

## **Honorable Keith A. Kelly – District Court Judge**

Serving Salt Lake, Summit and Tooele counties

### **Commission Recommendation: **RETAIN****

(vote count: 12-0 for retention)

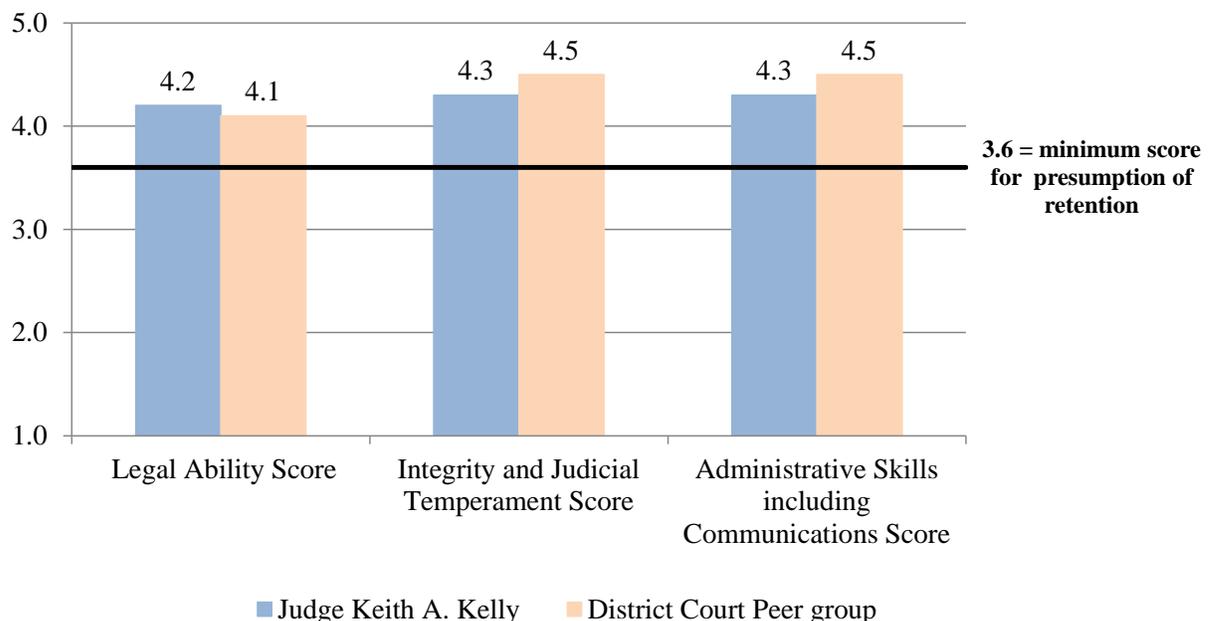


Appointed in 2009, Judge Keith Kelly was most frequently described by survey respondents as intelligent, attentive, knowledgeable, polite, and patient. Many respondents commented on Judge Kelly's obvious preparation and hard work. Others were critical because the judge seemed reluctant to control hearings in his courtroom and appeared indecisive. They complained that hearings before Judge Kelly were unnecessarily long, increasing costs to participants. Courtroom observers, however, cited Judge Kelly's unhurried, deliberate, and careful process as positive attributes, with all observers reporting they would feel comfortable appearing before him. Of survey respondents who answered the retention question, 86% percent recommended that Judge Kelly be retained.

The commission reviewed surveys and courtroom observation reports in addition to verifying that Judge Kelly has met all time standards, judicial education requirements, and discipline standards established by the judicial branch.

In 2009, Judge Keith A. Kelly was appointed to the Third District Court. He graduated from Stanford Law School in 1985, where he was an editor of the Stanford Law Review. Before becoming a judge, he worked for 23 years as a civil attorney in Salt Lake. He has served as chair of the boards of trustees of the Utah Parent Center, "And Justice for All," and the Disability Law Center; as president of the Anderson Inn of Court; as a member of the Utah State Advisory Board on Children's Justice; as a member of the Utah Supreme Court's Evidence Advisory Committee; as chair of the Utah Judicial Council's Guardian ad Litem Oversight Committee; and as president of the Utah State Bar's Young Lawyers Division.

