judicial decisions readily accessible to citizens, legal professionals, and lower courts, judicial transparency fosters greater clarity and consistency in judicial decision

making. Greater consistency enhances respect for and adherence to the law, as well as confidence in the rule of law. It is also a decisive factor for investors, who are particularly concerned about the predictability of the court system.

### Other Judicial Support

Increased judicial transparency to monitor and enhance judicial output can be particularly effective in strengthening the impact of the judiciary and enhancing public confidence support.

Additionally, effective and efficient enforcement of the judgments is essential to maintaining public confidence in the courts. Effective systems for the enforcement of judicial decisions represent a vital element for economic growth, job creation, foreign investments, and prosperity increase.

### **Predictable**

Consistency of rulings, understandability, rationality. In the law, predictability is important. People need to know the rules, and they cannot plan unless they know the law in advance. Predictability is expected from trial court judges, who are meant to follow the law far more than to make it.

### **Competent**

Not in the jurisdictional meaning, though this is important as well. Education, training, experience, having common sense, and understanding of all things legal.

Generally, 5 judicial competencies and behaviors can be assessed:

#### 1. Exercising judgement.

Demonstrates integrity and applies independence of mind to make incisive, fair and legally sound decisions and appreciation of the impact of the decision's neither biased or prejudiced appropriate manner.

#### 2. Possessing and building knowledge.

Possesses a detailed knowledge of the relevant jurisdiction, law and practice and demonstrates an ability and willingness to learn and develop professionally. Demonstrates knowledge of relevant law and procedure changes in law and embraces new court processes and procedures personal development.

#### 3. Assimilating and clarifying information.

Quickly assimilates information to identify essential issues, develops a clear understanding and clarifies uncertainty through eliciting and exploring information from multiple sources and applies appropriate weight to it avoiding irrelevant detail opiate legal rules and principles to the relevant facts and submissions.

4. Working and communicating with others ('Others' refers to all court users, colleagues, court staff, parties, litigants in person, advocates and witnesses) – Can also be termed **Temperament** (Defined as a person's nature, especially as it permanently affects their behavior, this must be suited for the importance of the job).

Conducts proceedings appropriately, recognizes and values diversity and shows an appreciation of the wider impact of communications. Builds rapport, demonstrating good communication skills, authority and empathy/sensitivity in building relationships using effective verbal and non-verbal communication. Presents relevant evidence and information while progressing the case effectively and efficiently to question reasoning. Demonstrates sensitivity to the particular needs of different communities, groups, and vulnerable individuals to ensure complex information is understood. Uses appropriate strategies to maintain control and defuse tension when needed. (**Humanitarianism**).

5. Managing work efficiently.

Works and plans effectively to make the best use of resources available (own and court time) and prioritizes tasks to ensure efficient completion of heavy workload both in and out of court, responding calmly and flexibly to challenging events. Resolves problems independently but seeks advice and offers assistance to others when appropriate available resources, including making full use of technology, particularly when conducting research responsibilities.

### **Impartial/Non-Biased/ Neutral**

Even playing field for all litigants. Judicial impartiality is a fundamental component of justice. Judges are expected to be impartial arbiters so legal disputes are decided according to the law free from the influence of bias or prejudice, or political pressure.

### **Ethical**

In the U.S., the ethical standards for judges are established by the code of judicial conduct adopted in each jurisdiction. The basis for the state and federal codes is the *Model Code of Judicial Conduct* adopted by the American Bar Association in 1972 and revised in 1990 and 2007.

Canon 1: A Judge Should Uphold the Integrity and Independence of the Judiciary

Canon 2: A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities

Canon 3: A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently

Canon 4: A Judge May Engage in Extrajudicial Activities That are Consistent With the Obligations of Judicial Office

Canon 5: A Judge Should Refrain From Political Activity

Off The Bench

Rule 1.2 provides: "A judge shall act *at all times* in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and avoid impropriety and the

appearance of impropriety.” Thus, the code of judicial conduct applies to ALL of a judge’s activities, both judicial and personal and both on and off the bench.

In general, as described by Rule 3.1, a judge must not participate in extrajudicial activities that will interfere with the proper performance of judicial duties, lead to frequent disqualification, or appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality.

### Community Activities

After election or appointment, a nascent judge may be surprised to learn that some civic and charitable activities that were an asset while a candidate may be prohibited after taking judicial office. Even laudable community activities may bias a professional conduct both on and off the bench; community activities; fiduciary positions; business and financial activities; political activities; ethics; courtroom management techniques; case management; and decision making.

