

Procedural Fairness

Judge Kevin S Burke

Berkeley Judicial Institute

Topics

- What the public thinks about courts and judges
- A tour of procedural fairness
- Some practical tips to achieving procedural fairness.

What people want is an
America as good as its promise.

- Barbara Jordan

A court as good as its promise looks at fairness and respect as well
as efficiency.

There is a lack of trust in public institutions that, although not focused specifically on courts, is very troublesome.

Public confidence in the Supreme Court plunged to 18% in 2022, the lowest level since the General Social Survey began tracking the trend half a century ago.

In the 2022 survey, just 18% of Americans said they have a great deal of confidence in the court, down from 26% in 2021, and 36% said they had hardly any, up from 21%. Another 46% said they have “only some” confidence in the most recent survey

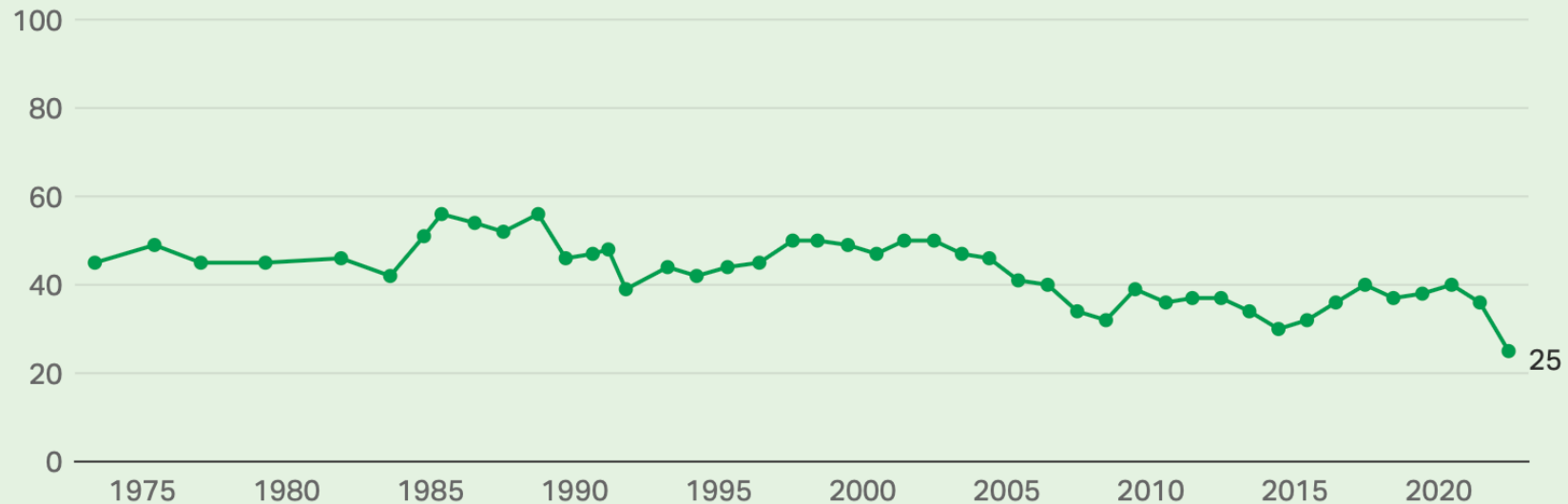
Just 12% of women said they have a great deal of confidence in the court in 2022, down from 22% a year earlier and from 32% in 2018

Supreme Court hits 50-year low

Confidence in the U.S. Supreme Court

Now I am going to read you a list of institutions in American society. Please tell me how much confidence you, yourself, have in each one -- a great deal, quite a lot, some or very little. The U.S. Supreme Court