### **This judge has met all minimum performance standards established by law.**



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# **The Honorable Keith A. Kelly**

**Judicial Performance Evaluation Commission Report**

**Retention 2014**

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### II. Courtroom Observation Report

# I. Survey Report

## Survey Results

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### A. How to Read the Results

For Judge Keith A. Kelly, 57% of qualified survey respondents submitted surveys. Of those who responded, 102 agreed they had worked with Judge Keith A. Kelly enough to evaluate his performance. This report reflects the 102 responses. The survey results are divided into five sections:

- Statutory category scores
- Procedural fairness survey score
- Responses to individual survey questions
- Summary of adjectives
- Retention question

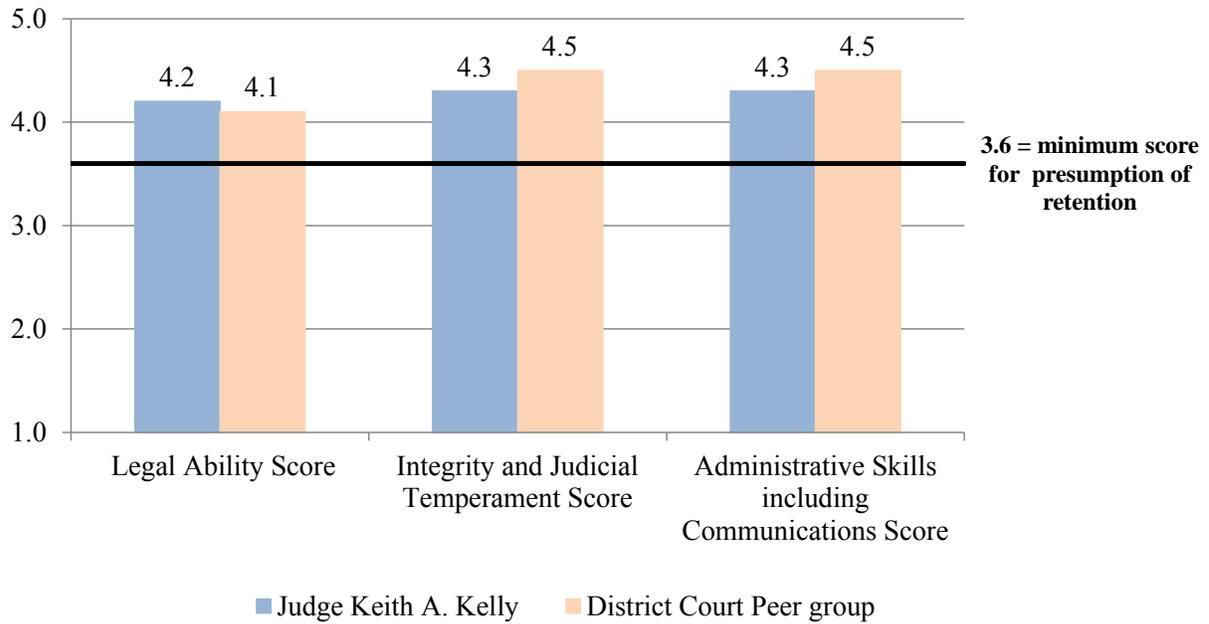
The results are shown in both graphs and tables. Each judge's scores are shown along with a comparison to other judges who serve at the same court level. The comparison group is called "District Court" on the charts.

The statutory category scores and the procedural fairness survey score represent average scores on a scale of 1 (inadequate) to 5 (outstanding). Responses from all survey respondent groups contribute to the average score shown for each category, with the exception of Legal Ability. Only attorneys answer these questions.

