

# Court Review

Volume 47, Issue 4

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

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# Court Review

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION  
Volume 47, Issue 4

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## EDITOR'S NOTE

Judges share many common problems, goals, experiences, and interests. That's why professional associations like the American Judges Association and its journal, *Court Review*, have a purpose.

With that in mind, I'd like to ask for your help. Let us know what you'd like to read about on these pages. Suggest a topic—or an author. You can reach me at lebens@kscourts.org, and I'd very much appreciate your thoughts.

This issue starts with an article identifying three targets of opportunity for the improvement of any court: clarify the vision, foster a public-service mentality, and get everyone involved. Brian Ostrom, Roger Hanson, and Kevin Burke focus on how to have a high-performance court.

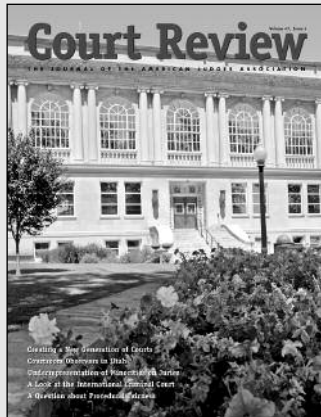
Two articles focus on considerations of procedural fairness. Nicholas Woolf and Jennifer Yim describe the courtroom-observation program now in place in Utah. Trained observers—vetted by the Utah Judicial Performance Evaluation Commission—observe judges on the bench. The Utah observers have been specifically instructed to observe the extent to which each judge observes accepted norms for procedural fairness. The Utah program presumes that procedural-fairness principles are relevant for all courts, but, in a separate article, Victor Flango challenges that premise. He suggests that these concepts may not apply to all courts and that court staff may need to play the procedural-fairness role in some dockets.

Elizabeth Neeley's article focuses on how one state has attempted to counter the underrepresentation of minorities on its jury panels. She reviews the thorough work done in Nebraska, not only providing details of those efforts but also suggesting ways in which other states and courts may address this issue.

Our final article comes from Judge David Admire, who served as a visiting professional at the International Criminal Court in The Hague. He tells us about his experience there and about the organization and early work of the court.

We're at work on some interesting future issues. One will explore the issues involved in eyewitness testimony. We'll also have our usual coverage this fall of the past year's United States Supreme Court decisions. And each issue closes with the Resource Page, which notes various items of interest to judges.

Please let us know what else you'd like to see on the pages of *Court Review*.—Steve Leben



*Court Review*, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States and Canada. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work. Guidelines for the submission of manuscripts for *Court Review* are set forth on page 101 of this issue. *Court Review* reserves the right to edit, condense, or reject material submitted for publication.

Advertising: *Court Review* accepts advertising for products and services of interest to judges. For information, contact January Serda at (757) 259-1864.

Photo credit: Mary Watkins (maryswatkinsphoto@earthlink.net). The cover photo is the Mesa County Courthouse in Grand Junction, Colorado. Construction began in 1922 and was completed at a cost of \$293,000. Mesa County had a design contest for the courthouse, and a design from architect Eugene Groves, who designed many public buildings in Colorado, was accepted.

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# President's Column

## Making Better Judges™

Kevin S. Burke

**R**obert F. Kennedy once said, “There is a Chinese curse which says, ‘May he live in interesting times.’ Like it or not we live in interesting times. They are times of danger and uncertainty; but they are also more open to the creative energy of men than any other time in history. And everyone here will ultimately be judged—will ultimately judge himself—on the effort he has contributed to building a new world society and the extent to which his ideals and goals have shaped that effort.”

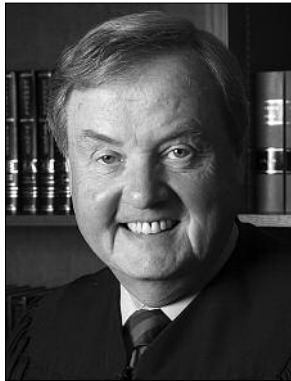
There is little doubt that the judges in the United States and Canada “live in interesting times.” We face three enormous challenges: First, there is the budget. From California to British Columbia, the courts have seen a serious erosion of court funding. What has happened there is devastating, but not being as bad off as those courts is hardly acceptable. In part, lack of funding explains the membership challenge the American Judges Association faces. Many courts no longer pay for memberships in organizations like the American Judges Association or the National Association for Court Management. Despite our claim to the mantra: Voice of the Judiciary®, AJA isn’t going to single-handedly fix court funding. AJA must offer a reason for judges to spend their own money to be an AJA member.

The second challenge of these interesting times is courthouse morale. Judges and court employees are increasingly not feeling appreciated. The judiciary must be committed to building a strong organization, which then and only then can create the environment for courts to be an effective branch of government. While courts cannot unilaterally fix the budget, judges can exercise the leadership that creates good morale and organizational excellence.

The judiciary cannot be an effective branch of government if judges’ vision of sharing power with each other is no better than an office-sharing arrangement of solo practitioner lawyers whose practice specialty is being a judge. Professor Doris Marie Provine put it this way: “The basic problem, crudely put, is that judges don’t want to govern themselves, but they don’t want anyone else to do it either.” The American Judges Association has much to contribute in meeting this challenge. In our publications, website, blog, and conferences, the

American Judges Association is uniquely situated to address courthouse morale, leadership, and change.

The third challenge judges face is the legitimacy of our decisions. That challenge may be the most serious. For reasons not wholly the fault of the judiciary, there is a skepticism about government that, while not presently focused on courts, needs to be addressed. Regardless of their attitudes toward the other branches of government, people need to have confidence in their courts.



Legitimacy is in part about building a reservoir of goodwill so that when the inevitable unpopular decision is made, people trust that the judges are trying their best. People need to trust their judges. The American Judges Association made a significant contribution toward making better judges and building stronger legitimacy for courts when the White Paper on Procedural Fairness was adopted, but the real work occurred after the paper. Thousands of judges have participated in educational programs featuring the concepts of procedural fairness first articulated in the AJA

White Paper. AJA is prepared to offer more with the upcoming White Paper and conference presentation at our conference this fall on *Minding the Court: Improving the Decision Process and Increasing Procedural Fairness*.

The American Judges Association needs to focus on making better judges and is positioned to do that. But to paraphrase Robert Kennedy, everyone here will ultimately be judged—and will judge himself or herself—on the effort we each contribute. The AJA needs vibrant membership contributions but, more importantly, the judiciary needs vibrant contributions by individual judges. Building a strong multinational judicial organization is not for the fainthearted. But it can be done. Contribute to the AJA blog (<http://blog.amjudges.org/>); offer to write a lengthier piece for *Court Review*; send me an email with advice or ask me to share your thoughts with the membership.

It is a great privilege to be president of AJA, but it is even a greater privilege to be a part of a time when we can make AJA stronger and we can make courts stronger. Let us recommit the American Judges Association to a new and brighter future of making better judges.

# Creating a New Generation of Courts

Brian Ostrom, Roger Hanson, & Kevin Burke

Courts are under ever-increasing pressure to be more transparent and accountable. Regardless of whether this is driven by fiscal crises, policy makers' concerns, or simple public outcry, a common question is, "What are courts doing to be efficient and effective?" If you are not careful, you might think a court is just another public body, like an executive agency, which public-administration experts want to re-engineer.

Some judges understandably are resistant to developing their administrative side because—on the surface—managerial values clash with what judges know well and are trained to do: they make decisions and issue orders in individual cases after purposeful deliberation. The role of effective administration in running a court is a topic absent from any law-school curriculum and is missing from many judicial education and training programs. On-the-job training certainly gives you experience, but there are limitations in any learn-as-you-go approach to training.

In this short article, we seek to draw a closer connection between the administration of the legal process in trial courts and how well the legal process serves individual litigants. The thesis is that the nature of court administration affects procedural due process. Advocacy is advanced in courts that make known to attorneys and parties what is going to happen, when, why, and how at all critical stages of the process. To develop and sustain these connections, court personnel at all levels should strive to enhance three areas of administration.

First, judges and staff members should aim to articulate clearly what kind of court they want to own and offer to their community. Court leaders play a critical role in encouraging this discussion when they point out to every judge and staff member that good courts are not just tidy; they enable opposing parties and their attorneys to argue their respective sides effectively.

Second, a key perspective for improving operations overall is the recognition that the interests, values, and rights of all participants in the legal process are court responsibilities. Courts deliver services, and participants in the legal process are like valued customers. Fairness is desired by everyone, with court customers wanting this result through a process that is predictable, timely, and cost-effective.

Third, organizing and mobilizing judges and court staff members around court improvement is a process requiring attention, patience, and compromise. Developing collegial support and making new approaches a reality inevitably bring into focus problems and possible solutions involving sharp differences of opinion among judges and administrators about what, if anything, needs to be done. Even if a presiding judge champions a course of action, it does not necessarily mean the plan will be fully enacted. And if acceptance is reached, it is not uncommon for objections to be raised again and previ-

ously settled issues scuttled or threatened. In the court world, the idea that the few can consistently command the abiding support of the many is a dubious expectation.

Knowing what courts want to be, focusing on customers, and building support for making changes are ways to uplift every court and, perhaps more important, to form a structure the courts can continue to use in addressing future challenges. The High Performance Court Framework developed by the National Center for State Courts is a key resource for judges and staff members to draw on because it addresses ideas to promote and implement enduring reform in the ordinary administration of justice. The framework suggests a series of flexible steps every court can take to improve its performance. *Achieving High Performance: A Framework for Courts* is available at: [www.ncsc.org/hpc](http://www.ncsc.org/hpc).

## THREE TARGETS OF OPPORTUNITY

Roscoe Pound noted that one root cause of the popular dissatisfaction with the American justice system is the belief that the administration of justice is simple—anyone can do it. For those of us who are involved in court administration, we know it isn't always easy. Sometimes the difficulty comes from not fully answering some basic questions: What are we trying to do, for whom, and by whom? Below are three strategies court leaders should consider to build and sustain effective administration, and perhaps make the tasks just a little bit easier.

## CLARIFY THE VISION

Someone once said the difference between a vision and a hallucination is simply how many people see it. Thus, court leaders need to provide a comprehensive vision for their court that a significant number of judges and other court staff will embrace and buy into. Setting and communicating a leadership vision statement is a critically important and deeply strategic activity that many court leaders fail to do adequately. It may seem like a simple activity for the court executive team to share a strategic vision of where they would like their court to go and of the obstacles that must be overcome to get there, but this is no self-executing task. Time is needed to make a vision explicit to everyone who works in the courthouse. For a statement to be more than words, judges and court staff must see how the statement's provisions direct the daily work they carry out.

There are those who argue that superior achievement is possible if and only if a true visionary charismatically convinces others to change their practices by adopting new and better ways of doing things. Inspirational leadership is surely a helpful ingredient to achieving high performance. But making improvements in a court is not dependent on the single-handed leadership of one person. Even courts with charismatically challenged leadership can be successful. The loosely coupled nature of courts means leadership is a matter of per-

suasion, bringing people together, and setting a tone. A feeling that “the leader cares about us, listens to us, and deeply cares about the court as an institution” is far more important than charisma. Building a culture based on mutual trust, collaboration, and commitment to solid administrative practices can serve to restrain strong egos. Arriving at a culture conducive to high performance is a challenge involving consensus of the entire bench, not something that can be forced on judges even by an inspirational leader.

### TREAT COURT ADMINISTRATION AS PUBLIC SERVICE

A high-performance court strives to give attention to the interests and rights of all individuals involved in the legal process. Customer satisfaction is a priority.

The term “customer” is new to many courts, but it captures the basic idea that people entering the courthouse react to both the services delivered and the manner of delivery. A strong public-service ethic is apparent when courts are readily accessible and exhibit fair processes in all court proceedings. People respond well to being treated with courtesy and respect.

This point of view has a long history, with Alexander Hamilton’s observation on the importance of providing effective administration of civil and criminal justice being a classic statement:

There is one transcendent advantage belonging to the province of the State governments, . . . [by which] I mean the ordinary administration of criminal and civil justice. This, of all others, is the most powerful, most universal, and most attractive source of popular obedience and attachment. It is that which . . . contributes, more than any other circumstance, to impressing upon the minds of the people, affection, esteem, and reverence towards the government.<sup>1</sup>

State courts are certainly one of the institutions Hamilton had in mind in making this claim. And the concern is clear: the images people have of the administration of justice in general and courts in particular affect their support of and trust in government.

Creating a positive image for state courts requires care because virtually all individual court customers have some degree of uncertainty about the legal process. This is particularly true of self-represented parties. As a result, a high-performance court tries to reduce confusion by making itself accessible, providing clear information, and adhering to predictable, orderly, and timely proceedings.

Hamilton’s insight is supported by modern research findings. Positive perceptions of a court are shaped more by how people feel they were treated than by the outcomes of their cases. Satisfaction with the process is mostly shaped by whether customers believe their rights and interests are taken into account in the resolution of disputes. If a court can

increase the sense of procedural fairness, social-science research suggests that compliance with court orders will increase as a byproduct.<sup>2</sup> Court leaders should give explicit attention to the concept of procedural fairness, the mantra being, “Every litigant has a right to be listened to, to be treated with respect, and to understand why the decision was made.” Ensuring that each individual receives his or her day in court connects administration with due process.

### GET EVERYONE INVOLVED

The ability to adapt successfully to new ways of doing business is strengthened when everyone understands the court’s vision and is properly aligned to achieve it. A sign of a healthy court is that court staff members are viewed as active partners with judges and senior managers.

Each part of the court troika—judges, professional administrators, and line staff—works more effectively when it understands and appreciates the role of the other two. In her book, *Team of Rivals*, Doris Kearns Goodwin described Abraham Lincoln as a man with an extraordinary ability to put himself in the place of other men to experience what they were feeling and to understand their motives and desires.<sup>3</sup> The ability of court leaders to marshal everyone’s talent is a key ingredient to high-performance success, although leadership qualities like Lincoln’s understandably are rare. Employees can help find ways to sustain areas of high performance (e.g., documenting successful approaches for managing case files) and ways to improve areas of less-than-successful performance (e.g., spending more time improving customer service at the counter). Because staff members often have regular contact with the public, many have a refined sense of what aspects of current service delivery lead to dissatisfaction.

Active listening reveals competing ideas on how best to solve particular problems. As difficult as it may be, court leaders need to recognize that there are alternative paths to a desired goal. Good court leaders are careful when there is a close vote among judges. A close vote may indicate it is time to go back to the drawing board and refine the alternatives. The best court leaders willingly accept a collective choice that will bring about the desired outcome better or more easily than their most preferred options—even if it does not appear on paper to be the best.

Acceptance of alternatives builds trust and enables cooperative communication. Judges and staff members need not fear that administrative discussions are merely forums used to foist practices upon them.

### MOVING FORWARD

Systematic feedback evaluates the implementation of the three strategies. And establishing measures of performance is a way to organize the categories of feedback. Performance results, in turn, are an interpretable basis for everyone to judge

#### Footnotes

1. Alexander Hamilton, *THE FEDERALIST*, No. 17, at 88 (Clinton Rossiter ed., 1999).
2. See generally Tom R. Tyler, *Procedural Justice and the Courts*, 44 *CT. REV.* 26 (2007-08); Kevin Burke & Steve Leben, *The Evolution of*

*the Trial Judge from Counting Case Dispositions to a Commitment to Fairness*, 18 *WIDENER L.J.* 397, 404-08 (2009).

3. DORIS KEARNS GOODWIN, *TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN* (2005).

how well a court is doing. By circulating results that revolve around customer satisfaction, court leaders demonstrate the sort of respect and rectitude Hamilton believed attracted public support.

