



THE NATIONAL JUDICIAL COLLEGE

EDUCATION | INNOVATION | ADVANCING JUSTICE

WHY APPELLATE COURTS OVERTURN DECISIONS

DIVIDER 8

Honorable David M. Gersten

OBJECTIVES:

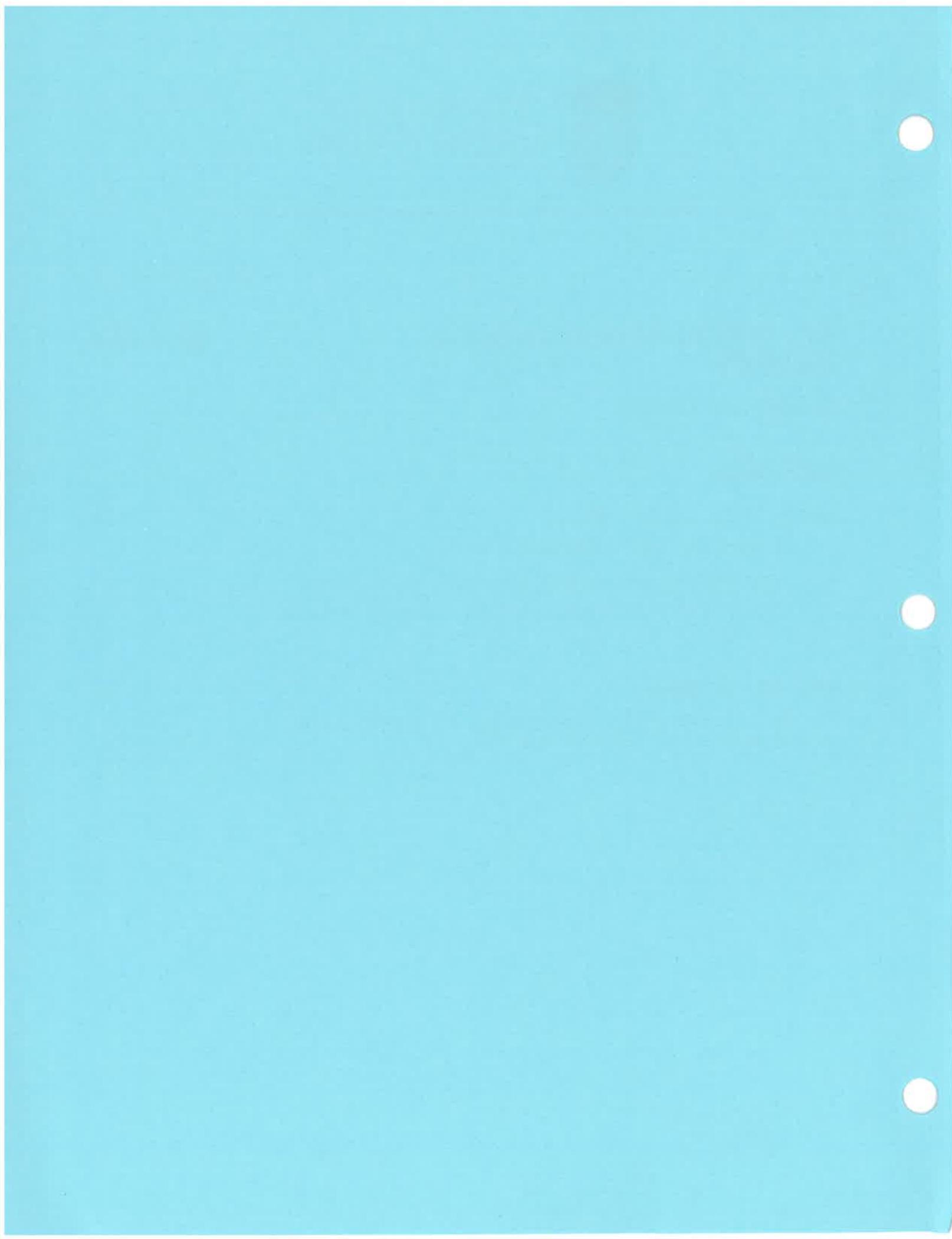
After this session, you will be able to:

1. Recognize and apply the Standards of Review;
2. Distinguish the source of the different standards of review; and
3. Prepare for pre-trial, trial, and appellate proceedings to avoid reversal.

REQUIRED READING:

PAGE

David M. Gersten, <i>The Decision Making Process: Why Appellate Courts Overturn Decisions</i> (Apr. 2016) [NJC PowerPoint].....	1
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The Decision-Making Process: Why Appellate Courts Overturn Decisions

Presented By:
Judge David M. Gersten



Standard of Review

- Extent to which an appellate court will:
 - Deal with an issue
 - Examine the correctness of the factual findings
 - Examine the correctness of the law the trial court applied to the facts
 - Examine the appropriateness of the trial court's discretionary acts
- Also referred to as the "scope of review"

Why Should Trial & Administrative Judges Care About the Standards?

- Allows the trial court to avoid error
- Provides ready-made outline—what to do first
- Gets the court thinking about the task at hand



Why It Matters to Appellate Judges

- Shows the trial court knew its task
- Helps the appellate court approach the record and the briefs
- Helps protect trial court error

Question of Fact or Law?

- The standards of review hinge on whether there is a question of fact or conclusion of law
- The distinction turns on whether one judicial actor is better positioned than the other to decide the issue

The Buzz Words

- Findings of Fact
- Conclusions of Law
- Mixed Facts & Law
- Constitutional Facts
- Discretion

Findings of Fact

➤ Facts are descriptive



➤ Facts state history



Conclusions of Law

- Results when legal effects are assigned to events
- If a rule of law must be applied before a conclusion is reached

Mixed Facts and Law

- Requires findings as to what happened and a conclusion as to the legal significance of those events
- Example: Negligence – mixed
 - What the person did – fact
 - What a reasonable person would have done in similar circumstances – law

Constitutional Facts

- A fact whose determination is decision of constitutional rights
- Example: voluntariness of a search or a confession



Discretion

The power the courts exercise to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the court's personal judgment.

Standards of Review

- De novo
- Clearly erroneous
- Mixed questions of law and fact
- Abuse of discretion
- Harmless error
- Plain error
- Fundamental error

De Novo

- Questions of law
 - No deference to the trial court
- Reversal chances best
- Promotes coherent legal doctrines

Clearly Erroneous

- Questions of fact
- Example: Was the proper standard applied?
 - Preponderance of evidence
 - Beyond a reasonable doubt

Mixed Questions

- Who is in best position to decide the case?
 - Those who observe the witnesses and evaluate the testimony?
 - Those who know how to apply the legal doctrine to the facts and maintain uniformity?
 - NOTE: Best advocates argue the position most advantageous to the case.

Fact or Law?

