

# **To Be Fair: Procedural Fairness/ Justice**



*Judge Brian MacKenzie (Ret.)  
Michigan*

## **Presenter Biographies:**

**Judge Brian MacKenzie (Ret.)** is an award winning judicial educator who retired from the bench after almost twenty-seven years of service. After leaving the bench he helped to create the Justice Speakers Institute where he is now a partner and Chief Financial Officer.

He has been honored by the Foundation for the Improvement of Justice with the Paul H. Chapman medal, for significant contributions to the American Criminal Justice System and by the American Judges Association for significant contributions to judicial education.

Judge MacKenzie served as the President of the American Judges Association from 2014 to 2015. From 2008 to 2010 Judge MacKenzie was the American Bar Association/National Highway Traffic Safety Administration Judicial Fellow. He received his Juris Doctorate from Wayne State University Law School in 1974.

Judge MacKenzie has written and lectured throughout the world on issues including procedural fairness, veterans treatment courts, domestic violence, drug treatment courts, alcohol/drug testing, and high visibility cases. Among other entities he has presented for American University, the National Judicial College, the National Association of Drug Court Professionals, the American Judges Association, the American Bar Association, the National Highway Traffic Safety Administration, and the National Association of Court Managers. Recently, he was invited to observe the conference on the new treaty between the European Union and Turkey involving Syrian refugees, in Istanbul Turkey.

He is the co-editor of the book, Michigan Criminal Procedure. He is also the author of the American Judges Association's position paper entitled "Procedural Fairness: The Key to Drug Treatment Courts."

Judge MacKenzie is married to Karen MacKenzie. He has three children; Kate, David and Breanna and five grandsons, Daniel, Raymond, Henry, Zachary and Lucas.



# Justice Speakers Institute

SPEAKING, TEACHING & TRAINING - WORLDWIDE



## To Be Fair: Procedural Fairness/Justice

Judge Brian Mackenzie (Ret.)

Justice Speakers Institute

<http://justicespeakersinstitute.com>



## As a Result of This Session You Will Be Able To:

1. List the four key principles of procedural fairness
2. Apply procedural fairness in your court
3. Use procedural fairness to improve outcomes

<http://justicespeakersinstitute.com>

## 2 Types of Justice

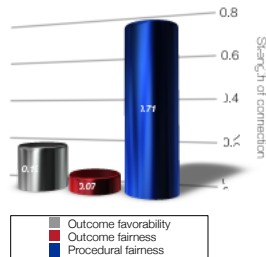
1. Procedural justice is the perceived fairness of court procedures while a case is processed.
2. Distributive justice is the perceived fairness of the final outcome (i.e., whether the litigant "won" or "lost")



Tom Tyler, Procedural Fairness, COSCA 2011

## Procedural Fairness

Posits that the manner in which justice is done is more important as than the perceived fairness of the outcome or the favorably of the decision

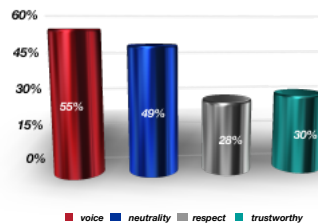


Butke, Kevin and Steve Libair, "Procedural Fairness: A Key Ingredient in Public Satisfaction," Court Review, American Judges Association

Tom Tyler, Procedural Fairness, COSCA 2011

## The Key Principles of Procedural Fairness

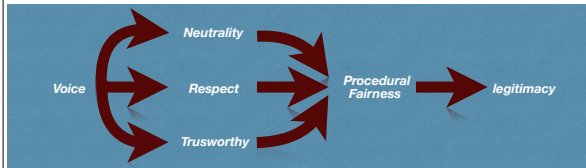
1. Voice
2. Neutrality
3. Respectful Treatment
4. Trustworthy Authorities



Procedural Justice and the Courts  
Tom R. Tyler



## Indirect and Direct Influences



Perspective and procedural justice: Attorney and litigant evaluations of court procedures

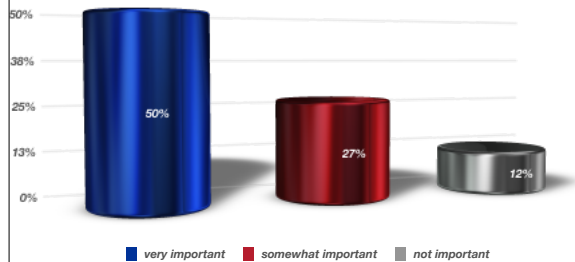
## Key Principle 1: Voice

"The ... experience of ... speaking ... in court appears to have a powerful effect ...."