Court leaders and a cadre of judges and senior managers can facilitate sharing results by first having the conversation internally. Because results are subject to interpretation, an opportunity to review and comment provides a forum for fair debate, to reconcile divergent points of view, and to develop presentation methods able to withstand scrutiny. Openness shapes a court's accountability environment, and it can both set the terms of discussion with funding sources and promote a more healthy review by everyone of court progress and resources.



*Brian Ostrom is a principal court research consultant with the National Center for State Courts. He has extensive training and experience in performance evaluation and in using a wide range of qualitative and quantitative analysis techniques to understand and overcome problems in the courts. His main research interests since joining the National Center for State Courts in 1989 have included the study of felony sentencing and the development of structured sentencing systems, civil justice reform, the methodology of judge and staff workload assessment, and court organizational development and performance assessment. Ostrom has a Ph.D. in economics from the University of Washington.*



*Roger Hanson is engaged in legal research for the purpose of legal reform. Hanson has previously been a senior researcher at the National Center for State Courts and more recently has served as a courts consultant. His past work includes assisting the Right Honourable the Lord Woolf in his report of civil justice in England and Wales; Hanson has also worked in Afghanistan and the Phillipines as well as in American state and federal courts. Hanson has a Ph.D. in political science from the University of Minnesota, and he serves as an adjunct professor in law and political science at the University of Colorado.*



*Kevin Burke has been a state trial judge in Minneapolis since 1984 and presently serves as president of the American Judges Association. He coauthored the AJA's 2007 white paper on procedural fairness, and he regularly lectures judges throughout the United States and Canada on procedural fairness, court leadership, and other topics. Burke has served four terms as chief judge of the 62-judge Hennepin County District Court, and he received the William H. Rehnquist Award from the National Center for State Courts in 2003, an award presented annually to the state judge who most exemplifies the highest level of judicial excellence, integrity, fairness, and professional ethics. Burke received his law degree from the University of Minnesota.*

## ***INNOVATIVE JUDGING***

**The Sheraton New Orleans  
September 30-October 5, 2012**



The AJA Annual Education Conference always presents the best judicial education available anywhere, and this year we'll be collaborating with the Louisiana judiciary. Our educational programs are accredited for continuing judicial education and feature faculty experts who have demonstrated an ability to engage their audience.

You'll be at a great hotel located on Canal Street immediately across from the French Quarter, and you'll have a chance to interact with judges from throughout the United States and Canada.

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### **SUNDAY, SEPT. 30**

AJA committee meetings in the day, an opening reception for all attendees in the evening.

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### **MONDAY, OCT. 1**

The day starts with the traditional Red Mass on Law Day at the St. Louis Cathedral with the Louisiana judiciary. The afternoon is full of educational sessions, including Dean Erwin Chemerinsky's annual review of the past year's United States Supreme Court decisions.

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### **TUESDAY, OCT. 2**

We have a full day of educational programs. Topics include new approaches to procedural fairness and judicial decision making, issues in child-custody cases, handling journalist inquiries, issues in civil cases, and handling pro se protective-order hearings.

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### **WEDNESDAY, OCT. 3**

Another full day of educational programming brings you experts on innovative approaches to community justice, a primer on courts and media, and sessions on handling drugged-driving cases, how to effectively use high-intensity probation supervision, and how to handle domestic-violence cases. The day ends with an evening reception with local judges at the Riverview Room—on the fourth floor of the Jackson Brewery.

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### **THURSDAY, OCT. 4**

Sample the AJA's business meetings, then take some time to tour New Orleans before the conference-closing dinner.

**For the full conference schedule and registration information, go to the AJA website.**

# The Courtroom-Observation Program of the Utah Judicial Performance Evaluation Commission

Nicholas H. Woolf & Jennifer MJ Yim

The State of Utah has recently introduced several innovations to its judicial performance evaluation program. Since the 1960s, such programs have been used in a growing number of states to inform decisions about judicial retention and to provide feedback to judges about their performance. The evaluations have traditionally been limited to surveys completed by a variety of stakeholders in the court system. But several states have begun to expand the scope of their evaluation programs beyond surveys, and one of these innovations is to observe judges in their courtrooms.

Utah has developed its courtroom-observation program to become a major component of its overall judicial performance evaluation. This article describes the history of judicial performance evaluations in Utah, the introduction of courtroom observation by lay observers, and the recent innovations to the observation program, including its focus on procedural fairness, use of qualitative evaluation methods, and use of systematic content analysis of the observers' narrative reports.

## BACKGROUND TO THE UTAH COURTROOM-OBSERVATION PROGRAM

### History of Judicial Performance Evaluation

Judicial performance evaluation (JPE) has steadily grown in popularity since the first program in Alaska in 1967.<sup>1</sup> In 1985, the American Bar Association issued its first guidelines for JPE, and by 1998 "approximately 23 states had some sort of JPE program in place or under development."<sup>2</sup> In 2005, the American Bar Association updated its JPE guidelines, proposing that all court systems implement a formal program to promote judicial self-improvement, enhance the quality of the judiciary, and pro-

vide relevant information to voters. These guidelines provide evaluative criteria in five areas (legal ability, integrity and impartiality, communication skills, professionalism and temperament, and administrative capacity), and suggest various aspects of evaluation design, including evaluating actual behaviors rather than the general qualities of judges, collecting data from multiple sources, and using experts for developing evaluation methods and for collecting and analyzing data.<sup>3</sup>

It is not clear that these guidelines have uniformly been followed, and David Brody has proposed a nationwide assessment of the processes currently in use in JPE programs.<sup>4</sup> One issue seems clear from the JPE literature: reliance on surveys that result in a single metric of performance does not promote acceptance and trust of JPE by judges.<sup>5</sup> While some studies of JPE programs find that judges have predominantly positive comments about JPE, including the usefulness of feedback and the appropriateness of criteria,<sup>6</sup> other studies document judicial mistrust of survey-based JPE. In a Colorado study, while judges reported positive comments about JPE, many criticized the survey methodology used as "unscientific" and "inherently flawed."<sup>7</sup> Another study found that some JPE surveys appear to be "a fishing expedition trolling about for evidence of judicial misbehavior or performance problems"<sup>8</sup> rather than an evaluation of clear performance standards. Analyses of survey data show that respondents tend to evaluate female and minority judges more harshly<sup>9</sup> and that aggregating scores across a wide variety of criteria, or using a single measure for different kinds of courts, reduces the validity of the survey results.<sup>10</sup> Concerns with survey methodologies provide one explanation for the slow adoption of JPE.<sup>11</sup>

The authors would like to thank David Roth, Joanne Slotnik, and David Turner for their constructive feedback on earlier drafts of this article.

## Footnotes

1. Richard C. Kearney, *Judicial Performance Evaluation in the States*, 22 PUB. ADMIN. Q. 468 (Winter 1999).
2. *Id.* at 471.
3. AMERICAN BAR ASSOCIATION, JUDICIAL DIVISION, LAWYERS CONFERENCE, ABA BLACK LETTER GUIDELINES FOR JUDICIAL PERFORMANCE EVALUATION (Feb. 2005), available at [http://www.americanbar.org/groups/judicial/conferences/lawyers\\_conference/resources/judicial\\_performance\\_resources.html](http://www.americanbar.org/groups/judicial/conferences/lawyers_conference/resources/judicial_performance_resources.html) (last visited Feb. 24, 2012).
4. David C. Brody, *The Use of Judicial Performance Evaluation to Enhance Judicial Accountability, Judicial Independence, and Public Trust*, 86 DENVER U. L. REV. 115 (2008).
5. *Id.* at 155-56.
6. E.g., AMERICAN JUDICATURE SOCIETY—WASHINGTON CHAPTER, COMMITTEE ON JUDICIAL PERFORMANCE STANDARDS AND EVALUATION,

- FINAL REPORT OF THE WASHINGTON STATE JUDICIAL PERFORMANCE EVALUATION PILOT PROJECT 29 (2002); KEVIN M. ESTERLING & KATHELEEN M. SAMPSON, JUDICIAL RETENTION EVALUATION PROGRAMS IN FOUR STATES: A REPORT WITH RECOMMENDATIONS 39 (American Judicature Society 1998).
7. Brody, *supra* note 4, at 147.
8. Kearney, *supra* note 1, at 484.
9. Rebecca Wood, Sylvia R. Lazos & Mallory Waters, Sacrificing Diversity for "Quality": How Judicial Performance Evaluations Are Failing Women & Minorities, *Scholarly Works*, Paper 24 (Apr. 5, 2010), <http://scholars.law.unlv.edu/facpub/24/>.
10. Rebecca Gill & Sylvia R. Lazos, Reflections in Response to the Nevada Judicial Evaluation Pilot Project, Working Paper Series, Abstract No. 1539825 (Dec. 18, 2009), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1539825](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1539825).
11. Seth S. Andersen, *Judicial Retention Evaluation Programs*, 34 LOY. L.A. L. REV. 1375 (2001).



In response to these concerns, some states have broadened their JPE programs to include reviews of case-management records, solicitation of public comments, or interviews with judges.<sup>12</sup> Several states also have courtroom-observation programs of various kinds. In Alaska, an independent organization trains volunteers to observe courtroom proceedings, complete surveys, and write narrative comments, a selection of which are reproduced in a report to the Alaska Judicial Council and included as input to the JPE process.<sup>13</sup> Citizen organizations in both New York and Minnesota, neither of which have state JPE programs, train volunteers to conduct courtroom monitoring as outsiders to the legal system; these organizations publicize their reports and recommendations to the public and the court system.<sup>14</sup> Colorado has multiple JPE commissions by geographic jurisdiction, and courtroom observation is conducted by the JPE commission members themselves, who receive training in collecting various sources of data for their evaluations. In Nevada, a 2010 ballot measure to establish a comprehensive JPE program included a formal courtroom-observation program, but the measure was defeated.

### **History of the Utah Courtroom-Observation Program**

Since 1986, the Utah State Courts have conducted JPEs for state-court judges. However, in 2008, the Utah State Legislature passed the Judicial Performance Evaluation Commission Act,<sup>15</sup> altering the judicial-retention process by moving responsibility for JPE from Utah's judicial branch to a newly created, independent Judicial Performance Evaluation Commission (JPEC). The statute was based on the work of the Judicial Retention Election Task Force, which was composed of legislators and judges. The task force met for approximately six months to produce draft legislation, receiving input from the Institute for the Advancement of the American Legal System at the University of Denver regarding JPE efforts across the nation.

By statute, Utah's JPEC is composed of 13 volunteer members, four appointed by each branch of government, and a final member who is the executive director of the Governor's Commission on Criminal and Juvenile Justice. The statute sets members' terms, limits the number of attorneys, balances political-party affiliations, precludes sitting legislators and sitting judges from membership, and creates an executive-director position to staff the commission. The statute covers all state, county, and municipal judges (county and municipal

courts are known collectively in Utah as justice courts). Utah judges are appointed either by the state's governor, county government, or a municipal appointing authority, and all face uncontested retention elections at the conclusion of their terms. Two important purposes of the new JPEC were to provide Utah voters with meaningful and independent information about judges and to provide for retention recommendations from JPEC during retention elections.

The statute requires JPEC to complete a JPE twice during each six-year term of office for all sitting judges: once at midterm and again near the end of term in preparation for the retention election.<sup>16</sup> Each JPE must include a judicial performance survey, courtroom observation, and a review of judicial disciplinary records. The statute sets minimum performance standards, makes requirements about the publication and availability of evaluation data, and specifies required survey respondent groups and survey categories.

As noted, the statute mandates the creation of a courtroom-observation program, and requires JPEC to "make rules concerning the conduct of courtroom observation" with respect to who may perform observations, whether they are to be completed in person or electronically, and the principles and standards used to evaluate the observed behaviors.<sup>17</sup> While the statute is specific about the details of the survey design and implementation, the legislature required JPEC to determine both the details of the courtroom-observation program and how the resulting information should be used in formulating judicial-retention recommendations.

In its first effort, JPEC developed an observation survey instrument similar to the survey instrument completed by attorneys. JPEC recruited and trained volunteer observers who observed judges in court, scored judges on the survey questions, and added comments as they thought appropriate. Results closely mimicked the survey results and generated no new information. Additionally, JPEC members worried that an observation survey based on a small sample size of about five observers per judge was fraught with reliability concerns.

To glean different information from that available in its surveys, JPEC changed its approach in two major ways. First, the courtroom-observation program focused exclusively on procedural fairness.<sup>18</sup> Second, the observation instrument elicited qualitative rather than quantitative information.

The focus on procedural fairness recognized the well-established yet counterintuitive body of social-science research that

12. Rebecca Love Kourlis & Jordan M. Singer, *Using Judicial Performance Evaluations to Promote Judicial Accountability*, 90 JUDICATURE 200 (2007).

13. For the most recent report of the independent citizen organization, Alaska Judicial Observers, Inc., on its in-court observations of Alaska judges, see Alaska Judicial Observers, 2010 Biennial Report, <http://www.ajc.state.ak.us/retention/retent2010/judobse10.pdf>.

14. The Fund for Modern Courts in New York has been training volunteers to observe judges and publicly report their observations since 1975. Recent reports may be found at <http://www.moderncourts.org/Programs/monitoring.html>. A group in Minnesota, called WATCH, indicates on its website that it has trained volunteers to observe court hearings in Hennepin County, Minnesota.

See <http://www.watchmn.org/>.

15. 2008 Utah Laws ch. 248, § 5, *codified at Utah Code Ann. 78A-12-201*.

16. Utah Supreme Court judges serve ten-year terms and so receive two midterm evaluations and a retention-election evaluation. The courtroom-observation component is currently administered for all Utah judges except appellate level judges and part-time justice-court judges.

17. 2008 Utah Laws ch. 248, § 7, *codified at Utah Code Ann. 78A-12-203(3)*.

18. We consider the terms *procedural justice* and *procedural fairness* to be synonymous, and for consistency use the term procedural fairness throughout.

has developed over the last 20 years.<sup>19</sup> The central conclusion of this research is that people are strongly influenced by their judgments of how fairly they are treated by authorities of all kinds, including courts and judges. Their trust in the law and their voluntary acceptance of judges' decisions are more strongly influenced by their judgment of the fairness of the procedures and their treatment than by the favorability of the outcome they receive in court. The research does not in any way suggest that the desirability of achieving a party's outcome is not of great concern, but rather emphasizes the particular importance people place upon fair procedures and fair treatment. The behavior of judges has a central role in producing perceptions of procedural fairness. Consequently, JPEC decided to focus the courtroom-observation portion of the JPE on this important area.

The decision to adopt qualitative methods was important too. Quantitative methods, such as those used in surveys, produce information in different ways from qualitative methods, and the two methods complement one another to generate a more complete picture of what is being evaluated. Surveys collect structured information from respondents about clearly defined descriptions of behaviors (e.g., *the judge properly applies the rules of civil procedure*), and measure responses in statistically valid ways. In contrast, qualitative evaluations seek unstructured information about behavior in its natural context (e.g., the narrative comments about judicial behaviors written by courtroom observers), without specifying in advance exactly what those behaviors might be. JPEC decided that because context was so important to evaluating procedural-fairness behaviors, qualitative methods would be most appropriate for the courtroom-observation program.

To provide a systematic analysis of the qualitative courtroom-observation data, and to produce careful summaries of the large amount of information that would be produced by observers, JPEC hired an outside consultant with expertise in qualitative-evaluation research to conduct a pilot study of five judges.<sup>20</sup> For each judge in the pilot study, the consultant prepared a content analysis of the judge's courtroom-observer narratives and a summary report presenting the analysis in a concise format.<sup>21</sup> After completion, JPEC staff and the Courtroom Observation Subcommittee chairperson visited each of the five judges to solicit feedback both on the results of the pilot study and on the observation program more generally. JPEC concluded from the positive responses to the pilot study that the summary reports were effective in enhancing the credibility of the courtroom-observation data and so decided to incorporate content analyses into the program.<sup>22</sup>

JPEC consequently adopted administrative rules to codify the details of the courtroom-observation program,<sup>23</sup> including the selection and terms of service of observers, the required training, the numbers of observations per judge, and the minimum time spent observing each courtroom. The rule also established procedural-fairness principles as the basis for the observers' evaluations.