— % Great deal/Quite a lot



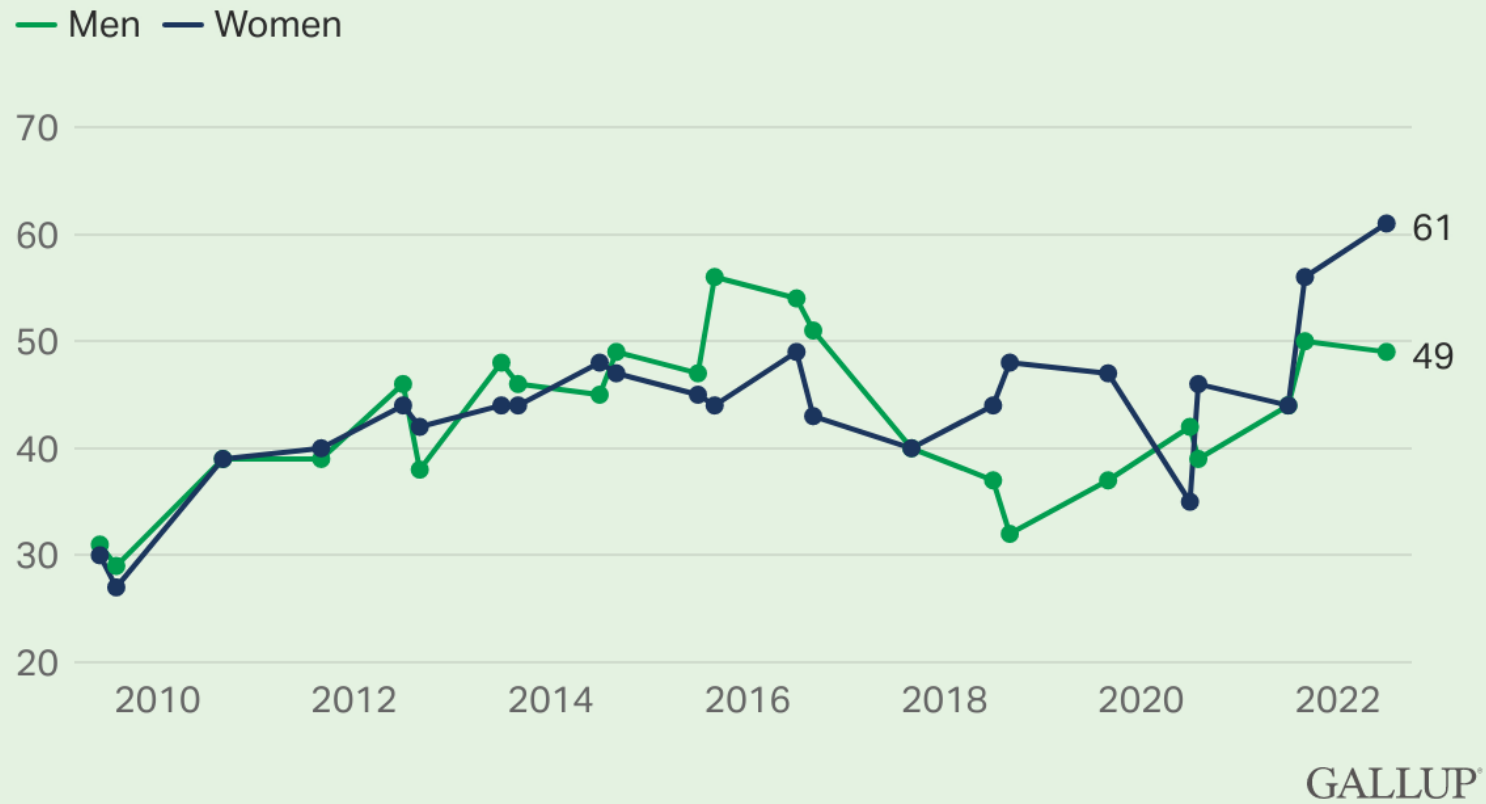
[Get the data](#)