<http://www.courtinnovation.org/research/participant-and-staff-perspectives-drug-courts>

## % Who Felt It Was Important To Speak



Testing Therapeutic Jurisprudence Theory: An Empirical Assessment Of The Drug Court Process.  
<http://www.Westerncriminology.Org/Documents/Wor/CGNT/Serjo/Serjo.html>

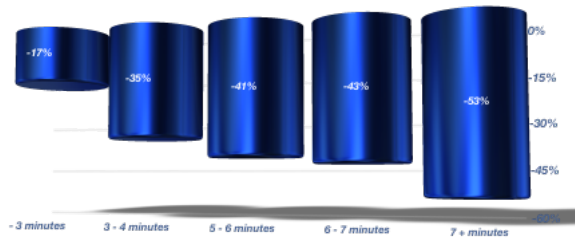
## Key Principle 1: Voice, cont.

- The ability to be an active participant in the process
- The ability to express viewpoints/facts/opinions
- Being heard
- Active listening



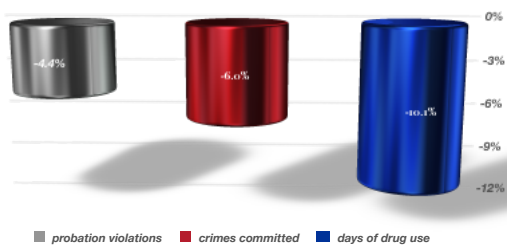
<http://www.courtinnovation.org/research/participant-and-staff-perspectives-drug-courts>

## Time Spent With Participant Reduction In Recidivism



What Works? The Ten Key Components Of Drug Court: Research-Based Best Practices

## Impact Of Voice



The Multi-Site Adult Drug Court Evaluation: The Drug Court Experience, Volume 3



## Key Principle 1: Voice, Suggestions

- Give opportunity to participate in court proceedings
- Be attentive and acknowledge you heard
- Learn about specific cultural differences to avoid miscommunications.
- Explain to litigants how information can be presented
- Ensure that all speakers in court speak clearly, while preventing people talking over each other

Procedural Fairness in the California Courts

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## Key Principle 2: Neutrality

"[T]aking steps to promote a fair court experience, and having a judge who can serve as an effective symbol of the court's commitment to ... neutrality ... can improve concrete offender outcomes."



The Multi-Site Adult Drug Court Evaluation: TheDrug Court Experience, Volume 3

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## Key Principle 2: Neutrality, cont.

- Consistently applied legal principles
- Unbiased decision making
- Transparency and honesty about how decisions are made



Burke, Kevin and Steve Luban, "Procedural Fairness: A Key Ingredient in Public Satisfaction," Court Review  
American Judges Association

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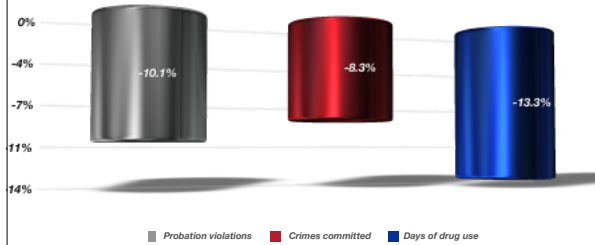
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## Impact Of Neutrality



The Multi-Site Adult Drug Court Evaluation: The Drug Court Experience, Volume 3



## Key Principle 2: Neutrality, Suggestions

- Be consistent in one's behavior, treatment of court users, courtroom actions, and rulings
- Explain court processes when they may appear inconsistent
- Ensure litigants leave court with a clear understanding of the reasons for a decision
- Spell out what is expected of them

Procedural Fairness in the California Courts



## Key Principle 3: Respectful Treatment

"Programs with judges that treated clients fairly and respectfully were shown to achieve better success than programs without such judges."