## THE CURRENT COURTROOM-OBSERVATION PROGRAM

The courtroom-observation program is coordinated by a part-time JPEC staff person, and overseen by JPEC's advisory Courtroom Observation Subcommittee.<sup>24</sup> This section describes the recruitment and training of observers, the observation procedures, and the content analysis and summarization of the observation data.

### Observer Recruitment and Training

*Recruitment.* JPEC seeks volunteers with a "broad and varied range of life experiences" who can commit to a one-year renewable term of service.<sup>25</sup> The coordinator recruits volunteers using a statewide advertising and public-outreach effort that taps local media, continuing-education programs, and government and nonprofit organizations. JPEC staff and commission members provide an orientation, and screen applicants based on written applications and an interview process. JPEC excludes those lacking basic computer skills or access, those involved in pending litigation in the state, and convicted felons. Those with professional involvement in the courts and certain types of relationships with judges or the courts are also automatically ineligible. During 2011, JPEC had 28 volunteer courtroom observers who produced 330 courtroom-observation reports for 65 judges.

*Training.* Over time, JPEC has developed a thorough training program for volunteer observers. Initial training includes an orientation about the overall evaluation process of which courtroom observation is a part; a primer on levels of court and court process; confidentiality, nondisclosure, and conflict-of-interest requirements; an introduction to the principles and standards of procedural fairness; and technical instruction on the data-collection process, including proper use of the courtroom-observation instrument. Some sections are taught by commission members, some by JPEC staff, and some by senior judges or court administrators. Initial training includes practice observations and mentoring opportunities with experienced observers. Periodic in-service trainings and other meetings, such as Ask-a-Judge sessions with senior judges and events with commission members, help to ensure ongoing effective observations and volunteer retention.

19. For a comprehensive discussion of the importance of procedural fairness, see the special issue of *Court Review*, comprising the first two issues of Volume 44 (2007-08), which is available on the web at <http://aja.ncsc.dni.us/courtrv/cr44-1/CR44-1-2.pdf>.

20. The first author of this article, Nicholas H. Woolf, is the qualitative-research consultant who conducted the pilot study and is conducting the 2012-2014 content analyses and preparation of summary reports.

21. Further information about the content analysis and summary

report appears below in the section, "Current Program."

22. Further information about feedback from the five pilot study judges to their summary reports appears below in the section, "Uses of Courtroom-Observation Reports."

23. Utah Admin. Code R597-3-3.

24. The second author of this article, Jennifer MJ Yim, is the vice-chairperson of JPEC, appointed by the governor, and is the past chairperson of the Courtroom Observation Subcommittee.

25. Utah Admin. Code R597-3-3.

## Observation Procedures

By administrative rule, a minimum of four different volunteers observe each judge for both the midterm and end-of-term evaluations. To date, JPEC has provided almost all judges with five observations, both at midterm and end of term. Each observer observes a judge in person for a minimum of two hours while the judge is actively on the bench. Observations may be completed in one sitting or over several courtroom visits, after which the observer completes the data-collection instrument and submits it electronically to JPEC staff. The identity of the observer is withheld from the judge, JPEC commissioners, and the public. However, JPEC staff records information about who conducted the observation (by observer code), the dates and type of proceedings observed, and the gender of the observer.

The data-collection instrument is narrative-based, instructing the observer to report his or her experiences in the courtroom with respect to the procedural-fairness principles of neutrality, respect, and voice, and to report other notable aspects of the observation experience, including whether they found the judge to be trustworthy, whether they would feel comfortable appearing before the judge as a litigant, and whether the judge was aware of the observation. Trainers instruct observers to write detailed, contextually specific narratives that articulate: (1) the behaviors they observed, and (2) the observer's personal reaction to those behaviors. Observers report that compiling their notes into comprehensive narratives requires several hours of work beyond the time spent in the courtroom.

## Content Analysis and Summarization of Observation Data

**Criteria.** The consultant first developed a set of evaluative criteria for analyzing the observers' narratives. These criteria describe the judicial behaviors that lead people to believe they have been treated fairly in the courtroom. The criteria are based on the "four key procedural fairness principles,"<sup>26</sup> *i.e.*, whether recipients feel that they have been given *voice*, have been treated with *neutrality* and *respect*, and experience *trust* in the judge and the legal system. The consultant reviewed the procedural-fairness literature and identified approximately 50 judicial behaviors that have been proposed to lead those in the courtroom to experience (or not experience) procedural fairness. These were clustered into 20 criteria, which were

grouped into six approximately equal-sized groups. Table 1 displays the six groups of 20 criteria, with brief descriptions of each criterion.<sup>27</sup>

**Content analysis.** A content analysis describes the content of narrative data, but goes beyond simple summarizing of information. The consultant developed a set of 29 "codes," or categories, consisting of the 20 evaluative criteria (see Table 1) and nine additional codes that provide greater detail for some of the criteria (for example, the criterion *courtroom tone & atmosphere* was divided into two for purposes of coding: *general demeanor* and *courtroom tone*). Each code has a definition to facilitate consistent coding of observer comments.

The observers' narratives are segmented into "codable units" that reflect a single experience or reaction to a judicial behavior. These range from a single phrase for a straightforward observation to one or more paragraphs describing in detail something that occurred in court. Each codable unit is then "coded," *i.e.*, associated with one or more codes, using the qualitative-analysis software program Atlas.ti. Observers are encouraged to write in whatever manner best reflects their experience of the judge's behaviors, and codes are selected to best describe the observers' reactions to judicial behaviors, rather than to interpret the fairness of the judge's behavior in any objective sense. In this way the evaluation assesses how judicial behaviors are experienced by others.

**Summary report.** After coding all five observers' narratives for a judge, the coded units for each criterion are analyzed for themes and commonalities, and then synthesized into one or more short paragraphs that evoke as accurately as possible the experience of reading all the narrative associated with each criterion. The paragraphs for all codes are then compiled into a two- to three-page report. The report begins with an "executive summary" that further synthesizes the information into three standard categories: *widely agreed-upon themes*, *minority observations*,<sup>28</sup> and *anomalous comments*. Table 2 displays the content and purpose of each of the three summary sections in more detail.<sup>29</sup>

## Uses of Courtroom-Observation Reports

The courtroom-observation program has three primary audiences: the general public, judges, and JPEC. Each stakeholder group uses and benefits from the reports in different ways.

26. Tom R. Tyler, *Procedural Justice and the Courts*, 44 CT. REV. 30 (2007-08).

27. While trust is one of the four principles of procedural fairness, there is no group of criteria called trust, nor any individual criterion called trust. From the perspective of evaluating performance behaviors, we consider trust an outcome of respect, neutrality and voice, rather than a behavior in itself. Some observers reported difficulty in assessing behaviors themselves as "trustworthy." Similarly, researchers in the management field listed behaviors that engendered employee trust, rather than describing trustworthiness as a behavior itself, see Ellen M. Whitener, et al., *Managers as Initiators of Trust: An Exchange Relationship Framework for Understanding Managerial Trustworthy Behavior*, 23 ACAD. MGMT. REV. (1998). We foresee difficulties with feedback to judges if trust is considered a criterion. It may be one thing to say to a judge, "Your behaviors, such as lack of eye contact, were perceived as not

respectful, and respectful behaviors engender trust," but quite another to say, "Your behaviors were not trustworthy."

28. Minority in this context refers to comments from two, or possibly three, of the five observers, and does not refer to observers' ethnic or racial membership.

29. The courtroom-observation instrument initially collected a numerical rating of the judge on a five-point scale, similar to JPEC's survey. Observers reported difficulty accurately assigning scores in the context of writing contextual narratives. Commissioners felt concern that the scoring did not meaningfully reflect the content of the narrative data or qualitative synthesis, and the qualitative-research consultant felt concern that the act of completing the numerical scores would have a priming effect on observers when writing their narrative comments. Judges in the pilot study were not averse to the removal of the scores. Consequently, JPEC removed the scoring questions from the observation instrument.

**TABLE 1: TWENTY EVALUATIVE CRITERIA**

<b>CRITERIA</b>	<b>DESCRIPTION</b>
<b>GROUP 1: RESPECTFUL BEHAVIORS</b>	
<i>LISTENING AND FOCUS</i>	Here listening refers to indications of attention and engagement through active listening.
<i>WELL PREPARED AND EFFICIENT</i>	Here efficiency refers to the judge's behaviors. The court's efficiency appears below under "Courtroom tone & atmosphere."
<i>RESPECT FOR OTHER'S TIME</i>	This includes the starting time of sessions as well as all interactions with those in court that take into consideration the value of their time.
<i>RESPECTFUL BEHAVIORS</i>	This refers to specifically described behaviors directed at specific individuals or situations that indicate respect for a person's value or status.
<b>GROUP 2: RESPECTFUL TONE</b>	
<i>COURTESY, POLITENESS, AND PATIENCE</i>	This refers to descriptions of respectful behaviors more generally, not in the context of a specific individual or situation.
<i>COURTROOM TONE AND ATMOSPHERE</i>	This refers more generally to the tone of the court, and includes both the judge's general demeanor over and above specifically respectful behaviors, as well as the atmosphere of the courtroom.
<i>BODY LANGUAGE</i>	This refers to eye contact and facial expressions, general body language, and engaged behavior.
<i>VOICE QUALITY</i>	This refers to both mechanical qualities such as pitch and volume, and emotional qualities such as inexpressive, sarcastic, or exasperated tone.
<b>GROUP 3: NEUTRALITY</b>	
<i>CONSISTENT AND EQUAL TREATMENT</i>	This refers to listening to all sides and treating individuals in similar situations similarly.
<i>ACTS WITH CONCERN FOR INDIVIDUAL NEEDS</i>	This refers to concern for individual differences being taken account of in the judge's actions.
<i>EXPRESSES CONCERN FOR THE INDIVIDUAL</i>	This refers to expressions of concern and due regard for the individual's specific situation, over and above expressions of respect that are included in "Respectful behaviors."
<i>UNHURRIED AND CAREFUL</i>	This refers to allowing sufficient time for the judge and those in court to conduct themselves in a thorough manner.
<b>GROUP 4: VOICE</b>	
<i>CONSIDERED VOICE</i>	This refers both to allowing those in court to express themselves and to the judge's consideration of what was expressed in his/her statements or decision.
<i>FORMAL VOICE</i>	This refers to giving voice based on required procedure without apparent consideration by the judge of what was expressed.
<b>GROUP 5: COMMUNICATION</b>	
<i>COMMUNICATES CLEARLY</i>	This refers both to clarity of speech and to the use of language appropriate to the listener.
<i>ENSURES INFORMATION UNDERSTOOD</i>	This refers to active attention by the judge in ensuring those in court understand all information relevant to them, and includes translation and comprehension for non-native English speakers.
<i>PROVIDES ADEQUATE EXPLANATIONS</i>	This refers to providing sufficient explanation of the basis of decisions and of legal procedure and terminology to ensure that those in court understand proceedings relevant to them.
<b>GROUP 6: APPARENT FAIRNESS</b>	
<i>VENEER OF FAIRNESS</i>	This refers to behaviors intended to demonstrate fairness but backfire due to perceived insincerity.
<i>INEFFECTIVE INGRATIATION</i>	This refers to efforts to be liked, either defensively through apologies, self-deprecation, etc., or assertively through praise or flattery, that backfire due to inappropriateness or perceived insincerity.
<i>MANIPULATION</i>	This refers to behaviors intended to produce feelings of fairness that backfire because the behaviors are perceived to be manipulative.

**TABLE 2: OVERVIEW SECTIONS OF THE CONTENT-ANALYSIS SUMMARY REPORT**

<b>WIDELY AGREED-UPON THEMES</b>	<p>Behaviors reported by all (or almost all) observers and are thus well established. Deficits mentioned here were widely reported and therefore merit attention.</p> <p>The first statement in this section is an overall summary of the entire set of observer reports.</p> <p>The subsequent statements are not intended to be a complete summary of the observers' comments, but rather highlight the most frequently noted and forcefully expressed themes in the way that the observers expressed them, with the goal of evoking an overall sense of the entire set of observer comments.</p> <p>The final statement in this section indicates the number of observers indicating that they would feel comfortable appearing before the judge.</p>
<b>MINORITY OBSERVATIONS</b>	<p>Behaviors noted by two (or possibly three) observers that would be worth building on (if desirable) or otherwise thinking about avoiding.</p> <p>Not every behavior reported by a minority of observers is summarized here, only those that reflect a notable or somewhat discrepant perspective that was not widely agreed upon.</p>
<b>ANOMALOUS COMMENTS</b>	<p>Comments of one (or in rare cases two) observers that reflect a markedly different or contradictory perspective from all other observers. They are intended to stimulate reflection, such as: why were these observers affected by this behavior; or, does this particular situation tend to lead to this uncharacteristic behavior?</p> <p>Not every anomalous comment is included in this overview section. While all are included in the main body of the report, some are not included in this overview section because they are too minor or appear to reflect something anomalous about the observer rather than the judge.</p>

*General public.* Recent research suggests that voters in judicial elections are more interested in judges “as guarantors of procedural fairness” than in assessing the individual policy preferences, case outcomes, and partisanship of judges.<sup>30</sup> JPEC’s courtroom-observation program addresses this public concern by providing information to voters about each judge’s performance with respect to procedural fairness.

The program also benefits the public in two other ways. First, it provides certain members of the public—the courtroom observers themselves—an important voice in the evaluation process, as proxies for the many voters who never get to court. Second, the program will help to increase procedural fairness by providing feedback to judges about their behaviors. The courtroom-observation summary report provides context-specific and rich information about how judicial behaviors are perceived by observers in terms of procedural fairness. JPEC anticipates that this detailed and candid feedback to judges will help judges make any needed behavioral changes.

In summary, JPEC anticipates that through these three benefits to the public—providing voters with valued procedural-fairness information, providing a way for members of the public, as observers, to have a voice in JPE, and through improvements to procedural fairness through context-specific feedback to judges—the courtroom-observation program will contribute to increased levels of public trust and confidence in the court system in Utah.

*Judges.* Judges benefit from the courtroom-observation program both at an individual level, through self-improvement, as well as at the level of the overall judiciary. One important goal of the JPEC statute, as well as of the American Bar Association in

its JPE guidelines, is judicial self-improvement. The two evaluations completed during each six-year retention cycle<sup>31</sup> are similar in content but have different purposes. The midterm JPE is intended to provide feedback for self-improvement, while the end-of-term JPE is intended to provide JPEC with information for its retention-election recommendation. The way judges use their performance evaluations, however, is more continuous. As most judges in Utah are retained, every JPE, whether completed at midterm or end of term, contains valuable self-improvement feedback.<sup>32</sup>

For any judge, obtaining specific feedback about courtroom conduct is generally a challenge. Typically, everyone in a courtroom has something at stake or is otherwise involved in the proceedings. Most people would demur if asked by the judge for critical feedback. Courtroom observers are perhaps the only people in court with the unique potential to provide judges with candid and constructive feedback about their procedural-fairness behaviors.

Adopting procedural fairness as the basis for the courtroom-observation program has raised awareness about procedural fairness in Utah’s judiciary. Using procedural fairness as a component of JPE has prompted judges to become more conscious of their courtroom conduct. Indeed, the judiciary has already begun including procedural fairness as a topic in its judicial-education curriculum.