GALLUP®

Latest survey June 1-20, 2022

Americans' Views of the Supreme Court, by Gender

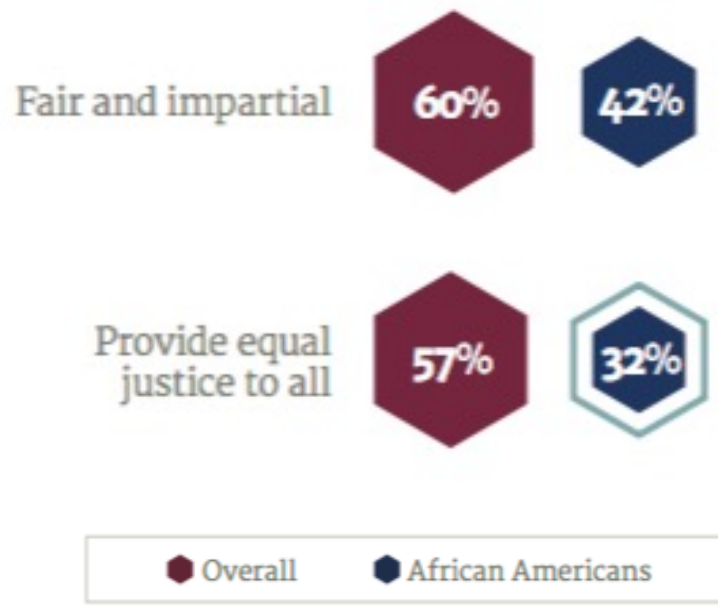
Do you approve or disapprove of the way the Supreme Court is handling its job? - % Disapprove



Confidence in SCOTUS v Local Courts

	SCOTUS %	Local Courts %
A great deal of confidence	7	7
Quite a lot of confidence	21	24
Some confidence	40	44
Very little confidence	22	16
No confidence at all	10	7

Q: “How well does each of the following describe state courts?”**



Racial perceptions of court fairness differ nationally too



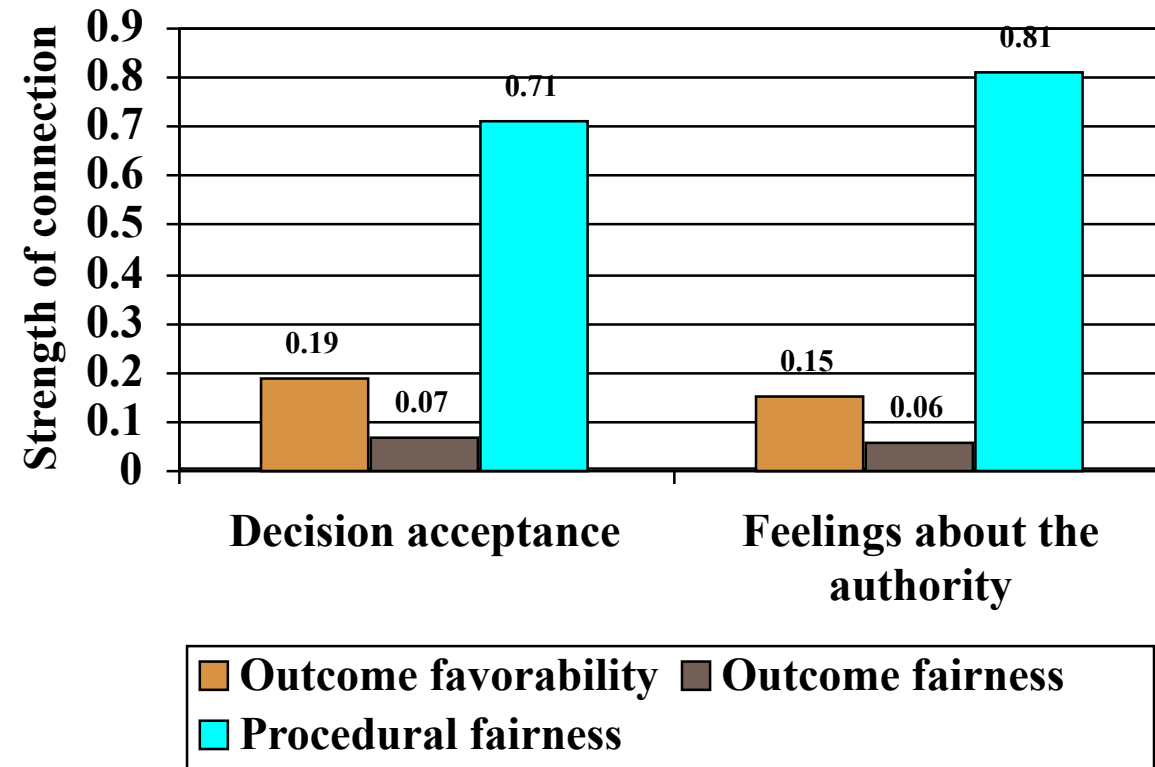
Public trust measures are the lowest since NCSC began tracking confidence indicators, which is consistent with virtually all other surveys taken recently. This is true across all institutions of government.

