



Commission on Judicial Performance

The Honorable Michael L. Bender 2009 Interim Judicial Performance Survey Supreme Court

September 30, 2009



The Honorable Michael L. Bender
Colorado State Judicial Bldg.
2 East 14th Avenue
Denver, CO 80203

Dear Justice Bender:

This year, The State Commission on Judicial Performance has requested Talmey-Drake Research & Strategy to provide interim survey reports concerning all justices and judges. Going forward, there will continue to be survey reports on retention justices and judges in retention election years and interim survey reports on all justices and judges in non-retention years.

Talmey-Drake Research & Strategy conducted the 2009 Interim Judicial Performance Survey regarding appellate judges among attorneys who have had a case they appealed decided between July 1, 2008 and March 31, 2009, and for which an opinion was published. The results in this report also include responses to surveys conducted prior to July 1, 2008 and not used in previous reports. These earlier surveys were conducted by mail.

In addition to this introduction, the report is divided into three main sections:

- **Results.** The results section is broken down into three parts. **Tables:** A table displaying the percentage distribution of grades for each question that used an "A" to "F" scale, your average grade for each question and the combined average for the other six Supreme Court justices. The table also shows the averages for all "A" to "F" questions combined. The table also gives the percentage results to the retain/do not retain question. **Graphs:** Following the table is a set of graphs displaying the average grades for each question. **Comments:** Respondents were also asked to comment about your performance. These comments have been redacted to eliminate respondent identifying information. Most spelling and typographical errors have been fixed, but where the respondent entered a comment in all upper or all lower case, or without punctuation, the comment was not corrected.
- **Methodology.** The second section of the report discusses the methodology of the survey.
- **Questionnaire.** And the final section provides a copy of the questions that were used.

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If you have any questions about the methodology and how the survey was conducted, please feel free to contact me at 303-443-5300 ext 1 or by email at talmey@talmeyresearch.com (please put the words "Judicial Performance" in the subject line), and for any other questions you might have about the survey please call the Executive Director of the Office of Judicial Performance Evaluation, Jane Howell, at 303-837-3665.

Best regards,

Handwritten signature of Paul A. Talmey in blue ink.

Paul A. Talmey
President

enc:

**Survey of Attorneys Regarding
Justice Michael L. Bender
(Sample Size 33)**

Survey of Attorneys Regarding Appellate Judges

Justice Michael L. Bender Sample Size = 33							Average	
	A	B	C	D	Fail	DK/NA	Justice Bender	All Supreme Court Justices Excluding Justice Bender

Question 2:

2a. Being fair and impartial toward each side of the case.	67%	24%	3%	3%	0%	3%	3.59	3.26
2b. Writing opinions that are clear.	55%	42%	3%	0%	0%	0%	3.52	3.08
2c. Writing opinions that adequately explain the basis of the Court's decision.	58%	39%	3%	0%	0%	0%	3.55	3.13
2d. Issuing opinions in a timely manner.	52%	33%	9%	3%	0%	3%	3.38	3.36
2e. Allowing parties to present their arguments and answer questions.	64%	12%	3%	3%	0%	18%	3.67	3.41
2f. Making decisions without regard to possible criticism.	58%	24%	0%	0%	0%	18%	3.70	3.42
2g. Making reasoned decisions based upon the law and facts.	64%	21%	12%	0%	3%	0%	3.42	2.92
2h. Refraining from reaching issues that need not be decided.	61%	21%	6%	0%	0%	12%	3.62	2.98
2i. Treating parties equally regardless of race, sex or economic status.	79%	3%	0%	3%	0%	15%	3.86	3.71
2j. Being courteous toward attorneys.	73%	9%	0%	3%	0%	15%	3.79	3.58
2k. Not engaging in ex parte communications.	67%	3%	3%	0%	0%	27%	3.88	3.91
2l. Being prepared for oral argument.	67%	9%	3%	0%	0%	21%	3.81	3.53

Overall Average Grade:	3.65	3.34
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Survey of Attorneys Regarding Appellate Judges

Justice Michael L. Bender

Sample Size = 33

Percentage

Justice Bender

All Supreme
Court Justices
Excluding
Justice Bender

5. How strongly do you recommend that Justice Bender be retained in office, or not be retained in office?

[Percentages excluding undecided responses.]