What does it take to "pass"? The judge must score a minimum of 3.6 on Legal Ability, Integrity & Judicial Temperament, and Administrative Skills to earn a presumption of retention from the Commission. That is, if a judge scores an average of 3.6 in each of these categories, the commission will vote to recommend retention unless it can articulate a substantial reason for overcoming the presumption in favor of retention. Similarly, if a judge fails to get a 3.6 in a category, the commission will vote against retention unless it can articulate a substantial reason for overcoming the presumption against retention.

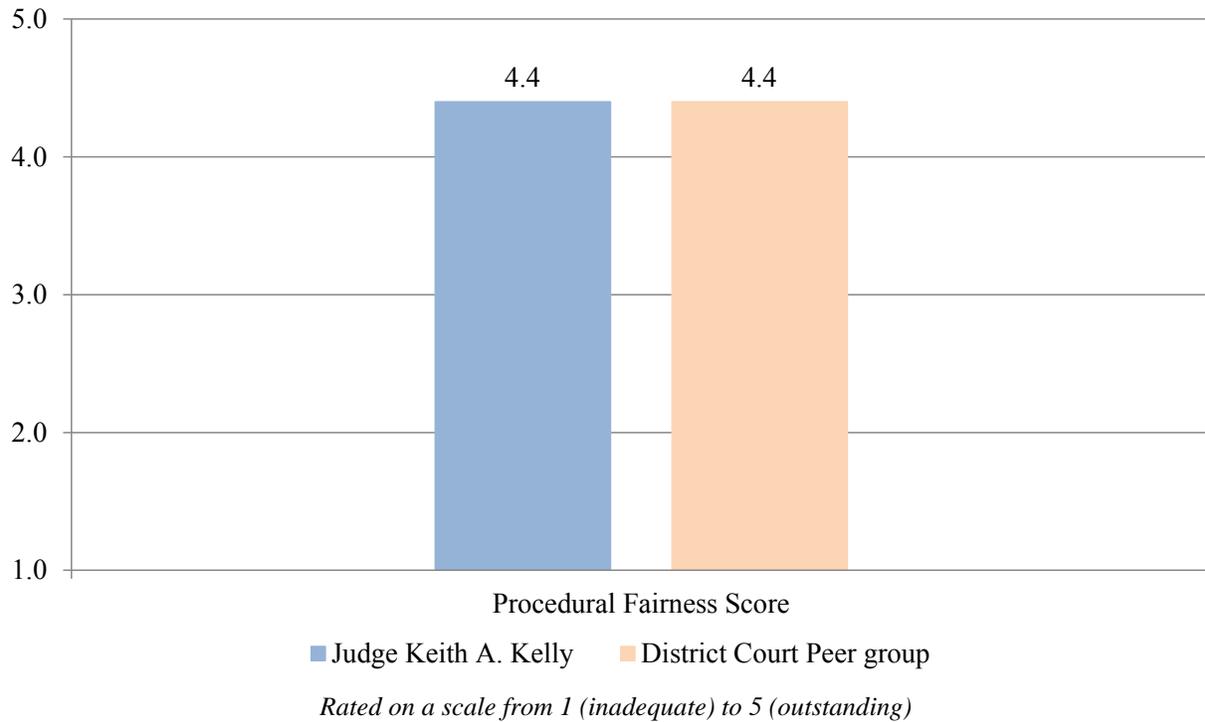
For procedural fairness, the judge must demonstrate that it is more likely than not, based on courtroom observations and relevant survey responses, that the judge's conduct in court promotes procedural fairness for court participants. Judges will receive either a Pass or Fail in procedural fairness, and this determination will be made by the commission only during the retention cycle.

## B. Statutory Category Scores



*Rated on a scale from 1 (inadequate) to 5 (outstanding)*

### C. Procedural Fairness Survey Score



For procedural fairness, the judge must demonstrate by a preponderance of the evidence that the judge’s conduct in court promotes procedural fairness for court participants. This determination is based on courtroom observations and relevant survey responses.

