

Considering Procedural-Fairness Concepts in the Courts of Utah¹

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In the past few years, procedural fairness has emerged as a dominant theme when considering how courts should function in the United States. Indeed, researcher David Rottman of the National Center for State Courts has called procedural fairness “the organizing theory for which 21st-century court reform has been waiting.”³

¹ Prepared for presentation at an educational conference of the Utah state courts, September 14, 2011, Midway, Utah. © Steve Leben 2011.

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³ David B. Rottman, *Procedural Fairness as a Court Reform Agenda*, 44 COURT REVIEW 32, 32 (2007-2008).

The consideration of procedural-fairness concepts isn't by itself an adequate checklist of what judges or a justice system must do: in addition to procedural aspects, we still need to get the outcome right. And we need to process cases expeditiously, which is not an explicit procedural-fairness construct. But there's substantial evidence that procedural-fairness concepts best match what the public looks for from its justice system, and that adherence to procedural-fairness principles improves public acceptance of the courts and compliance with court orders.

In this paper, I will provide an overview of the commonly accepted elements of procedural fairness, as well as some of the research about how adherence to these principles affects public and litigant perceptions. I will then discuss some of the ways these principles may be applied in trial and appellate courts. I will close with a brief look at how adherence to these principles is being evaluated in Utah trial courts by courtroom observers.

I. An Overview of Procedural-Fairness Concepts⁴

In 2006, Minneapolis trial judge Kevin Burke and I began work to draft a white paper on procedural fairness for the American Judges Association. Kevin had served several terms as chief judge of the 62-judge Minneapolis trial court, where he worked to incorporate procedural-fairness principles throughout his court. I had found the same concepts invaluable in my own work as a trial judge. Our paper was based on the extensive research work of psychology professor Tom Tyler and other social scientists, who have demonstrated that how disputes are handled has an important influence upon people's evaluations

⁴ For this section, I have drawn liberally on two prior articles I have coauthored with Kevin Burke: Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 COURT REVIEW 4 (2008) (available at <http://digitalcommons.unl.edu/ajacourtreview/226/>); Kevin Burke & Steve Leben, *The Evolution of the Trial Judge from Counting Case Dispositions to a Commitment to Fairness*, 18 WIDENER L. REV. 397 (2009).

of their experience in the court system. In fact, these researchers have convincingly shown that the public's view of the justice system is driven more by how they are treated by the courts than whether they win or lose their particular case.⁵

The American Judges Association approved the procedural-fairness white paper in 2007, and the Conference of State Court Administrators (representing the administrative leaders of the American judiciary) formally endorsed the AJA's white paper in early 2008.⁶ So there is growing acceptance in both academia and the justice system that courts must pay attention to procedural-fairness principles.

Tyler has identified four basic concepts that comprise procedural fairness and drive public opinion about the courts:

1. *Voice*: litigants' ability to participate in the case by expressing their viewpoint;
2. *Neutrality*: consistently applied legal principles, unbiased decision makers, and a transparency about how decisions are made;
3. *Respect*: individuals are treated with dignity and their rights are explicitly protected; and
4. *Trust*: authorities are benevolent, caring, and sincerely trying to help the litigants—a trust garnered by listening to individuals and by explaining or justifying decisions that address the litigants' needs.⁷

⁵ See, e.g., David B. Rottman, *Adhere to Procedural Fairness in the Justice System*, 6 CRIMINOLOGY & PUB. POL'Y 835 (2007); TOM R. TYLER, ET AL., *SOCIAL JUSTICE IN A DIVERSE SOCIETY* 75 (1997); Jonathan D. Casper et al., *Procedural Justice in Felony Cases*, 22 LAW & SOC'Y REV. 483, 483, 486-87, 504 (1988); Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC'Y REV. 513, 514-15 (2003); JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* 67-96 (1975).

⁶ Conference of State Court Administrators, Resolution 6, *In Support of AJA White Paper on Procedural Fairness* (July 30, 2008), reprinted in 44 COURT REVIEW 48 (2008).

⁷ Tom R. Tyler, *Procedural Justice and the Courts*, 44 COURT REVIEW 26, 30-31 (2008).

People view fair procedures as a way to produce fair outcomes.

An extensive 2005 study in California found that perceptions of procedural fairness were “the strongest predictor by far” of public confidence in the California court system—if litigants or members of the public perceived that the court provided fair treatment in the aspects Tyler identified, their overall opinion of the court system was much more positive.⁸ Significantly, the elements of procedural fairness dominate people’s reactions to the legal system across ethnic groups, across gender, and across income and educational levels.⁹

While the public focuses on the fairness of the process, judges and lawyers tend to focus on fair outcomes, often at the expense of meeting the criteria of procedural fairness that are critical to public perceptions of the courts.¹⁰ Figure 1, a chart provided in the report of California’s separate surveys of attorneys and the general public, aptly demonstrates the different ways in which these two groups look at the importance of procedural fairness and outcome fairness.

We can only speculate about the reasons for this. Traditional law-school education focuses on outcomes; first-year students learn the holding of each case and then take those legal rules and make them into an outline of the key legal principles of substantive courses. In addition, attorneys are more familiar than others with a court’s typical procedures and thus do not feel as lost during the process.¹¹

⁸ DAVID B. ROTTMAN, TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS: A SURVEY OF THE PUBLIC AND ATTORNEYS 19-20, 24 (2005), *available at* <http://www.courts.ca.gov/5275.htm>.

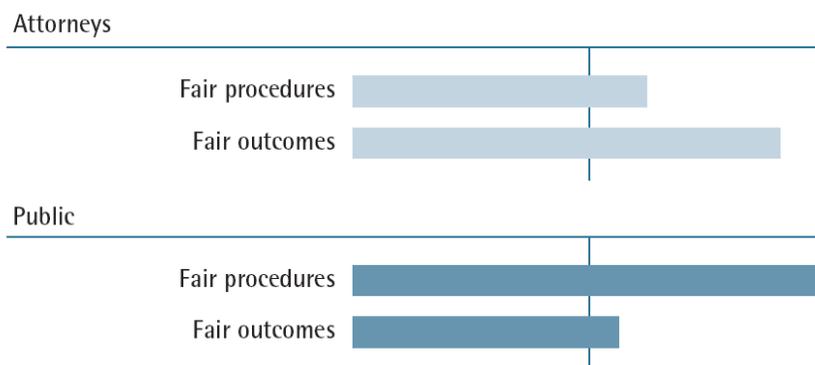
⁹ Burke & Leben, *supra* note 4, 44 COURT REVIEW 4, 7; Tom R. Tyler, *Procedural Justice and the Courts*, 44 COURT REVIEW 26, 28 (2008).

¹⁰ See Larry Heuer, *What’s Just About the Criminal Justice System?: A Psychological Perspective*, 13 J.L. & POL’Y 209, 215-17 (2005).

¹¹ See ROTTMAN, *supra* note 8, at 11, 18.

Figure 1¹²

Relative importance of significant factors on overall court approval



But whatever the cause for these differences in the views of the public and those of the law-trained community of attorneys and judges, the justice system depends upon public trust. That trust is enhanced when those in the justice system focus on making sure that all who pass through it feel that they were treated fairly.

In addition to the important role procedural fairness plays in affecting the public’s overall opinion of the court system, it also plays an important role in improving compliance with court orders. There’s less data on this effect of procedural fairness than on its impact on overall public opinion, but what’s presently available strongly suggests that when litigants perceive that they’ve been treated fairly, they are more likely to comply with the court orders that follow.¹³

¹² Reprinted from ROTTMAN, *supra* note 8, at 25.