In summary, the procedural-fairness-based courtroom-observation program serves judges in two ways. First, it assists with judicial self-improvement by providing judges with candid feedback based on actual behaviors observed. Second, it has drawn attention to the importance of procedural fairness both for individual judges and for the judiciary as a whole,

30. Jordan M. Singer, *The Mind of The Judicial Voter*, MICH. ST. L. REV., forthcoming, <http://ssrn.com/abstract=1937742> (Oct. 3, 2011).

31. This is the cycle for judges other than justices of the Utah Supreme Court and part-time justice-court judges. See n. 15 *supra*.

32. JPEC provides both the midterm and end-of-term courtroom-observation reports to judges using the same procedures and reporting format.

leading to an increased number of judicial training opportunities on procedural fairness.

*JPEC.* JPEC benefits from the courtroom-observation program because it provides an additional and different source of data, thus enhancing the credibility of the evaluation for each judge. In addition to the benefits JPEC receives, it also faces a challenge in terms of how it will utilize the courtroom-observation data in the JPE.

With the addition of courtroom-observation data, JPEC's retention recommendation will be based both on contextually rich and systematically analyzed qualitative data from the courtroom observations, and on statistically valid quantitative data from the surveys. Using these multiple types of data increases the quality of the JPE for Utah judges.<sup>33</sup>

Through the courtroom-observation program, JPEC has developed a way to systematically assess judicial behaviors in terms of procedural fairness.<sup>34</sup> Although JPEC was not statutorily required to evaluate judges on procedural-fairness criteria, the growing body of research demonstrates its particular importance to voters and court users. Indeed, after much deliberation, JPEC decided that the relevance of procedural fairness reached beyond courtroom observation to the full JPE. JPEC therefore unanimously adopted an administrative rule creating a minimum performance standard for procedural fairness. The new minimum performance standard states that the judge's performance must "demonstrate by a preponderance of the evidence, based on courtroom observations and relevant survey responses, that the judge's conduct in court promotes procedural fairness for court participants."<sup>35</sup>

While JPEC has now promulgated a minimum performance standard governing procedural fairness, it must still decide how courtroom-observation results will be used in the JPE process. JPEC will need to integrate the qualitative courtroom-observation data and the quantitative survey data to decide whether a judge has met the minimum performance standard for procedural fairness. While the three statutory survey categories—judicial temperament & integrity, legal ability, and administrative performance—do not explicitly include procedural fairness, the survey includes questions related to several aspects of procedural fairness. Deciding whether a judge has met the minimum performance standard for procedural fairness will therefore be based on both courtroom observation and relevant survey information. JPEC will determine the relative weight to be given to survey and courtroom-observation findings.

In summary, JPEC benefits from the courtroom-observation program by increasing the quality of the JPE through the addition of qualitative data on procedural fairness. JPEC now faces the challenge of integrating the courtroom-observation results and the survey results to determine whether judges

meet the minimum performance standard established for procedural justice.

## FUTURE PLANS

### *Development of Courtroom-Observation Program*

JPEC plans several developments for its courtroom-observation program, in part based on the experience of completing courtroom observations for 72 judges. These plans include updating the observer training program, efforts to increase the diversity of observers, and extending the courtroom-observation program to part-time justice-court judges. Two other potential uses of the program data are also described below.

*Training program.* Observers write their comments in very different styles. Because the goal is to learn how observers experience the judge's procedural fairness behaviors, no constraints are put on the way in which the observers most comfortably express themselves. However, because the role of the observer is intended as a proxy for courtroom participants, JPEC trains observers to simply describe how they experience the judge's procedural fairness behaviors, not to interpret their feelings or the judge's behaviors in terms of their personal knowledge of procedural fairness or other social-science principles. To assist ongoing training, the consultant periodically provides examples to JPEC of ideal comments (containing both a description of a judicial behavior and the observer's experience or reaction to the behavior), comments that could be improved (those that are codable but that are insufficiently elaborated to be included in the synthesis), and uninterpretable comments (those that cannot be coded as written).

*Diversity of observers.* Volunteers for courtroom observation are not necessarily representative of courtroom participants. The current cadre of observers are predominantly Caucasian, middle-aged or older, middle class, retired, and well educated. Because research suggests that the core principles of procedural fairness are universal, an unrepresentative cadre of volunteers may not adversely affect the validity of the observations. While research has shown that certain personalities are more sensitive to procedural fairness than others,<sup>36</sup> it is not known whether in fact an unrepresentative cadre of volunteers does experience certain judicial behaviors in the same way as courtroom participants. If the efforts of JPEC to recruit a more diverse cadre of volunteers are successful, then further research on the accumulating body of content analyses may shed light on this issue.

A second issue concerns the gender of judges and observers. Research has shown that female judges score consistently and significantly lower than their male counterparts in JPE surveys.<sup>37</sup> For example, female judges are systematically evaluated as weak and indecisive when observers perceive that they fail

33. See generally JANICE M. MORSE & LINDA NIEHAUS, *MIXED METHOD DESIGN: PRINCIPLES AND PROCEDURES* (2009).

34. Courtroom observation is undoubtedly daunting to many judges. JPEC's efforts to conduct its pilot study and to solicit feedback from judges about the program's design, including the use of a professional research consultant and the structure and usefulness of the summary report, helped to alleviate concerns about JPEC's use of courtroom observation in JPE.

35. Utah Admin. Code R597-3-4. The standard became effective on November 23, 2011, and first affects Utah judges facing retention election in 2014.

36. Manfred Schmitt & Martin Dörfel, *Procedural Injustice at Work, Justice Sensitivity, Job Satisfaction and Psychosomatic Well-Being* 29 EUR. J. SOC. PSYCHOL. (1999).

37. Wood, *et al.*, *supra* n. 9.

to assert control, but as unduly punitive when they assert authority. In one study, male judges were found to have a lower baseline expectation for courtesy, and so were judged as more courteous than female judges. Other research has shown that ingratiation between males and females is viewed with suspicion.<sup>38</sup> Where ingratiation is sincere and nonmanipulative, such as appropriate apology or praise, this does not threaten procedural fairness, but if a judge and the recipient of ingratiation are of different genders, this may have negative procedural-fairness effects. JPEC attempts to minimize potential gender effects by allocating both male and female observers to each courtroom wherever feasible.<sup>39</sup>

**Justice-court judge JPEs.** Although full-time justice-court judges are currently evaluated in the same way as all other non-appellate judges in Utah, JPEC has found that these evaluations cannot be used with part-time justice-court judges. Part-time justice courts, with their low volume of cases, rural locations, part-time hours, high levels of self-represented litigants, and few court staff, make valid surveys results impossible to obtain. Courtroom observation will, however, remain a critical component of the justice court JPE, both because it is not dependent on large sample sizes and because of its particular value to part-time justice-court judges. Most litigants in justice courts do not have an attorney to represent them. Consequently, the direct interactions between judges and litigants are an especially important feature of a justice-court experience. The detailed procedural-fairness feedback contained in the courtroom-observation summary report could be some of the most valuable self-improvement information the JPE can provide to a justice-court judge.

### **Research on Accumulating Content Analyses of Courtroom Observations**

As the number of content analyses that have been made increases, JPEC may decide to compare various groups of content analyses (e.g., by type of court, rural or urban location, years of experience, and gender of judge, etc.), and to explore themes, trends, and other patterns and commonalities within and among the various groups. This may include comparing and contrasting the quantitative survey scores for each judge with the qualitative content analyses of observation data, both to validate the evaluation process and to gain further understanding of judicial performance and evaluation.

### **Development of Procedural Fairness Based Judicial Training**

The accumulating findings of the courtroom-observation program could be used to develop more judicial training about procedural fairness. The detailed descriptions of observed courtroom situations coupled with the observers' accounts of how they experienced those situations could be used in judicial education. Further, the systematic collection of courtroom practices that link specific judicial behaviors with procedural-fairness reactions may help to build a body of evidence about procedural fairness that judges find persuasive and compelling.

## **CONCLUSION**

Utah's JPEC has taken advantage of the discretion afforded by the Utah Legislature to make administrative rules regarding the mandated courtroom-observation component of the Utah JPE program. Specifically, JPEC has focused courtroom observations on the procedural-fairness aspects of judicial behavior; established a minimum performance standard for procedural fairness; used qualitative methods to capture the rich, context-specific information available in the observers' narratives; and retained a consultant experienced in qualitative-evaluation research to systematically analyze and produce syntheses of the narrative data. JPEC hopes that its work will provide voters in retention elections with valued procedural-fairness information; provide members of the public, as volunteer observers, with a voice in JPE; provide judges with candid feedback on procedural-fairness behaviors for self-improvement; draw attention to issues of procedural fairness in the judiciary as a whole; and provide JPEC with a wider range of information for making retention recommendations. JPEC plans to continue its efforts to improve the courtroom-observation program, and looks forward to dialogue with other states about this important aspect of JPE.



*Nicholas H. Woolf is the qualitative-research consultant to the Utah Judicial Performance Evaluation Commission; in 2011, he completed content analyses of courtroom-observation data for 72 Utah judges. Woolf has a Ph.D. in education from the University of Iowa and has served as qualitative research and evaluation consultant to numerous national and international projects in a variety of fields. He is a Visiting Academic Fellow at Henley Business School, part of the University of Reading in the United Kingdom. As an independent educator and trainer, he has conducted more than 280 workshops in qualitative-data analysis using the ATLAS.ti software program. More information about his work is available at [www.learnatlas.com](http://www.learnatlas.com), and he may be contacted at [woolf@pobox.com](mailto:woolf@pobox.com).*



*Jennifer MJ Yim, MPA, is the vice-chairperson of the Utah Judicial Performance Evaluation Commission. She is the past chairperson of JPEC's Courtroom Observation Subcommittee and a past member of its Rules Subcommittee. Her work in the justice system has included service on Utah's Third Judicial District Nominating Commission (2003-2007), Utah's Youth Parole Authority (2001-2011), and as the director of the Utah Judicial Council's Task Force on Racial and Ethnic Fairness in the Legal System (1997-2001). She is currently an appointed member of the Magistrate Merit Selection Panel for the United States District Court for the District of Utah, a procedural-justice consultant to the Utah Division of Juvenile Justice Services, and a doctoral candidate in the Department of Political Science at the University of Utah.*

38. Robert C. Liden & Terence R. Mitchell, *Ingratiation Behavior in Organizational Settings*, 13 *ACAD. MGMT. REV.* 572 (1988).

39. Research has reported similar effects for African-American judges. No African-American judges are in the current cycle of Utah JPEs.

# Is Procedural Fairness Applicable to All Courts?

Victor E. Flango

In a white paper of the American Judges Association published in this journal, Judges Kevin Burke and Steve Leben present a powerful case for using the principles of procedural fairness:

Judges must be aware of the dissonance that exists between how they view the legal process and how the public before them views 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.<sup>1</sup>

They further summarized Professor Tom Tyler's expectations of procedural fairness as:

- **Voice:** The ability to participate in the case by expressing their viewpoint;
- **Neutrality:** consistently applied legal principles, unbiased decision makers, and a "transparency" about how decisions are made;
- **Respectful treatment:** individuals are treated with dignity and their rights are obviously protected; and
- **Trustworthy authorities:** authorities are benevolent, caring, and sincerely trying to help the litigants—this trust is garnered by listening to individuals and by explaining or justifying decisions that address the litigants' needs.<sup>2</sup>

These are laudable expectations. If they can help operationally define the desirable characteristics of judges in a way that the more ambiguous and abstract concepts, such as "judicial temperament," do not, they could help sitting judges improve and could also help guide the public (in elective states) and governors and legislators (in appointive states) select new judges.

Many judges and academics have provided lists of the qualities a good judge should have. These usually include professional competence (legal abilities and intellect), integrity, and judicial temperament (neutral, decisive, respectful, and composed). For example, in his essay, "What Makes a Good Judge?," Sir Gary Hickinbottom divides the attributes of a good judge into professional, personal, and administrative components.<sup>3</sup> Professional attributes include knowledge of the law, legal analytic skills, "good judgment," and intellectual concentration, whereas personal attributes include such qualities as integrity, objectivity, and temperament.

Do the four basic "expectations" of procedural fairness cover these desirable qualities of a judge? My contention here is that the role of courts has evolved over time and that the role of judges has adapted to match the changing role of courts. Thomas Henderson and his colleagues have clearly distinguished three adjudication processes—procedural, decisional, and diagnostic—and have noted that *all* three, along with variations on each, are used by contemporary courts in varying combinations.<sup>4</sup> Thomas Clarke and I have gone a step further and suggested that court structures be modified to be more congruent with adjudication processes.<sup>5</sup> In any event, the contention here is that different adjudication processes require different judicial attributes and skills, and that procedural fairness was developed with the image of the traditional trial court in mind. So I ask: Are procedural-fairness concepts equally effective and applicable to judges serving in courts that do not fit the traditional image of trial courts?

## PROCEDURAL ADJUDICATION AND PROCEDURAL FAIRNESS

The classic image of judge as neutral arbiter has its roots in the adversary system. The very conception of courts, and therefore the expectations we have of them, is derived from the adversary process. The image of a court is that of a judge in a trial setting. Even though trials are "vanishing", *i.e.*, becoming a smaller and smaller portion of the way cases are resolved, tri-

### Footnotes

1. Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction* (A White Paper of the American Judges Association), 44 CT. REV. 4, 4 (2007-08).
2. *Id.* at 6. Some other sources use "respect" for "respectful treatment," "participation" for "voice," and "trust" or "trustworthiness" for "trustworthy authorities." See generally, David B Rottman, *Adhere to Procedural Fairness in the Justice System* 6 CRIMINOLOGY & PUBLIC POL'Y 835 (2007); Tom R. Tyler, *Procedural Justice and the Courts*, 44 CT. REV. 26, 30-31 (2007-08).
3. Gary Hickinbottom, *What Makes a Good Judge?*, in JUDICIAL

APPOINTMENTS: BALANCING INDEPENDENCE, ACCOUNTABILITY AND LEGITIMACY 55-66 (2010), available at <http://www2.americanbar.org/calendar/young-lawyers-division-spring-conference-2011/Documents/independentjudiciaryprogrammaterials.pdf> (last visited June 1, 2012).

4. THOMAS A. HENDERSON, CORNELIUS KERWIN & HILDY SAIZOW, *STRUCTURING JUSTICE: THE IMPLICATIONS OF COURT UNIFICATION REFORM* (1984).
5. Victor E. Flango & Thomas Clarke, *Which Disputes Belong in Court?* 50 JUDGE'S J. 22 (2011).



als provide the drama of courts and are the images that are televised and covered in the news.<sup>6</sup>

The adversary process assumes that there are two sides to the case—perhaps rooted in the medieval process of trial by combat.<sup>7</sup> The core of the adversary system is the *form* of participation accorded to the parties. Lon Fuller defines these as the “institutionally protected opportunity to present proofs and arguments for a decision in his favor.”<sup>8</sup> Each side has the opportunity to present arguments in his or her favor. Logically, the requirement for the participant to be able to provide proofs and arguments requires a neutral arbiter before whom to present the arguments and a set of standards or laws so that the litigants know the basis upon which the decision will be made.

Accordingly, the role of the judge in the adversary process is to preside over the proceedings and maintain order. Henderson and his colleagues called this process procedural adjudication. During a trial, the judge rules on whether any of the evidence the parties want to use is illegal or improper. If the trial is before a jury, the judge gives instructions about the law that applies to the case; if the trial is before the court, the judge determines the facts and decides the case. After the trial (bench or jury), the judge may decide on damages or mete out the sentence to the convicted. Note also the role of the judge in this idealized conception—a very passive umpire enforcing the procedural rules of the game. In the language of one recent confirmation hearing, the judge’s role is a passive referee who just “calls balls and strikes.”<sup>9</sup>

Procedural fairness comports well with the adversary process. Voice is the most important component of procedural fairness, not only because it is important for litigants to have their say in court but also because it shapes the other components—neutrality, trust, and respect.<sup>10</sup> The structure of the adversary process provides ample opportunity for voice because time is allotted for each side to tell their side of the story before a decision is made. A trial in particular is a place “where a citizen can effectively tell his own story publically in a forum of power.”<sup>11</sup> Moreover, the expectation of neutrality—honest and impartial decision makers who base decisions on consistent application of law to facts—is built into the role of the judge in the adversary process as is the expectation that

defendants will be treated with dignity and respect.