A new judge should ask the following questions and take any steps necessary to be in compliance with the new standards when she takes office:

- Am I a member of a governmental commission that does not concern the law, the legal system, or the administration of justice (Rule 3.4)?
- Am I a member of an organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation (Rule 3.6A)?
- Am I an officer of an organization or entity that is engaged in proceedings that would ordinarily come before me (Rule 3.7A(6)(a))?
- Am I an officer of an organization or entity that will frequently be engaged in adversary proceedings in the court on which I serve or in any court subject to the appellate jurisdiction of my court (Rule 3.7A(6)(b))?

If a future judge has in the past participated in fundraising for charitable organizations, she should review the code to see if she can continue those activities and inform the organizations about any new restrictions to prevent inadvertent violations of the code. Under Rule 3.7A, a judge cannot:

- solicit charitable contributions except from members of the judge’s family or judges over whom she does not exercise supervisory or appellate authority;
- solicit memberships except in an organization that is concerned with the law, the legal system, or the administration of justice; or
- be honored at, be featured on the program of, or permit her title to be used in connection with a fundraising event unless the event concerns the law, the legal system, or the administration of justice.

“Judges are generally permitted to engage in financial activities, including managing real estate and other investments for themselves or for members of their families,” but participation “is subject to the requirements of this Code.” Comment 3, Rule 3.11.



Rule 3.11B, for example, will require a judge-select “to resign as an officer, director, manager, general partner, advisor, or employee of any business entity” unless the business is “closely held by the judge or members of the judge’s family” or “primarily engaged in investment of the financial resources of the judge or members of the judge’s family.”

Further, a judge-select must examine her financial, business, or remunerative activities and withdraw from any that will (Rule 3.11C):

- interfere with the proper performance of judicial duties;
- lead to frequent disqualification;
- involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves; or
- violate other provisions of the code.

### **Efficient/Effective Case Manager**

Case management is extremely important. There is no one way to handle a courtroom or cases but certain strategies have proven effective.

For example, scheduling an initial conference covering important issues sets a good foundation.

*Establish jurisdiction and identifying pivotal issues*

*Set realistic and measurable timeframes*

*Dates for future proceedings*

*Settlement*

*Discovery*

*Motions*

*The Final Pretrial Conference*

*Defining and narrowing the issues*

*Previewing the evidence*

*Considering use of special procedures*

*Enforce the timeframe*

*Monitor and disseminate data*

*Set procedural and case management policies and practices*

*Establish caseload and workload policies*

Good case managers work with the parties and their lawyers to identify the real issues in dispute and to identify how best to proceed to resolve those issues.

Good case managers show the parties and their lawyers, through their management activities, that they have taken the time to truly understand what the case is about and that they are willing to invest their time to ensure that the pretrial process remains focused on the real issues.

Good case management is not an opaque process that occurs solely behind chambers’ doors. Rather, good case managers interact with the parties and welcome - if not invite or even require -

client participation. Practiced that way, case management provides the parties not just with an opportunity to be heard but also with an opportunity to see (and feel) that justice is being done.

### Implementation Approaches

There are several ways case management or case flow management can be implemented. These may be generally described as:

1. Moral suasion – this is the judge who actively manages his or her courtroom. These are not formal rules. For example in this courtroom, counsel will provide a written outline of their argument.
2. Local practice – this is moral suasion applied to a set of cases. It is usually geographically circumscribed but can be based on case type. For example, in all commercial crime cases counsel will provide a draft exhibit list.
3. Practice preference – this is more formal and indicates an official preference but is not mandatory. For example, counsel should attempt to pre-mark exhibits on commercial crime cases. It may be applied to a local or general area. Unlike local practices, they are usually published. They are frequently issued by the Chief Judge or Justice.
4. Practice directives or notices– these are formal directions that have binding force. For example, counsel will use and file a specific form when mutually agreeing to limit the scope of a preliminary inquiry. Practice directives are normally issued by the Chief Judge or Justice. They are published.
5. Statutory enactments – these are case management and case flow management decisions that are imposed uniformly through a statute.
6. Rules of Court – these are broad based rules which can include case management and case flow aspects.
7. Case Management Rules – these are specific case management rules created by the judge

### Conclusion

I hope this has instilled or supplemented your confidence and strengthened the court's ethical, behavioral, and professional practices. You have full control of your courtrooms and of your court system. Continue to strive for judicial independence, transparency, and fairness!