¹³ See, e.g., TOM R. TYLER, WHY PEOPLE OBEY THE LAW 8, 172 (1990); Tom R. Tyler, *Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375 (2006); Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUSTICE 283, 286 (2003); Burke & Leben, *supra* note 4, 44 COURT REVIEW 4, 7; Tyler, *supra* note 7, at 28; Tom R. Tyler, et al., *Reintegrative Shaming, Procedural Justice, and Recidivism: The Engagement of Offenders’ Psychological Mechanisms in the Canberra Rise Drinking-and-Driving Experiment*, 41 LAW & SOC’Y REV. 553, 570-78 (2007);

For trial judges, if we're right that more procedural fairness results in greater compliance with court orders, then mastering the principles of procedural fairness is doubly important. It can help both to improve public opinion about the courts and to help judges cope with caseload pressures within existing resources. Even a small decrease in the number of hearings required for violations of bond or probation conditions or domestic-violence orders could be quite helpful.

II. *Areas of Trial Work Implicating These Concepts*

For most trial judges, the majority of their work takes place in the open—on the bench in a courtroom open to the public. For many, the majority of the day is spent sitting at the bench. People in the courtroom will form impressions of the judge based on verbal and nonverbal cues, the substance of what the judge says and does, and the actions of the judge's staff. Let's consider each of these separately.

Verbal and Nonverbal Cues. Once a judge begins to consider the world from a procedural-fairness viewpoint, things that once seemed normal behavior on the bench are recognized as counterproductive. For example, most trial judges I've met have at some time signed a stack of orders on the bench. I did it, and I never gave a thought to what the parties in the case then proceeding in front of my were thinking. (Well, sometimes I did, in which case I made sure that I looked up periodically so that they knew I was still awake and paying attention.) But

Kevin S. Burke, *Just What Made Drug Courts Successful?*, 36 N.E.J. CRIM. & CIV. CONFINEMENT 39, 56-58 (2010); Allison Redlich, *Voluntary, But Knowing and Intelligent?*, 11 PSYCH. PUB. POL'Y & LAW 605, 610 (2005); DEBORAH A. ECKBERG & MARCY R. PODKOPACZ, FAMILY COURT FAIRNESS STUDY 3, 29, 32-33, 34-35, 38 (Fourth Judicial Dist. [Minn.] Research Division 2004), available at http://www.mncourts.gov/Documents/4/Public/Research/Family_Court_Fairness_Report_Final.pdf (last visited Aug. 29, 2011); Katherine M. Kitzmann & Robert E. Emery, *Procedural Justice and Parents' Satisfaction in a Field Study of Child Custody Dispute Resolution*, 17 LAW & HUM. BEHAV. 553, 554 (1993).

when you *do* think about this from a procedural-fairness standpoint, doing anything other than paying attention to the case and parties in front of you while presiding over a hearing is indefensible. You could not explain to the editorial board of your local newspaper that the parties in court proceedings in front of you are only entitled to 50 percent—or less—of your attention. Nor could you explain that directly to the attorneys and parties in front of you. But they can *see* that you are not giving them your undivided attention.

Divided attention on the bench is an even bigger problem now that computers are available to judges there, just as divided attention for drivers is a bigger problem now that computers are available in smartphones and car consoles. Lots of research is showing that a person can't really sufficiently do a task with divided attention.¹⁴ Judges are no different.

One of the film clips Kevin Burke and I use in training judges about procedural fairness came from the courtroom of a well-regarded and experienced New Hampshire judge. He was hearing argument by the attorneys about whether to change the bail conditions pending trial in a domestic-violence case. The main issue being addressed was whether to lift the no-contact order. The defendant, a man, was the primary breadwinner for the family, but he had no car. Since the no-contact order went into place, the woman he had been living with was unable to provide rides for him to and from work, and the family's income had dried up. Whether you might think the no-contact order should have been lifted or kept in place, all judg-

¹⁴ See generally M.H. Sam Jacobson, *Paying Attention or Fatally Distracted? Concentration, Memory, and Multi-Tasking in a Multi-Media World*, 16 J. LEG. WRITING INST. 419 (2010); David Glenn, *Divided Attention: In an Age of Classroom Multitasking, Scholars Probe the Nature of Learning and Memory*, CHRON. HIGHER ED., Feb. 28, 2010, available at <http://chronicle.com/article/Scholars-Turn-Their-Attention/63746/> (last visited August 30, 2011). The United States Department of Transportation has a separate website providing information about distracted driving at www.distraction.gov.

es would surely agree that this family had no more important issue to be decided by a court than whether this no-contact order was to remain in place for another three months or more pending trial. But during most of the argument, the judge was flipping through and processing a stack of routine documents requiring his signature. When the victim's turn to speak came, she started telling the judge that the defendant "never really hit me that night," and the prosecutor objected. Before the judge looked up and reacted, the victim had in effect sustained the objection by moving on to something else. The judge had lost control of his own courtroom, his attention sufficiently divided that he could not react as quickly as the prosecutor or the lay victim did.

That video clip provided an example both of divided attention and of a situation in which the parties in court might well perceive that the judge didn't give his full attention and appropriate concern to their case. More broadly, videotapes can be a great way to assess the various verbal and nonverbal cues a judge gives from the bench. In New Hampshire, six trial judges volunteered to be filmed for half a day each, and we've used portions of these videos in judicial-training programs. In addition, though, part of what we wanted to do was to see what a judge could learn on his or her own simply by watching such a videotape. In Appendix A, you can read the comments made by these New Hampshire judges after watching their tapes. In all likelihood, many of the comments of the New Hampshire judges would apply to most judges across the United States.

Doing a video self-assessment this way is not difficult. For the New Hampshire project, each judge advised those in attendance that a film was being made solely for judicial-training purposes, and that only the judge would be shown on the tape. The camera, set up to the side of the courtroom, was turned on and generally ran for about half a day. While the audio in such a setup is not ideal, it's certainly adequate for this limited purpose. If a judge wants to go beyond self-assessment, the tape could be viewed by someone else who could give feedback—the

judge's spouse, another judge, a communications professor or student, or someone else whose opinion the judge would respect.

What the Judge Says and Does. Paying attention to procedural-fairness concepts doesn't mean that people no longer care about outcomes; it's still important for a judge to get the outcome right. But what the judge says and does along the way, including the judge's explanation of the ruling, goes a long way in determining whether litigants and others will accept that decision.

For those trial judges who issue written opinions or rule frequently on written motions, the suggestions contained in the next section for appellate judges may be equally applicable to you. For the many rulings that are made from the bench, however, procedural-fairness concepts still remain in play. Most rulings should be understandable not only to attorneys but to parties and courtroom observers. If the parties and observers don't understand what has happened, they can't tell whether the judge was trying to be fair or not. Explaining decisions in clear language, while showing that the decision was made based on neutral principles (like a statute that might govern a landlord-tenant dispute), is important in showing neutrality and trustworthiness.

Listening skills are a key ingredient for a trial judge who wants to master procedural fairness. The voice aspect requires both that parties have a chance to be heard and that they perceive they were understood, even if the court ultimately rules against them. Unless the judge correctly understands what has been said and gives an indication of that understanding, parties can go away without having their need for voice in the proceedings being met.

Yet listening skills are rarely taught in either legal or judicial education. Reading and writing are a focus, but listening is not. There are some useful training programs available, and

listening-skills training is an area in which judges and other court personnel might well work together toward the common goal of providing better service to the public. For a judge who wants to work on this individually, there's a useful online evaluation test and booklet about how to improve listening skills available from a company called HRDQ.¹⁵ Such a course can help a judge think through topics like how to maintain attention during a lengthy hearing, how to focus, and how to help speakers (like attorneys and witnesses) communicate with the listener (here, the judge).

Actions of the Judge's Staff. Courtroom personnel also give verbal and nonverbal cues about who and what is important in the courtroom and courthouse. Moreover, their behavior may be different when the judge is present than at other times. Ultimately, judges are responsible for those who work in our courts, and we should try to bring the staff on board in meeting the procedural-fairness expectations of the public.