### PROCEDURAL FAIRNESS IN PROBLEM-SOLVING COURTS

Procedural fairness is also compatible with the problem-solving process. The idea of providing voice to litigants in a non-adversarial setting was one of the reasons this cooperative approach to dispute resolution was created. Particularly in family law, once a fertile source of trials, there have been calls to abandon adversarial proceedings “in favor of more informal approaches with the goal of encouraging parents to develop positive post-divorce co-parenting relationships.”<sup>12</sup>

More recent “problem-solving” courts<sup>13</sup> originated from the efforts of “practical, creative, and intuitive judges and court personnel, grappling to find an alternative to revolving door justice, especially as dispensed to drug-addicted defendants.”<sup>14</sup> From the opening of the first drug court in Dade County, Florida, in 1989,<sup>15</sup> drug courts spread rapidly based upon anecdotal reports of success in reducing recidivism, as well as the infusion of federal dollars. By the end of 2009, there were 2,459 drug courts and an additional 1,189 problem-solving courts in the United States, including courts for DWI, mental health, domestic violence, truancy, child support, homeless, prostitution, reentry, and gambling.<sup>16</sup>

Problem-solving courts require judges to be more active, less formal, and more personally engaged with each offender. One *New York Times* article summarized:

The judges often have an unusual amount of information about the people who appear before them. These people, who are often called clients, rather than defendants, can talk directly to the judges, rather than communicating through lawyers. And the judges monitor these defendants for months, even years, using a system of rewards and punishments, which can include jail time. Judges also receive training in their court’s specialty and may have a psychologist on the staff.<sup>17</sup>

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fairness  
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adversary  
process.**

6. See the special issue of the *Journal of Empirical Legal Studies* (Nov. 2004) devoted to the issue of “vanishing” trials.

7. ANNE STRICK, *INJUSTICE FOR ALL* 21 (1977).

8. Lon L. Fuller, *Adjudication and the Rule of Law*, in *PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW* 2 (1960).

9. It is interesting to note how this perception of judging permeates the traditional conception of what a judge is. Even John Roberts at his confirmation hearing to be Chief Justice of the United States noted that the judge, in this case an appellate judge, is merely an umpire, calling balls and strikes. *Confirmation Hearing on the Nomination of John G. Roberts Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr.).

10. See Tyler, *supra* note 2, at 30.

11. Paul Butler, *The Case for Trials: Considering the Intangibles*, 1 J. EMPIRICAL LEGAL STUD. 634 (2004).

12. Jane C. Murphy, *Revitalizing the Adversary System in Family Law*, 78 U. CIN. L. REV. 891, 895 (2010).

13. The conventional term “problem-solving courts” has passed into the language even though most are not separate courts but separate dockets or calendars of larger courts or divisions. In most instances, they involve a single judge handling a single type of case on a periodic schedule.

14. David B. Wexler, *Therapeutic Jurisprudence: It’s Not Just for Problem-Solving Courts and Calendars Anymore*, in *FUTURE TRENDS IN STATE COURTS 2004* (C. Flango, N. Kauder, K. Pankey, and C. Campbell eds.), and citing BRUCE J. WINICK & DAVID B. WEXLER, *JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS* 6 (2003).

15. Greg Berman & John Feinblatt, *Problem-Solving Courts: A Brief Primer*, LAW AND POL’Y 23 (2001).

16. C. WEST HUDDLESTON III AND DOUGLAS B. MARLOWE, *PAINTING THE CURRENT PICTURE: A NATIONAL REPORT CARD ON DRUG COURTS AND OTHER PROBLEM SOLVING PROGRAMS IN THE UNITED STATES* 1 (2011).

17. Leslie Eaton & Leslie Kaufman, *In Problem-Solving Court, Judges Turn Therapist*, N.Y.TIMES, April 26, 2005.

**The use of procedural fairness principles for disposition-oriented resolution of cases is more problematic because of the focus on expeditious decision making.**

This personal involvement creates a tension with the neutral arbiter role of the judge and sometimes leads to the characterization of problem-solving judges as “social workers” or “therapists.”<sup>18</sup> Problem-solving judges are not neutral—they hope that treatment succeeds. They praise and sanction defendants, rather than remain aloof, but this active engagement could create the perception that they are not impartial. Some may also consider collaboration in “staffings,” where the judge and treatment team meet in advance of hearings to discuss

the offender’s progress in treatment and to reach consensus about rewards and sanctions, to be in conflict with the neutral arbiter judicial role.

Problem-solving courts would seem to be the ideal setting for procedural fairness, especially voice, but stumbles on the concept of neutrality because a judge cannot both give the impression of neutrality and be a cheerleader for the success of treatment.

There is a way out of this dilemma, however—bifurcate cases into adjudication and sentencing phases—“emphasize traditional due process protections during the adjudication phase of a case and the achievement of tangible, constructive outcomes post-adjudication.”<sup>19</sup> Especially in criminal cases with a substance-abuse component, such as DWI cases, the full adversary process with all of its due process protections could be employed until guilt has been established. After guilt is established, problem-solving principles designed to prevent repeat offenses could be used to select the best sentencing options, whether they be therapeutic or punitive. If problem-solving processes were used primarily after adjudication, procedural-fairness principles could be put into play for treatment.

### **DISPOSITIONAL ADJUDICATION AND PROCEDURAL FAIRNESS**

The use of procedural fairness principles for disposition-oriented resolution of cases is more problematic because of the focus on expeditious decision making. Although a small proportion of “important” cases are resolved by trial (only about 2% in 2008), trials have never been the way most cases, even

felonies, were resolved. The justice system would simply break down if most cases went to trial. Instead, most criminal cases are resolved by plea agreements, and have been since the 19th century. Civil cases are settled, and traffic cases and ordinance violations are resolved by the payment of a fine. About 80% of criminal cases are misdemeanors and most (more than 70%) are handled in courts of limited jurisdiction by municipal judges, justices of the peace, or magistrates.<sup>20</sup> In the sense that these lower criminal courts hear the bulk of criminal cases, including disorderly conduct, drunkenness, prostitution, petty theft, and simple assault cases, they *are* the courts with the most contact with offenders, and it is in these courts that the stereotype of “assembly line” justice was created.<sup>21</sup> One Albany lawyer described the situation in the lower courts of New York:

The biggest problem with our court system is the volume of cases. The volume is so large that the courts have to rely on assembly line justice. It really is an assembly line. The police officer prepares the initial papers and files them with the clerk. The clerk gives the papers to the prosecutor who reviews them and discusses the case with the lawyer or the pro-se defendant. The papers then go back to the clerk, who then hands them to the judge. The judge calls the case. There’s a brief discussion at the bench. Then the papers go back to the clerk, who then processes the result (fine notice, schedule next date, etc.). Think about this: If a court has 100 cases on for a particular session (a typical number for courts like Colonie, Guilderland, Albany, etc), and each case takes 15 minutes, that would take 25 hours. That’s not going to work. If each case takes only 5 minutes, it still takes 8 hours, so that’s still not going to work. Most courts end up at about 1-2 minutes per case. That’s assembly line justice.<sup>22</sup>

These types of cases require facts to be established so that the law can be quickly applied; sentences and financial penalties are limited so that dispositions can be expeditious.<sup>23</sup> Clearing the docket then becomes very important, and the task becomes processing large numbers of individual cases, a more bureaucratic process not unfamiliar to the executive branch of government. Judges must decide large numbers of lower-stakes cases every day, rather than spend days or weeks making a decision in one case at trial, and so the procedures must be streamlined. Consequently, judges may take a more active role in all phases of case processing to ensure that the attorneys, many of whom may be court appointed, are devoting the proper attention to their clients. The point here is with that

18. *Id.* (“Now, in drug treatment courts, judges are cheerleaders and social workers as much as jurists.”).

19. J. Feinblatt, Gregg Berman & D. Denckla, *Judicial Innovation at the Crossroads: The Future of Problem Solving Courts*, 15(3) CT. MANAGER 28-34 (2000).

20. Even that 70% is an underestimate because ten states plus the District of Columbia and Puerto Rico are unified and thus do not distinguish courts of general jurisdiction from courts of limited jurisdiction, but often use a different category of judge, such as an

associate judge, to handle these cases.

21. *See, e.g.,* MALCOLM FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* (1979).

22. Warren Redlich, *Assembly Line Justice*, at ALBANY LAWYER (blog), <http://albany-lawyer.blogspot.com/2007/04/assembly-line-justice.html> (last visited June 1, 2012).

23. *See* Henderson, Kerwin & Saizow, *supra* note 4, at 11 (summarizing “decisional adjudication”).

many cases to dispose of in such a short time, can lower court judges really be expected to provide litigants with meaningful voice—the ability to participate in a case by expressing their viewpoint—and still keep ahead of their dockets? Is there time to express their caring, to explain and to justify their decisions? In sum, is procedural fairness possible in high-volume lower courts?

With respect to judges, I think the answer is “no,” but there is no reason why the principles of procedural fairness would not apply to other court employees. A study conducted by the Administrative Office of the Courts in California found that experience with traffic and other low-stakes courts were a particular source of litigant dissatisfaction.<sup>24</sup> Because judges have such short interactions with litigants in these high-volume courts, the way litigants are treated by court staff becomes more important.

In summation, the principles of procedural fairness were created for an adversarial process and work well there. They can be adapted for the problem-solving process that happens

after adjudication, but they can only be employed in the vast numbers of ordinary, run-of-the-mill cases by court staff, not by judges.



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24. DAVID B. ROTTMAN, TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS (Administrative Office of the Courts, Calif. 2005).

# Addressing Nonsystematic Factors Contributing to the Underrepresentation of Minorities as Jurors

Elizabeth Neeley

The Sixth Amendment to the United States Constitution guarantees the right of criminal defendants to “a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.” An “impartial jury” requires the jury be selected from a representative cross-section of the community. But how is a fair cross-section determined? In *Duren v. Missouri*, the Supreme Court outlined a three-pronged test defendants must satisfy to establish a prima facie violation of the fair-cross-section requirement:

(1) that the group alleged to be excluded is a “distinctive” group in the community; (2) that the representation of this group in venues from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.<sup>1</sup>

In her article, “Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must be Expanded,” Paula Hannaford-Agor explains:

[w]ith few exceptions, the cases that have survived the hurdle of *Duren*’s [first and] second prong[s] ultimately fail because the underrepresentation was not the result of “systematic exclusion.” Courts have consistently held the Constitution cannot hold trial courts accountable for protecting the rights of defendants if they lack the ability to prevent or control the factors that undermine or interfere with those rights.<sup>2</sup>

For example, caselaw has established that when source lists used to compile master jury lists (especially voter-registration lists) significantly underrepresent minorities, it is not systematic exclusion for two reasons. First, unless those lists were created in a manner that constitutionally discriminates against

minorities they presumptively pass constitutional muster. Second, because courts have no authority to require underrepresented groups to register to vote or obtain a state driver’s license, their underrepresentation is not inherent to the jury-selection process, but rather is a result of self-exclusion. Hannaford-Agor argues:

By perpetuating the misconception that courts have no responsibility to address causes of underrepresentation other than those inherent in the system itself, caselaw has created a functional safe harbor in which courts can ignore substantial minority underrepresentation in their own jury pools as long as they can plausibly deny actively contributing to the problem.<sup>3</sup>

Hannaford-Agor argues that despite this lack of incentive created by caselaw, there are in fact many practices that courts can employ to address or mitigate the impact of nonsystematic factors. This article discusses one state’s work to both measure and address the extent to which nonsystematic factors have contributed to the underrepresentation of racial and ethnic minorities in the initial and eligible pools of jurors.

## REFORM OF NEBRASKA’S JURY-COMPILATION PROCESS

In 2001, the Nebraska Supreme Court and the Nebraska State Bar Association established a joint task force to examine issues of racial and ethnic bias in the court system and legal profession.<sup>4</sup> The 18-month investigation was released in 2003 and examined a broad range of topics.<sup>5</sup> The primary recommendation of the report was to establish a standing committee to implement the recommendations of the report and to continually work to promote diversity in the judicial workforce and legal profession, ensure equal access to the justice system, and address racial disparities in the criminal and juvenile justice systems. Over the past nine years, a priority for the Nebraska Minority Justice Committee has been to examine

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### Footnotes

1. *Duren v. Missouri*, 439 U.S. 357, 364 (1979).
2. Paula Hannaford-Agor, *Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must be Expanded*, 59 DRAKE L. REV. 761, 763-64 (2011).
3. *Id.* at 764.

4. For information on state commissions and task forces charged with examining issues of racial and ethnic fairness in the courts visit the website for the National Consortium on Racial and Ethnic Fairness in the Courts at: <http://www.consortiumonline.net/>
5. THE NEBRASKA MINORITY JUSTICE TASK FORCE REPORT FINAL REPORT (2003), available online at: [http://ppc.nebraska.edu/userfiles/file/Documents/projects/MinorityandJusticeTaskForce/mjtf\\_final\\_report.pdf](http://ppc.nebraska.edu/userfiles/file/Documents/projects/MinorityandJusticeTaskForce/mjtf_final_report.pdf).

and improve the extent to which Nebraska's juries are representative of the communities that they serve.

### **REQUIRING PERIODIC JURY REFRESHMENT**

During their study, the Task Force discovered that there was no statutory requirement for how often counties should update their jury-pool lists. Some counties, therefore, had not updated their jury-pool lists for several years (in some instances more than 15 years). Given the state's quickly changing demographics, this practice resulted in jury pools that were not representative of the communities that they served (excluding several groups of people including young adults, recent residents of Nebraska, and newly naturalized citizens).

To remedy this, LB 19 was passed in 2003, requiring all counties within Nebraska to refresh their jury-pool lists annually.<sup>6</sup> The goal of LB 19 was to make jury pools across the state more representative of their communities. In 2005, the Nebraska Appleseed Center on Law in the Public Interest, together with the Minority Justice Committee, conducted a small-scale study to examine the impact that these bills had on the diversity of Nebraska's jury pools. Because baseline data were not available, perceptual data measuring the impact of the legislation were gathered through phone interviews with district court clerks. Prior to the law change, only 44 of Nebraska's 93 counties updated their master list on an annual or biannual basis. Researchers concluded that more than 25% of counties interviewed reported noticing either *great* or *some change* in the composition of the jury pool following annual updates, suggesting that the bill had its intended effect in a number of counties. Although not an intended impact of the legislation, annual or biannual updates also improved the efficiency of the jury-compilation process by updating resident addresses and removing individuals who have moved from the county (and are therefore ineligible) as well as county residents who are deceased.

### **EXAMINING THE JURY COMPILATION PROCESS: ESTABLISHING A NATIONAL MODEL**

While the Committee counted its experience with jury refreshment as an early success, it was still inhibited from fully examining the extent to which juries are representative of their community because of a lack of data on the racial and ethnic composition of potential jurors, an issue affecting most jurisdictions. In Nebraska at this time, each county utilized its own distinctive juror-qualification form, and only a handful of Nebraska's 93 counties collected data on race and ethnicity. Because existing data were not available, Nebraska established its own process to allow it to examine and monitor the jury-compilation process.

