Some Thoughts on the Judge's Written Work

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In the course description, Bob Alsdorf and I have set out to discuss how judges can best convey their rulings through written opinions, how to handle high-profile cases, and how to make sure the parties feel that they have received a fair hearing. In this paper, I'll provide an overview of the principles of procedural fairness, which underlie how courtroom participants and observers perceive what we do, discuss the handling of high-profile cases, and discuss how judges can use written opinions to make sure that litigants and others who read judicial opinions conclude that the parties have been treated fairly.

Promoting a Sense of Fairness

At this point, I hope that most of you have heard at least something about procedural fairness (also called procedural justice). Over more than two decades, social-science researchers have shown convincingly that when authority figures pay attention to the key elements of procedural fairness, those who interact with the authority figures have a greater sense of trust, are more satisfied with the interaction, and are more likely to do what the authority figure directs.[1]

In my view, a judge needs to pay attention to these same principles when issuing written decisions—and the use of written

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[1] For an overview, *see* Tom R. Tyler, *Procedural Justice and the Courts*, 44 COURT REV. 26 (2007-2008); Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 COURT REV. 4 (2007-2008).

decisions can by itself help to make sure that judges touch the procedural-fairness bases and that litigants realize it. To do this, we need to start with a quick overview of the elements of procedural fairness:

- *Voice*: the ability of litigants to participate in the case by expressing their viewpoint, directly if possible.
- *Respect*: individuals are treated with dignity and their rights are openly protected.
- *Neutrality*: consistently applied legal principles, unbiased decision makers, and a transparency about how decisions are made.
- *Trustworthy authorities*: authorities are benevolent, caring, and sincerely trying to help the litigants, a trust that is garnered by listening to individuals and by explaining or justifying decisions that address litigants' needs.[2]

Research shows that decision recipients generally focus more on fair procedures, while decision makers focus more on fair outcomes.[3] To be sure, judges should make sure that outcomes are fair. But if we are to meet public expectations, we must also be sure that we openly address the public's expectations for fair procedures. One way to do that, whether a judge rules orally or in writing, is to make sure that the principles of procedural fairness have been addressed:

- Summarize the basic points made by each side, emphasizing that you did, in fact, listen to the parties.

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[2] These are the elements of procedural fairness as summarized by Yale Law School Professor Tom Tyler, the leading researcher in the field of procedural justice in courts and law enforcement. For an overview, *see generally* Tom R. Tyler, *Procedural Justice and the Courts*, 44 COURT REV. 26 (2007-2008); Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 COURT REV. 4 (2007-2008); and David R. Rottman, *Procedural Fairness as a Court Reform Agenda*, 44 COURT REV. 32 (2007-2008).

[3] *See* Larry Heuer, Steven Penrod & Ayelet Kattan, *The Role of Societal Benefits and Fairness Concerns Among Decision Makers and Decision Recipients*, 31 LAW & HUM. BEHAV. 573 (2007); Diane Sivasubramaniam & Larry Heuer, *Decision Makers and Decision Recipients: Understanding Disparities in the Meaning of Fairness*, 44 COURT REV. 62 (2007-2008); Kevin Burke & Steve Leben, *The Evolution of the Trial Judge from Counting Case Dispositions to a Commitment to Fairness*, 18 WIDENER L.J. 397, 406-08 (2009).

- Explain the legal points that control the outcome in lay terms, citing where possible to key statutes or caselaw so that the parties can see that you are not just making this stuff up as you go. Parties often come to court skeptical of legal authorities and want to make up their own mind about whether the law has been applied fairly. Give them the tools to make their own judgment.
- Show respect in ways like using the parties' names and making sure you are pronouncing them correctly. Parties may perceive disrespect when the judge fails ever to address them personally. Though no disrespect may have been intended, a person whose important matter is handled in court without anyone ever directly addressing him or her might well perceive a lack of respect—unintentional though it may have been.
- Allowing voice, transparently applying neutral legal rules, and treating litigants with respect should lead to greater trust in the judge. Ultimately, the parties want to leave with a sense that the judge cared about them and tried to do what was right.