III. *Areas of Appellate Work Implicating These Concepts*

To date, procedural-fairness research has concentrated on trial courts, not appellate ones. But there are obviously procedural-fairness perceptions at work at the appellate level as well. Let's review some of the settings in which procedural-fairness concepts might play out at the appellate level.

Motions. Appellate courts get lots of motions. The Kansas Court of Appeals gets about 10,000 each year. Obviously you can't issue detailed written orders that show you've carefully considered each of 10,000 motions and still keep up with the rest of the work. After all, an appellate court's main task is deciding the cases based on briefing and argument, not figuring out all those motions.

¹⁵ Their program guide and assessment test, called "Learning to Listen," can be accessed online at <http://www.hrdqstore.com/Learning-To-Listen-Online-Participant-Guide.html> (last visited August 30, 2011). At present, the test and guidebook cost \$13 when purchased individually online.

But I suspect that sometimes lawyers and litigants rightly wonder whether appellate judges are paying any attention at all to the substance of the motions they've filed. In my court, rulings were traditionally handled by a single judge, who would write something like, "Accepted," or "Denied," or "Denied on present showing," on the first page of the motion. And that was our order. If you received such an order, how confident would you be that the court understood what you had requested, respected your right to ask, cared about your rights, and applied neutral principles in its decision?

Perhaps we on the appellate bench sometimes hide behind a generally heavy workload and the overall numbers showing we have so many motions that providing more appropriate orders seems impossible. When you look behind the 10,000-motion number on my court, you find that replies were filed in less than five percent of those motions. Thus, even if we assume that all motions with replies are opposed (while in fact some replies tell us that the other party has no objection), that means that fewer than 5 percent of my court's motions are contested. Now we're down to only 40 motions per month.

My guess is that only a few of the 40 or fewer contested motions per month need to have something more than the present, terse handwritten order. In recent years, our court's motions panel has been preparing explanatory written orders on a regular basis as they've deemed it appropriate. Whether explicitly focused on procedural fairness or not, the increased use of written orders has undoubtedly helped in public perceptions of procedural fairness in the court's handling of motions. But, to the extent appellate courts throughout the country are not yet doing so, they should start thinking more carefully about perceptions of procedural fairness when ruling on motions. What *do* lay people think when their attorney tells them that their motion has been "denied on present showing?"

Oral Argument. The way a judge acts during oral argument can certainly leave an impression about whether the judge genuinely seems to want to hear the litigant’s position, acts in a respectful manner to the parties and their attorneys, and seems sincerely interested in a fair resolution. Judges can certainly argue about whether those are the primary purposes of oral argument. But if the public is viewing our work through a procedural-fairness lens, then a failure by appellate judges to consider this perspective when conducting oral argument risks alienating the public we serve.

Let’s consider the views of one litigant who attended an argument in the United States Supreme Court. Senator John McCain attended oral argument in *Citizens United v. Federal Election Commission*.¹⁶ After the decision came out, McCain said that he wasn’t surprised by it: “I went over to observe the oral arguments. It was clear that Justice Roberts, Alito, and Scalia, by their very skeptical and even sarcastic comments, were very much opposed to [it.]”¹⁷ McCain was left with the impression that these justices, who McCain noted had no experience in the political arena, weren’t really interested in understanding the perspective of others, including that of the majority of both houses of Congress. Leaving impressions like that is not healthy for the court system.

Now, one may say that this was an unusual case because most of the time, few if any members of the public come to watch appellate arguments. But public access to appellate courtrooms is changing. Many state supreme courts offer streaming audio or video coverage, and a simple Google search for a judge’s name can lead to a blog or other nontraditional account of someone’s experience with the courts.

¹⁶ 130 S. Ct. 876 (2010).

¹⁷ Transcript, *Face the Nation*, Jan. 24, 2010, available at 2010 WLNR 1538117 (Westlaw).

Moreover, judges generally don't know who the people in the gallery are. Was the crime victim present when a judge made a cavalier comment? Did the judge seem to care about the case as much as how much time was left for oral argument? Did the judge seem to pay attention at all? It's easy to think of many situations in which judges might give attendees a bad impression of the court system—one that could stick with them for a very long time.

Opinions. Our opinions say a lot from a procedural-fairness vantage point as well. Opinions that skip over any recognition of the concerns of the parties may leave the impression that the court didn't care about them, especially if the case ended up being decided on something that seems like a legal technicality, such as the statute of limitations. Opinions written in something other than plain terms understood by a lay reader say that the court's intended audience is lawyers, not litigants or members of the public.

Judges have certainly differed over whether opinions should be written for a lay audience or for lawyers. But if we think about it from a procedural-fairness viewpoint, only opinions written for a lay audience can gain acceptance from someone who values procedural fairness. Can a litigant who finds that she can't understand portions of the opinion really feel that the judge cares about her? Will a litigant who doesn't understand the explanation of the legal principles involved feel that his case has been decided on neutral principles rather than judicial bias disguised in gobbledygook?

We must recognize that the audience for judicial opinions has changed dramatically with web access. When most of today's appellate judges went to law school, appellate opinions were mostly read by—and understandably were written for—lawyers. But that's not the state of things today. In 2009, there were more than 100,000 separate viewings of Minnesota Supreme Court opinions on the court's website. There were about 74,000 website viewings of published Minnesota Court of Ap-

peals opinions and even 139,000 separate viewings of that court's *unpublished* opinions.¹⁸ With ease of access, litigants and the public are reading the opinions of appellate courts.

Judges like to emphasize that they make up a branch of the government. But surely citizens need to understand what any branch of their government does. The citizenry is certainly showing interest: the Minnesota court system's website was visited 4.75 million times in 2009 by nearly 2 million different individuals.¹⁹ Unless appellate opinions are written for the lay reader, citizens cannot be expected to understand what the appellate courts are doing.

Let me give one example. My court had a case in which a man who now lives in Africa had filed a court case to set aside the adoption of his biological son. This wasn't his first visit to the Kansas court system, and his new claim was barred by *res judicata*. But the district court had already told him that, and he had appealed, listing 21 different reasons he said the district court had erred in a 45-page initial brief and a 12-page reply brief. Our court's majority opinion told him that he had "fail[ed] to present a single reason why the district court erred in denying his motion as *res judicata*," but it neither addressed his separate claims nor explained the concepts beyond *res judicata* rules.²⁰ The opinion was undoubtedly typical, though, of how most courts in the United States would resolve such a case: it provided the basic factual background, and it told the litigants that the father's attempt to reopen the adoption more than four years after it had been court-approved was too late and barred by the doctrine of *res judicata*.

I wrote a six-paragraph concurring opinion (one that with minor revision could have served as the court's opinion). I in-

¹⁸ Email correspondence with John Kostouros, Minnesota Court Information Office, January 29, 2010 (on file with the author).

¹⁹ *Id.*

²⁰ *In re Adoption of B.M.J.F.*, 2010 WL 3665154, at *2 (Kan. App. 2010).

clude it here because it provides one example of how appellate courts might tailor an opinion to focus on procedural-fairness concepts through plain English and an explanation of the concepts at issue:

The history of N.M.'s sporadic appearances in the Kansas court system to reassert claims that he previously had abandoned suggests that he may not understand some of the overriding legal principles we must follow. I offer this concurring opinion in the hope that he may yet understand them. See Ronner, *Therapeutic Jurisprudence on Appeal*, 37 Ct. Rev. 64 (Spring 2000).

The American court system works hard to ensure that court proceedings involving children are resolved in as short a time frame as possible. We recognize that children deserve an answer to the most basic questions about their lives—like, who are my parents? Where will I live?—within a time frame that is reasonable as judged from a child's viewpoint.