- Landlord changed the locks. **FACT**
- Landlord evicted the tenant. **LAW**

Abuse of Discretion

- Must find “no reasonable person would take the trial court’s view” to justify overturning the decision
- Difficult to persuade the reviewing court that the trial judge exceeded discretion

Harmless Error

- Appellate courts must disregard preserved trial errors that do not affect the substantial rights of a complaining party
- Only comes into play when party has properly preserved an issue before the trial court and raised it on appeal

Plain Error

- Error that affects substantial rights
- May be considered even though it was never brought to the court's attention

Fundamental Error

- Error reaches down into the validity of the trial itself
 - Goes to the heart of the judicial process
 - Results in a miscarriage of justice
- Applied in rare circumstances
- Example: Omission of jury instructions that are pertinent or material

Sources of Standards of Review

- Constitution
- Statutes
- Administrative agencies
- Case law



Constitution



Limits appellate jurisdiction

Statutes

- Limits review where error is not preserved
- Examples resulting in waiver
 - Failure to object before a ruling is made
 - Failure to make an offer of proof after court has ruled against counsel
 - Failure to object at jury instruction conference
 - Failure to object to the sufficiency of evidence in a trial does not always constitute waiver

Admin. Agencies

- Determine whether the right to judicial review is statutory and, if so, what is that right
- If determined purely by statute, then civil rules are inapplicable
- In most jurisdictions, the courts do not have the power to reverse in the interest of justice
- If statutory power is inadequate, then judicial relief may be sought

Admin. Review May Be Statutorily Restricted

- Confined to the record
- Appellate court determines if there is material procedural error
- Court can set aside, remand, or modify the agency's order if order erroneously interpreted the law and a corrected interpretation compels a particular action

Case Law

- | | |
|--|---|
| ➤ Some states:
Evidentiary rulings are discretionary determination | ➤ Other states:
Question is one of law |
| ➤ Some states:
Questions of equity are decided <i>de novo</i> by the courts | ➤ Other states:
It is a question of discretion |

If You Want Peace, Prepare For War

- If you want lawyers to be prepared, then you have to be prepared yourself as a judge
- Preparation at pre-trial and trial will help move your case to its conclusion

Pre-trial Preparation

- Focus on the legal issues, the ultimate facts, and any evidentiary issues that will most likely command the attention of the court
- Order parties to submit pre-trial legal memoranda on all relevant points of law

Trial Preparation

- Use memos and create an issue checklist
- Make a finding on each checklist issue
- Don't go by the "seat of your pants"
- CYA:
 - Before concluding, ask counsel if you missed anything = WAIVER

More Trial Prep

- Determine the standard of review before ruling
- Make all factual (aka historical) findings on the record
- Make your ultimate finding and label it as such
- Issue a ruling on each objection

More Trial Prep

- Remember the transcript is COLD
- You can't see what is going on so be sure the record reflects what took place at trial



Example

COUNSEL: Please show the jury how the officer bent your arm.

WITNESS: Like this (bends arm).

COURT: Counselor, please provide narrative description of what you are seeing for the record.

COURT: Do you agree with that description?

The Big Reversal

- Arm yourself with the Standard of Review for each issue in each case
- Applying the right standard is the first step in preventing the big reversal





THE NATIONAL JUDICIAL COLLEGE

EDUCATION | INNOVATION | ADVANCING JUSTICE

EFFECTIVE OPINION & ORDER WRITING

DIVIDER 10

Honorable David M. Gersten

OBJECTIVES:

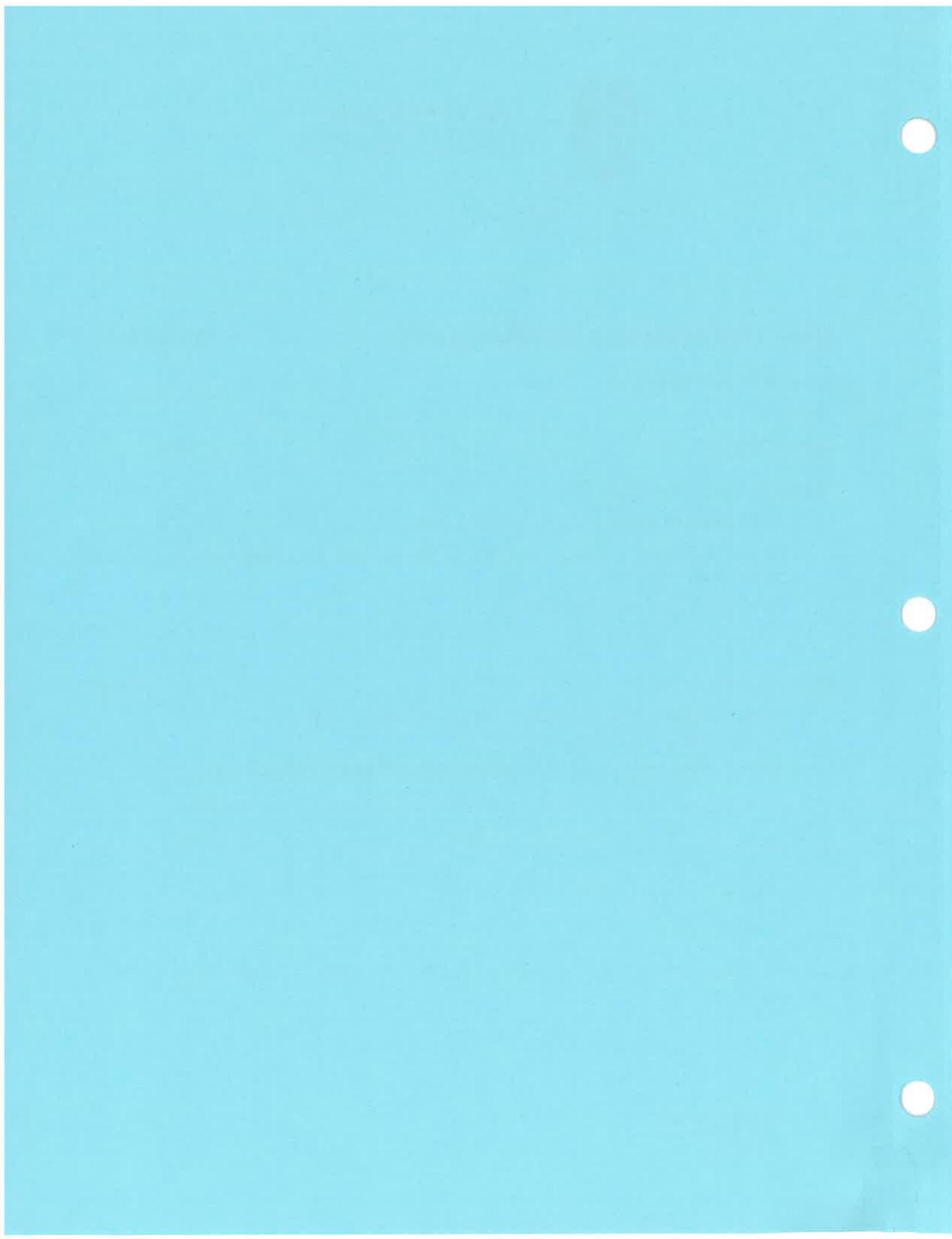
After this session, you will be able to:

1. Identify keys to effective opinion and order writing;
2. Develop and apply a writing formula that will produce tight, well-reasoned, and sound opinions and orders; and
3. Write an effective order or opinion.

REQUIRED READING:

PAGE

- | | | |
|----|--|----|
| 1. | David M. Gersten, <i>Decision Making Process: Opinion & Order Writing</i> (Apr. 2016) [NJC PowerPoint] | 1 |
| 2. | David M. Gersten, <i>Gersten's Rules of Writing</i> (July 2010) [NJC Document] | 11 |



Decision Making Process: Opinion & Order Writing

Presented By:
Judge David M. Gersten
Chair Appellate Division
Bilzin Sumberg
Miami Florida

Common Elements

- › Simple language
- › Standard format
- › Short paragraphs
- › Lots of eye pause signals



Common Elements

- › Logical Structure
- › Consistent verb usage
- › Clear transitions between paragraphs
- › Active voice

*Don't include too much
fluff data because it doesn't
matter.*

Your Audience

- Your audience is lawyers and judges. **FALSE**
- Your audience is the average educated person. **TRUE**



Goals

- Easy to Read.
- Easy to Understand.
- Easy to Finish.