Handling High-Profile Cases

I had the good fortune to handle two high-profile murder trials that drew national media attention. Based on that experience—and comments I received in response to an email I sent to reporters who had covered those trials—I've separately set out ten tips for dealing with the media.[4]

For the purposes of today's presentation, the takeaway point is that you should use the tools at your disposal to make sure that your rulings are set out clearly in a way that the media can understand. In some cases, you may find it best to rule orally from the bench. To emphasize that you have carefully considered the parties' presentations—and to make sure that observers realize you did so—you may want to allow some time to pass between the end of evidence (and any closing argument) and your oral ruling. Whether you come back later the same day or on the next (or a later) day, an observer will more clearly see that you have taken the time necessary to think it over.

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[4] Steve Leben, *Ten Tips for Judges Dealing with the Media*, 47 COURT REV. 38 (2011).

From your standpoint, that case—and your potential ruling—may have been all you've been thinking about throughout the trial (and after hours). But observers, including the media, only know what they see. And the media will probably be in and out. What they will know, though, is when to expect the ruling, so they will realize that you took a break to think matters over. Some judges even comment that they wanted to take some time to carefully consider things and to let emotions subside.

Even if you are ruling orally, you should have at least some notes of the key points you want to make. Think about what the lead of the news story about your ruling might be; then be sure to address that directly. You might want to have a summary both at the start and at the end of your oral ruling. That way the key points will be clear to all, including a media member who only attended part of the trial.

Meeting the Expectations of Being a Sincere, Caring Judge

In 2009, President Barack Obama publicly said that he wanted to appoint a justice to the Supreme Court who had empathy: "I view that quality of empathy, of understanding and identifying with people's hopes and struggles as an essential ingredient for arriving at just decisions . . . ."[5] When Obama then nominated Sonia Sotomayor for the Court, her confirmation process swirled with controversy about whether judges should, indeed, be empathetic. Some suggested that an empathetic judge is the antithesis of a neutral one.

I participated in a series of essays on that question. I argued that a judge meeting the public's expectations for procedural fairness is necessarily an empathetic judge. I then made these suggestions, excerpted from that article, for how a judge can meet these public expectations[6]:

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[5] *See* John Paul Rollert, *Justice Sotomayor—Not Guilty of "Empathy,"* CHRISTIAN SCIENCE MONITOR, Aug. 29, 2011 (available online at http://goo.gl/QyeHar).

[6] The following is excerpted from Steve Leben, *An Expectation of Empathy*, 51 WASHBURN L.J. 49, 54-58 (2011-2012). Most footnotes have been omitted; those that are included have been renumbered to match the sequential footnote numbering of this paper.

Let me outline some of the ways that judges can be responsive to the public's expectation of an empathetic judge. Especially for the trial judge, one good start is to work on improving one's listening skills. Most of the critical information a trial judge learns during a trial or evidentiary hearing comes from witnesses, and even in nonevidentiary hearings, much of the information that a trial judge gets comes to him or her orally. Yet how much time do judges spend in training—either in law school or in judicial-education programs—on how to be a better listener? Usually none.

An effective listener tries to understand the message the speaker is actually trying to convey, which is best done with an understanding of the context from which the speaker is communicating. Yet it's tempting, and often quite easy, for a judge with a busy docket to try to quickly fit each case into a preexisting pigeonhole so that it can be quickly disposed of. Teaching a judge effective listening techniques can help keep the judge focused on learning all of the parties' concerns and interests, which can then be addressed, even if they cannot always be accommodated. Kevin Burke and I include a segment on improving listening skills in our judicial-education programs on procedural fairness, and we have found that judges are very receptive to the need for improvement in this area.

Next on my list is getting judges to explain things so that a layperson can understand them, whether it's an oral ruling or a written opinion. A person involved in a court proceeding is more likely to accept a court decision that he or she can understand, and the failure to explain legal concepts to the layperson leads to an unnecessary lack of understanding of what judges do. It's a rare legal principle that can't be explained to a layperson if you try. And I would suggest that quite often flaws in the legal reasoning are exposed when you take the time to explain principles in plain language.

Legal-writing expert Bryan Garner urges judges to write opinions that a person of average intelligence and education can understand. He notes approvingly Justice Breyer's statement during his confirmation hearings that he

wanted to write opinions that a good high-school student could understand. Keeping such a reader in mind and then writing so that a high-school student would understand the opinion would by itself greatly enhance opinion readability.