The ultimate need for legal disputes to be resolved, so that people may get on with their lives and business affairs, is also the driving force behind the legal doctrine called *res judicata*. Under *res judicata*, when a dispute has been decided in a final court judgment, the same issues may not be relitigated in a later suit. That allows parties to go on about their business based on the court's final judgment without worrying that some later court action might yet revisit the same issues.

The court's opinion has correctly held that *res judicata* applies here. N.M.'s parental rights were terminated by the district court in its January 2003 ruling. N.M. appealed, but when he dismissed that appeal, the district court's ruling terminating his parental rights became a final judgment. And after that, the proposed adoptive parents proceeded with their adoption of

B.M.J.F. based upon the final judgment, which terminated N.M.'s parental rights. So *res judicata* prevents further litigation over the matter.

Even if some exception to the *res judicata* rule were available—and I am not aware of one—this is exactly the sort of case in which we would be reluctant to apply it. This child has lived with the adoptive family from a few days after his birth in 2002 until now. From the time the adoption was finalized in October 2004 until N.M. filed pleadings in April 2009 seeking to reopen the case, the child's family knew that there was a final judgment terminating N.M.'s parental rights and an order of adoption in place. When we look at this situation from the standpoint of the child, he has had only one home and one family. He and his family have a right to rely upon the finality of the 2003 ruling terminating N.M.'s parental rights, a judgment that became final when N.M. voluntarily dismissed his appeal in 2004.

N.M.'s continued interest in his biological son is understandable, perhaps even laudable. But no matter its sincerity, it is no longer an interest that Kansas law can force this 8-year-old boy's adoptive parents to respond to.²¹

Obviously, I have not yet convinced even all the judges on my own court to apply these principles in every case; after all, I wrote a concurrence, not the court's opinion. Truth be told, the difference here represents a real and reasonable point on which judges may disagree. An intermediate appellate court like mine has a very busy docket, and we simply can't take the time to write every opinion as if we were the United States Supreme Court. Compromises often must be made between the dual goals of timeliness and thoroughness.

²¹ *Id.* at *2-*3 (Leben, J., concurring).

But from my experience, there's no downside to writing for the lay audience. Doing so will often expose flaws in legal reasoning that were hidden when the underlying concepts weren't explained. Sometimes a judge will find that the result that at first seemed appropriate really makes little sense. It's a rare case—if one exists—that a judge would not be able to explain to a high-school student, a family member, or any other non-lawyer if the judge really made that a goal for every opinion.²²

*IV. Placing the Court's Role in Context*²³

Sometimes both trial and appellate courts can help litigants and the public better understand that a case has been handled fairly by clearly explaining the role of the courts.²⁴ The court's role often is more limited than the public in general—and the litigants in particular—realize. For example, when citizens appeal government action in the courts, they rarely think in advance about the standard of review that will be used to judge that governmental action. Rather, having lost in round one, they seek a second round to press their case on the merits. Meanwhile, although judges often put a section in a written opinion regarding the standard of review, it's often written in

²² On my court, worker's-compensation cases are among the most difficult in which to carry out this task. The statutory language is often convoluted, and the legal work is highly specialized. Thus, the decisions I'm reviewing are almost always in some form of legalese. But I have found that if I didn't first sort out where my individual case fit into the bigger picture, I really couldn't fully understand it as a judge. Making sure that I was always trying my best to explain the bigger picture in my opinions and to write for a lay reader has given me much greater confidence in worker's-compensation cases that we have ruled correctly than I otherwise would have had.

²³ Parts of this section are adapted from Steve Leben, *Thoughts on Some Potential Appellate and Trial Court Applications of Therapeutic Jurisprudence*, 24 SEATTLE U.L. REV. 467 (2000).

²⁴ See generally Deanell Reece Tacha, *Renewing Our Civic Commitment: Lawyers and Judges as Painters of the "Big Picture,"* 41 KAN. L. REV. 481 (1993).

legalese rather than presenting a plain-language explanation of whatever limits there may be on the court's role.

The handling of zoning appeals provides a good example. I wonder how often lawyers take the time to explain to their clients the limited role the court will play in resolving these disputes. As a trial judge, I handled the appeal of a city's approval of a large auto mall in one of the Kansas-side suburbs of Kansas City. The appeal was filed by neighboring property owners and their homeowners association, each of which had opposed the rezoning before the city commission. In a 15-page written opinion, in addition to noting that I had reviewed the full 2,600-page administrative record, I also devoted a full page of the opinion to a discussion of the role of a court in zoning matters, which began by noting that elected officials had made the decision:

We live in a democracy in which many of the important decisions to be made that affect our lives are rightly to be made by our elected officials. Although the consideration by a city council of a rezoning request is deemed a quasi-judicial proceeding, the initial decision is to be made by elected officials, not judges. It is in the making of that initial decision that a great deal of discretion exists. In a given case, it might well be a reasonable decision either to grant or to deny the requested rezoning, and the decision would depend upon the elected body's preferences for its city's development.²⁵

That introduction set the stage for further discussion of the court's formal standard of review, under which the elected body makes a decision that must be upheld unless it is well beyond the range of potentially reasonable decisions.

²⁵ *Lancaster Homes Ass'n v. City of Overland Park*, No. 99C10769, slip op. at 1 (Johnson Co., Kan., Dist. Ct. Jan. 6, 2000). A longer excerpt from the opinion is found at Leben, *supra* note 23, at 468-69.

One of the most unpopular United States Supreme Court decisions in recent decades was *Kelo v. City of New London*,²⁶ the Court's decision upholding a city's eminent-domain power. Historically, public approval of the United States Supreme Court has been at about 60 percent—but approval in the Gallup Poll's regular surveys dipped to 42 percent in the immediate aftermath of the *Kelo* decision. It returned to 56 percent in the next survey, only three months later, and to 60 percent by the following year. (More recently, perhaps related to general dissatisfaction with all branches of government, approval of the Supreme Court has again dipped to 51 percent in the September 2010 survey.)²⁷ When one looks at the *Kelo* opinion, it reads like a typical legal discussion of relatively abstract concepts. Perhaps had it been written more for the lay reader—and emphasized the leeway that a court must give to elected officials—the negative public reaction might have been lessened.²⁸

V. *Some Thoughts on Measurement of Adherence to Procedural-Fairness Principles for the Purpose of Evaluating Judges*

A. Trial Judges

In many jurisdictions, whether as part of a formal, government-sponsored evaluation process or a survey by a local bar association, attorneys are asked a number of questions that do, in part, evaluate a trial judge's adherence to procedural-fairness principles. For example, standard questions asked of lawyers may include whether the judge:

²⁶ 545 U.S. 469 (2005).

²⁷ Gallup Poll data regarding its surveys of public approval of the United States Supreme Court is reported on Gallup's website at <http://www.gallup.com/poll/4732/Supreme-Court.aspx> (last visited August 26, 2011). The data reported are from Gallup surveys from June 24-26, 2005 (42%); September 12-15, 2005 (56%); September 7-10, 2006 (60%); and September 13-16, 2010 (51%). The *Kelo* decision was issued June 23, 2005.

²⁸ For suggestions on dealing with high-profile cases, see Robert Alsdorf, *High-Profile Cases: Are They More Than a Wrinkle in the Daily Routine?*, 47 COURT REVIEW 32 (2011).

- displays fairness and impartiality toward each side of the case;
- allows parties latitude to present their arguments;
- allows parties sufficient time to present their case;
- is courteous toward court staff;
- demonstrates appropriate demeanor on the bench;
- clearly explains all oral decisions; and
- provides written opinions and orders that are clear.²⁹

A more tailored assessment of adherence to procedural-fairness principles can certainly be done. Since most public interaction with trial judges takes place in the courtroom, some effective method for evaluating judges there is critical. As will be discussed in a later section of this paper, Utah has begun a comprehensive courtroom-observation program specifically focused on assessing judicial adherence to the principles of procedural fairness. Using trained lay observers for courtroom observation seems essential for any comprehensive evaluation of a trial judge's performance. As explained previously in this paper, lawyers tend to become more focused on outcome than process, so attorney evaluations of judges may not reflect the public's greater emphasis on procedural fairness. Trained lay observers should be able to provide valuable information regarding a judge's work on the bench.