- Bottom Line: Get in at point A and get out at point B.

- Follow Gersten's Order/Opinion Writing Formula

Gersten's Order/Opinion Writing Formula

ORDERS

- Introduction
- Findings of Fact
- Issues
- Conclusions of Law
- Conclusion

OPINIONS

- Introduction
- Facts
- Issues
- Discussion
- Conclusion

The Introduction

- Identify the parties and/or counsel.

- Identify the lawsuit.

- Identify the decision.

Example: Introduction

<u>ORDER</u>	<u>OPINION</u>
This matter/cause came before the Court on July 15, 2012. X was present and represented by ABC, Esq. . . .	X appeals a final summary judgment entered in favor of Y. We reverse.

Findings of Fact

- Identify the Court's jurisdiction.

- Identify the parties and their relationships.

- Identify the salient facts in chronological order.

**Example:
Findings of Facts in Orders**

1. This Court has jurisdiction over the subject matter and the parties.
2. The parties stipulated to the following facts:
 - a. X is a tenant in Y's apartment complex.
 - b. On July 1, 2009, X attempted to fix a pothole at Y's apartment complex. While attempting to fix this pothole, X fell and injured himself.

**Example:
Facts in Opinion**

Y owns a property that is under construction. While visiting the property, X was injured when he tripped over some wires.

X sued Y for negligence, and Y moved for summary judgment. The trial court entered summary judgment in favor of Y because X's injuries were not foreseeable as a matter of law.

The Issues

<p style="text-align: center;"><u>ORDER</u></p> <ul style="list-style-type: none"> > Identify what the parties are requesting the Court to do. > Identify the underlying dispute(s). 	<p style="text-align: center;"><u>OPINION</u></p> <ul style="list-style-type: none"> > Identify what the appellant contends and the issues on appeal. > Identify what the appellee contends and the issues on appeal.
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Example: Issues in Order

1. In Count I of the complaint, X requests this Court to declare the sale of the property invalid. At issue is whether the relevant provision applies and prevents. . . .
2. In Count II of the complaint, X seeks specific performance. At issue is whether. . . .

Example: Issues in Opinion

X contends that the trial court erred in granting summary judgment because there were several genuine issues of material fact. Y asserts that the trial court did not err because there were no genuine issues of material fact.

Conclusions of Law & Discussion

- Based on stated/determined facts.
- Applies relevant law to relevant issue only.
- Do not discuss unrelated issues.
- Makes a conclusion on each issue.

**Example:
Opinion Discussion**

The party moving for summary judgment must demonstrate as a matter of law that there are no genuine issues of material fact. See ABC v. DEF (Ghi. 2001). Here...

**Example:
Conclusions of Law in Order**

Based on the foregoing findings of fact, the Court reaches the following conclusions of law:

1. Concerning Count 5 of the complaint, X sought to have this Court declare the sale of the property is invalid. In order for the sale to be invalid, the court must find that homestead protection applies. The court determines that there was no declaration of homestead. Therefore, the sale is valid.

Conclusion

- > Announce the decision.
- > Provide the reasons for the decision.
- > Identify the disposition.

Example: Conclusion

ORDER

WHEREFORE, it is ordered and adjudged that:

1. Count 1 of the complaint is involuntarily dismissed.
2. . . .

OPINION

Accordingly, the summary judgment in this cause must be reversed because there are material issues of fact to be determined.

Reversed and remanded for further proceedings.

Gersten's Rules of Writing

- Remember your audience.
- Use active voice instead of passive voice.
- Avoid legalese.
- Avoid words ending in "tion."
- Check tense consistency in every paragraph.

More Rules

- Edit—edit—edit and remove words wherever possible.
- Shorten sentences and paragraphs.
- Use punctuation where needed and provide the reader with eye pauses.
 - KEY: <10 words without an eye pause.

Even More Rules

- Short paragraphs are easier to read.
- Keep each sentence in the paragraph related to subject of the paragraph.
- Rarely use one-sentence paragraphs.
 - Key: 2-5 sentence paragraphs are best.

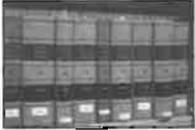
**Keys to Writing
An Effective Order/Opinion**



Research	Editing
Writing	Proofreading

Research

- Relevant case law.
- Relevant statutes.
- Relevant constitutional provisions.
- Relevant law review articles or other secondary materials.



Writing

- Have law clerks or counsel write one or more memoranda setting out relevant law, and factual information.

- Prepare a draft order/opinion.
 - Note: three-page order/opinion may involve 5-15 drafts.

Proofreading

- Look for grammar, spelling, and usage mistakes.

- Check for proper case citations.

- Assure fact are accurate.

- One person - Order/Opinion =
Edit Fatigue

Multiple Drafts

- To assure that each comma, word and each paragraph is correct;

- To assure the form and structure meet the follow the formula; and

- To assure that the opinion is legally correct.

GERSTEN'S RULES OF WRITING

1.	Remember your audience.
2.	Use active voice instead of passive voice.
3.	Avoid legalese and words ending in "tion."
4.	Check tense consistency in every paragraph.
5.	Edit—edit—edit and remove words wherever possible.
6.	Shorten sentences and shorten paragraphs.
7.	Use punctuation where needed and provide the reader with several eye pauses (Key: no more than 10 words without an eye pause).
8.	Always remember short paragraphs are easier to read.
9.	Keep each sentence in the paragraph related to the subject of the paragraph.
10.	Rarely use one sentence paragraphs. Two to five sentences are best.



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EDUCATION | INNOVATION | ADVANCING JUSTICE

EXERCISING DISCRETION

DIVIDER 11

Honorable Susan L. Formaker

OBJECTIVES:

After this session, you will be able to:

1. Discuss the limits and scope of review applicable to the use of judicial discretion;
2. Identify specific ways judges utilize judicial discretion; and
3. Articulate your own reasons and justifications for exercising discretion in particular cases.

REQUIRED READING:

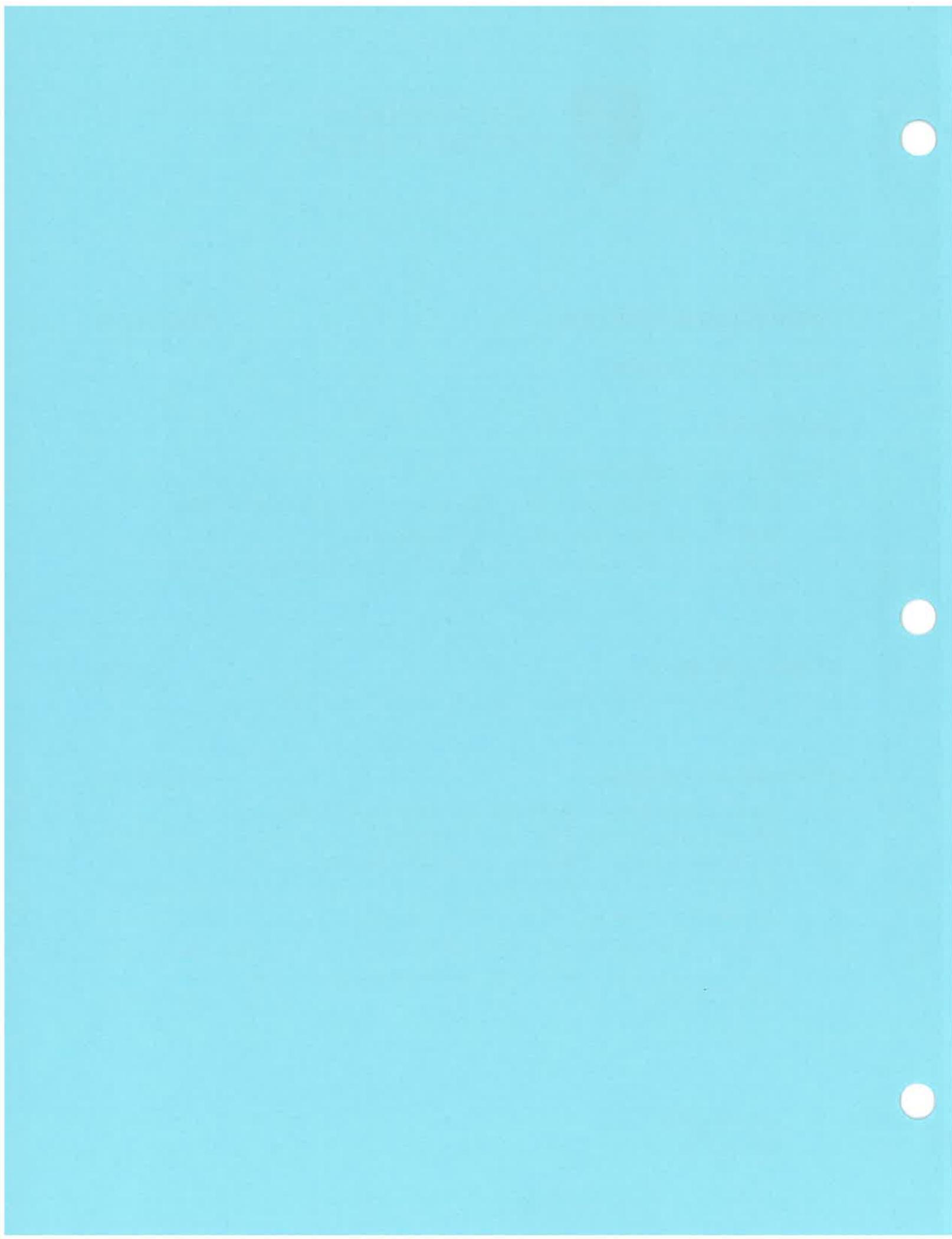
PAGE

Susan L. Formaker, <i>Exercising Discretion</i> (Apr. 2016) [NJC PowerPoint].....	1
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RECOMMENDED READING:

LOCATION

- | | |
|---|-----------|
| 1. Alex Kozinski, <i>What I Ate For Breakfast and Other Mysteries of Judicial Decision Making</i> , 26 LOY. L.A. L. Rev. 993 (1993) | NJC CLOUD |
| 2. Joan Humphrey Lefkow, <i>What Persuades When the Judge Has Discretion?</i> 31 LITIG. 21 (Fall 2004) | NJC CLOUD |
| 3. <i>Alarcon-Chavez v. Ashcroft</i> , 403 F.3d 343 (5 th Cir. 2005) | NJC CLOUD |
| 4. <i>Holland v. Florida</i> 560 U.S. 631, 130 S.Ct.2549(2010)..... | NJC CLOUD |
| 5. <i>People v. Superior Court (Mitchell)</i> (2010), 184 Cal.App.4th 451, 109 Cal.Rptr.3d 207 | NJC CLOUD |



Exercising Discretion

Presented By:
Hon. Susan L. Formaker

What is *Judicial Discretion?*

“The exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court’s power to act or not act when a litigant is not entitled to demand the act as a matter of right.”

Black’s Law Dictionary (9th ed. 2009)

Elements of Discretion

- Personal judgment of judge/court
- Considering what is fair
- Within boundaries of rules/law
- Where more than one option is available

Objectives

- Discuss the limits and scope of review applicable to the use of judicial discretion.
- Identify specific ways judges utilize judicial discretion.
- Articulate your own reasons and justifications for the exercise of discretion in particular cases.

How Does Judicial Discretion Arise?

"Judicial discretion is identified by two reasons which cause it to exist. First, the trial judge is the only objective person who is on the scene and who is able to see, hear and evaluate the situation from firsthand knowledge. Second, no strict rule can be made applicable for every conceivable situation in the many areas of law."

Justice Ben Overton of the Florida Supreme Court, *The Meaning of Judicial Discretion*, Judicial Discretion, 1991, NJC Publication.

Tension in Exercising Discretion:

Flexibility

vs.

Certainty and Consistency

Views of Discretion

➤ Primary

You can do virtually whatever you want provided it is not mere whim or caprice, and within the law.

➤ Secondary

Review by higher authority after final decision for "abuse of discretion," "substantial evidence," etc.

Classes of Discretion

- (Almost) unfettered
- Presumption of validity
- Some appellate deference
- "Lip service" discretion (independent review)

Examples of (Almost) Unfettered Discretion

- Controlling the order of proof
- Controlling the order of witnesses
- Bifurcation
- Other trial/hearing management rulings
- Erroneous jury instructions (with no objection)
- Others?

Examples of Presumption of Validity with High Degree of Appellate Deference

- > Credibility of witnesses
- > Orders sustaining a jury verdict
- > Adjournments
- > Continuances
- > Evidentiary rulings

Examples of Presumption of Validity with High Degree of Appellate Deference

- > Form of the verdict
- > Admission/exclusion of expert testimony
- > Agency statute, rule, and jurisdiction
- > Agency interpretations
- > Others?

Some Appellate Deference but Basis for Exercise of Discretion Must Appear

- > Vacating civil verdicts
- > Remittitur and Additur (decreasing or increasing jury award of damages)
- > Standards of dress and courtroom deportment

“Lip Service” Discretion

Reviewing courts indicate trial/hearing judge has discretion but then do an independent review.

Examples: equitable remedies, including injunctions or extraordinary common law writs such as mandamus, certiorari, and prohibition

Restraints on Exercising Discretion

- Legislative (statutes and rules)
- Appellate decisions
- Prior agency decisions
- Agency policy or directives (regulations)
- Personal or “internal” factors
- Public perceptions/expectations

How Do I Exercise Discretion?

- Determine range of discretion
 - ❖ Applicable statutes, regulations, rules, precedent
- Ascertain the facts; establish the record
- Consider the equities and the results
- Consider how, whether, and when to decide
- Make the decision

How Do I Exercise Discretion?

- Articulate the legitimate reasons for the decision that you would state on the record
- Allow parties to support or object on the record, if the decision is made during the proceeding
- Include the ruling and discussion in your findings, conclusions, and order
- Take the time to avoid reacting to bad behavior and initial impressions

Formulating Your Decision

Factual findings must relate to legal conclusions; legal conclusions must form the basis for your order.



Use Forms and Templates

- Identify common factual scenarios, leaving space for additions
- Include only the most important facts, guided by statute, regulation, etc.
- Provide the introduction to your legal conclusion using the appropriate legal standard, e.g., "Claimant has demonstrated good cause for ___ because . . ."
- Have alternative order language, e.g., "Claimant's request for ___ is granted/denied."

Scenario No. 1

A state agency seeks revocation of a nurse's license based upon multiple drug offenses. The agency contends the nurse poses a risk of harm to the public.

One week before the scheduled hearing, the nurse seeks a continuance because new counsel has substituted in to represent her.

The relevant statute requires "good cause" for a continuance.

Scenario No. 1

The continuance statute also requires application for a continuance within 10 working days following the reasonable discovery of the event establishing good cause.

- > How do you rule and why?

Scenario No. 1 (cont.)