#### Overall Procedural Fairness Determination

| Category            | Judge Keith A. Kelly |
|---------------------|----------------------|
| Procedural Fairness | PASS                 |

## D. Responses to Individual Survey Questions

| Category                         | Question  | Judge Keith A. Kelly | District Court |
|----------------------------------|---|----------------------|----------------|
| Legal Ability                    | The judge follows the applicable legal rules (e.g. civil procedure, criminal procedure, evidence, juvenile, appellate) that apply to the case at issue.     | 4.2                  | 4.2            |
| Legal Ability                    | The judge makes appropriate findings of fact and applies the law to those facts.  | 4.2                  | 4.1            |
| Legal Ability                    | The judge follows legal precedent or clearly explains departures from precedent.  | 4.1                  | 4.1            |
| Legal Ability                    | The judge only considers evidence in the record.  | 4.1                  | 4.2            |
| Legal Ability                    | The judge's written opinions/decisions offer meaningful legal analysis.   | 4.2                  | 4.1            |
| Integrity & Judicial Temperament | The judge makes sure that everyone's behavior in the courtroom is proper.   | 4.4                  | 4.5            |
| Integrity & Judicial Temperament | The judge appears to pay attention to what goes on in court.  | 4.5                  | 4.5            |
| Integrity & Judicial Temperament | The judge's personal life or beliefs do not impair his or her judicial performance.   | 4.4                  | 4.3            |
| Integrity & Judicial Temperament | The judge demonstrates respect for the time and expense of those attending court.   | 3.7                  | 4.3            |
| Integrity & Judicial Temperament | The judge promotes access to the justice system for people who speak a language other than English, or for people who have a physical or mental limitation. | 4.7                  | 4.6            |

*Rated on a scale from 1 (inadequate) to 5 (outstanding)*

| Category              | Question  | Judge Keith A. Kelly | District Court |
|-----------------------|---|----------------------|----------------|
| Administrative Skills | The judge is prepared for court proceedings.  | 4.5                  | 4.4            |
| Administrative Skills | The judge's interactions with courtroom participants and staff are professional and constructive. | 4.5                  | 4.5            |
| Administrative Skills | The judge is an effective manager.  | 3.8                  | 4.3            |
| Administrative Skills | The judge convenes court without undue delay.   | 4.1                  | 4.5            |
| Administrative Skills | The judge rules in a timely fashion.  | 4.2                  | 4.4            |
| Administrative Skills | The judge maintains diligent work habits.   | 4.5                  | 4.5            |
| Administrative Skills | The judge's oral communications are clear.  | 4.3                  | 4.5            |
| Administrative Skills | The judge's written opinions/decisions are clear and logical.                                     | 4.2                  | 4.3            |
| Procedural Fairness   | The judge treats all courtroom participants with equal respect.                                   | 4.5                  | 4.5            |
| Procedural Fairness   | The judge is fair and impartial.  | 4.3                  | 4.4            |
| Procedural Fairness   | The judge promotes public trust and confidence in the courts through his or her conduct.          | 4.3                  | 4.3            |
| Procedural Fairness   | The judge provides the parties with a meaningful opportunity to be heard.                         | 4.4                  | 4.4            |