There are other methods that could be used to assess trial-judge performance related to procedural fairness. For example, a professor of communications would have the ability to provide excellent feedback regarding both verbal and nonverbal cues a judge may be giving from the bench. A communications professor who reviewed this paper or one or two articles about procedural fairness would be able to provide a good evaluation of a judge's procedural-fairness performance. A judge, or a local court, could arrange with a local professor at a college, univer-

²⁹ Model Attorney Survey for Trial Judge Evaluations, *in* INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, SHARED EXPECTATIONS: JUDICIAL ACCOUNTABILITY IN CONTEXT, Appendix D (2006).

sity, or community college to provide feedback to the judge or court.

For a more formal process, the Hennepin County (Minn.) District Court engaged in a program to help each of its judges develop judicial skills and receive feedback on procedural-fairness issues. The court surveyed attorneys who had appeared in each judge's courtroom for the past year as well as internal members of the court team (chief judge, court reporter, law clerk, court clerks, probation officers, etc.). Specific questions were targeted to procedural-fairness issues. Each judge then had the opportunity to review the data regarding that judge with a facilitator, a group that included psychologists, private attorneys, and current and former judges—all of whom had gone through a training session about the data they'd be reviewing with the judges. All but two of the then-60 Hennepin County judges reviewed the data with a facilitator as a way of enhancing both understanding of the data and what steps a judge might take in response to it. A full report about this Hennepin County project is available on the Internet.³⁰

In a perfect world, a combination of the Hennepin County project (surveys of attorneys along with court personnel), courtroom observations by trained lay observers, an assessment by a communications professor or some other person with expertise in that area, and a session with a facilitator to talk through how the judge might best understand and act on the information provided would be ideal. In the real world, each judge, court, and state must determine what sort of evaluation program can be sustained over time to achieve the best result possible with available resources. The Hennepin County project properly emphasizes that performance-evaluations can be

³⁰ Marcy R. Podkopacz, Report on the Judicial Development Survey (Hennepin County [Minn.] Dist. Ct. 2005), *available at* http://www.mncourts.gov/Documents/4/Public/Research/The_Judicial_Development_Survey.pdf. Reports regarding multiple fairness studies conducted by the Hennepin County District Court from 2002 to 2007 are on the court's website at <http://www.mncourts.gov/district/4/?page=1756>.

an important part of judicial skills development as well as something the public needs to evaluate judges at retention elections.

B. Appellate Judges

Three immediate problems unique to the appellate context are attendant to the objective evaluation of appellate judges for adherence to procedural-fairness concepts. First, appellate judges generally act as a group. For courts that sit in three-judge panels, outcomes—and even opinion language—require the agreement of at least two judges. For courts with greater numbers, like state supreme courts, even more must agree before action takes place. Second, even though fairness concepts have been incorporated for many years into what we expect from trial-court judges,³¹ a similar consensus may not yet exist at the appellate level. Third, even if we can all agree that appellate courts must meet some acceptable performance level for procedural fairness, we lack time-tested, standardized measurement tools.

In my view, none of these objections should prevent us from evaluating appellate judges at least in part upon their adherence to procedural-fairness principles. I base that viewpoint on the evidence that procedural-fairness principles drive public opinion of the courts, litigant satisfaction, and litigant adherence to court orders. While there is little research at present specifically tying those conclusions to appellate courts, there also is little reason to suggest that they wouldn't apply.

If we can agree on the importance of procedural fairness, we have to come up with some measurement to see whether we are incorporating it. As my friend Kevin Burke puts it, “We

³¹ The National Center for State Courts issued trial-court performance standards in 1990, including explicit standards for equality, fairness, and integrity, with accompanying measurements. See Pamela Casey, *Defining Optimal Court Performance: The Trial Court Performance Standards*, Winter 1998, COURT REVIEW, at 24.

measure what we care about and we care about what we measure.” That’s part of what’s behind judicial performance evaluations, anyway: they not only provide information to the public but also provide feedback to the judge so that he or she can improve. Judges will naturally focus on what’s measured and publicly reported.

Kansas has had formal judicial-performance evaluations for only four years,³² but all ten of the appellate judges who answered a survey last year said that going through that process had been either significantly (20%) or somewhat (80%) beneficial to their professional development.³³

Among the questions asked to Kansas attorneys in surveys about appellate judges were several related to procedural fairness:

- whether the judge is fair and impartial to each side;
- whether the judge allows parties to present their arguments and answer questions;
- whether the judge is courteous toward attorneys;
- whether the judge participates in oral argument with good questions and comments;
- whether the judge writes clear opinions; and
- whether the judge writes opinions that adequately explain the basis of the court’s decisions.³⁴

³² The 2011 Kansas Legislature provided no funding for the Kansas Commission on Judicial Performance for the coming year but did not eliminate the commission’s statutory authority. At least for the time being, there are no plans—and no funds—for further judicial-performance evaluations in Kansas, though it’s uncertain whether the program might be funded in the future. Kansas did public evaluations of judges on the ballot for retention in both trial and appellate courts in 2008 and 2010.

³³ KANSAS COMMISSION ON JUDICIAL PERFORMANCE, SUMMARY REPORT ON SURVEY OF KANSAS RETENTION JUDGES ABOUT THE KCJP JUDICIAL PERFORMANCE EVALUATION PROGRAM 2 (Jan. 2011).

³⁴ For a sample Kansas appellate-judge performance evaluation, you can review the 2010 evaluation of Justice Carol A. Beier, which is available on the web at <http://www.kansasjudicialperformance.org/evaluation.cfm?JudgeID=117>.

Similar questions are used in other states, so even if there isn't universal agreement on what should be measured, there is at least substantial commonality in what is being measured.

Given the response of Kansas judges that they had found the performance evaluation valuable in their professional development, it would seem that those judges were in agreement that criteria like these are appropriate ones to consider. I can say from my own personal experience, as well as from discussions with my fellow judges, that we took seriously the ratings and comments provided by the attorneys who had been before us for oral arguments.

Beyond questions like these in surveys of attorneys, at least two other measures of adherence to procedural-fairness concepts by appellate judges seem advisable. First, some evaluation commissions review written opinions from each judge. That review should explicitly consider whether the opinion is understandable to a lay reader. Decisions from a branch of government should be understandable to the citizenry. While judges may differ about who the intended audience for an opinion may be, the public—acting through a formal performance-evaluation commission where ones exist—is entitled to state its own expectation that judicial opinions should be understandable to the lay reader. In addition, written decisions should be reviewed under additional procedural-fairness notions, like whether the opinion accurately reflects the basic arguments made by the parties. Second, Utah's performance evaluations of trial judges have recently expanded to include courtroom observations; the same should be done at the appellate level. When a judge presides over an appellate argument, does he or she do so in a fair manner? Does a judge hog most of the time in oral argument or let the attorneys have at least some time to respond to questions from the bench? Do the judge's words and body language show interest or disinterest in the case and the argument?

Let me add a comment about those judges who say little during oral argument. Justice Clarence Thomas gets noticed in oral argument mainly for the number of years it has been since he last asked a question.³⁵ But I would suggest that it's unfair to use the number of questions—even whether a judge asks questions at all—as some absolute measure. Everyone has a different learning style; some learn from oral presentations, some from written presentations, some from discussions. Some judges just don't get much out of oral argument. So long as a judge who presides over oral argument does so fairly and courteously while listening to the presentations, it should not be a requirement that the judge ask questions. For those judges who do regularly ask questions, though, they should be expected also to allow some chance for the lawyers to answer them, and follow-up questions should not suggest that the judge wasn't listening. All of these things could be assessed through courtroom observation of at least one oral-argument docket for each judge during a performance-evaluation cycle.