Our legitimacy is not assumed
by many who come before us.
Trust must be earned in each
encounter.

What Is The Definition of Fairness?

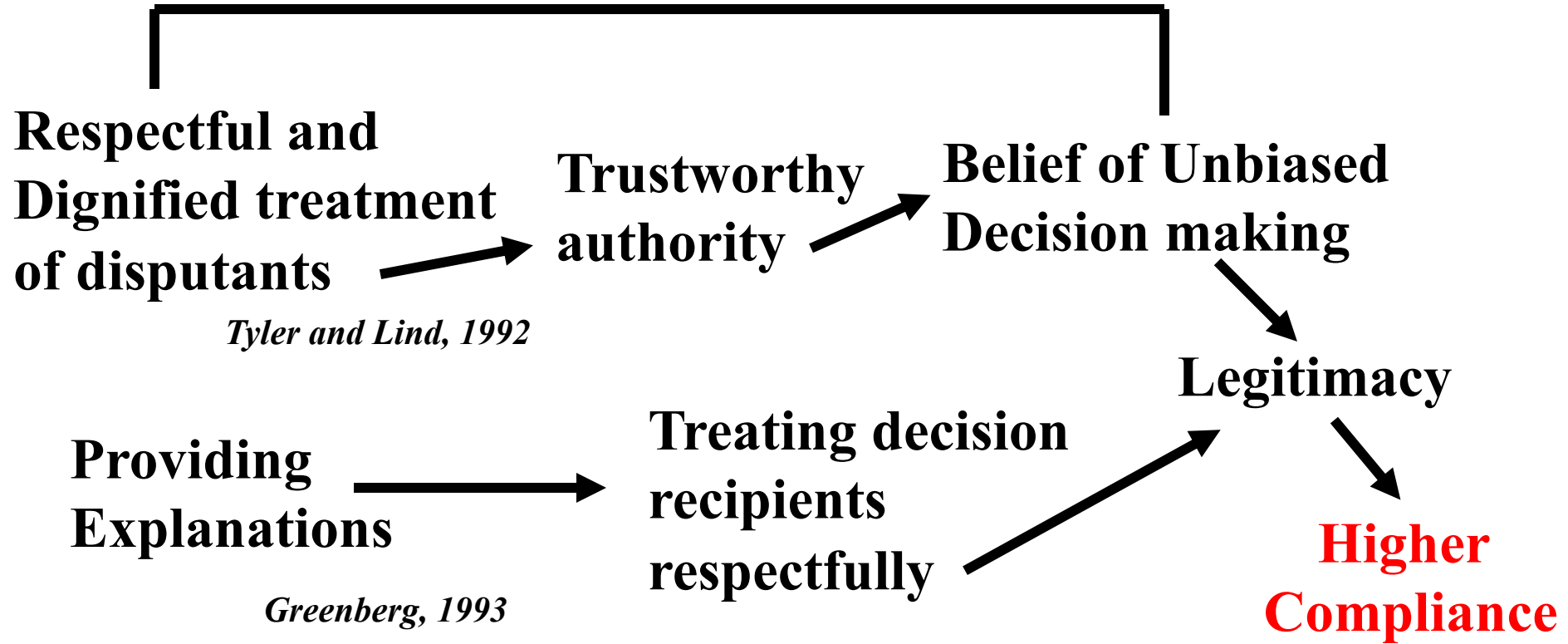
- Outcome favorability – Did I win?
- Outcome fairness – Did I get what I deserve?
- Procedural fairness – Was my case handled through fair procedures?