. . . .

Judges also need to consider the changed audience for judicial opinions. When many of today's judges went to law school, few people other than lawyers had either access to or an inclination to read judicial opinions. There was no Internet, and opinions weren't even seen by lawyers until weeks after they had been issued. Today's world is much different. As an example, consider the interest shown in opinions of the Minnesota Court of Appeals, that state's intermediate appellate court. In 2009, its published, precedential opinions were accessed on the Internet 73,600 times, and even its unpublished, nonprecedential opinions (issued in greater numbers) were accessed 139,000 times. That's a lot of people reading the opinions of an intermediate state appellate court. Overall, there were 4.75 million visits by 1.94 million different people (technically, different computer IP addresses) to the Minnesota state-court website in 2009. This is a world in which people seek out information, and that includes information about courts and court decisions. Members of the public should be able to understand how the judiciary—one of our branches of government—carries out its responsibilities.

So when a judge writes or orally presents an opinion understandable by a layperson, should the judge actually express empathy or show the sort of full understanding of the parties' concerns that would come from empathetic listening? . . . . I think a good judge should do both.

Again, let's think of some situations in which an individual judge or a multi-member appellate court might want to do so. I'll start with the appellate court. It's beyond question at this point that sometimes innocent people are convicted of crimes and imprisoned. As a percentage of the cases, it's probably a fairly low number. But with more than 20 million criminal cases filed in the state courts each year, even a low-percentage error rate adds up.

As an appellate judge, inmate habeas claims arrive on the docket in large numbers. In every case, the defendant has already lost at trial, lost in a direct appeal, and lost in the trial court on the habeas claim that alleges that some error resulted in a wrongful conviction. Having both a cognitive awareness that mistakes do happen in criminal trials and appeals and some empathy for the person who must pursue his claim from prison can help judges to spend the time needed—in every case—to carefully review it.

I would suggest that writing the opinion with some aspect of empathy for both the defendant and the victim also is in order. It's easy for a court opinion to leave a victim feeling dehumanized, much as the crime did to begin with. And it's easy for a court—faced with a particularly gruesome crime—to paint the picture of the gruesome crime but not fully paint the picture of the legal claim made by the defendant.

And what of the cases in which the defendant actually is innocent? Wouldn't every judge want that person, while still stuck in prison, at least to believe that his claims had been taken seriously by the court? Let's take one case in which DNA evidence later proved a wrongful conviction--that of Kerry Kotler, who was wrongly convicted of rape, robbery, and burglary. We know he was wrongfully convicted: he recovered $1.51 million from the State of New York for his ten years of wrongful imprisonment.[7] But what did the court handling his initial direct appeal say about his claim of innocence? Just this: "In considering the defendant's other claims on appeal, we find that any errors that occurred were unpreserved for appellate review, and we decline to exercise our interest of justice jurisdiction to review such errors."[8]

Imagine what Kotler thought when he received the opinion. Equally important, even a lay reader of the opinion would wonder why the appellate court was so unwilling to consider the "interest[s] of justice." State legislators funding

[7] Kotler v. New York, 680 N.Y.S.2d 586,586 (N.Y. App. Div. 1998).
[8] New York v. Kotler, 499 N.Y.S.2d 196, 196 (N.Y. App. Div. 1986). The court's full opinion takes only one page in West's New York reporter.

> the $1.51 million wrongful-imprisonment judgment a decade later might wonder too. Had the court taken time to explain itself—when does the court exercise its interest-of-justice jurisdiction, why wasn't that appropriate here, etc.—those reading the opinion, even a decade later with knowledge that Kotler had been wrongfully convicted, might well conclude that the court had done its job and even that it had done it well. It's much harder to reach such a conclusion when the court's treatment of the claim appears so cursory. And Kotler's case—an innocent but wrongfully convicted man whose court claims were denied in a cursory appellate opinion—is not unique.[9]
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> At the trial level, examples abound in which judges should make clear their understanding of the parties' concerns—and even their feelings. After a disputed child-custody case, it often would be appropriate to recognize the legitimate emotional needs of all parties. In contested child-custody cases, the successful outcome is one in which the parties are ready, after the initial decisions are made by the court, to work things out on their own going forward. I don't have specific data for custody cases, but the data we do have on both decision acceptance and compliance suggests that the situation will be better going forward in courts in which the parties to a custody dispute believe that the judge was a sincere and caring person who took their emotional needs and interests into account. The same sort of factors can be in play when a trial judge sentences a defendant in a criminal case after hearing victim-impact statements or testimony, when a trial judge rules on a dispute between family members over inheritance rights in an estate, and when a trial judge handles a boundary-line dispute between two residential neighbors. And surely the trial judge presiding over a mediation or settlement conference can make effective use of empathy.