Strongly recommend retention	89%	69%
Somewhat recommend retention	7%	14%
Somewhat recommend not to retain	0%	8%
Strongly recommend not to retain	4%	9%
Total Retain	96%	83%
Total Not Retain	4%	17%

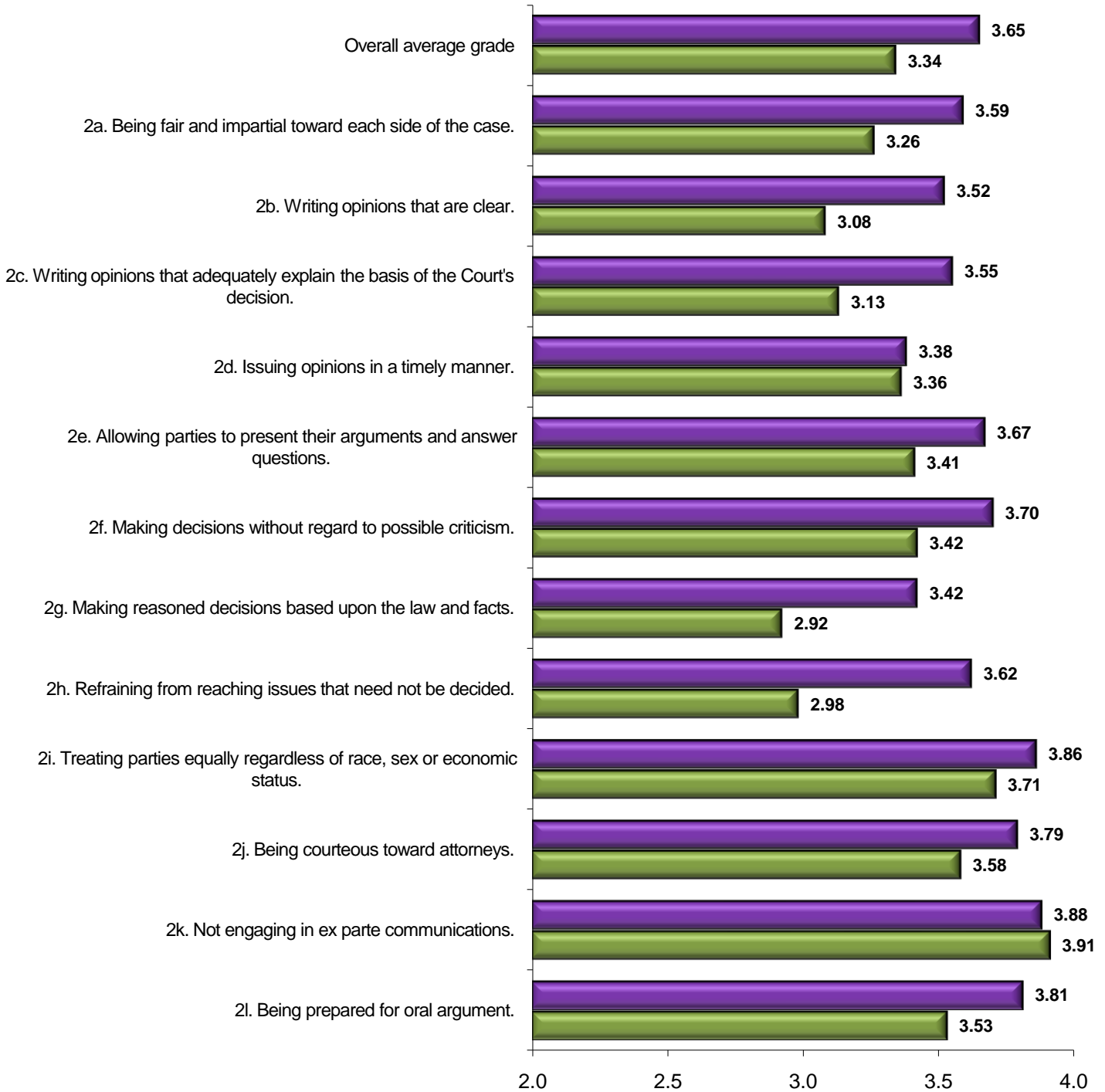
[Percentages including undecided responses.]