VI. *Utah's Courtroom-Observation Program*

Utah is taking a position of national leadership in using actual observations of judges doing their daily work on the bench as part of a statewide judicial-performance evaluation program. Only two other states have had courtroom observation as part of a statewide, government-sponsored evaluation of trial judges.³⁶ Alaska has used courtroom observations as part of its evaluation program for many years, and its observers rate performance on a 1 (poor) to 5 (excellent) scale in 10 are-

³⁵ Nina Totenberg, *Skip the Legalese and Keep It Short, Justices Say*, NPR Morning Edition, June 13, 2011, available at 2011 WLNR 11789153 (Westlaw) (noting that Clarence Thomas hadn't asked a question in more than five years).

³⁶ Email correspondence, August 29, 2011, with Malia Reddick, Director of Judicial Programs, and Natalie Knowlton, Research Analyst, of the University of Denver's Institute for the Advancement of the American Legal System, which tracks state judicial-performance evaluation programs (on file with the author).

as.³⁷ Courtroom observations are also part of the process in Colorado, but Colorado has local commissions for its trial judges and thus the procedures used for courtroom observations may vary from place to place.³⁸ Utah's new program may well be the most comprehensive, and it is the only state whose observation program attempts a comprehensive review of whether trial judges adhere to procedural-fairness principles.

Utah's current, 13-member, independent Judicial Performance Evaluation Commission was created in 2008, with directions to have a system in place to provide public evaluations of Utah's judges in time for the 2012 judicial-retention election.³⁹ The statute creating the evaluation commission required that its judicial evaluations be based in part on courtroom observation.⁴⁰ Specifically, the Utah Legislature has provided that the evaluation commission "shall consider only" certain types of information, specifically including information obtained from courtroom observation,⁴¹ and it required that the evaluation commission adopt rules for conducting courtroom observations,

³⁷ The 2010 report of Alaska Judicial Observers, Inc., which provides a biennial report of its observations to the Alaska Judicial Council, can be found at <http://www.ajc.state.ak.us/retention/retent2010/judobse10.pdf> (last visited August 29, 2011). Among the criteria evaluated are whether the judge paid attention, made remarks that were understood and made sense, showed understanding and consideration to the plaintiff or victim, showed understanding and consideration to the defendant, explained the proceedings to participants, and treated all participants professionally.

³⁸ Each local commission member is required to make "unannounced visits to the courtroom to observe at least three of the trial judges being evaluated," and each local commission must make sure that each judge being evaluated "receives adequate observation." Rule 10(b), Colorado State Commission on Judicial Performance, *available at* <http://www.coloradojudicialperformance.gov/documents/rules.pdf> (last visited August 29, 2011).

³⁹ 2008 Utah Laws ch. 248, § 5, *codified at* Utah Code Ann. 78A-12-201.

⁴⁰ 2008 Utah Laws ch. 248, § 7, *codified at* Utah Code Ann. 78A-12-203(2)(c).

⁴¹ Utah Code Ann. 78A-12-203(2).

including “a list of principles and standards used to evaluate the behavior observed.”⁴²

The Utah Judicial Performance Evaluation Commission adopted formal rules establishing procedures for the courtroom-observation program in October 2010,⁴³ after it had carried out a pilot observation program with 10 judges who will be up for retention in 2012.⁴⁴ In its rules, the commission formally adopted the four generally recognized criteria for procedural fairness as the principles and standards that would be used to evaluate judicial behavior in the courtroom: neutrality, respect, voice, and trustworthiness. In addition, the rules provide several representative behaviors for each aspect of procedural fairness. For example, for voice, the rule suggests that a judge may provide voice to litigants by “giving parties the opportunity, where appropriate, to tell their story or voice their perspective and [by] demonstrating that their story or perspective has been heard.”⁴⁵ At least three representative behaviors are given for each of the four aspects of procedural fairness.

Volunteers who have been approved by the evaluation commission do the courtroom observations.⁴⁶ Each volunteer must complete a training program before doing the observations.⁴⁷ In its pilot-project evaluations, the training included an overview of procedural-fairness concepts through an introductory article by Professor Tom Tyler.⁴⁸

⁴² *Id.* 78A-12-203(3).

⁴³ Utah Admin. Code R597-3-3.

⁴⁴ See LIZ CORDOVA, 2009 UTAH COURTROOM OBSERVATION PILOT PROGRAM REPORT (Utah Judicial Performance Evaluation Commission Dec. 2010).

⁴⁵ Utah Admin. Code R597-3-3(4)(a)(iv)(A).

⁴⁶ Utah Admin. Code R597-3-3(2).

⁴⁷ Utah Admin. Code R597-3-3(2)(d).

⁴⁸ Each observer received a copy of Tom R. Tyler, *Procedural Justice and the Courts*, *supra* note 7. In addition, observers received an overview of the Utah Judicial Performance Evaluation Commission, an overview of the Utah court system, a glossary of legal terms, and information about courtroom etiquette. Cordova, *supra* note 44, at 10-11.

By December 2010, the Utah Judicial Performance Evaluation Commission had developed a form for use by its courtroom observers, and that form has been used thus far in 2011 to guide courtroom observations of Utah trial judges. The first part of the form graded judges on their performance in each of the four aspects of procedural fairness on a 1 to 5 scale: 1 (inadequate), 2 (substandard), 3 (acceptable), 4 (very good), and 5 (outstanding). In addition, observers were asked to provide written comments about what had been observed—good or bad—in each of those areas. The second part of the form asked for comments about whether the observer “would feel comfortable appearing before this judge as a litigant,” the organization and administrative efficiency of the judge’s court, the judge’s overall strengths and weaknesses, and anything else the observer thought notable.⁴⁹ Excerpts from the evaluation commission’s 2010 form are found in Appendix B to this paper.

Beginning in fall 2011, the evaluation commission plans to remove the 1 to 5 quantitative scoring and obtain only qualitative comments from the courtroom observers.⁵⁰ Excerpts from the courtroom-observation form the evaluation commission plans to use starting this fall are found in Appendix C to this paper. The new form collapses the four aspects of procedural fairness into three by dropping “trustworthiness” as an explicit category, but many of the representative behaviors listed in the commission’s rule defining trustworthiness have simply been moved to fit within either neutrality or respect. For example, whether the judge “listened carefully and impartially” is now one of the items courtroom observers are to assess under the topic of neutrality, while whether the judge “demonstrated interest in the needs, problems, and concerns of participants” is one of the items to be assessed under the topic of respect. Since courtroom observers are still being asked to evaluate all of the aspects of procedural fairness, this reorganization of the form

⁴⁹ Cordova, *supra* note 44, Attachment 1.

⁵⁰ Information about current plans and activities of the Utah Judicial Performance Evaluation Commission is based on an interview with Joanne Slotnik, its Executive Director, on August 29, 2011.

used by courtroom observers should not have any significant effect. The commission's decision to drop the 1 to 5 rating probably does not result in the loss of any useful information, either; quantitative ratings by five or fewer observers would be of little statistical significance.

The evaluation commission has contracted with an education professor who specializes in qualitative data analysis to synthesize the comments made by each courtroom observer for each judge. Qualitative content analysis is an accepted social-science research methodology that can help to find themes and patterns in qualitative data.⁵¹ The commission's consultant prepares a summary report of the comments made by up to five courtroom observers for each judge. Themes that emerge about a judge's bench behavior from different observers at different times may well be significant, especially when taken as a part of the evaluation commission's broader, overall evaluation of the judge.