*Rated on a scale from 1 (inadequate) to 5 (outstanding)*

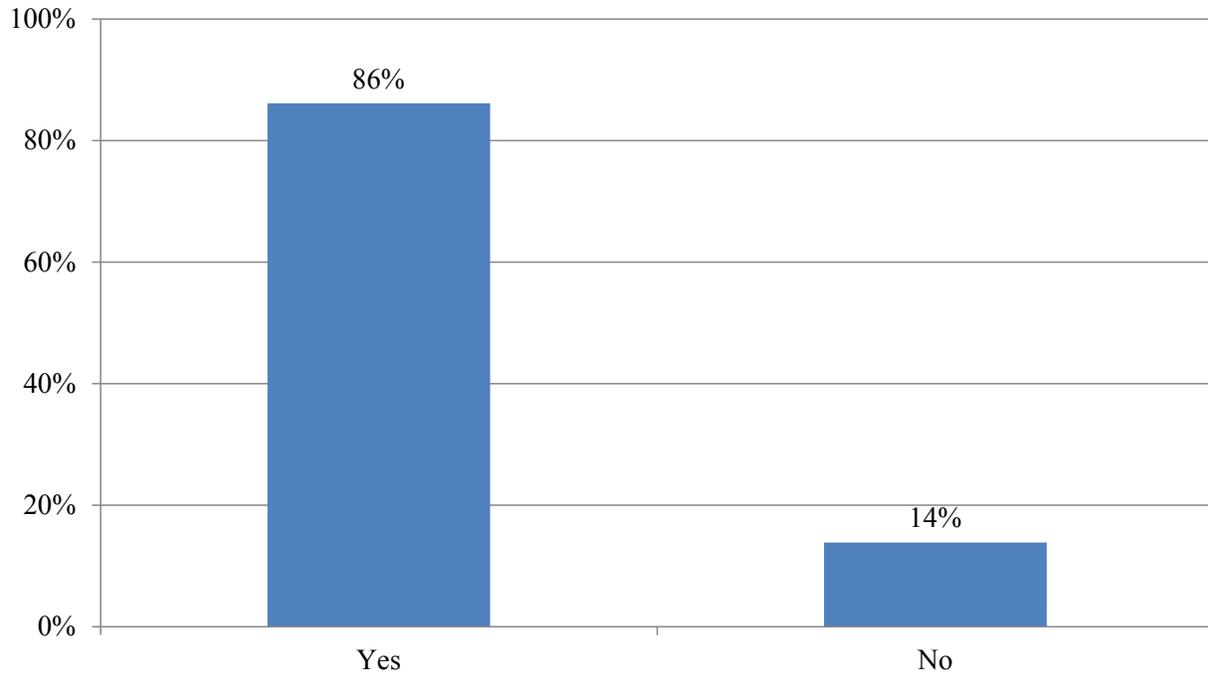
## E. Adjective Question Summary

|                                       | Number of Times Mentioned* |
|---------------------------------------|----------------------------|
| Attentive                             | 57                         |
| Calm                                  | 25                         |
| Confident                             | 27                         |
| Considerate                           | 30                         |
| Consistent                            | 15                         |
| Intelligent                           | 58                         |
| Knowledgeable                         | 50                         |
| Patient                               | 36                         |
| Polite                                | 37                         |
| Receptive                             | 20                         |
| Arrogant                              | 8                          |
| Cantankerous                          | 0                          |
| Defensive                             | 4                          |
| Dismissive                            | 7                          |
| Disrespectful                         | 0                          |
| Flippant                              | 2                          |
| Impatient                             | 2                          |
| Indecisive                            | 12                         |
| Rude                                  | 0                          |
| <b>Total Positive Adjectives</b>      | <b>355</b>                 |
| <b>Total Negative Adjectives</b>      | <b>35</b>                  |
| <b>Percent of Positive Adjectives</b> | <b>91%</b>                 |

Respondents were asked to select adjectives from a list that best described the judge. The number shown is the total number of times an adjective was selected by respondents. The percent of positive adjectives shows the percent of *all* selected adjectives that were positive.

## F. Retention Question

**Would you recommend that Judge Keith A. Kelly be retained?**



## G. Attorney Demographics

### What are your primary areas of practice?

|             |     |
|-------------|-----|
| Collections | 7%  |
| Domestic    | 26% |
| Criminal    | 13% |
| Civil       | 74% |
| Other       | 5%  |

### How many trials or hearings have you had with this judge over the past year?

|              |     |
|--------------|-----|
| 5 or fewer   | 61% |
| 6 - 10       | 28% |
| 11 - 15      | 11% |
| 16 - 20      | -   |
| More than 20 | -   |

# Survey Background and Methods

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This report presents the results from the 2013 survey process, conducted by Market Decisions, LLC. A detailed description of the survey methodology is available separately on the Utah Judicial Performance Evaluation website.