Strongly recommend retention	81%	64%
Somewhat recommend retention	6%	13%
Undecided or Don't Know	10%	7%
Somewhat recommend not to retain	0%	7%
Strongly recommend not to retain	3%	8%
Total Retain	87%	77%
Undecided/Don't Know	10%	7%
Total Not Retain	3%	15%

Justice Michael L. Bender

Survey of Attorneys Regarding Appellate Judges

Average Grades



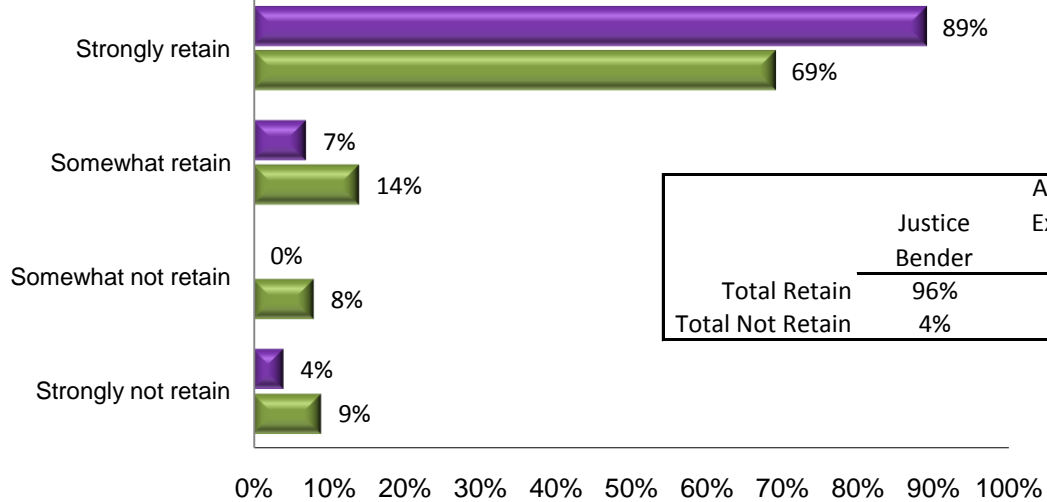
■ Justice Bender
 ■ All Supreme Court Justices Except Justice Bender