The Multi-Site Adult Drug Court Evaluation: The Drug Court Experience, Volume 3



### Key Principle 3: Respect, cont.

- Treated with dignity
- Rights are visibly and clearly protected
- Interactions are appropriate



The Multi-Site Adult Drug Court Evaluation: The Drug Court Experience, Volume 3

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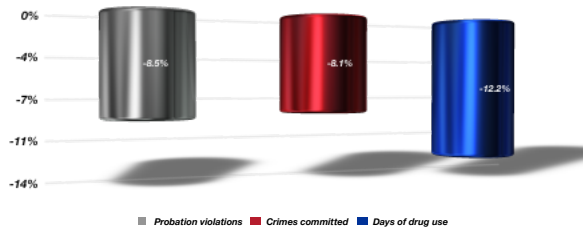
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### The Impact Of Respectful Treatment



The Multi-Site Adult Drug Court Evaluation: The Drug Court Experience, Volume 3

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### Key Principle 3: Respect, Suggestions

- Make appropriate eye contact
- Acknowledge parties and witnesses by name
- Treat all people in the courtroom courteously
- Be sensitive to parties and witnesses's discomfort

Procedural Fairness in the California Courts

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## Key Principle 3: Respect, Suggestions

- Develop materials in plain English and in other languages commonly spoken
- Explain what will happen in court
- Respond to parties and hear their cases in a timely manner
- Be respectful of their time and avoid long waits and delays

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## Key Principle 4: Trustworthy Authorities

"Most clients indicated that the judge was ... trustworthy .... [T]he judge was believed by the majority to be influential in terms of their progress."



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## Key Principle 4: Trust, cont.

- Listening and explaining decisions
- Sincere in the desire to help individuals
- Caring



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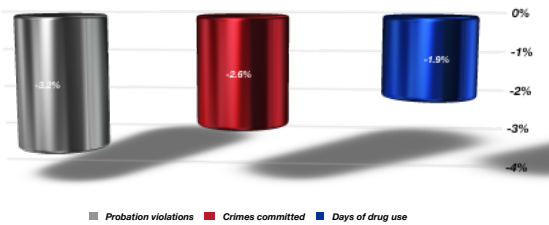
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## The Impact Of Trust



The Multi-Site Adult Drug Court Evaluation: The Drug Court Experience, Volume 3



## Key Principle 4: Trust, Suggestions

- Demonstrate through words and demeanor that the interests and needs of all parties will be fairly considered
- Emphasize that disputes will be resolved and rights will be protected
- Communicate with the public in an open and ethical manner
- Remind court staff that their actions affect public approval of your court
- Empower staff to be important representatives of your court through their interactions with the public

Procedural Fairness in the California Courts



## Procedural Fairness

- "When participants have more positive attitudes toward the judge, they have better outcomes."
- "This is true across all subgroups of participants ..."



Burke, Kevin and Steve Lieben, "Procedural Fairness: A Key Ingredient in Public Satisfaction," Court Review, American Judges Association



## What Did You Notice ?



Burke, Kevin and Steve Labaree, "Procedural Fairness: A Key Ingredient in Public Satisfaction," Court Review  
American Judges Association

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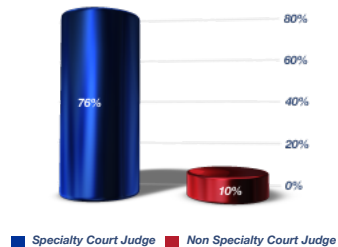
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## Positive Judicial Interactions

"The judge's interactions with defendants are crucial in shaping perceptions. Even within the traditional court, defendants who were more satisfied with the judge were more satisfied with the court's overall fairness."



The Multi-Site Adult Drug Court Evaluation: Volume 4 The Impact Of Drug Courts

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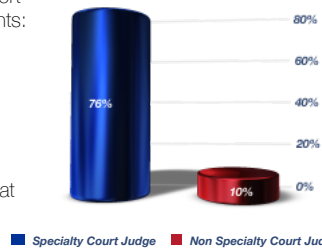
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## Positive Judicial Interactions

Judges who make an effort to connect with defendants:

- making eye contact,
- providing clear, explanations of court proceedings and decisions,
- Appearing respectful.
- Enhance the sense that the court is fair.



[http://www.communitycourts.org/sites/default/files/Procedural\\_Fairness.Pdf](http://www.communitycourts.org/sites/default/files/Procedural_Fairness.Pdf)

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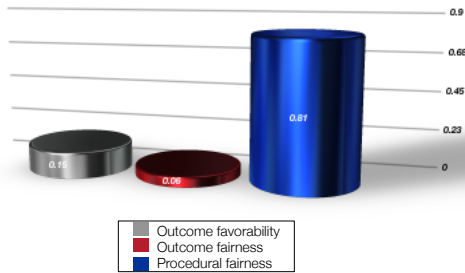
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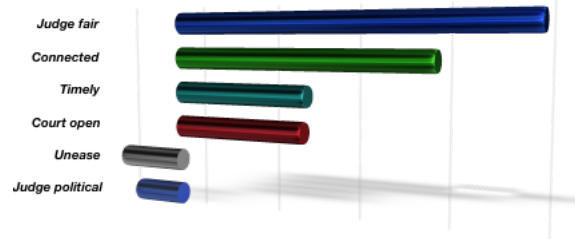