## A. Survey Overview

### 1. Description of Sample

The following groups are invited to participate in the survey process:

- Attorneys with appearances before the judge
- Court staff who work with the judge
- Juvenile court professionals who work in the judge's courtroom on a regular and continuing basis to provide substantive input to the judge (juvenile court judges only)
- Jurors who participate in jury deliberation (district and justice court judges only)

With the exception of the attorney survey, the survey contractor attempts to survey all court staff and juvenile court professionals who work with judge and all jurors who reach the point of jury deliberation. The lists of court staff and juvenile court professionals are provided by the courts and by the Division of Child and Family Services and Juvenile Justice Services. A list of jurors is created after each trial. All lists are forwarded to the surveyor, Market Decisions, LLC.

For the attorney survey, a representative sample of attorneys is drawn to evaluate each judge based on appearances over a designated two-year period. The sample is weighted to select those with the greatest experience before the judge, assuming that these people will have a better knowledge base about the judge than those with less experience. Attorneys are first stratified into three groups; those with one or more trial appearances, those with 3 or more non-trial appearances, and those with 1-2 non-trial appearances. Attorneys within each sample are then randomized prior to selection. Selection begins with attorneys who have trial experience, then those with a greater number of non-trial appearances (if needed), and finally those with fewer non-trial appearances (if needed).

### 2. Summary of Survey Methods

Surveys are conducted online, using web-based survey software. Each respondent receives an initial email invitation requesting participation in the survey. A separate email is sent for each judge that a respondent is asked to evaluate. A reminder email is sent one week later to those who did not respond by completing and submitting a survey. This is followed by three additional reminder emails sent to respondents over the next three weeks. If a respondent completes only part of the survey, he or she is able to finish the survey at a later time. Once a respondent has completed the survey for a specific judge, the survey is locked and cannot be accessed again.

The number of questions included in the survey varies, ranging from 9 (jurors) to 24 (attorneys with an appearance before an appellate court judge). Each question is evaluated on a sliding scale ranging from 1 (inadequate) to 5 (outstanding).

Responses to individual questions are used to calculate averaged scores in three statutory categories: Legal Ability, Integrity & Judicial Temperament, and Administrative Skills. Judges also receive an averaged score in Procedural Fairness.

## **B. Evaluation Period**

The retention evaluation period for judges standing for election in 2014 began on June 1, 2012 and ended on June 30, 2013.

# II. Courtroom Observation Report

## REPORT OF COURTROOM OBSERVATIONS FOR JUDGE KEITH A. KELLY

Four observers wrote 67 codable units that were relevant to 13 of the 17 criteria. One observer reported that the judge was not aware that JPEC observers were present, and three did not know if the judge was aware.

### Overview

|                           |   |
|---------------------------|---|
| WIDELY AGREED-UPON THEMES | <ul style="list-style-type: none"> <li>All observers were positive about Judge Kelly. Additionally, two observers each expressed a reservation (see “Anomalous comments”).</li> <li>All observers variously reported that Judge Kelly was extremely efficient, prepared, and prompt, and explained any delays to those waiting. He was open, inquiring, and sympathetic, and displayed his keen interest and engagement in cases through his body language. He spoke in an even, clear, and authoritative voice, and consistently worked to achieve agreement between parties. He was unhurried, deliberate, and careful.</li> <li>All observers particularly emphasized that Judge Kelly actively requested and gave ample time and opportunity for all participants to express their perspectives and provide input and suggestions. He went to great lengths to make every aspect of the proceedings and his decisions clearly understandable, and he asked many questions and watched defendants as he explained their rights, to ensure their understanding. He was skilled and meticulous in explaining his thinking process and the reasons for his decisions.</li> <li>All observers reported that they would feel comfortable appearing before Judge Kelly.</li> </ul> |
| MINORITY OBSERVATIONS     | <ul style="list-style-type: none"> <li>None</li> </ul>  |
| ANOMALOUS COMMENTS        | <ul style="list-style-type: none"> <li>One observer reported that Judge Kelly’s lack of warmth was a weakness, and gave examples of his stern and insensitive style of communication that did not make the observer feel comfortable or at ease (see “Respectful behavior generally” and “Courtesy, politeness and patience”).</li> <li>One observer was disturbed by a case in which a small company prevailed against a large bank. The observer felt that Judge Kelly favored the bank’s attorney but was dismissive of the small company’s attorney, and the observer left disheartened that the voice of a lesser or younger attorney for a small company taking on a big bank could have been “squelched” due to the judge’s behavior (see “Consistent and equal treatment”).</li> </ul>  |