Utah is the first state with a statewide performance-evaluation program to directly identify procedural fairness as the focal point for its evaluation of judicial behavior and performance. In theory, this has great potential for improving the public's perception of the Utah judiciary given the social-science research underlying procedural-fairness concepts. With the continued effort of Utah's judges, that potential can be realized.

⁵¹ See generally Yan Zhang & Barbara M. Wildemuth, *Qualitative Analysis of Content*, in BARBARA M. WILDEMUTH, APPLICATIONS OF SOCIAL RESEARCH METHODS TO QUESTIONS IN INFORMATION AND LIBRARY SCIENCE (2009), available at http://www.ischool.utexas.edu/~yanz/Content_analysis.pdf (last visited August 29, 2011).

APPENDIX A

A few years ago, six New Hampshire trial-court judges agreed to let themselves be videotaped while presiding on the bench for several hours, and then to let Kevin Burke and me use excerpts from those tapes in training other judges about procedural-fairness practices. Another part of the exercise was that each of the judges had to watch his or her own tape and then answer a couple of questions about what he or she had learned. Their answers are probably typical of what most judges could learn from such an exercise, so I have included them in this Appendix. My thanks to the New Hampshire trial judges—Gerry Boyle, Sue Carbon, Ned Gordon, James Leary, Deborah Kane Rein, and Mike Ryan—for their valuable contributions.

Question 1: Please give 2 observations of things you noted when watching the tapes that you may not have been aware of or paid sufficient attention to before.

- A. Time seems to go faster when you are sitting on the bench than when you are watching the hearing. Parties from other cases who are waiting to be heard are probably bored stiff and must feel that the Court has wasted their time.
- B. An enormous amount of time is taken up in completing forms while on the bench, particularly in criminal matters. This diverts the judge's focus away from the litigants and may make it appear like the judge is not paying attention to what is being said.
- C. I was reading and sometimes even writing while defendants were speaking. I was flipping complaints and other paperwork over and reading them while the defendant is presenting his position on bail conditions. Pretty rude.
- D. [There] is an appearance of impatience. I say appearance because I believe I am patient but, when presented with dozens of files to get through in a restricted time period, I have a sense of urgency that appears to me to come across as impatience. Rush, rush, rush.
- E. I have a tendency to look angry.
- F. I nod my head a lot—on the tape it's annoying. Perhaps in person it's not as bad (I hope!).

- G. I had no idea how much I nod during the course of a presentation. I am not sure whether this is good (because it shows I am affirming that I am listening) or whether it seems that I am agreeing with what they are saying, which can cause some problems.
- H. I was already aware of how slow I speak (not just on the bench but generally), but I was not aware of the number of large gaps in time that occur when I am thinking and how much of an opportunity it provides for a litigant/lawyer to fill the gap with unnecessary talk.
- I. The first behavior I noted was it appeared as though I was constantly looking down. I have found that in marital cases, the taking of good notes is very important so I look down to write more often than I would in other type cases. I think participants could find my inconsistent eye contact as meaning I was not paying attention.
- J. A second behavior was to ask counsel questions before asking the pro se litigant. I do not know how this is perceived by the pro se litigant. I do it only because counsel usually has a better handle on what the issues are.

Question 2: Please list 2 items on which you believe you might be able to improve your on-the-bench performance after viewing the tapes.

- A. Don't call a hearing and then spend 10 minutes trying to figure out the background of the case on the bench. I should read the file in advance or take a recess if necessary in order to appear informed when the hearing begins.
- B. I show my emotions easily. I tend to show more warmth toward attorneys I know and respect. I could perhaps be more stoic in that regard, particularly when the other party is pro se.
- C. I plan to put the paperwork down and make eye contact with the defendant when s/he is speaking. This change may well further exasperate the issue of time constraints, but I was truly struck by my putting my head down and doing busy work while someone was speaking to me.
- D. I plan to have the courtroom clerk separate those files with multiple or more complex charges so I can review them before

the hearing. With such preparation, I will have a better idea of the charges when I address the defendant and not have to read everything for the first time with him/her standing there.

- E. It would be helpful to smile and make a more welcoming greeting at the beginning of the case. I always thought I did, but at least from this angle, it seemed very curt.
- F. I should try to sound and look more even-tempered. Even though I am questioning the litigant (and suspicious of what he was telling me), it is nonetheless important to appear open-minded and even-tempered.
- G. I realized that I need to smile more to make people feel more at ease in the courtroom.
- H. I would like to decrease the number of pauses I create. In addition to the problem expressed above, I wonder if it makes people feel that I lack confidence, which in turn may make them less confident in me. I am not sure how to do this since it is the way I speak in general, but I might be able to come up with some helpful technique.
- I. If I were looking at this tape, I might think that I have all the time in the world to hear these cases because each hearing was longer than probably necessary. It was just an unusual day (generally we are swamped), but each case stayed within the time allowed on the docket (and the last one with the prisoner was just marking time until the plaintiffs (wife and daughter) appeared, which they did right after Gina turned off the camera). I am sure, however, that I am wont to allow people to go on longer than needed. I am not sure that this related to procedural fairness, but it does effect the court calendar. So, I could work on being more efficient while still giving everyone a full opportunity to speak.
- J. The first thing I need to work on is to be better prepared before the hearing so that it does not appear that I am unprepared by going through the file to look at the Motion when introducing the case. I try to read the pleadings the morning of the hearings but sometimes when I get to a hearing, I have forgotten what the issues were.
- K. The second thing is to remember to explain legal terms to the pro se litigants. I sometimes forget that not everyone speaks legalese.

APPENDIX B

EXCERPTS FROM THE UTAH JUDICIAL PERFORMANCE EVALUATION
COMMISSION'S COURTROOM OBSERVATION REPORT FORM (2010)

COURTROOM OBSERVATION REPORT

Judges can alleviate much of the public dissatisfaction with the judicial branch by paying critical attention to the key elements of procedural fairness: voice, neutrality, respectful treatment, and engendering trust in authorities. Judges must be aware of the dissonance that exists between how they view the legal process and how the public before them view it. While judges should definitely continue to pay attention to creating fair outcomes, they should also tailor their actions, language, and responses to the public's expectations of procedural fairness. By doing so, these judges will establish themselves as legitimate authorities; substantial research suggests that increased compliance with court orders and decreased recidivism by criminal offenders will result. Procedural fairness also will lessen the difference in how minority populations perceive and react to the courts.

*Hon. Kevin Burke, Minnesota District Court, Hennepin County,
and Hon. Steve Leben, Kansas Court of Appeals
"Procedural Fairness: A Key Ingredient in Public Satisfaction,"
Court Review*

This observation report has two parts.

The first part centers on the four principles of procedural justice: *neutrality, respect, trust, and voice*. For each principle, we ask a question and request three responses: (a) consider which behaviors you observed, (b) describe the judge's performance on the bench, and (c) score the judge on that principle.

We've provided a brief description of each principle. Please base all of your responses on the judge's behaviors which you observed while in court.

Do not expect to see all the sample behaviors each time you observe in court.

Select a score based on the following standards:

- 1 = inadequate performance
- 2 = substandard performance
- 3 = acceptable performance
- 4 = very good performance
- 5 = outstanding performance

The second part of this observation report asks additional, more general questions and provides an opportunity for other comments on your experience in this judge's court.

....

PART I

Neutrality

People bring their disputes to the court because they view judges as neutral, principled decision makers who make decisions based upon rules and not personal opinions, and who apply legal rules consistently across people and over cases.

Tom Tyler, "Procedural Justice and the Courts," Court Review

1. How would you describe this judge's ability to be neutral, principled, and consistent?

Consider, for example, whether:

- The judge clearly articulated awareness of the practical impact on the parties of the judge's rulings, including the effect of delay and increased litigation expense.
- The judge displayed judicial fairness and impartiality toward all parties.
- The judge applied rules consistently across people and over cases.
- The judge clearly explained the reasons for his/her decisions when appropriate.
- The judge maintained a neutral demeanor/expression while in court.
- The judge was open, clear, and transparent about how the rules of law were applied and how decisions were begin made.