In 2005 the Committee worked to pass LB 105, which authorized the Nebraska Supreme Court to adopt a uniform juror-qualification form and provided the Nebraska Supreme Court, or its designee, access to juror-qualification forms for the purpose of research. Accordingly, the Nebraska Minority Justice Committee worked on developing a uniform document that would continue to meet the needs of each county but would also allow for a confidential method of collecting demographic data. The Committee reviewed dozens of counties' juror-qualification forms, consulted Nebraska statutes regarding juror qualifications, and worked with a group of district court clerks and jury commissioners in developing the uniform juror-qualification form. The form was subsequently approved and adopted by the Nebraska Supreme Court and is currently being implemented in each county.<sup>7</sup>

In addition to the information required by statute and information added at the request of the district court clerks for practical administrative purposes, the qualification form collects data on the race and ethnicity of the potential juror. This information is collected on a page separate from the body of the juror-qualification form. The page containing the "confidential juror information" is removed from the qualification form, stored by the clerks until the end of the jury term, and then mailed to the Committee via the Nebraska Administrative Office of the Courts, along with lists of those ultimately selected for voir dire and those who served on the impaneled juries. The information gleaned from the uniform juror qualification form allows researchers to examine each stage of the jury-compilation process, from the compilation of the initial pool to the final impaneled jury, to determine whether and why the composition of the jury pools may or may not be reflective of the diversity of Nebraska's counties. To our knowledge, Nebraska is the first state to institutionalize a system to allow the continual monitoring of jury demographics throughout the compilation process.

### **EXPANDING JUROR SOURCE LISTS**

State law had provided that master jury lists were comprised by combining the lists of registered voters and registered drivers in the state of Nebraska. There had been anecdotal concerns that because minorities may be less likely to be registered to vote or to drive, the source lists may not effectively achieve a representative master list. In December of 2008, the Committee released a study that confirmed these perceptions. Based on an examination of nearly 70,000 juror-qualification forms from eight of Nebraska's most diverse counties, data indicated that racial and ethnic minorities were significantly underrepresented in the initial and eligible pools of jurors.<sup>8</sup> Addressing disparity in these initial stages is important

6. Because many of Nebraska's smaller counties may not even hold a jury trial over the course of a year, LB 712 was passed in 2010 to require counties with populations under 3,000 to refresh every five years, counties with populations between 3,000 and 7,000 to refresh every two years, and counties with populations over 7,000 to refresh annually.

7. Nebraska Supreme Court Rules Regarding the Use of Nebraska Juror Qualification Form (adopted December 14, 2005, effective

January 1, 2006), available online at: <http://court.nol.org/rules/amendments/Ch6Art10AppAAmds.pdf>.

8. ELIZABETH NEELEY, REPRESENTATIVE JURIES: EXAMINING THE INITIAL AND ELIGIBLE POOLS OF JURORS (2008) (Nebraska Minority Justice Committee), available at: [http://ppc.nebraska.edu/userfiles/file/Documents/projects/MinorityJusticeCommittee/Reports/Representative\\_Juries\\_Policy\\_Report\\_2008.pdf](http://ppc.nebraska.edu/userfiles/file/Documents/projects/MinorityJusticeCommittee/Reports/Representative_Juries_Policy_Report_2008.pdf).

**TABLE 1: 2008 RACIAL COMPOSITION OF DRIVER'S-LICENSE HOLDERS AND STATE-ID-CARD HOLDERS**

RACE	DRIVER'S LICENSE	PERCENTAGE	ID CARD	PERCENTAGE
Asian	23,768	1.85%	3,284	4.26%
Black	47,626	3.71%	13,672	17.73%
Hispanic	3,068	0.24%	1,149	1.49%
Am. Indian	7,569	0.59%	2,352	3.05%
Other	50,354	3.92%	13,191	17.11%
Unknown	3	0.00%	2	0.00%
White	1,152,354	89.70%	43,461	56.36%
Total	1,284,742	100%	77,111	100%

because representative jury panels are necessarily dependent on the extent to which the initial and eligible juror pools are representative of the community.

The Committee explored several potential reforms to the compilation process and concluded that the most viable solution was to expand the source lists used to compile the master jury lists. The Committee explored the possibility of adding the following registries: state identification cards, tax rolls, unemployment, and those receiving state aid through the Department of Health and Human Services. In determining which, if any, of these lists would be appropriate, the Committee considered numerous factors including: whether the addition of the list would reduce the significant racial and ethnic differences documented in the initial jury pools; the costs involved in obtaining the list; the willingness of various agencies to provide the necessary data; the qualifications for being included on the potential list; and the level of duplication with the current source lists. Ultimately, the Committee recommended that through legislative action, the source lists used to create the master jury list should be expanded to include individuals with state identification cards.

State identification cards are issued through the Nebraska Department of Motor Vehicles.<sup>9</sup> As of October 2008, the total number of individuals with state identification cards (but not drivers' licenses) was 77,111. To obtain a state identification card, Nebraska law indicates that applicants need only provide "proof of date of birth and identity with documents containing a photograph or with nonphoto identity documents which include his or her full legal name and date of birth."<sup>10</sup>

The Department of Motor Vehicles provided a county breakdown by race and ethnicity of individuals over the age of 18 with state identification cards. The table above indicates that nonwhites (Asians, Blacks, Hispanics,<sup>11</sup> and American Indians) comprise a much greater percentage of state-identification-card holders than of registered drivers.

Based on data indicating the significant underrepresentation of certain minority groups, and the above statistics regarding state identification cards, a bill was drafted adding state-identification-card holders as a source list for compiling juries. On May 29, 2009, the Governor signed the bill, LB 35, into law.

### MEASURING THE IMPACT OF LB 35

Since the law change, the Committee has measured the extent to which this legislative change has resulted in juries that are more representative of the communities that they serve. Relying on the methods used in its original examination,<sup>12</sup> the analysis compares the demographics of the county population to the demographics of the initial and eligible pools of jurors. The county population is based on U.S. Census data, which excludes individuals under the age of 19 and noncitizens (who are ineligible for jury service). The initial pool of jurors includes individuals who have received and returned a juror-qualification form. The eligible pool of jurors includes those who remain in the pool after individuals are removed for statutory eligibility criteria or disqualification, and those who opt out for jury service.

Chi-square analyses were conducted to determine whether the county's demographics were significantly different from the demographics of the county's initial jury pools and eligible pools. A chi-square test takes an expected proportion (in this case, the proportion of each racial and ethnic group) and compares it to an observed proportion (in this case, the observed racial and ethnic proportions in the initial and eligible pools). The chi-square test indicates whether the difference between the groups is statistically significant. A standardized residual over 2.0 indicates that the disparity contributes to the significant chi-square value; the greater the standardized residual, the greater the disparity.

Given the space limitations of this article, the results discussed below are limited to Douglas County (Omaha), Nebraska's largest county. Prior to the law change, Whites and Asians were significantly overrepresented in the initial pools of jurors while Blacks and Hispanics were significantly underrepresented in the initial pools of jurors (see Table 2). Following the law change, Blacks are no longer significantly underrepresented in the initial pool (the standardized residual indicating significant disparity dropped from 16.1 to 1.8), and Whites are no longer significantly overrepresented in the initial pool (the standardized residual dropped from 5.8 to 1.1). While significant disparities still remain for Asians and Hispanics, the extent of the disparity, as measured by the standardized resid-

9. Neb. Rev. St. § 60-4,181.

10. Neb. Rev. Stat. § 60-484 (f)(i).

11. Please note that the Nebraska Department of Motor Vehicles only began collecting information on Hispanics in 2008. For this rea-

son, the number of Hispanics is drastically lower than expected. It is likely that a large percentage of Hispanic drivers were captured in the "other" category prior to the policy change.

12. See NEELEY, *supra* note 8.



**TABLE 4: RACIAL BREAKDOWN OF REASONS FOR INELIGIBILITY**

	<b>WHITES</b>	<b>BLACKS</b>	<b>ASIANS</b>	<b>AM. INDIANS</b>	<b>HISPANIC</b>
<b>REQUIREMENTS</b>	21.5%	44.9%	88.4%	26.6%	84.5%
<b>DISQUALIFIED</b>	6.9%	13.9%	1.3%	22.4%	2.7%
<b>OPTED OUT</b>	71.6%	41.3%	10.3%	51.0%	12.8%

American Indians, the majority of those ineligible for jury service opted out (specifically, being over the age of 65 or having an impairment).

In examining why Hispanics remain underrepresented in the eligible pools of jurors, several explanations are possible. First, as described above, Hispanics are significantly underrepresented in the initial pools of jurors, and the addition of state-identification-card lists has not adequately raised their representation in the initial pool. Second, it is possible that the population of Hispanics who do not return a juror-qualification form is growing. Third, it is possible that the population of ineligible Hispanics in the state is growing. Finally, anecdotal concerns have been expressed by jury commissioners about the number of Hispanics claiming an inability to read, speak, or understand English (particularly in situations where those individuals are known in the community to possess English skills).

These reports beg the question of whether the requirement for English is being utilized as a convenient way for Hispanics to “opt out” of jury service.<sup>14</sup> At a minimum, these reports have signaled the need for a process to determine English proficiency—in some counties, anyone who indicates on the juror qualification form that they do not read, speak or understand English is presumptively removed from consideration; in other counties, judges or jury commissioners make these determinations on a case-by-case basis, albeit with no formal criteria. The Committee will continue to monitor the representation of the Hispanic population and has partnered with the Latino American Commission to provide statewide education on the importance of jury service.

## **CONCLUSION**

While other jurisdictions may not face the same barriers regarding periodic refreshment, measurement, or limited juror-source lists, Nebraska’s experience of court-led reform demonstrates that courts can in fact develop policy and employ practices to reduce or mitigate the impact of nonsystematic factors that result in the underrepresentation of minorities. Moreover, the strategy of data-driven jury reform can be applied to other types of nonsystematic exclusion.

For example, jurisdictions could re-evaluate the eligibility criteria set forth to qualify someone as eligible for jury service.

In Nebraska a person who has been convicted of a criminal offense punishable by imprisonment in a correctional facility (which is highly correlated with race) when the conviction has not been set aside or pardoned is not eligible for jury service,<sup>15</sup> while in New Mexico a person who was convicted of a felony and who met all other requirements for eligibility could be summoned for jury service if the person had successfully completed all conditions of the sentence imposed for the felony, including conditions for probation or parole.<sup>16</sup> Moreover, a large percentage of Hispanics and Asians in Nebraska are ineligible for jury service because they do not “read, speak, or understand English.”<sup>17</sup> In New Mexico, however, language ability is not a criterion to determine eligibility for jury service<sup>18</sup> and, in fact, court interpreters are provided to jurors with limited English ability. Jurisdictions could also re-evaluate the informal and subjective processes by which eligibility determinations are made (see discussion above regarding the need to develop an objective and uniform way of determining language ability).

Another potential area of inquiry is the extent to which minorities are overrepresented in the pool of individuals with undeliverable summonses (local migration rates are highly correlated with socioeconomic status, which in turn is related to minority status) and whether increased efforts to reduce incorrect address information will yield more representative pools. For example, the National Center for State Courts recommends that before summoning prospective jurors, staff verify and correct their addresses using the National Change of Address (NCOA) database available through the U.S. Postal Service.<sup>19</sup> States with county-based systems will likely find that the efforts and practices in place to deliver summonses initially returned for inaccurate address information will differ greatly from county to county.

Efforts can also be taken to reduce failure to appear for jury service. Research in other contexts suggests that failure-to-appear rates are higher for racial and ethnic minorities than they are for Whites.<sup>20</sup> The National Center for State Courts recommends that a timely second summons or notice typically reduces the nonresponse or failure-to-appear rate by 24% to 46%.<sup>21</sup> Research by the University of Nebraska Public Policy Center indicates that providing information about what would

14. While the numbers of Asians who are ineligible for jury service for not being a citizen and for language ability are nearly identical, the number of Hispanics who are ineligible for jury service for language reasons is about 10% higher than the number who are ineligible for citizenship reasons.

15. Neb. Rev. Stat. § 25-1601.

16. N.M. Stat. Ann. § 38-5-1.

17. See text at notes 13-14 *supra*.

18. N.M. Stat. Ann. § 38-5-1.

19. The National Center for State Courts’ Center for Jury Studies maintains an online resource, *Best Practices in Jury System Management*, which is available at <http://www.ncsc.org/services-and-experts/areas-of-expertise/jury-management.aspx>.

20. Brian Bornstein, Alan Tomkins & Elizabeth Neeley, *Reducing Courts’ Failure to Appear Rate: A Procedural Justice Approach* (2010) (United States Department of Justice, Office of Justice Programs, National Institute of Justice, 2008-IJ-CX-0022).

21. See *Best Practices*, *supra* note 19.



happen if a misdemeanor defendant failed to appear (i.e., possible sanctions) significantly decreases failure-to-appear rates. Given research by the American Judicature Society indicating that the single biggest predictor of nonresponse rates to jury summonses is the jurors' expectations about what would happen if they failed to appear,<sup>22</sup> it is likely that the threat of sanctions on the initial summons would also increase response rates, particularly for minority populations.

Given the diversity of statutory frameworks and formal and informal juror-compilation processes, it is likely nonsystematic exclusion factors can continue to be identified and addressed to produce more representative juries. Progress, however, is dependent on judicial leadership to examine and address these issues and research partnerships to effectively determine the direction and impact of reforms.



Elizabeth Neeley, Ph.D., is the director of Nebraska's Minority Justice Committee, a joint initiative of the Nebraska Supreme Court and Nebraska State Bar Association, established to address issues of racial and ethnic fairness in the justice system. Dr. Neeley is a member of the American Bar Association and the National Legal Aid and Defender Association. She serves on the Board of Directors of the National Consortium on Racial and Ethnic Fairness in the Courts and on the Editorial Board of *Court Review*. Dr. Neeley is a Faculty Fellow for the University of Nebraska Public Policy Center. She is an active member of the Nebraska Supreme Court's Interpreter Advisory Committee and the Nebraska Crime Commission's Committee on Disproportionate Minority Contact.

22. ROBERT G. BOATRIGHT, IMPROVING CITIZEN RESPONSE TO JURY SUMMONSES: A REPORT WITH RECOMMENDATIONS (1998).

## Court Review Author Submission Guidelines

*Court Review*, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States and Canada. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work.

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**Pre-commitment:** For previously published authors, we will consider making a tentative publication commitment based upon an article outline. In addition to the outline, a comment about the specific ways in which the submission will be useful to judges and/or advance scholarly discourse on the subject matter would be appreciated. Final acceptance for publication cannot be given until a completed article, essay, or book review has been received and reviewed by the *Court Review* editor or board of editors.

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# The International Criminal Court: Our Differences in Jurisprudence

David Admire

On July 1, 2002, the International Criminal Court (ICC) became operational following establishment by the Rome Statute.<sup>1</sup> The Court is made up of the Presidency, an Appeals Division, a Trial Division, Pre-Trial Division, the Office of the Prosecutor, and the Registry.<sup>2</sup> The purpose of the Court is to provide a means to bring to justice the perpetrators of “the most serious crimes of concern to the international community . . . .”<sup>3</sup> The crimes within the jurisdiction of the court are the crimes of genocide, crimes against humanity, war crimes, and the crime of aggression.<sup>4</sup> To date, no crime of aggression has been charged.