Why do people accept court decisions?



Procedural Fairness

Aspects of Procedural Fairness



EXPLAIN THIS

Who's a good deal happier?

Fairness registers in a part of the brain that also responds to pretty faces and eating chocolate, a study finds.

By ELENA CONIS
Special to The Times

What's new: The sinking feeling that creeps in after you've paid too much for a house, car or new pair of shoes may actually be a hard-wired, neurological response to being treated unfairly.

On the flip side, getting a fair deal on that same car or pair of shoes stimulates parts of the brain associated with reward and happiness.

The finding: Researchers at UCLA's Semel Institute for Neuroscience and Human Behavior recently reported in the journal *Psychological Science* that getting a fair deal activated the same parts of the brain — the ventral striatum, the amygdala and the ventromedial prefrontal cortex, together known as the reward circuit — that are stimulated by earning money, looking at attractive faces or eating chocolate (in those who like the stuff).

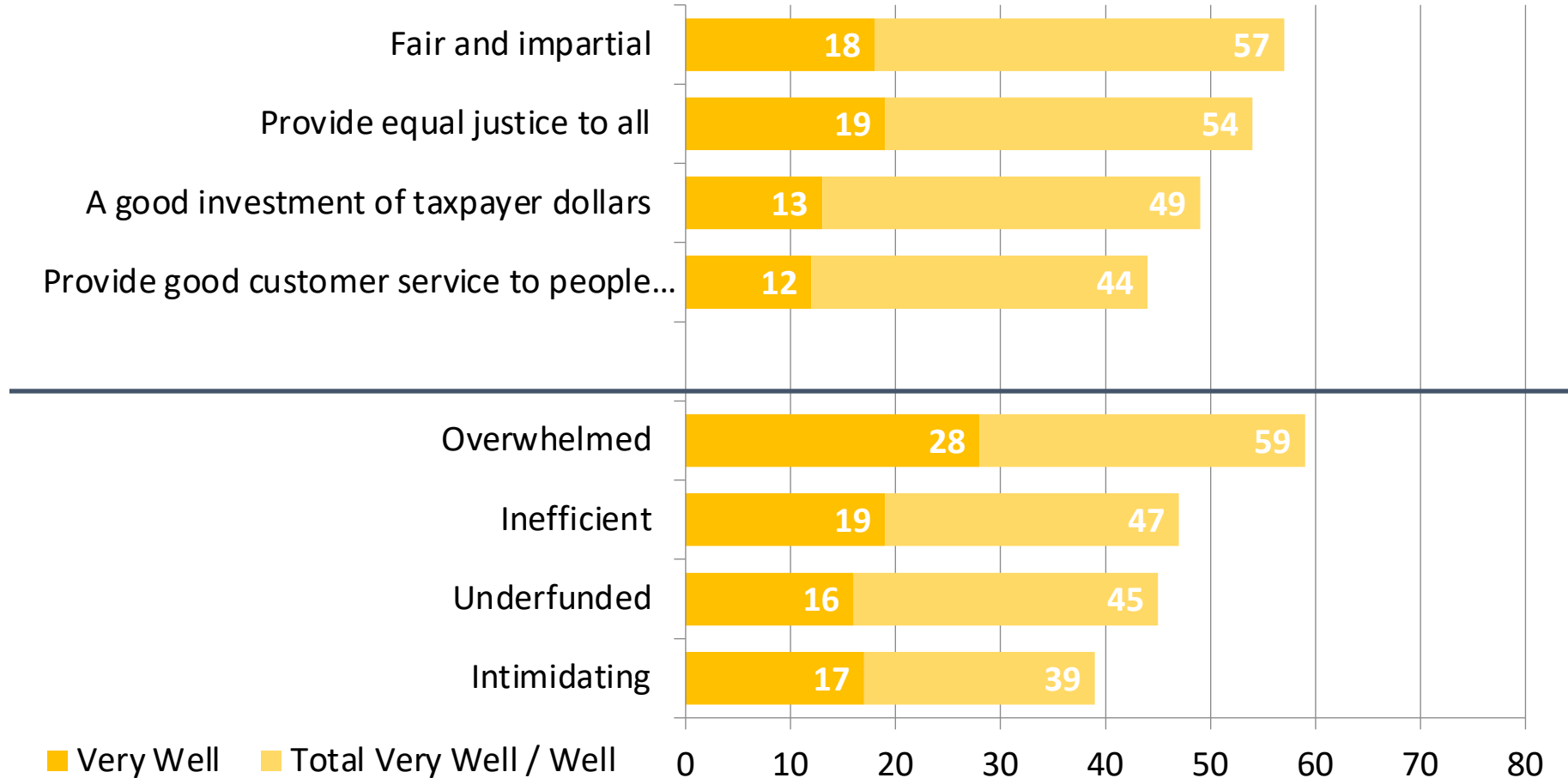
- Study reported in 2008 says perceived fairness triggers brain reactions similar to eating chocolate or seeing a pretty face