- > Any difference if a prominent newspaper has published an extensive series of articles on the lengthy delays in bringing nurse discipline cases to hearing and the governor has expressed the need to get cases heard sooner?
- > Any difference if the continuance motion is made on the first scheduled day of hearing and a reporter from the prominent newspaper is observing?

Scenario No. 2



Scenario No. 3

Defendant is charged with murder. Over the course of several years, you have repeatedly ordered the deputy district attorney to produce discovery to the defendant's public defender.

After a new public defender is assigned, you specifically order production of evidence with a concrete deadline. Prior to the production date, the public defender reminds the deputy district attorney of the deadline.

No production occurs.

Scenario No. 3 (cont.)

A motion to compel is filed, along with a motion to preclude the specific evidence ordered to be produced. Under the relevant statute, you may make any order necessary to enforce discovery obligations, including requiring disclosure, initiating contempt proceedings, precluding testimony or evidence, or ordering a continuance. You may only preclude testimony if all other sanctions have been exhausted.

➤ What do you do, and why?

Scenario No. 4

You are an immigration judge. Petitioner is seeking asylum.

After 20 minutes, Petitioner has failed to appear for his asylum hearing. You find he has failed to appear, find him removable, and issue an order of deportation *in absentia*.

Scenario No. 4 (cont.)

You have returned to chambers.

Minutes later, you are notified of Petitioner's presence in the courtroom.

- > What do you do, and why?
- > What if you have a packed calendar—does it make a difference? Why?



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EDUCATION | INNOVATION | ADVANCING JUSTICE

TIMELINESS, CREDIBILITY ASSESSMENTS, AND FAIRNESS & EQUITY

DIVIDER 14

Honorable James A. Morrow

OBJECTIVES:

After this session, you will be able to:

1. Review, develop, and discuss the traits of a good trial judge;
2. Explore the issue of timeliness of decisions and procrastination;
3. Recognize and identify some key factors that affect decision makers;
4. Discuss the importance and accuracy of credibility assessments; and
5. Discuss how stereotypical thinking/bias can adversely affect one's impartiality and reputation.

REQUIRED READING:

PAGE

1.	James A. Morrow, <i>Timeliness, Credibility Assessments, and Fairness & Equity in Judicial Decision Making</i> (Apr. 2016) [NJC PowerPoint]	1
2.	James Morrow, <i>Self-Assessment Questionnaire</i> (July 2012) [NJC Document]	27
3.	<i>Factfinder's Credibility Quiz</i>	29
4.	<i>Myths About Witness Credibility</i>	31
5.	<i>Fact Finding Factors Used by Federal Labor Arbitrators</i>	33
6.	<i>Fact Finding Factors Used by Administrative Law Judges</i>	34
7.	<i>What to Do?</i> (Various Articles)	35
8.	James Morrow, <i>Perjury Speech</i>	39
9.	<i>Project Implicit® - Select a Test</i> [NJC Document]	41

10. Thinking FAST Think SLOW - Daniel Kahneman



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TIMELINESS, CREDIBILITY ASSESSMENTS, AND FAIRNESS & EQUITY (CONT.)

DIVIDER 14
Page 2

RECOMMENDED READING:

LOCATION

1. *Decision Making*NJC CLOUD
2. *Trial Management Conference Checklist*NJC CLOUD
3. *Judicial Response to Biased Statements Made by Witnesses*.....NJC CLOUD

Timeliness, Credibility Assessments, and Fairness & Equity in Judicial Decision Making

Hon. James Morrow



Judicial Decision Making

“One thing is clear: Judges receive precious little training to be decision makers. Yet, decisions are the stock of the judicial trade. Decisions are judges’ professional product. Trial judges must make decision after decision; then regroup their energies and resources to make another decision after that. Are there common behavioral components to the decision making process, whether good or bad? Can we enhance the decision-making ability and improve its quality through training?”

-Bartell

Ten Commandments

HON. EDWARD J. DEVITT

1. Be Kind
2. Be Patient
3. Be Dignified
4. Don't take yourself too seriously
5. A Lazy Judge is a Poor Judge
6. Don't Fear Reversal
7. There are No Unimportant Cases
8. Be Prompt
9. Common Sense
10. Pray for Divine Guidance

Procedural Fairness

Americans are highly sensitive to the processes of procedural fairness. It is no surprise, then, that the perception of unfair or unequal treatment “is the single most important source of popular dissatisfaction with the American legal system.”

- *Procedural Fairness*, Judge Burke & Judge Leben

Procedural Fairness

Most people care more about procedural fairness—the kind of treatment they receive in court—than they do about “distributive justice,” i.e., winning or losing the particular case. This discovery has been called counterintuitive . . . But researcher after researcher has demonstrated that this phenomenon exists.

- *Procedural Fairness*, Judge Burke & Judge Leben

Procedural Fairness Independently Enhances Litigant Satisfaction

- How just and impartial were the proceedings?
- Did the judge appear to have sufficient information to support the decision?
- Did the judge take the evidence into account?

Procedural Fairness Independently Enhances Litigant Satisfaction

- Did the judge listen to your side of the story?
- Did the judge take enough time to consider the case carefully?
- Was the judge seemingly unbiased?

- *Procedural Fairness*, Judge Burke & Judge Leben

Research on Procedural Fairness

- Unlike the public, judges focus on the fairness of case outcomes instead of the process.
- Case volume of courts is a management challenge for judges, not an excuse for deemphasizing procedural fairness.
- Perceptions of procedural fairness differ dramatically among minority and majority populations.

Research on Procedural Fairness

- Litigants have a powerful need to express themselves vocally during the hearing.
- Body language influences how litigants perceive the judge and the judge's decision.
- Procedural fairness is the critical element in public perception and satisfaction with the court system.

- *Procedural Fairness*, Judge Burke & Judge Leben

Research on Procedural Fairness

- A judge's attitudes, beliefs, or expectations about the trial's outcome can influence the decision-making process of the jurors or of the actual trial outcome.
- When judges expect or predict a certain trial outcome, they intentionally or unintentionally behave in a way that indicates what they think the outcome should be.

What About Judicial Demeanor?

by Experienced Trial Attorneys

"A judge who demonstrates a warm, caring, yet somewhat formal demeanor, I have found is the most helpful type of judge for everyone. He puts people at ease, but yet he makes it clear that this is a courthouse where the people's justice is conducted."

What About Judicial Demeanor?

"This judge is very bright, very hard working, and tries to be fair, but he is such a jerk demeanor-wise. I do my best to avoid appearing in front of him. If he wasn't so cranky and mean, he would be a great judge."

National Research

- Exercise Control Over the Trial
- Decisiveness
- Punctuality
- Minimizing Trial Recesses
- Avoiding Interruptions
- Knowledge of the Law

What I Want in a Judge

by Experienced Minnesota Trial Attorneys

- | | |
|---------------------|-----------------------------------|
| ➤ Control Courtroom | ➤ Require Attorney Preparation |
| ➤ Enforce Rules | ➤ Encourage Stipulations |
| ➤ Equal Treatment | ➤ Tight Ship |
| ➤ Punctuality | ➤ Make Timely Decisions |
| ➤ Run A Tight Ship | ➤ Control "Warring" Attorneys |
| ➤ Control | ➤ Requirement Exhibit Preparation |
| ➤ Tight Reign | ➤ Avoid <i>Ex Parte</i> Contacts |
| ➤ Short Breaks | ➤ <u>Don't Over Control</u> |
| ➤ Decide Motions | |

Trial Management Conference Checklist

Attorneys meet and:

1. Exchange witness lists and summaries
2. Go over all exhibits, stipulate or make objections, make sure all exhibits are pre-marked
3. Make copies of exhibits
4. Make other stipulations
5. Go over motions *in limine*
6. Know the Minnesota Civil Trialbook rules
7. Go over ground rules

Courtroom Management / Trial Momentum Checklist

➤ Punctuality –

Attorneys, Judges, Court Personnel – local legal culture

➤ Minimize Interruptions

* Breaks – a.m., noon, p.m.