One case is pending before the Pre-Trial Division<sup>5</sup> and six cases are being tried before a Trial Chamber,<sup>6</sup> leaving eleven cases where the defendants are at large and warrants have been issued for their arrests<sup>7</sup> and two cases where a Pre-Trial Chamber refused to confirm charges.<sup>8</sup> The jurisprudence of the ICC results from the decisions in these cases by the Pre-Trial, Trial, and Appeals Divisions interpreting the Statute of Rome, the Elements of Crimes, and the Court’s Rules of Procedure and Evidence. Following that, the Court may look to applicable treaties and the principles and rules of international law. Lastly, the Court may under certain circumstances review the national law of states.<sup>9</sup>

## PRE-TRIAL CHAMBER

The major role of the Pre-Trial Chamber once a defendant has been brought before it is to conduct a hearing to determine whether the prosecutor has brought forth “sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged.”<sup>10</sup> If the prosecutor has met that burden, the Pre-Trial Chamber sends the defendant to the Trial Chamber for trial.<sup>11</sup> This process is similar to any probable-cause hearing in the United States. However, the confirmation decisions issued by the Pre-Trial Chamber are substantially different than those in the U.S. The confirmation deci-

sions are quite long, ranging, for example, from 157 pages in *Lubanga* to 226 pages in *Katanga and Ngudjolo*.<sup>12</sup> These decisions may contain a discussion of the factual background, preliminary evidentiary matters, material elements of the crimes, and modes of liability. Each discussion is footnoted at great length to the prosecution and defense briefs.<sup>13</sup>

The Pre-Trial Chamber in its confirmation decision in *Katanga and Ngudjolo* in effect usurps the authority of the Trial Chamber by setting forth the mode of criminal responsibility that the prosecutor is bound to follow. The Statute of Rome was carefully constructed to include virtually all methods of criminal responsibility, and it states:

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
  - (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
  - (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
  - (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
  - (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
    - (i) Be made with the aim of furthering the criminal activity or criminal purpose of

## Footnotes

1. ROME STATUTE OF THE I.C.C., 37 I.L.M. 1002 (1998), 2187 U.N.T.S. 90.
2. *Id.* at art. 34.
3. *Id.* at Preamble.
4. *Id.* at art. 5 (1).
5. The Prosecutor v. Laurent Gbagbo, ICC-02/11-01/11.
6. The Prosecutor v. Bemba, ICC-01/05-01/08; The Prosecutor v. Katanga & Ngudjolo, ICC-01/04-01/07; The Prosecutor v. Lubanga, ICC-01/04-01/06; The Prosecutor v. Banda & Jerbo, ICC-02/05-03/09; The Prosecutor v. Ruto and Sang, ICC-01/09-01/11; The Prosecutor v. Muthaura and Kenyatta, ICC-01/09-02/11.
7. The Prosecutor v. Bashir, ICC-02/05-01/09; The Prosecutor v. Harun & Kushay, ICC-02/05-01/07; The Prosecutor v. Ntaganda, ICC-01/04-02/06; The Prosecutor v. Kony, Otti, Odhiambo & Ongwen, ICC-02/04-01/05; The Prosecutor v. Hussein, ICC-

- 02/05-01/12; The Prosecutor v. Gaddafi and Al-Senussi, ICC-01/11-01/11.
8. The Prosecutor v. Garda, ICC-02/05-02/09; The Prosecutor v. Mbarushimana, ICC-01/04-01/10.
9. ROME STAT. art. 21 (1) (a)-(c).
10. *Id.* at art. 61 (7).
11. *Id.* at art. 61 (7) (a).
12. Decision on Confirmation of Charges, The Prosecutor v. Lubanga, ICC-01/04-01/06-803, Pre-Trial Chamber I (Jan. 29, 2007), available at <http://www.icc-cpi.int/iccdocs/doc/doc266175.pdf>; Decision on Confirmation of Charges, The Prosecutor v. Katanga & Ngudjolo, ICC-01/04-01/07-717, Pre-Trial Chamber I (Sept. 30 2008), available at <http://www.icc-cpi.int/iccdocs/doc/doc571253.pdf>.
13. *See Id.*

- the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
- (ii) Be made in the knowledge of the intention of the group to commit the crime;
  - (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
  - (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.<sup>14</sup>

A close review of this language indicates that criminal responsibility exists for one's own acts, acts done jointly with or through another person, complicity, aiding or abetting, or acting through a group of persons. Also, criminal responsibility exists based on actions or inactions as a commander.<sup>15</sup> Furthermore, no indication shows one mode is more or less serious than another because all modes are subject to the same level of punishment.<sup>16</sup> However, the Pre-Trial Chamber in *Katanga and Ngudjolo* must have believed that actions contained in subsections (b), (c), and (d) were less serious than those contained in subsection (a). In a tortured interpretation of this subsection, the Pre-Trial Chamber devised a scheme whereby an individual can be criminally liable for the acts of another's subordinates. This interpretation was clearly unnecessary because such acts are criminally liable under subsections (b), (c), or (d). The only reason for this interpretation is that conviction under subsection (b), (c), or (d) was believed to be less serious as an accessory rather than under subsection (a) as a principal.

The practical effect of this determination is that the Trial Chamber is now bound by the Pre-Trial Chamber's confirmation of charges, which includes this mode of liability. Furthermore, this mode of liability was not the method of proof that was desired by the prosecutor, which in effect also binds the prosecutor's hands.<sup>17</sup> In summary, the Pre-Trial Chamber exceeded its authority while limiting the options of both the prosecutor and the judges who would try the case. While a Trial Chamber has the authority to act as a Pre-Trial Chamber,<sup>18</sup> it

has not done so. It appears the Trial Chamber has ceded its authority to the Pre-Trial Chamber to determine which mode of criminal responsibility is appropriate. It is interesting to note that in *Katanga and Ngudjolo* the court requested briefs from the parties regarding the mode of responsibility.<sup>19</sup> No decision was made on that issue, and the case proceeded to trial. Closing arguments have been completed and still this issue hangs over the case. Apparently the court will resolve this issue when it renders a verdict.

**The court may allow victims not only to be present at trial but also to participate as a party.**

## TRIAL

Trials are held before three-judge panels at the ICC.<sup>20</sup> Because judges elected to the ICC bench are not required to have judicial experience,<sup>21</sup> two of the eight judges assigned to the Trial Division have no judicial experience and little if any trial experience.<sup>22</sup> The drafters of the Rome Statute desired that 2/3 of the judges have experience as a judge, prosecutor, or advocate. The remaining judges should have expertise in international law, which results in many of those judges being academics. Obviously, the skill sets necessary to be an academic and a judge are significantly different.

Trials at the ICC contain factors that simply do not exist in most American courtrooms. Because the official languages of the court are both French and English, participants in the trial may speak one language but not the other. As a result, the court must have significant electronic facilities such that each counsel, judge, and other participant has available headphones to hear the statements of those at trial as those statements are translated by a group of interpreters. In *Katanga and Ngudjolo*, the Congolese witnesses also need interpreters. This obviously slows down the trial process.

Another interesting aspect of the ICC is the prominent role of victims. The court is required to take appropriate measures to assure the physical and mental well-being of victims.<sup>23</sup> The court may allow victims not only to be present at trial but also to participate as a party. Witnesses are entitled to be represented by counsel, who may question witnesses during trial and call their own witnesses.<sup>24</sup> This substantial difference between trials in American courts and the ICC carries the danger of a victim's counsel acting in effect as a second prosecutor. Their participation increases the length of the trial to the detriment of the defendant who is in custody.

14. ROME STAT. art. 25 (3).

15. *Id.* at art. 28.

16. *Id.* at art. 77.

17. See *Katanga*, *supra* note 12, at para. 469.

18. ROME STAT. art. 64 (6) (a).

19. See Prosecution's Pre-Trial Brief on the Interpretation of Art. 25 (3) (a), *Katanga*, ICC-01/04-01/07-1541 (Oct. 19, 2009), available at <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200107/court%20records/filing%20of%20the%20participants/of>

<http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200107/court%20records/filing%20of%20the%20participants/of>

20. ROME STAT. art. 39 (2) (b) (ii) & art. 61 (11).

21. *Id.* at art. 36 (3) (b).

22. See *Structure of the Court: Trial Division*, INTERNATIONAL CRIMINAL COURT, <http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/chambers/trial%20division/trial%20division?lan=en-GB> (last visited Feb. 27, 2012) (supplying biographical information of the trial division judges).

23. ROME STAT. art. 68 (1).

24. *Id.* at art. 68 (3).

**The ICC's approach to the admission of hearsay . . . leaves the Rome Statute's guarantee of confrontation tenuous.**

Like in the U.S., defendants are entitled to be represented by counsel. These attorneys are paid by the court.<sup>25</sup> The defense's costs, which include multiple attorneys, investigators, and support staff, are staggering. In *Katanga and Ngudjolo*, the 2008 budget for each defendant was 472,459 and 442,309 euros, respectively.<sup>26</sup> The conversion rate to

U.S. dollars is approximately \$614,196 and \$575,001.

## INDIVIDUAL RIGHTS

### SPEEDY TRIAL

As a result of the confirmation practices of the Pre-Trial Chamber, the length of time existing between arrest and trial is certainly a concern. For example, Thomas Lubanga was taken into custody on March 17, 2006, charges were confirmed on January 29, 2007, and his trial began on January 26, 2009. He was found guilty on March 14, 2012, but has yet to be sentenced. Germain Katanga was placed in custody on October 17, 2007. Matthieu Ngudjolo was taken into custody February 6, 2008. The charges were confirmed on September 30, 2008, and trial began on November 24, 2009. Jean-Pierre Bemba was taken into custody on May 24, 2008, the confirmation of charges was issued on June 15, 2009, and trial commenced on November 22, 2010.<sup>27</sup> None of these trials have concluded. The ICC is required to bring defendants to trial without undue delay;<sup>28</sup> however, these time frames, ranging from 21 months to nearly 3 years, do not square with U.S. concepts of a speedy trial.

As discussed above, the participation of witnesses creates delay. How the court schedules its calendar also affects this delay. For example, the *Katanga and Ngudjolo* trial is held in either morning or afternoon sessions. The remaining time is left for other court business. Much of that business is another interesting facet of the ICC that adds to the delay in reaching a final determination. While some decisions on motions before the Trial Chamber are issued from the bench, many are written. Each decision is written in the same format as confirmation

decisions in that it is completely footnoted as to facts, prosecution and defense positions, and the court's decision. Each one of these proposed decisions must be drafted and circulated among the judges for review, changes, and agreement. These decisions can be lengthy from a U.S. perspective.<sup>29</sup> The process is more akin to an appellate court proceeding. Delay can also be attributed to the lack of trial or judicial experience among the judges.

The jurisprudence of the ICC has interesting differences from the U.S. system. For example, the Rome Statute lists a series of defendant's rights that are similar to rights guaranteed by the U.S. Constitution; however, when one delves into the decisions of the court, it becomes obvious that stark differences exist. Clearly the right to a speedy trial discussed above is one of those.

### CONFRONTATION/HEARSAY

One of the strongest protections provided to a criminal defendant and embodied in the Sixth Amendment is the right to confront the witnesses upon whose testimony the state relies for conviction. This provision assures a defendant that he or she may test through cross-examination a witness's truthfulness. Furthermore, the confrontation clause allows a defendant to examine the accuracy of a witness, the witness's memory, and the meaning and sincerity of the witness's testimony. Without this protection, there lies a real and ever-present danger that an individual could be wrongfully convicted.

Within the ICC's founding document rests an apparently similar provision to the Sixth Amendment.<sup>30</sup> This provision indicates a defendant shall have minimum guarantees, including "[t]o examine, or have examined, the witnesses against him or her . . . ." While this subsection appears to be relatively straightforward, when one examines the decisions of the ICC, it is apparent that this protection is illusory at best.

The ICC's approach to the admission of hearsay and its reliance on judges determining the probative value of hearsay evidence leaves the Rome Statute's guarantee of confrontation tenuous. The ICC has found first that the exclusion of hearsay evidence is not expressly provided by the Statute.<sup>31</sup> Furthermore, in *Katanga and Ngudjolo*, the Pre-Trial Chamber determined that "any challenges to hearsay evidence may affect its probative value, but not its admissibility."<sup>32</sup> The chamber did address confrontation and the determination of

25. *Id.* at art. 67 (1) (b).

26. *Report on Different Legal Aid Mechanisms Before International Criminal Jurisdictions*, ICC-ASP/7/23 (Oct. 31, 2008), available at [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP7/ICC-ASP-7-23%20English.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP7/ICC-ASP-7-23%20English.pdf).

27. *See Situations and Cases*, INTERNATIONAL CRIMINAL COURT, <http://www.icc-cpi.int/Menu/ICC/Situations+and+Cases/Cases/> (last visited 27 Feb. 2012) (supplying dates of apprehension).

28. ROME STAT. art. 67 (1) (c).

29. *See Corrigendum to Decision on Prosecution Motion for Admission of Prior Recorded Testimony of Witness P-02 and Accompanying Video Excerpts*, *Katanga*, ICC-01/04-01/07-2289-Corr-Red, Trial Chamber II, (Aug. 27, 2010), available at <http://www.icc-cpi.int/NR/exeres/F7695FFB-40B0-4231-A3B7-40C915B556CA.htm>; *Order in Relation to Disclosure of Identity of P-143*, *Katanga*, ICC-01/04-01/07-1817, Trial Chamber II, (Feb.

1, 2010), available at <http://www.icc-cpi.int/NR/exeres/AA43436E-8447-42DA-8942-AF1C6E716A5B.htm>; *Decision of the Communication of P-316's Statement*, *Katanga*, ICC-01/04-01/00-1728-Red, Trial Chamber II, (Dec. 17, 2009), available at <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200107/court%20records/chambers/trial%20chamber%20ii/1728?lan=en-GB>.

30. ROME STAT. art. 67(1) (e).

31. *Decision Regarding Protocol on Practices to be Used to Prepare Witnesses for Trial*, *Lubanga*, ICC-01/04-01/06 at para. 41, Trial Chamber I (May 23, 2008), available at <http://www.icc-cpi.int/iccdocs/doc/doc494990.pdf>.

32. *Decision on Confirmation of Charges*, *Katanga*, *supra* note 12, at para. 137.

probative value when it stated “the parties’ inability to cross-examine a Prosecution source is simply one factor in the Chamber’s determination of the probative value accorded to the evidence in question.”<sup>33</sup> The ICC also looks to the text of the Rome Statute and its own rules of evidence for its position that the Chamber can consider this type of evidence.<sup>34</sup> If one examines Article 69 (3), the second sentence states: “The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.”<sup>35</sup> The ICC and other national jurisdictions have a strong reliance on appropriate judicial determination of probative value to obtain the truth, while in U.S. courts, the hearsay rule makes this determination unnecessary because trustworthiness of an out-of-court statement is found to be inherently lacking unless it falls within an exception to the rule. In the U.S., every law student has drilled into him or her the importance of the confrontation clause and underlying reason for the hearsay rule. Instead, the ICC views this as a hindrance to the determination of the truth.

A recent decision by Trial Chamber III in *Bemba* once again provides insight into the immense differences in jurisprudence between the U.S. and the ICC. In a 17-page decision, the court admitted as prima facie evidence all documents submitted by the prosecutor before the start of the presentation of evidence.<sup>36</sup> The Court distinguished admission of evidence and the probative value to be given it at the end of the trial. The Court justified its action as ensuring the proper conduct of the trial. Furthermore, the court believed that the drafters of the Statute wanted to avoid the “technical formalities of the common law system of admissibility of evidence in favour of the flexibility of the civil law system . . . .”<sup>37</sup> Fortunately, this decision was reversed on appeal.<sup>38</sup> Twelve of the eighteen judges at the ICC come from civil-law systems.<sup>39</sup> This mixture of civil-law and common-law judges creates its own set of problems as the court attempts to provide a coherent approach to trial and criminal procedure.

The result of these conflicting views is apparent. In the U.S., a defendant has protection under our Constitution and the rules of evidence. At the ICC, in contrast, a defendant is at the mercy of a judge’s determination of probative value without the safeguards of cross-examination and rules limiting the admission of evidence.