### Summary and *exemplar language* of four observers’ comments

| <i>RESPECTFUL BEHAVIORS</i> |   |
|-----------------------------|---|
| Well-prepared & efficient   | Two observers reported that Judge Kelly was <i>extremely efficient</i> and used <i>recesses to good effect</i> . He knew his cases <i>backward and forward</i> .  |
| Respect for others’ time    | Three observers reported that Judge Kelly was <i>prompt to the minute</i> , always <i>returned promptly</i> from a recess, and <i>explained delays</i> to those who were waiting. He <i>reviewed with each attorney the time needed</i> and set <i>strict time lines for filings, responses, disclosures, etc.</i> , stating that he did <i>not want cases lost in “never, never land.”</i> |

|                               |  |
|-------------------------------|--|
| Respectful behavior generally | <p>Two observers reported that Judge Kelly was <i>clear and definite</i> but <i>not dictatorial</i> when giving instructions. He demanded that participants show each other respect, saying <i>sternly</i>, “<i>We don’t interrupt each other in this courtroom,</i>” <i>but then pausing and adding</i>, “<i>Let me make clear, you can object,</i>” thereby showing that he was <i>open to hearing their disagreements</i>.</p> <p>However, one observer noted that Judge Kelly was <i>inconsistent in greeting people, sometimes saying “Good morning, sir”</i> but not at other times, and his <i>weakness</i> was a <i>lack of warmth and the small niceties of smiling and thanking people</i>. This observer found it <i>odd and insensitive</i> when the judge did <i>not turn his head to glance at or recognize a victim</i> who was called by an attorney, and imagined that victim <i>would have felt marginalized</i> by the judge.</p> |
|-------------------------------|--|

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*RESPECTFUL TONE*

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|                                   |  |
|-----------------------------------|--|
| Courtesy, politeness and patience | <p>One observer reported that Judge Kelly did not make them <i>feel comfortable or at ease</i>. He was <i>irritated</i> with and <i>cautioned sternly</i> an attorney discussing fees, saying, “<i>You may have a very hard time getting attorneys’ fees from me, so I suggest you go and try and work this out.</i>” Another observer noted that in one case he <i>attempted to hurry along a hearing by telling the participants more than once he had a “big case waiting,”</i> before <i>seeming to catch himself and adding</i>, “<i>Yours is important too.</i>”</p> |
| Courtroom tone & atmosphere       | <p>Three observers reported that Judge Kelly was <i>open, decisive, inquiring, sympathetic, and compassionate,</i> and <i>maintained good control</i> over the courtroom.</p>  |
| Body language                     | <p>Three observers reported that Judge Kelly <i>literally sat on the edge of his seat, leaned forward</i> while listening and talking, and <i>made good eye contact</i>. His facial expression was <i>open and calm without any negative emotional reactions</i>.</p>  |
| Voice quality                     | <p>Three observers reported that Judge Kelly’s voice was <i>slow, even, clear,</i> and <i>easily heard,</i> and his tone <i>inquisitive</i> and <i>authoritative</i>. One noted approvingly that <i>he always used the microphone</i>.</p>   |