- Fairness is an ingrained motivational force:
 - Law and Economics folks want everything to be rational but in “Ultimatum Games” people on both sides of a transaction place a value on fairness.
 - Lots of study of how to get people to better follow doctors’ orders. Primary factor in adherence is the *quality*, as judged by the patient, of the doctor-patient communication. (Univ. of Mich. Medical School study)



Weak Numbers on Key Principles of the Court System

Thinking about the (STATE) court system, please tell me whether, in your opinion, each of the following words or phrases describes the state's courts very well, well, not very well, or not well at all.



Source: NCSC/Justice at Stake survey, June 2012 (MOE ± 3%)

- Voice
- Neutrality
- Respect
- Trust (trustworthy authorities)

Voice

- People want the opportunity to tell their side of the story and have their stories told to a judge who listens carefully.
- What are the challenges to giving voice?

Voice

- “Once our courtroom team participated in trauma training, we questioned all our routine practices. We communicated more respectfully and effectively, and we began to be much more individualized in our approach to each case.” —Treatment Court Judge
 - *quoted in* Trauma-Informed Care, Essential Components of Trauma-Informed Judicial Practice, a paper presented by Mandy Davis, LCSW, Portland State University School of Social Work (Oct. 2014 Oregon Judicial Conf.)

Voice

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Neutrality

- Be transparent and open about how decisions are being made.
- Give an explanation in terms understandable by a lay person.
- Cite to relevant statutes, rules, or court policies.

Neutrality

Neutrality is important, but if applied improperly, it can mask that you care.



A view that the judge should emphasize impersonality and dispassion as central to neutrality and legal authority can hurt your effectiveness.

- Emotions have been viewed as inherently irrational, disorderly, impulsive and personal and therefore as inconsistent with the legitimate exercise of judicial authority in the courtroom.
- Insight about emotion, including stress and work satisfaction, is critical.

Judicial emotion in theory...

- Hobbes (1651): a judge ought to be “divested of all fear, anger, hatred, love, and compassion”
- Sen. Grassley at Sotomayor hearing: a judge’s “most critical qualification” is “the capacity to set aside one’s own feelings”

... and in reality...

- State v. Hutchison (Maryland, 1970): “Judges, being flesh and blood, are subject to the same emotions and human frailties as affect other members of the species.”
- Hon. Sotomayor at her hearing: “We are not robots [who] listen to evidence and don’t have feelings.”