## Feeling About Legitimacy



<http://www.amjdgis.org/publications/court/cb53-4PJ-Bench-Card-Full-Final.pdf>

## California Study



Trust and Confidence in the California Courts, 2005

## Procedural Fairness: Summary, cont.

- Attorneys, witnesses and litigants appeared to use the same criteria to generate their procedural justice judgments
- There was no evidence that attorneys were more outcome-oriented than were litigants



Perspective and procedural justice: Attorney and litigant evaluations of court procedures

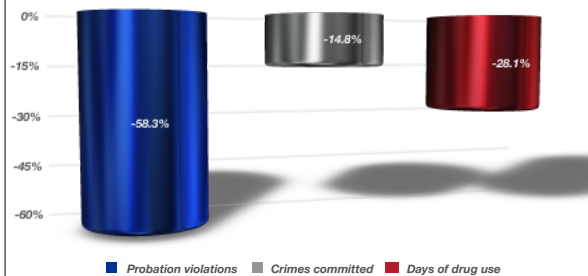
## Procedural Fairness: Summary, cont.

Research suggests that judgments about the procedural justice of the courts play a central role in public evaluations of the legitimacy of the courts



*How Do The Courts Create Popular Legitimacy? The Role Of Establishing The Truth, Punishing Justly, And/Or Acting Through Just Procedures*  
Tom R. Tyler\* & Justin Sower\*\*

## The Impact Of Procedural Fairness



*The Multi-Site Adult Drug Court Evaluation: The Drug Court Experience, Volume 3*

## Procedural Fairness, Proceedings

- Bail/Bond hearing
- Plea hearing
- Sentencing





## Procedural Fairness, Suggestions, Bail

Research shows:

- Court date reminders using procedurally just language are more effective than those that emphasize the consequences of failure to appear
- Text messages are connected to high appearance rates



Procedural Fairness in the California Courts

<https://www.civilic.com/equity/2019/01/hello-your-court-date-is-tomorrow55163/>



## Procedural Fairness, Suggestions, Bail

- Ask participants to give you their understanding of the orders
- The order should be printed in clear, plain language
- Explain the next steps in the process
- Written instructions for next court appearance are given clearly along with written reminders of court dates

Procedural Fairness in the California Courts



## Procedural Fairness, Suggestions, Plea

- Give voice to participants (either directly or via their attorneys)
- Go beyond rote plea colloquy to ensure understanding
- Ask them to repeat back their understanding of the rights they are giving up
- If they seem unsure about a desire to plead guilty, offer a short recess so they can discuss the plea with counsel
- Refuse to take a plea when they assert that they are not guilty

Procedural Justice: Practical Tips for Courts™ Center for Court Innovation



## Procedural Fairness, Suggestions, Sentence

- Explain the factors that are going to be considered
- State that while the attorneys will have their say, their recommendations are only suggestions
- Describe the benefits of compliance and the consequences of non-compliance
- Ask defendants to repeat back what is expected of them

Procedural Justice: Practical Tips for Courts™ Center for Court Innovation

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## Procedural Fairness, Suggestions, Sentence

- Provide a written summary of the sentence requirements in plain language
- If the sentence includes probation, briefly explain the intake process and what to expect going forward
- Convey that it is in everyone's best interest if the defendant is able to successfully complete the sentence

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### PROCEDURAL FAIRNESS/PROCEDURAL JUSTICE A BENCH CARD FOR TRIAL JUDGES

#### KEEP IN MIND:

- This may be the most important hearing the parties will ever have.
- Filling out forms is important but eye contact and engagement with the parties is critical.
- Trust is not a given. But it can be gained in each hearing through adherence to procedural-fairness principles.
- People make assumptions when they lack knowledge. Explain things.
- Listening is a key skill. Decision acceptance is greater if it's clear you listened—note their key points when ruling.
- Like others, judges can be affected by perceptions, assumptions, and stereotypes—in other words, implicit biases. Be aware.

<http://www.amjudges.org/publications/court/vof63-4PJ-Bench-Card-Full-Final.pdf>

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## W/O Legitimacy Strange Things Happen



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Thank You for Your  
Kind Attention

For More Information  
Judge Brian MacKenzie (Ret.)  
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