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[9] *See* Steve Leben, *Thoughts on Some Potential Appellate and Trial Court Applications of Therapeutic Jurisprudence*, 24 SEATTLE U. L. REV. 467, 474-75 (2000) (noting other cases in which courts gave no explicit consideration to the possibility of error in denying appeals of defendants later shown to have been wrongfully convicted).

Samples from Some Written Opinions

For the remainder of this paper, I include several excerpts from opinions in which I've tried to meet these ideals. The samples cover two situations: how to explain the decision to the losing party and how to explain the role of the court.

A Respectful Letter to the Loser

Let's start with how a court might write an opinion addressed to the losing party in the case. In a discussion of this practice, Professor David Wexler recently used two of my opinions as examples in a recent article.[10] The first was a case in which my appellate court had affirmed a trial court's denial of a biological father's attempt to reopen an adoption proceeding. The father was representing himself and lived in another country. The trial court had denied his motion based on res judicata (the father's parental rights had been terminated years earlier, he had appealed, but he then dismissed his appeal), and our court affirmed on the same basis. But our court's opinion made no effort to explain res judicata to a lay audience. I tried to fill that gap:

> LEBEN, J., concurring: The history of N.M.'s sporadic appearances in the Kansas court system to reassert claims that he previously had abandoned suggests that he may not understand some of the overriding legal principles we must follow. I offer this concurring opinion in the hope that he may yet understand them. See Ronner, *Therapeutic Jurisprudence on Appeal,* 37 Ct. Rev. 64 (Spring 2000).
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> The American court system works hard to ensure that court proceedings involving children are resolved in as short a time frame as possible. We recognize that children deserve an answer to the most basic questions about their lives—like, who are my parents? Where will I live?—within a time frame that is reasonable as judged from a child's viewpoint.
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> The ultimate need for legal disputes to be resolved, so that people may get on with their lives and business affairs,

[10] *See* David B. Wexler, *Elevating Therapeutic Jurisprudence: Structural Suggestions for Promoting a Therapeutic Jurisprudence Perspective in the Appellate Courts*, 5 PHOENIX L. REV. 777, 782-85 (2012).

> is also the driving force behind the legal doctrine called res judicata. Under res judicata, when a dispute has been decided in a final court judgment, the same issues may not be relitigated in a later suit. That allows parties to go on about their business based on the court's final judgment without worrying that some later court action might yet revisit the same issues.
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> The court's opinion has correctly held that res judicata applies here. N.M.'s parental rights were terminated by the district court in its January 2003 ruling. N.M. appealed, but when he dismissed that appeal, the district court's ruling terminating his parental rights became a final judgment. And after that, the proposed adoptive parents proceeded with their adoption of B.M.J.F. based upon the final judgment, which terminated N.M.'s parental rights. So res judicata prevents further litigation over the matter.
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> Even if some exception to the res judicata rule were available—and I am not aware of one—this is exactly the sort of case in which we would be reluctant to apply it. This child has lived with the adoptive family from a few days after his birth in 2002 until now. From the time the adoption was finalized in October 2004 until N.M. filed pleadings in April 2009 seeking to reopen the case, the child's family knew that there was a final judgment terminating N.M.'s parental rights and an order of adoption in place. When we look at this situation from the standpoint of the child, he has had only one home and one family. He and his family have a right to rely upon the finality of the 2003 ruling terminating N.M.'s parental rights, a judgment that became final when N.M. voluntarily dismissed his appeal in 2004.
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> N.M.'s continued interest in his biological son is understandable, perhaps even laudable. But no matter its sincerity, it is no longer an interest that Kansas law can force this 8–year–old boy's adoptive parents to respond to.[11]