- Timing

- Length

- Scheduling Witnesses

Courtroom Management / Trial Momentum Checklist

Controlling the Courtroom

Ground Rules, including “Rules of Civil Trial Book”

- Repetitive Questions or Testimony
- Keeping Track of Exhibits
- Opening and Final Time Estimates

Small Group Exercise

1. Choose a reporter/recorder
2. How can you most efficiently review the file and learn the law ahead of time?
3. How can you narrow the issues?

My Final Decision is: "Maybe"

At Judge Maybe's discipline hearing, he was cooperative and contrite. He candidly admitted that the three admiralty cases "got away" from him. He often works evenings, weekends, and holidays and volunteered for difficult cases. These were complicated suits involving multiple parties who had made motions and cross motions, most of which related to discovery...

Procrastination

- "Procrastination is a sin of lawyers, trial judges, reporters, appellate judges, in brief, everyone connected with the machinery of criminal law."
—Macklin Fleming
- Nothing is so fatiguing as the eternal hanging on of an uncompleted task.
—William James
- Putting off an easy thing makes it hard. Putting off a hard thing makes it impossible.
—George Claude Lorimer

Procrastination is a terrible habit, and the internet is truly the great enabler. How many hours of productivity are lost to YouTube each year?

Judging from "Law Firm March Madness" traffic, lawyers are definitely among the office workers looking for distraction. "Slate" has gathered "procrastination rituals" from various professionals.

Judge Richard Posner of the Seventh Circuit: Procrastination is very unhealthy. It causes problems for the people who are counting on you to complete things in a timely fashion and it makes your own life more difficult.... It helps to be a little compulsive. Then you feel uncomfortable if something is hanging over you — that's the opposite of procrastination, a compulsion to complete things and get rid of the albatross hanging over you....

Judicial Cannon

3(b)(8) A judge shall dispose of all judicial matters promptly, efficiently, and fairly.

Judicial Board Complaint

The board acted on a complaint alleging a single instance of delay. It would be difficult for a single complainant to show that a judge is habitually late or provide a context for a delay. Once a complaint puts a judge's timeliness at issue, the board has an obligation to investigate beyond the single case.

Procrastination, Habits, Rituals, Issues

Procrastination is one of my biggest weaknesses; I spend a lot of time *thinking* of what to do and not enough time *doing* what I need to do.

“Procrastination is, hands down, our favorite form of self-sabotage.”

—Alyce P. Cornyn-Selby

Cognitive Reflection Test

(1) A bat and a ball cost \$1.10 in total. The bat costs \$1.00 more than the ball. How much does the ball cost?
_____cents

(2) If it takes 5 machines 5 minutes to make 5 widgets, how long would it take 100 machines to make 100 widgets?
_____minutes

(3) In a lake, there is a patch of lily pads. Every day, the patch doubles in size. If it takes 48 days for the patch to cover the entire lake, how long would it take for the patch to cover half of the lake?
_____days

CRT Results of the 252 Judges Who Answered All 3 Questions

	Percent Accurate
Question 1	28.2%
Question 2	44.0%
Question 3	50.4%

Blinking on the Bench: How Judges Decide Cases

Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich

How do judges judge? Do they apply law to facts in a mechanical and deliberative way, as the formalists suggest they do, or do they rely on hunches and gut feelings, as the realists maintain?

How Judges Decide Cases

- Intuitive processes “occur spontaneously and do not require or consume much attention.” They are “spontaneous, intuitive, effortless, and fast.”
- Deliberative processes are “mental operations requiring effort, motivation, concentration, and the execution of learned rules.” They are “deliberate, rule-governed, effortful, and slow.”

How Judges Decide Cases

Intuitive responses can also emerge from repetition of the same deliberative procedure.

How Judges Decide Cases

...we have conducted several studies involving hundreds of federal and state trial judges around the nation, and we have found that judges commonly encounter stimuli on the job that induce intuitive reactions, though they occasionally demonstrate an ability to override those intuitive responses.

How Judges Decide Cases

>The capacity to use intuitive thinking successfully may require years of “effortful study” as well as accurate and reliable feedback on earlier judgments.

>Judges are unlikely to obtain accurate and reliable feedback on most of the judgments they make.

Inducing Deliberation

1. Time
2. Opinion Writing
3. Training and Feedback
4. Scripts, Checklists, and Multifactor Tests
5. Divided Decision Making

From a *Pro Se* Handbook

“ The first thing you need to know is that representing yourself is called “*Pro se*,” which when translated into English means:

‘You’re F—ked!’ It means that judges are immediately going to look down their noses at you...”

Danger Areas

- Judge who mistreats *Pro Se*
- Judge who favors *Pro Se*
- Judge as Judge Judy

Maintaining Courtroom Civility

Judicial Demeanor

- Do not use disdainful comments or tone
- Do not make negative comments about self-representation
- Use titles for *Pro se* comparable to counsel: Sir, Madam, Mr., Ms.
- No over-familiar conduct toward attorneys or parties

No Rude Conduct by *Pro Se*

- Rude conduct displayed on television court shows like “Judge Judy” is not acceptable in a real courtroom, either from or directed to the litigant
- Explain bailiff’s role
- Loud talking or swearing is a criminal misdemeanor—Disorderly Conduct
- I recommend using a tape recorder

Assistance for *Pro Se* Litigants

- Tell *Pro se* where to sit and where to stand
- Give them Courtroom Civility Rules, emphasizing:
 - No shouting, name calling, swearing
 - Stand when speaking to judge or witness
 - Be courteous to EVERYONE—you are more persuasive
 - Don’t interrupt; wait your turn

Assistance for *Pro Se* Litigants

- Anything you file must be served on the other side; the clerk may help you
- Direct your arguments and comments to the judge, not to the other side
- Do not bring gum, food, or drinks into the courtroom; water will be provided
- Do not approach a witness or the bench without judge's permission

Pre-Hearing – Evidence

- Explain the kinds of evidence that **can** be admitted and the kinds of evidence **that** cannot be admitted
- Explain why you will only make your decisions on admitted evidence
- Encourage the parties to:
 1. Stipulate to uncontested facts
 2. Exchange and admit as many documents as possible

Why Have a Ban on Hearsay

- We rely on hearsay in everyday decision making
- And we know – some hearsay (e.g., a diary kept contemporaneously with an event) is *more* reliable than live testimony years after an event

Why Exclude Hearsay

- Concern about what we need to know about the declarant
- Perception
- Narration
- Sincerity
- Memory

What Hearsay Misses

- Oath
- Demeanor
- Cross Examination

Non-Confrontational Questions

- Tell me more about _____
- Help me understand _____
- Give me some specific details re: _____
- Give me a word picture – kind of like a slow motion instant replay _____
- That's not a question (give an example of a question)

Firm – Polite – Control

- “Talk to me, not _____.”
- “Stay with the facts, not personal issues.”
- “Anger is not persuasive.”
- “Raising your voice is not helpful.”
- You can’t interrupt; take notes until it’s your turn (provide a note pad).