### REASONABLE DOUBT/DOUBLE JEOPARDY

Another interesting difference in jurisprudence is our con-

cept of reasonable doubt. Without considering the definition of this term, most jurisdictions in the U.S. require that a verdict be unanimous. Every prosecutor and defense attorney understands that a single juror voting not guilty constitutes a win for the defense.

The decisions of a Trial Chamber at the ICC are made not by a jury, but rather by a three-judge panel.<sup>40</sup> Like in the U.S., those subject to the jurisdiction of the ICC are presumed innocent.<sup>41</sup> The burden of proof at the ICC is also beyond a reasonable doubt.<sup>42</sup> However, the two jurisdictions split on how sufficient proof is counted. The Rome Statute urges the judges to seek unanimity, but if it is lacking, a simple majority is sufficient to establish guilt.<sup>43</sup> Therefore, a judge with strong doubts as to the veracity of important witnesses or the probative value of evidence presented has no ability to affect the finding unless that individual can sway an additional judge to his or her point of view.

It is interesting to compare the ICC’s view of double jeopardy with that of U.S. jurisdictions. The Double Jeopardy clause of the Fifth Amendment has protected citizens from the government’s attempt to obtain a conviction once a jury has rendered a not-guilty verdict. Absent extreme circumstances, a finding of not guilty by a jury simply prevents the retrial of a criminal defendant for the same charge.

The Rome Statute provides defendants with an apparently similar protection as that contained in the Fifth Amendment. It reads: “Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.”<sup>44</sup> The term “except as provided in this Statute” leads to the procedure for appeals within the statute. After conviction, the prosecutor has the right to appeal a procedural error, a factual error, or an error of law.<sup>45</sup> While it is procedurally possible in the U.S. for a prosecutor to obtain appellate review for errors in procedure and law, it is nearly impossible to obtain review of the factual determination made by the jury.

During the process of deliberation, a Trial Chamber must, like juries in the U.S., weigh the evidence and issue a verdict. It is required to issue a written decision, which contains a “full and reasoned statement of the Trial Chamber’s findings on the

**It is interesting to compare the ICC's view of double jeopardy with that of U.S. jurisdictions.**

33. *Id.* at para.109.

34. ROME STAT. art. 64 (9) (a); ICC Rules of Proc. & Evidence, Rule 63 (2).

35. *Id.* at 69 (3).

36. Decision on Admission into Evidence of Material Contained in Prosecution’s List of Evidence, *Bemba*, ICC-01/05-01/08-1022, Trial Chamber III, (Nov. 19, 2010), available at <http://www.icc-cpi.int/iccdocs/doc/doc969801.pdf>.

37. *Id.* at para. 17.

38. Judgment on the appeals of Mr. Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled “Decision on the Admission into Evidence of Materials Contained

in the Prosecution’s List of Evidence,” *Bemba*, ICC-01/05-01/08 OA 5 OA 6, Appeals Chamber (May 3, 2011), available at <http://www.icc-cpi.int/iccdocs/doc/doc1066048.pdf>

39. Judges Blattmann, Cotte, Diarra, Gurmendi, Kaul, Kourula, Odio Benito, Steiner, Tarfusser, Trendafilova, Usacka, and Van den Wyngaert.

40. ROME STAT. art. 39 (2) (b) (ii).

41. *Id.* at art. 66 (1).

42. *Id.* at art. 66 (3).

43. *Id.* at art. 74 (3).

44. *Id.* at art. 20 (1).

45. *Id.* at art. 81 (1) (a).

**If . . . evidence was illegally obtained, the court must then engage in a two-pronged test to determine if it will admit the contested evidence.**

evidence and conclusions.”<sup>46</sup> It is from this decision that a prosecutor may appeal a factual determination. The options available to the Appeals Division upon review of the Trial Chamber’s decision include ordering a new trial before a different Trial Chamber or reversing or amending the decision.<sup>47</sup> It appears from this statutory

framework that the Appeals Division of the ICC can reverse a finding of not guilty and enter a finding of guilty based on its determination that the Trial Chamber made a mistake of fact. In other words, judges who have not heard the live testimony of the witnesses or had the opportunity to judge their credibility can enter a finding of guilty. While this apparent authority vested in the Appeals Division is disconcerting, no indication as yet shows whether it will be exercised.

#### EXCLUSIONARY RULE

In the U.S., the exclusionary rule is a well-founded doctrine designed to deter police violations of citizens’ constitutional rights. During the drafting of the Rome Statute, a division between common-law and civil-law advocates on the rules of evidence existed. The final result was a “delicate combination” of the two.<sup>48</sup> The ICC’s founding document recognizes that evidence may be obtained in violation of accepted rules. It reads:

Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:

- The violation casts substantial doubt on the reliability of the evidence; or
- The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.<sup>49</sup>

If determined that evidence was illegally obtained, the court must then engage in a two-pronged test to determine if it will admit the contested evidence. The first prong relates to the reliability of evidence. If it is reliable, the violation has no bearing on admissibility. The second prong suggests that serious damage to the integrity of the proceedings is the lynchpin upon which a decision will be made. In *Mapp v. Ohio*,<sup>50</sup> the United States Supreme Court found that “the imperative of judicial integrity” was one of the justifications for the application of the exclusionary rule. More recently, the Court relied on the deter-

rence of police misconduct as the prime justification.<sup>51</sup>

The Pre-Trial Chamber in *Lubanga* addressed the issue of evidence it found to have been obtained in violation of recognized human rights.<sup>52</sup> The Chamber, in discussing the issue of “integrity of the proceedings,” stated: “. . . in the fight against impunity, it must ensure an appropriate balance between the rights of the accused and the need to respond to victims’ and the international community’s expectations.”<sup>53</sup> The Chamber continued, indicating that exclusion would result only from “serious human rights violation[s].”<sup>54</sup> Like in the U.S., the Chamber understood the difficulty in balancing the “contradictory and complex matters of principle.”<sup>55</sup> The Trial Chamber upheld the Pre-Trial Chamber’s decision on the application of the exclusionary rule.<sup>56</sup> Furthermore, the Trial Chamber went on to question whether deterrence of illegal police activity was a concern of the court.<sup>57</sup> Clearly, the jurisprudence of the ICC reflects the desire to leave in the hands of the judges what evidence should be heard and what weight is to be given such evidence.

#### WITNESS PREPARATION/WITNESS PROOFING

Preparing one’s witnesses for trial is a longstanding and well-accepted practice among American lawyers. Rarely are judges even involved in the process. It is not unusual for law firms to have courtroom facilities within their offices so that witness’s testimony can be rehearsed. At the ICC, this practice is divided into two separate areas of witness familiarization and witness preparation.

The court has approved the process of witness familiarization as an important practice for witnesses. That process includes the following:

- a. Assisting the witness to understand fully the Court proceedings, its participants and their respective roles;
- b. Reassuring the witness about her role in proceedings before the Court;
- c. Ensuring that the witness clearly understands she is under a strict legal obligation to tell the truth when testifying;
- d. Explaining to the witness the process of examination first by the Prosecution and subsequently by the Defence;
- e. Discussing matters that are related to the security and safety of the witness in order to determine the necessity of applications for protective measures before the Court; and
- f. Making arrangements with the Prosecution in order to provide the witness with an opportunity to acquaint

46. *Id.* at art. 74 (5).

47. *Id.* at art. 83 (2) (a)-(b).

48. WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 294 (3d ed. 2007).

49. ROME STAT. art. 69 (7).

50. *Mapp v. Ohio*, 367 U.S. 643 (1961).

51. *See Davis v. United States*, 131 S. Ct. 2419 (2011).

52. Decision on Confirmation of Charges, *Lubanga*, *supra* note 12, at para. 82.

53. *Id.* at para. 86.

54. *Id.*

55. *Id.*

56. Decision on Admission of Material from “Bar Table,” *Lubanga*, ICC-01/04-01/06-1981 at para. 48, Trial Chamber I (June 24, 2009), available at <http://www.icc-cpi.int/iccdocs/doc/doc702244.pdf>.

57. *Id.* at para. 45.

herself with the Prosecution's Trial Lawyer and others who may examine the witness in Court.<sup>58</sup>

However, the court takes a very different view from American practices when it comes to witness preparation. While recognizing that many national jurisdictions and other international criminal tribunals allow witness preparation, the Trial Chamber in *Lubanga* charted a different course for the ICC. While the Chamber allowed a witness to review a previously written statement, it forbade counsel from discussing other topics or evidence. The court stated:

. . . the Trial Chamber is not convinced that either greater efficiency or the establishment of the truth will be achieved by [witness preparation]. Rather, it is the opinion of the Chamber that this could lead to a distortion of the truth and may come dangerously close to constituting a rehearsal of in-court testimony. . . . A rehearsed witness may not provide the entirety or the true extent of his memory or knowledge of a subject, and the Trial Chamber would wish to hear the totality of an individual's recollection. . . . Finally, the Trial Chamber is of the opinion that the preparation of witness testimony by parties prior to trial may diminish what would otherwise be helpful spontaneity during the giving of evidence by a witness. The spontaneous nature of testimony can be of paramount importance to the Court's ability to find the truth, and the Trial Chamber is not willing to lose such an important element in the proceedings.<sup>59</sup>

Obviously, that Chamber believes witness preparation is not conducive to finding the truth. Contrary to standard American legal thought, many questions will be asked without counsel knowing what the answer will be.

## CONCLUSION

The jurisprudence of the ICC is a work in progress. It is a daunting task to establish a framework to try some of the most notorious crimes occurring throughout the world. The court works at a disadvantage because some judges lack judicial or trial experience. It is especially difficult given the differences existing between the civil-law and common-law systems in the approach to and conduct of trials. Clearly that court relies heavily on judges weighing the evidence—some of which would not be admitted in the U.S. It is also apparent that some of the constitutional rights afforded individuals in the U.S., which appear to be protected by the Statute of Rome, are in fact not protected.

The mission of the ICC is to assure that the most serious crimes are punished, to end the impunity for those who commit such crimes, and to give voice and protection to victims. The court's success in achieving these goals remains to be seen. Only time will tell whether the decisions made will obtain international acceptance and approval. Until the court has a proven history of acceptable court management and jurisprudence, one must expect that countries such as the U.S., China, and Russia will not submit to its jurisdiction.



Judge David Admire was elected to the King County District Court bench in Washington State at the age of 33. He served in that position for 22 years before he retired. He was a criminal justice professor at Bethany College for three years. He currently teaches at Southern Utah University. During the summer of 2010, Judge Admire was a visiting professional at the International Criminal Court in The Hague, Netherlands. He served as a legal advisor to Judge Christine Van Wyngaert on a case involving two defendants charged with multiple war crimes and crimes against humanity. Judge Admire can be reached via email at [admire@suu.edu](mailto:admire@suu.edu).

58. "Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial," *Lubanga*, ICC-01/14-01/06-1049, Trial Chamber I (Nov. 30, 2007), para. 29.

59. *Id.*, paras. 51 and 52.

## AMERICAN JUDGES ASSOCIATION FUTURE CONFERENCES

### 2012 Annual Conference

New Orleans, Louisiana  
Sheraton New Orleans  
September 30-October 5  
\$169 single/double

### 2013 Midyear Meeting

Orlando, Florida  
Royal Plaza Hotel  
May 2-4  
Rate TBD

### 2013 Annual Conference

Kohala Coast, Hawaii  
The Fairmont Orchid  
September 22-27  
\$219 single/double

### 2014 Midyear Meeting

TBD

### 2014 Annual Conference

Las Vegas, Nevada  
Dates and Hotel TBD

### 2015 Midyear Meeting

TBD

### 2015 Annual Conference

Seattle, Washington  
Dates and Hotel TBD



# The Resource Page



## WEBSITES OF INTEREST

### Procedural Fairness for Judges and Courts

<http://proceduralfairness.org>

There's now a place on the web to find all the basics about procedural fairness, along with the latest research, how these concepts have been implemented, and additional resources that will be of use to judges. On the site, you can find:

- Quick access to the AJA's White Paper on Procedural Fairness, as well as the special issue of *Court Review* on the topic.
- Tips for judges on how to incorporate procedural-fairness concepts into a judge's daily work. (Tip #1: "Join the American Judges Association, which has for the past several years been leading judges toward better procedural-fairness practices.")
- Separate tips for court administrators, whose support is essential.
- Recent lectures—including video and PowerPoint slides—on procedural-fairness concepts from Yale law and psychology professor Tom Tyler, the leading academic researcher in this field for more than two decades.

The website is designed to provide easy access to theoretical and practical materials on procedural fairness.

Click on the tab "Procedural Fairness Theory" to see how research in the area has developed into a coherent theory that shows how paying attention to procedural-fairness concepts improves public acceptance of courts in general and compliance with court orders in particular. A three-part lecture from Professor Tyler shows how perceptions of institutional legitimacy, which are rooted in procedural-justice principles, are central to individual decisions to adhere to a society's rules.

Click on the tab "Relevant Research" to see specific research in areas like specialized courts, juvenile justice, and media-

tion. Or click on the tab "Resources" to see specific tips for judges and court administrators.

The procedural-fairness website has been put together by Professor Tyler, National Center for State Courts researcher David Rottman, current AJA president Kevin Burke, and *Court Review* coeditor Steve Leben.

### Procedural-Fairness Blog

<http://proceduralfairnessblog.org>

There's a procedural-fairness blog that complements the website. The blog has an active discussion on procedural-fairness issues, as well as its own links to recent papers in the field (including some published only on the blog or the procedural-fairness website).

The primary bloggers are the founders of the procedural-fairness website: Yale law and psychology professor Tom Tyler, National Center for State Courts researcher David Rottman, current AJA president Kevin Burke, and *Court Review* coeditor Steve Leben. But guest bloggers are also welcome—if you'd like to comment on something related to procedural fairness, click on the heading for "Guest Blog Posts" and get in touch.

Anything that relates to procedural fairness—as practiced or perceived—is fair game on this blog. Recent blog entries have included:

- An appraisal in April of the fairness of the United States Supreme Court's oral argument in the healthcare cases, followed by a reaction to its opinion—from a procedural-fairness perspective—when it was released in late June.
- "Good Judging Often Starts with Good Listening"—some thoughts about how judges might improve their listening skills and why that could be important.
- "Where to Start?"—advice for the judge or court administrator starting down the road toward exploring procedural fairness in court.
- "The Value of Video"—discussing how individual judges might use video of their work on the bench to improve performance, much as the amateur (or professional) golfer might improve a

golf swing through watching it on video.

- "Procedural Fairness on Appeal"—a guest blog from Minnesota appellate judge Francis J. Connolly providing practical ways appellate courts might improve perceptions of procedural fairness on appeal.

All of the blog entries are open for comment.

### The AJA Blog

<http://blog.amjudges.org>

*Court Review* is published quarterly, but events of interest to judges happen all the time. Current AJA President Kevin Burke has started a blog that fills the gap.

Almost anything that's important to judges is likely to be touched on in the blog, often with links to new reports, articles of interest, or other websites with more information.

Recent blog entries have included:

- Updates on the court-funding crisis, with links to commentaries about problems in funding courts in Florida, New York, and Canada (including a speech by Chief Justice Robert Bauman of the Supreme Court of British Columbia).
- A summary of a new report from Justice at Stake, *The New Politics of Judicial Elections 2009-2010*, which found that the rise in noncandidate TV advertising made the 2010 election cycle the costliest nonpresidential election ever for TV spending in judicial elections. The blog provided a link for downloading the report, as well as a separate link to a Joyce Foundation report on money and politics.
- A report of a recent speech by Florida Bar President Scott G. Hawkins, who suggested that justices of the Florida Supreme Court may be targeted by opposition groups in 2012.
- A three-step action plan for reducing the chance that a rampant rumor mill will take over your courthouse.
- Guest commentaries, including ones on judicial wellness and court leadership.