The second case Professor Wexler noted was a fairly standard business dispute. One side appealed, claiming that the trial court's ruling was factually erroneous, and had this case been on appeal in

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[11] In re Adoption of B.M.J.F., 2010 WL 3665154, at *2-3 (Kan. App. 2010) (Leben, J., concurring).

a federal court, the issue would have been a close one. In federal courts, the appellate court reviews all the evidence and may overturn the trial court ruling when it has a definite and firm conviction that a mistake has been committed. But in Kansas state courts, even though we have adopted the Federal Rules of Civil Procedure, we have long interpreted them differently. On appeal from a trial-court decision in Kansas, we look only at the evidence supporting the trial court's decision and ignore contrary evidence. So even if the great weight of the evidence contradicts the Kansas state trial court's findings, a Kansas appellate court must affirm.

I felt that the losing party could easily feel that our decision had given it short shrift because of this standard, and I thought we should mention both that the evidence actually was quite conflicting and that our ruling was required based on longstanding Kansas caselaw. Again, I tried to craft a concurrence that would explain the ruling to the losing party:

> LEBEN, J., concurring: I join the opinion of the court. As explained there, the district court's decision on the percentage of ownership in Winning Streak Sports, LLC, is supported by substantial evidence under the standards that we are required to apply on appeal. I add this separate note, however, to discuss that standard and explain how it works to the parties.
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> For starters, our Kansas rules of civil procedure were adopted in 1963 based on the set of rules established in federal court. These virtually identical rules are in place for both federal and Kansas courts: a trial judge's findings of fact may not be set aside unless "clearly erroneous." Compare K.S.A. 60–252(a) ("Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.") with Fed. R. Civ. Proc. 52(a)(6) ("Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility."). Despite the similarities, Kansas appellate courts have never interpreted the standard of review under K.S.A. 60–252(a) the way the parallel federal standard has been interpreted.

In federal courts, when evidence can support both sides of a factual question, the appellate court may reverse when, upon review of *all* of the evidence, the court has a definite and firm conviction that a mistake has been committed. *Creative Consumer Concepts, Inc. v. Kreisler,* 563 F.3d 1070, 1078 (10th Cir. 2009). In Kansas state courts, an appellate court "must accept as true the evidence and all inferences to be drawn therefrom to support the findings of the trial court, and must disregard any conflicting evidence or other inferences that might be drawn therefrom." *In re Estate of Antonopoulos,* 268 Kan. 178, 193, 993 P.2d 637 (1999). Thus, we only look at the evidence supporting the trial court's factual finding in Kansas courts; if some substantial evidence supports it, we must uphold that finding even when the great weight of the evidence otherwise contradicts it.

The reason for this difference is not clear to me. The standard under the federal rule was well established before Kansas adopted it as our own. *E.g., United States v. United States Gypsum Co.,* 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948) ("A finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."). But despite this historical background, the federal standard of review was never adopted under the Kansas statute. See *Short v. Sunflower Plastic Pipe, Inc.,* 210 Kan. 68, 73, 500 P.2d 39 (1972) ("Decisions of our court after the adoption of the new code of civil procedure do not suggest that any change was made by [K.S.A.] 60–252(a)....").

The standard of review simply determines how fact-finding responsibilities will be allocated between trial and appellate courts. See Sward, *Appellate Review of Judicial Fact–Finding,* 40 Kan. L.Rev. 1 (1991). The Kansas standard tilts toward greater deference to the trial judge, and the trial judge is the only judge who hears the testimony directly. The federal standard tilts more toward the stringent review of factual findings by appellate judges who have not heard any testimony in person. The policy choice about which way to lean in determining the applicable standard is one for the legislature or for our Supreme Court.