Avoid Rambling or Repetition

Focusing litigant

- Ask nicely what his/her point is or why this is important (relevant)
- Define issues
- Explain need to cut off: “You have told me that 2 or 3 times; do you have anything new?”

Pay Attention

- Pay attention and *act like you are paying attention* by looking at the witness.
- If you take notes or refer to books or a computer for information, explain what you are doing so the litigants and witnesses understand what you are doing.

Problem: Order for Protection

Two quarreling families have filed against each other for Protective Orders, alleging harassment, stalking, and obscene phone calls. They show up in your courtroom for trial, not a lawyer in sight.

In court, they continue to quarrel, yell, and interrupt each other.

Each case has 6 plaintiffs and names all the members of the other family as defendants.

Your View of *Pro Se* in Criminal Court

- In my opinion, you would be far better defended by an attorney, and if you cannot afford an attorney, one would be appointed for you upon your request.
- If you represent yourself, and lose, you cannot later claim that you had incompetent counsel during trial.
- Since you do not know the law, the court procedures, or the rules of evidence, I do not recommend that you represent yourself.

Right to be Present at Trial

- Unruly conduct by the defendant may result in the loss of the defendant's right to be present during trial.
- A defendant can lose his/her 6th Amendment right to be present at trial if, after warning and gradual sanctions, he/she continues the disruptive conduct.

Illinois v. Allen 397 U.S. 337 (1970)

***Pro Se* in Family Court**

- Litigants are emotional and volatile
- Anger and vindictiveness are common
- Child issues become bargaining chips
- Dynamics of domestic violence spill over into the courtroom
- You must be especially CALM and in control of your judicial demeanor

Settlements and the *Pro Se*

- Ask *pro se* if she/he would agree to talk settlement
- Encourage, but do not coerce, settlement
- If an agreed settlement is presented, conduct Q & A on the record to insure *pro se* agrees to it with full knowledge of consequences
- Determine whether any waiver of rights was voluntary; make an appropriate finding
- Explain that if approved, settlement will become a binding Court Order – no appeal by *pro se*

Decision and the *Pro Se*

- Announce your decision from the bench?
- If you take the case under advisement, announce a decision date “in a week”
- Explain your decision in everyday English
- Explain the right to appeal your decision
- Direct *pro se* to resources for enforcement or collection of judgment
- If there is a victim, let victim leave first

**Self-Assessment
Questionnaire**
(Page 27 in Binder Materials)

Did you know you can beat stress, lift your mood, fight memory loss, sharpen your intellect, and function better than ever simply by elevating your heart rate and breaking a sweat?

The evidence is incontrovertible.

Just a 30-minute brisk walk physically changes our brains for peak performance.

"SPARK The Revolutionary New Science of Exercise and the Brain" (Ratey, MD (2008))

In "SPARK," Dr. Ratey embarks upon a fascinating journey through the mind-body connection, presenting startling research to prove that exercise is truly our best defense against everything from depression to addiction to aggression to menopause to Alzheimer's.

Regular EXERCISE
will improve
Your DECISION MAKING

"Spark," Dr. Ratey (2008)

What Values Affect Decision Making?

- Men & women
- "Work ethic"
- Different cultures
- Religion(s)
- Disability
- Patriotism
- Geographic regions
- Same-sex marriage
- Race

Discussion

What values have you seen influence decision making in other judges?

BIAS?

- The first witness was the Hatter. . . .
- "Take off your hat," the King said to the Hatter.
- "It isn't mine," said the Hatter.
- "Stolen!" the King exclaimed, turning to the jury, who instantly made a memorandum of that fact.
- "Give your evidence," said the King, "and don't be nervous, or I'll have you executed on the spot..."
- "Give your evidence," the King repeated angrily, "or I'll have you executed, whether you're nervous or not."

Judicial Bias*

"We all view reality from our own peculiar perspective; we all have biases, interests, leanings, instincts. These are important. Frequently, something will bother you about a case that you can't quite put into words, will cause you to doubt the apparently obvious result. It is important to follow those instincts, because they can lead to a crucial issue that turns out to make a difference. . .

Judicial Bias*

... But it is even more important to doubt your own leanings, to be skeptical of your instincts. *It is frequently very difficult to tell the difference between how you think a case should be decided and how you hope it will come out.* It is very easy to take sides in a case and subtly shade the decision-making process in favor of the party you favor."

"What I Ate for Breakfast and Other Mysteries of Judicial Decision Making,"
Judge Alex Kozinski, Circuit Judge, United States Court of Appeals for the
Ninth Circuit, March 19, 1993

Fairness and Equity in the Courtroom

Definition of BIAS for purpose of our discussion:
An automatic inclination or predisposition to favor or disfavor a case/issue for a reason other than the merits.

Fairness and Equity in the Courtroom

I. BIAS CAN BE BASED UPON

- A. Visually observable traits, e.g., race, sex, physical impairment, weight, height, jewelry, makeup, hair, clothes
- B. Aurally observable traits, e.g., nationality, socioeconomic class
- C. Not easily observable beliefs, e.g., religion, sexual orientation, employment

[Material: Adapted from Judge Gene D. Cohen]

Fairness and Equity in the Courtroom

II. BASIS OF BIAS (Stereotyping)

- A. Stereotypes – the brain’s shortcut to categorize and streamline response
- B. Experience and perceptions of specific individuals who then “stand for” the group, e.g., stereotypes associated with individual minority groups

Fairness and Equity in the Courtroom

III. MANIFESTATIONS OF BIAS

- A. Non-verbal behavior
- B. Forms of address
- C. Tone of language
- D. Innuendo or inappropriate humor
- E. Inconsistency in treatment
- F. Allowing improper comments by counsel
- G. Judicial decisions

Fairness and Equity in the Courtroom

IV. CONSEQUENCES OF BIAS OR STEREOTYPING IN THE COURTROOM

- A. Individual is seen as unfairly treated
- B. System is seen as untrustworthy
- C. Doubts about the judge’s objectivity
- D. Judge may be disciplined

QUIZ – SURVEY 1

According to the findings of a mail survey of judges, court personnel, and attorneys:

1. All respondents feel whites are treated fairly by the courts. T / F
2. Judges believe that minorities are subject to very fair treatment. T / F
3. Non-judicial court personnel feel minorities are treated somewhat fairly. T / F
4. Attorneys feel minorities are treated unfairly; 93% of the attorneys feel that a minority defendant is more likely to be found guilty. T / F

QUIZ – SURVEY 2

1. The majority of people surveyed believe their courts to be significantly fairer to WHITES than to any other group. T / F
2. African-Americans and Native Americans are perceived to be treated less fairly than everyone else. T / F
3. Everyone, whites and minority groups alike, think the courts are unfair to Native Americans. T / F
4. People surveyed perceive that courts treat people with a good understanding of English better than people who speak little or no English. T / F

Judicial Canons

Canon 3B(5) ABA Model Code of Judicial Conduct provides:

A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit court personnel and others subject to the judge's direction and control to do so.

Judicial Bias

Two types of bias:

1. One involving the judge's past traumatic experiences
2. And the other relating to interpretation of ambiguous terms or words

Can negatively influence judges by causing them to interpret the law in a hasty manner without fully exploring alternative channels of interpretation.

"Judicial Mindfulness," E Seamone, JD (2001)

Judicial Bias

The proposed model for judicial debiasing envisions judges who can better understand how their particular personal experiences might trigger certain biases; who can appreciate the limitations that such biases impose; who can detect these biases once triggered; and finally, who can determine the strength of such biases.