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*NEUTRALITY*

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|  |   |
|--|---|
| Consistent and equal treatment         | <p>Two observers reported that Judge Kelly was <i>very even-handed</i> and <i>consistently gave equal attention</i> to participants, <i>working consistently to achieve agreement wherever possible</i>.</p> <p>One observer found a case between a large bank and small LLC to be <i>disturbing</i> and to make her <i>uncomfortable</i>. The observer felt that the judge favored the bank’s attorney with <i>solicitous behavior, leaning forward with eye contact</i> that conveyed he <i>valued the attorney’s opinions</i>, but appearing <i>perturbed and agitated</i> when the LLC attorney spoke, <i>looking down, closing or shielding his eyes with his hand, frowning</i> as he <i>repeatedly shifted in his chair</i>, and speaking in a <i>dismissive tone</i>. The observer felt that that bank’s attorney <i>seemed to expect “executive” treatment, and the judge obliged</i>. Additionally, the judge <i>changed the hearing type</i> with only a <i>vague</i> explanation. In this particular case, the LLC attorney’s accusations that the bank attorney provided <i>false information</i> and <i>misled</i> the judge in other ways were found to be true, but the observer was concerned that the judge’s behavior could have <i>snuffed the voice of a lesser or younger attorney taking on a big bank</i>, and the observer left <i>disheartened</i>.</p> |
| Acts with concern for individual needs | <p>Two observers reported that Judge Kelly was <i>totally engaged in the entire proceedings</i>. His <i>mind was always working</i>, and he was <i>committed to keeping all participants in the loop at every step</i>. In one case he <i>made it very clear how concerned he was about the cost and time of the litigation</i>.</p>  |
| Unhurried and careful                  | <p>Two observers reported that Judge Kelly was <i>patient, unhurried, deliberate,</i> and <i>careful</i>, in one case <i>taking a 30 minute recess to research an issue before returning with his analysis</i>, ready to discuss the issue and then make his decision.</p>  |

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*VOICE*

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Considered voice      All observers reported that Judge Kelly gave *ample opportunity to everyone* to speak, sometimes asking each side for their *suggestion on how to proceed*. He *actively requested* participants' perspectives, saying, "*Help me understand this.*" In one case when *no-one had anything to say* he *wisely inquired*, "*Well tell me how long you have known this little girl, how do you feel about being the guardian?*" which led to an *outpouring of information and emotion*. When overruling an objection he *generously* said, "*But I will give you a chance to describe your point, and I won't decide before hearing you.*" In one case he ensured a participant would be heard by allowing a 20 minute delay to obtain a *special hearing-aid microphone device*.

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*COMMUNICATION*

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Ensures information understood      Three observers offered many examples in which Judge Kelly made the proceedings and his decisions clear and understandable to both the participants and to the observers. After making decisions he stated, "*Let's step back and look at this - I don't want you to walk out and say 'what do we do now?'*" In one case he described the *original order and the current status in detail*, without which the observer would have had great difficulty in understanding the situation.

When an attorney invoked the exclusionary rule, the judge *explained to the witnesses* that *they would have to leave the room so that each one would speak only from their own experience*, which was *much more helpful than just directing them to leave*. He ensured understanding by asking "*Does that makes sense to you?*" and when explaining defendants' rights he *made eye contact* to ensure *they were following him and that they understood*.

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Provides adequate explanations      Three observers reported that Judge Kelly was *skilled and meticulous* at *explaining his thoughts, talking the parties through the process*, and explaining the *legal basis for his decisions*, saying, "*I want you to know where I'm coming from.*" He frequently repeated the *purpose of the hearing*, saying, "*Let's make it clear, we are only going to go into who should be in the unit while the law suit goes forward. Today, not all issues will be resolved.*" One observer overheard an attorney saying to another, "*Some judges just come in and say this is my decision and you have to live with it. But Judge Kelly goes above and beyond to tell you why that decision was made.*"

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