I add these separate comments because Christopher Davis has made a strong argument that the district court's factual findings regarding his ownership interest were clearly erroneous. As he noted in his appellate brief, both Davis and Larson prepared multiple documents and notes about their understanding of their respective membership interests, and none of them showed Davis initially owning less than 49%. Given that and other evidence, I could certainly understand how Davis might have some difficulty understanding our decision. I also believe that appellate courts should try our best to explain our decisions to the parties—especially when, as here, the decision might not initially make much sense to one of them. See Ronner, *Therapeutic Jurisprudence on Appeal,* Ct. Rev., Spring 2000 64. Had we applied the federal standard, Davis might well have won on appeal, but I can't say for sure because we were not called upon to make that much more difficult decision. Here's what I can say: Kansas has consistently applied its own standard for decades, and we have certainly not deviated from it. Under the standard of review that we must apply, the evidence is sufficient—primarily through the testimony from John Gilliford and Craig Chance—to uphold the district court's factual findings.

All parties to a lawsuit want a fair decision, where each side fully presents its evidence and then the case is determined, whenever possible, based on established rules. The district court carefully listened to the evidence, and it then decided that Gilliford and Chance presented credible testimony. Based on that testimony, the district court determined that Davis and Larson hadn't reached an agreement on ownership interests. After reaching that conclusion, the district court determined that the limited-liability company only had one member at its formation, and the district court carefully applied the Kansas statutes for limited-liability companies to the facts as it found them to determine Davis' ownership interest. The district court's conclusions are internally consistent based on the testimony it found credible. We have reviewed the case and considered the evidence, and we have applied the well-established standard of review. As such, I am confident that we have made a proper and fair decision under the law as it stands,

> and we have given careful consideration to the well-crafted arguments from both sides.[12]

Professor Wexler noticed these opinions because I cited in them to an article by Professor Amy Ronner,[13] who had provided a compelling example of how a judicial opinion in one case had effectively convinced a convicted defendant that his voice had been heard in the proceeding. Although Ronner's client had won on appeal, she relied in part for her suggested approach on the work of Professor Nathalie Des Rosiers, who has suggested that a court pay attention to how the losing party will view the case and who commended a court opinion that "could be said to be a 'letter to the loser,' designed to explain why he or she lost but also to help the acceptance of the reality . . . ."[14] In Wexler's opinion, "[i]mplementing the respectful letter to the loser technique in opinion writing would take us a long way towards improving appellate courts—and their image."[15] Obviously, I agree, and this technique is certainly equally available at the trial court.

Explaining the Role of the Court[16]

Sometimes, courts are not the best places to resolve problems. In child-custody and parental-rights-termination cases, judges may not fully understand everything we hear about. We are usually neither psychologists nor social workers and will—even at the end of a trial—have far less information about the family than that family has about itself. Perhaps families would try harder to resolve these cases on their own, based on their knowledge and love for the child, if they had a better understanding of the limitations of the judges who will hear the cases.

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[12] Winning Streak, Inc. v. Winning Streak Sports, LLC, 2010 WL 348272, at *6-7 (Kan. App. 2010) (Leben, J., concurring).

[13] Amy D. Ronner, *Therapeutic Jurisprudence on Appeal*, 37 COURT REV. 64 (Spring 2000).

[14] Nathalie Des Rosiers, *From Telling to Listening: A Therapeutic Analysis of the Role of Courts in Minority-Majority Conflicts*, 37 COURT REV. 54, 56 (Spring 2000).

[15] Wexler, *supra* note 10, at 785.

[16] This section draws heavily from my article, Steve Leben, *Thoughts on Some Potential Appellate and Trial Court Applications of Therapeutic Jurisprudence*, 24 SEATTLE U. L. REV. 467 (2000).

We are also limited because we have no special skill in discerning truth-tellers from storytellers at trial—even though we are legally "deemed" able to do this. In one controlled study in which a group of 110 judges with an average of 11.5 years on the bench attempted to tell which of 10 individuals were telling the truth and which were lying, the judges did no better than chance in their judgments.[17]

When I was a trial judge, I had many situations in which it was very difficult to determine what the facts of the case really were. It's quite possible that justice wasn't done in some because I made incorrect factual findings. In those cases, I generally devoted some extra time to discussing the possibility that I had gotten the facts wrong. That usually consisted of a statement like this:

> Before I tell you what I think happened here, I want to talk with you about the burden of proof in civil cases like this one. In a criminal case, the prosecutor has to prove guilt beyond a reasonable doubt, which is a very hard standard to meet. In civil cases, the burden of proof is simply what's more likely than not. So on contested issues, I simply have to determine what I think is the more likely way things happened. I may be wrong, as I'm sure happens sometimes. But I've listened to each of you and it's my job to make findings of fact, indicating to you what I think more probably than not happened here.