Discussion Problems Handout

**Learned Hand:
The Spirit of Liberty**

"The spirit of liberty is the spirit which is not too sure that it is right; the spirit of liberty seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interests alongside its own without bias; the spirit of liberty remembers that not even a sparrow falls to earth unheeded."

So Far Today

"So far today, God,
I've done all right. I haven't
gossiped, I haven't lost my
temper, haven't been grumpy,
nasty, or selfish. I'm really thankful for that.
But in a few minutes, I'm
going to get out of bed. And from then on, I'm
probably going to need a lot of help."

A Prayer

I pray that today I will have the knowledge to discover, and the wisdom to clarify the legal issues; the ability to see, and the unbiased mind to recognize the true facts; the heart to know, and the gentleness to understand the human problems; and the patience and logic to reach, and the courage to declare, the just decision.

All these things, Lord, I ask that at the close of this day my conscience may truly say, "Today you were worthy to be called 'Judge'."

-Chief Justice Douglas K. Amdahl - 1961

FACT FINDING FACTORS USED BY FEDERAL LABOR ARBITRATORS

TOP FIVE CREDIBILITY DETERMINATION FACTORS

1. Prior inconsistent statements
2. Implausibility of testimony
3. Plausibility of testimony
4. Existence of facts testified to
5. Opportunity to perceive matters testified to

NEXT FIVE CREDIBILITY DETERMINATION FACTORS

6. Admission of untruthfulness
7. Nonexistence of facts testified to
8. Capacity to perceive, recall, or communicate matters testified to
9. Bias, interest, or motive
10. Prior consistent statements

FINAL FOUR CREDIBILITY DETERMINATION FACTORS

11. Character of testimony
12. Character for honesty or veracity or lack of either
13. Attitude of witness (positive or negative) toward proceeding or testifying
14. Demeanor evidence

FACT FINDING FACTORS USED BY ADMINISTRATIVE LAW JUDGES

TOP FOUR FACTORS

1. Ability to hear all of the evidence.
2. Direct and cross-examination.
3. Ability to hear live testimony.
4. Other credibility determination factors.

NEXT FOUR FACTORS

5. Variety of above factors depending on case.
6. Fact finding experience.
7. Nature of fact issues in the case.
8. Demeanor evidence.

WHAT TO DO?

(Based on a Law Enforcement Article on Deception)

1. “Don’t be too confident in your ability to know when someone else is lying or telling the truth.”
2. “Don’t conduct theory-driven interviews.”
 - “Don’t go in with a strong presumption, put blinders on, because you’ll like get what you expect – whether it’s right or wrong.”
3. “Listen more than look. “
 - “Auditory clues – as in pauses, voice pitch, and speech rate – are leakier and more diagnostic of deception than are visual cues, which tend to steal our attention.”
4. “Use logic, rather than psycho-logic, to analyze the fit between a statement and known crime facts...”
 - “...looking for signs that the witness or suspect provided vivid details that were accurate, internally and externally consistent, knowable only by the culprit – not via second-hand sources...”

Law Enforcement Article on Deception

* * *

In the case of making judgments of truth and deception, the key is not to throw your hands up in despair and conclude that people can't do it. The key is to advise people on how to do it more effectively. Admittedly, researchers right now are better at poking the holes and exposing the problems than finding the solutions. But some methods of improvement are self-evident. If I were to try and develop a list of what to do, or what to avoid, I'd start with, "Don't be too confident in your ability to know when someone else is lying or telling the truth," Then, I'd say, "Don't conduct theory-driven interviews." (Keep an open mind.) That is, don't go in with a strong presumption, put blinders on, and run the interview accordingly, because you'll likely get what you expect – whether it's right or wrong.

Finally, I'd say, "Listen more than look." As I noted earlier, auditory clues – as in pauses, voice pitch, and speech rate – are leakier and more diagnostic of deception than are visual clues, which tend to steal our attention. Last but not least, I'd say use logic, rather than psycho-logic, to analyze the fit between a statement and known crime facts, looking for signs that the witness or suspect provided vivid details that were accurate, internally and externally consistent, knowable only by the culprit – not via second-hand sources, and generative of evidence not previously known by investigators. These are some of the tips that can be gleaned from empirical studies. People are not good intuitive lie detectors, but it may well be possible to make them better. * * *

WHAT TO DO?

(From Judicial Decision Making Articles and
Judicial Decision Making Participants)

1. Stay away from first impressions.
2. Truly keep an open mind.
3. Listen.
4. Look for the independent witness.
5. Look for inconsistencies in testimony.
6. Look for evidentiary or other corroboration.
7. Totality of circumstances.
8. In difficult cases, use the “burden of proof” and “standard of proof” concepts to decide.
9. Perjury speech?
10. _____
11. _____
12. _____



Judge Morrow's Perjury Speech

(I use this in some court/bench trials and **all** pro se matters, including: harassment hearings, domestic abuse order for protection hearings, unlawful detainers, conciliation court/small civil claims, testimony in family motions and trials, etc.)

[The oath is given using the words "under penalties of perjury"]

Please look at me. This is important. This is a serious case, and I take it very seriously. I know how important this is to you, so you want to tell the full, complete truth, and only the truth.

You are now under oath; do you understand that? (Answer: Yes)

When you are under oath, you have to make sure you tell the truth. Even one lie (holding up one finger), you could be charged with felony perjury. One lie, one count of perjury (holding up one finger), up to five years in prison (holding up five fingers), so you don't want to do that. The court reporter takes down everything you say in the courtroom. Do you understand what I've said? (Answer: Yes)

Some people seem to think they can lie in [] hearings. I have referred more than one case like this to the Anoka County Attorney's Office for prosecution for felony perjury.

Do you understand? (Yes) Any questions? (No)

On the other hand: [actual Q & A from a court/bench trial]

Q: [judge] "Do you understand that you have sworn to tell the truth?"

A: [witness] "I do."

Q: [judge] "And do you understand what will happen if you are not truthful?"

A: [witness] "You bet ...My side wins."



Courtroom Protocol/Ground Rules

1. Please be on time; if you are detained in another courtroom or have other hearings in another courtroom which will make you late, please let the judge know where you are.
2. Please stand whenever addressing the court.
3. Please stand when the court/jury enters or leaves.
4. Please ask to approach a witness, clerk or the bench.
5. Please return to counsel table after approaching the witness, etc.
6. Please use last names of witness', jurors and opposing counsel.
7. Please follow the Rules of Evidence, MRE 103(a)(2) and MRE 103(c) and Minnesota Civil Trial Book 10(a); no speaking objections: a one, two or three-word legal basis only.
8. Please no arguing after the court has made a ruling.
9. Please do not thank the court whether you approve or disapprove of evidence rulings.
10. Please follow Rule 10(k) of the Minnesota Civil Trial Book; in other words, please refrain from making facial expressions, gestures or audible comments to indicate approval or disapproval of testimony, argument or rulings and insure that your clients and witness' also refrain from these behaviors.
11. Please follow MRE 615 and sequester all witness'.
12. In the case where the testifying witness disagrees with another witness, don't ask the testifying witness if he/she thinks their difference in testimony means that the other witness is lying – case law says you can't do this.
13. Don't ask a witness what he/she said in a deposition unless you have first asked the witness the question directly and the deposition contradicts what he/she is now saying.
14. When impeaching from a deposition, tell the court and opposing counsel the page and the line in the deposition you are referring to, then read the question and answer and ask the witness if that was what the witness said in their deposition.
15. After opening statement, the attorneys can do only two things in front of the jury: (1) Ask a question. (2) Make an objection with a one-word, two-word or three-word legal basis.