....

Respect

Respect includes treating people well, that is, with courtesy and politeness, and showing respect for people's rights.

Providing people with information about what to do, where to go, and when to appear, all demonstrate respect for both those people and their right to have their problems handled fairly by the courts.

Tom Tyler, "Procedural Justice and the Courts," Court Review

2. How would you describe this judge's respect for people and their rights?

Consider, for example, whether:

- The judge provided participants with specific information about what to do, where to go, and when to appear.
- The judge treated everyone with courtesy, dignity, and respect.
- The judge maintained decorum in the courtroom.
- The judge demonstrated appropriate consideration for the rights of all persons in the court.
- The court helped interested parties understand decisions and what parties must do as a result.
- The judge used clear language when speaking to jurors, litigants, witnesses, and attorneys.
- The judge demonstrated respect for people's time and acknowledged their patience as needed.
- The judge respected the time of the participants & understood the personal and financial costs they may be incurring to participate in court proceedings.

....

Trustworthiness

People infer whether they feel that court personnel, such as judges, are listening to and considering their views; are being honest and open about the basis for their actions; are trying to do what is right for everyone involved; and are acting in the interests of the parties and not out of personal prejudice.

Tom Tyler, "Procedural Justice and the Courts," Court Review

3. How would you describe this judge's ability to earn trust?

Consider, for example, whether:

- The judge was open, honest, and sincere about the basis for actions.
- The judge demonstrated an intention to do what is right for everyone involved.
- The judge acted in the interest of the parties without regard to personal prejudices.
- The judge demonstrated interest in the needs, problems, and concerns of participants.
- The judge listened carefully and impartially.
- The judge avoided impropriety and the appearance of impropriety.
- The judge was prepared for the proceedings.

....

Voice

People want to have the opportunity to tell their side of the story in their own words before decisions are made about how to handle the dispute or problem. Having an opportunity to voice their perspective has a positive effect upon people's experience with the legal system irrespective of their outcome, as long as they feel that the authority sincerely considered their arguments before making their decisions.

Tom Tyler, "Procedural Justice and the Courts," Court Review

4. How would you describe the judge's skill at providing the participants a voice in the proceedings?

Consider, for example, whether:

- The judge allowed participants to voice their perspectives/ arguments.
- The judge demonstrated to the parties that their story or perspective had been heard.
- The judge behaved in a manner that showed the judge had fully considered the case as presented through witnesses, arguments, and documents before the court.
- The judge attended, where appropriate to the participants' comprehension of the proceedings.

....

PART II

Understanding that the Judicial Performance Evaluation Commission will ultimately recommend that the voters retain a judge or not, is there anything else you would like the commission to know about your courtroom observation experience?

Consider, for example:

whether you would feel comfortable appearing before this judge as a litigant, the organization and/or administrative efficiency of the judge's court, the overall strengths and weaknesses of this judge's performance, and anything else particularly notable about your courtroom observation experience, not already covered in this report.

....

APPENDIX C

EXCERPTS FROM THE UTAH JUDICIAL PERFORMANCE EVALUATION
COMMISSION'S COURTROOM OBSERVATION REPORT FORM (2011)

COURTROOM OBSERVATION REPORT

Judges can alleviate much of the public dissatisfaction with the judicial branch by paying critical attention to the key elements of procedural fairness: voice, neutrality, respectful treatment, and engendering trust in authorities. Judges must be aware of the dissonance that exists between how they view the legal process and how the public before them view it. While judges should definitely continue to pay attention to creating fair outcomes, they should also tailor their actions, language, and responses to the public's expectations of procedural fairness. By doing so, these judges will establish themselves as legitimate authorities; substantial research suggests that increased compliance with court orders and decreased recidivism by criminal offenders will result. Procedural fairness also will lessen the difference in how minority populations perceive and react to the courts.

*Hon. Kevin Burke, Minnesota District Court, Hennepin County,
and Hon. Steve Leben, Kansas Court of Appeals
"Procedural Fairness: A Key Ingredient in Public Satisfaction,"
Court Review*

This observation report has two parts.

Part I is based on the principles of procedural justice. Please describe:

1. The behaviors that you observe; and
2. Your personal reaction to those behaviors.

Be as detailed as you can in describing the judge's behaviors as well as your reaction to them. Do not expect to see all the listed sample behaviors each time you observe.

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PART I

Neutrality

People bring their disputes to the court because they view judges as neutral, principled decision makers who make decisions based upon rules and not personal opinions, and who apply legal rules consistently across people and over cases.

Tom Tyler, "Procedural Justice and the Courts," Court Review

Consider, for example, whether the judge:

- displayed judicial fairness and impartiality toward all parties;
- acted in the interests of the parties without regard to personal prejudices;
- listened carefully and impartially;
- applied rules consistently across people and over cases;
- maintained a neutral demeanor or expression while in court;
- was open, clear, and transparent about how the rules of law were applied and how decisions were begun made;
- consistently treated participants equally and displayed behavior appropriate for the situation;
- was unhurried, patient and careful

1. How would you describe this judge's ability to be neutral, principled and consistent?

Observer comments:

Respect

Respect includes treating people well, that is, with courtesy and politeness, and showing respect for people's rights.

Providing people with information about what to do, where to go, and when to appear, all demonstrate respect for both those people and their right to have their problems handled fairly by the courts.

Tom Tyler, "Procedural Justice and the Courts," Court Review

Consider, for example, whether the judge:

- provided participants with specific information about what to do, where to go, and when to appear;
- treated everyone with courtesy, dignity, and respect;
- maintained appropriate courtroom tone & atmosphere;
- demonstrated appropriate consideration for the rights of all persons in the court;
- demonstrated an intention to do what is right for everyone involved;
- helped interested parties understand decisions and what parties must do as a result;
- used clear language when speaking to jurors, litigants, witnesses, and attorneys;
- demonstrated respect in the needs, problems, and concerns of participants;
- seemed prepared for the proceedings;
- demonstrated appropriate body language (*e.g.*, eye contact, facial expressions, posture, attire);
- demonstrated respectful voice quality (*e.g.*, pitch, volume, tone);
- clearly articulated awareness of the practical impact on the parties of the judge's rulings, including the effect of delay and increased litigation expense;
- clearly explained the reasons for his/her decision when appropriate.

2. How would you describe this judge's respect for people and their rights?

Observer Comments:

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Voice

People want to have the opportunity to tell their side of the story in their own words before decisions are made about how to handle the dispute or problem. Having an opportunity to voice their

perspective has a positive effect upon people's experience with the legal system irrespective of their outcome, as long as they feel that the authority sincerely considered their arguments before making their decisions.

Tom Tyler, "Procedural Justice and the Courts," Court Review

Consider, for example, whether the judge:

- allowed participants to voice their perspectives/ arguments.
- demonstrated to the parties that their story or perspective had been heard;
- behaved in a manner that showed the judge had fully considered the case as presented through witnesses, arguments, and documents before the court;
- attended, where appropriate to the participants' comprehension of the proceedings.

3. How would you describe the judge's skill at providing the participants a voice in the proceedings?

Observer Comments:

PART II

A:

Understanding that the Judicial Performance Evaluation Commission will ultimately recommend that the voters retain a judge or not, is there anything else you would like the commission to know about your courtroom observation experience?

Consider, for example:

- the organization, administrative efficiency and/or timeliness of this judge's court;
- whether the judge earned your trust and/or seemed to earn the trust of others in the courtroom;

- the overall strengths and weaknesses of the judge's performance; and
- anything else particularly notable about your courtroom observation experience, not already covered in the report.

Observer Comments:

B:

Please comment on whether you would feel comfortable appearing before the judge as a litigant. Why do you feel this way?