In cases in which I got it wrong—which were sure to happen—I hoped that this would help the losing party understand that I really was trying my best.

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[17] *See* Paul Ekman & Maureen O'Sullivan, *Who Can Catch a Liar?* 46 AM. PSYCHOLOGIST 913 (1991). In the same study, FBI polygraph agents, police robbery investigators, and psychiatrists also failed to do better than chance. Among the groups tested, only Secret Service agents scored well at being able to detect deception. *Id*. at 913-16. For most people, one study suggests that training in deception detection, even if it were given, wouldn't solve this problem. *See* Saul M. Kassin & Christina T. Fong, *"I'm Innocent!": Effects of Training on Judgments of Truth and Deception in the Interrogation Room*, 23 LAW & HUM. BEHAV. 499 (1999). *See also* Richard Schauffler & Kevin S. Burke, *Who Are You Going to Believe?* 49 COURT REV. 124 (2013).

We also need to explain the role of the court in our governmental structure. My guess is that a court's potential role in many of the disputes that come before us is much more limited than the public in general—and the litigants in particular—often realize. When citizens appeal governmental action in the courts, for example, they rarely think in advance about the standard of review that will be used to judge that governmental action. Rather, having lost in round one, they seek a second round to press their case on the merits. But we may not be reviewing it on the merits at all, nor should we.

The handling of zoning appeals provides a good example. As a trial judge, I handled the appeal of a city's approval of a large auto mall that was to go into a Kansas-side suburb of Kansas City. The appeal was filed on behalf of neighboring property owners and their homeowners' association, which had opposed the rezoning before the city commission. To make sure that the parties understood I had taken their cases seriously, I noted in my written opinion that I had carefully reviewed a 2,600-page administrative record. But I also wanted them to understand the limited role that I was supposed to play. So one full page of my 15-page opinion was devoted to a discussion of the role of a trial court in zoning matters:

> We live in a democracy in which many of the important decisions to be made that affect our lives are rightly to be made by our elected officials. Although the consideration by a city council of a rezoning request is deemed a quasi-judicial proceeding, the initial decision is to be made by elected officials, not judges. It is in the making of that initial decision that a great deal of discretion exists. In a given case, it might well be a reasonable decision either to grant or to deny the requested rezoning, and the decision would depend upon the elected body's preferences for its city's development.
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> The Kansas Supreme Court has appropriately recognized the proper role of courts in reviewing the zoning decisions made by elected officials:
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> > Our standard of review is reasonableness. In our view cities and counties in Kansas are entitled to determine how they are to be zoned or rezoned. Elected officials are closer to the electorate than the

> courts and, consequently, are more reflective of the community's perception of its image. No court should substitute its judgment for the judgment of the elected governing body merely on the basis of a differing opinion as to what is a better policy in a specific zoning situation.
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> This Court has no doubt that the plaintiffs in this case sincerely believe that the course of action taken by the Overland Park City Council in rezoning property for an auto mall was the wrong course of action. But, the decision to allow this rezoning was well within the range of reasonable actions that can be taken by an elected body. The Overland Park City Council spent more than five hours considering this zoning request at its July 19, 1999, meeting, ultimately approving the rezoning in a unanimous vote sometime after 1:00 a.m. the next morning. There is no basis in this record for a court to second-guess that decision.[18]

That opinion opener effectively explained the limited role the court is supposed to play. Doing so also is an important part of the "letter to the loser" approach; such an explanation should make it easier for the losing party to accept and to understand the court's decision.

I hope that some of these examples may be useful as you consider how best to use your written opinions to convey rulings that parties will understand and accept. If you have other examples that you'd like to share with me, please send them to me (sleben56@gmail.com).

FOR FURTHER REFERENCE

ProceduralFairness.org, a website created by Yale law professor Tom Tyler, Minnesota trial judge Kevin Burke, National Center for State Courts researcher David Rottman, and me to provide background information on procedural fairness in the context of courts and policing.

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