Respect

- Taking people's concerns seriously shows respect for them.
- People come to court about issues that are important to them, irrespective of whether they have a strong legal case.
 - Make clear that you have heard the needs and concerns that people are expressing.
 - Explain why those concerns can or cannot be accommodated in a legal setting.
- People take cues about respect for them as they encounter government employees in the building.

Respect

- “I deal with sexually violent persons. These men have at least two convictions each for either adult violent rapes or child molestation. I don’t have any problem with security. I don’t have one person that has to come into court in shackles, not one, because I give them respect. I call them by their names. It starts there.” —Criminal Court Judge
 - *Quoted in* Trauma-Informed Care, Essential Components of Trauma-Informed Judicial Practice, a paper presented by Mandy Davis, LCSW, Portland State University School of Social Work (Oct. 2014 Oregon Judicial Conf.)

Trust

- Give evidence that you have listened.
 - Restate the party's basic position.
- Explain your decision, including an explanation about why rules preclude you from adopting the party's position.
- Express awareness of and empathy for their situation—this need not eliminate neutrality.

Trust

- Studies of legal authorities constantly show that the central attribute influencing public evaluations of judges is an assessment of the character of the decision maker (sincere, caring).
 - Are you listening to and considering people's views?
 - Are you trying to do what is right for everyone involved?
 - Are you acting in the interests of the parties, not out of personal prejudice?

Hints For Demeanor

If you will be particularly busy, acknowledge it, and explain how you will handle it;

If there are factors that will affect your conduct or mood, consider when appropriate, explain the issue; and,

Treat all lawyers and participants respectfully without favoritism;

Be sensitive to parties and witnesses' discomfort.

To Become An Even Better Listener

- **PREPARE:** Clear your mind.
- **MONITOR:** Recognize when your concentration has strayed.
- **CORRECT:** Refocus your mental attention on the speaker.

Source: HRDQ

Capture the Message

- **BE OPEN MINDED:** Let go of your assumptions, biases, and expectations.
- **THINK:** Mentally interact with the speaker's ideas or information.
- **CLARIFY:** Ask questions to get more information and settle points that aren't clear.
- **CONFIRM:** Offer summaries to check your understanding.

Source: HRDQ

Help the Speaker

- **SCREEN:** Avoid distracting verbal comments.
- **CONTROL YOURSELF:** Avoid distracting nonverbal actions.
- **RESPOND:** Offer verbal encouragement.
- **ASSIST:** Offer nonverbal support.



HOW WE WALK WITH THE BROKEN
SPEAKS LOUDER THAN
HOW WE SIT WITH THE GREAT

—Bill Bennot

Six Key Principles Of A Trauma-informed Approach

Safety;
Trustworthiness and
transparency;
Peer support;
Collaboration and mutuality;
Empowerment, voice and
choice; and,
Cultural, historical, and
gender Issues.



- Summarize the main points made by each side, emphasizing that you did, in fact, listen.
 - Consider taking a listening-skills course.
- Explain the legal points that control the outcome in lay terms.
 - Parties come to court skeptical of legal authorities and want to make their own judgment about whether the law has been applied fairly. Give them the tools to make their own judgment.
 - Making it understandable: If the parties can't understand what you're saying (legalese), how can they evaluate its fairness?
- Show respect by using the parties' names and making sure you pronounce them correctly. Addressing the party directly sometime during the proceeding is a sign of respect.

Promoting a Sense of Fairness: Oral or Written Rulings

- Written Ruling
 - Can be reviewed again and again.
 - Can make sure you get it right.
- Oral Ruling
 - Avoids taking matters under advisement, delays.
 - Still can be based on outline, notes, etc. to make sure you have covered all bases.
 - Consider taking a break before ruling.
 - Emphasizes to parties you have carefully considered the matter. Ruling within seconds of the final point made by a party may mislead a lay audience about whether you have carefully considered the full presentation made to you.

There are four kinds of people:

- Cop-outs
- Hold-outs
- Drop-outs
- All-outs

To be committed, you must be “all in.”

You can't just do the best you can.

You have to do everything you can.