Justice Michael L. Bender

Survey of Attorneys Regarding Appellate Judges

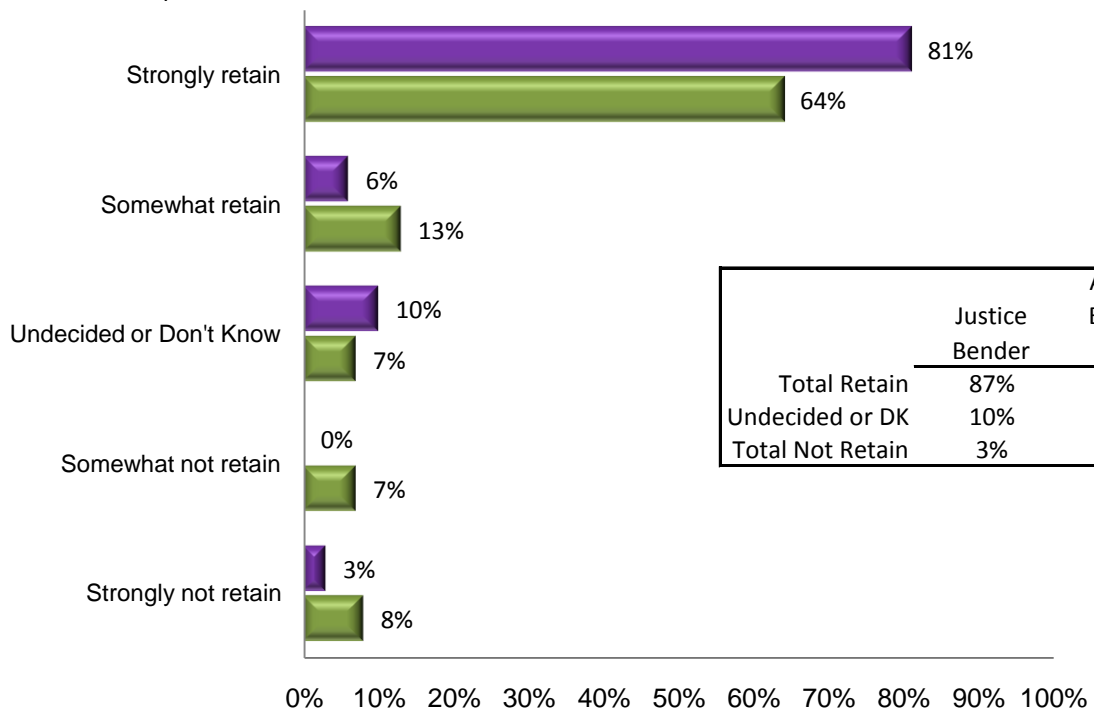
Q5. How strongly do you recommend that Justice Bender be retained or not retained in office?

Excluding Undecided Respondents



	Justice Bender	All SC Justices Except Justice Bender
Total Retain	96%	83%
Total Not Retain	4%	17%

Including Undecided Respondents



	Justice Bender	All SC Justices Except Justice Bender
Total Retain	87%	77%
Undecided or DK	10%	7%
Total Not Retain	3%	15%

■ Justice Bender
 ■ All Supreme Court Justices Except Justice Bender

Methodology

Methodology

Sample: For the 2009 Interim Judicial Performance Survey Talmey-Drake Research & Strategy received data files from the Colorado Judicial Department containing the names of attorneys who had appeals decided with a published opinion by the Supreme Court or Court of Appeals between July 1, 2008 and March 31, 2009.

Each attorney in the sample was then assigned to evaluate up to a maximum of seven judges and justices who had written opinions, concurrences or dissents in the cases he or she had appealed. If there were fewer than seven Supreme Court justices for an attorney to potentially evaluate, and he or she had cases decided by the Court of Appeals during the time period, the attorney was asked to evaluate the appropriate Court of Appeals judges. However, the combined total number of justices and judges any one attorney was asked to evaluate did not exceed seven.

The 2009 Interim Judicial Performance Survey of Attorneys Regarding Appellate Judges was conducted online. All attorneys who were listed in the data files were first sent a letter introducing them to the Survey and informing them that they would soon be receiving an email with a link to the Survey. The letter also included the Survey's Web address, and a password if the respondent wished to take the survey before receiving the email. Approximately one week after the letter was mailed a first email was sent, and a week after that a second reminder email was sent.

In order to increase the number of responses, attorneys who had not responded after the second email request were telephoned and asked to either go online to take the survey, or if they preferred, to complete the survey by telephone.

Responses to surveys conducted in prior years by mail that had not been used in a previous Judicial Performance report were combined with the above data to create the total sample used in the 2009 Interim Judicial Performance Survey.

The table below shows the count of completed survey evaluations by Supreme Court and Court of Appeals by when the data was collected.

	2009 Online Survey	Data Collected 2006 - 2008	Data Collected 2005 - 2006	Total
Supreme Court	80	83	55	218
Court of Appeals	1,074	302	27	1,403
Total	1,154	385	82	1,621

Questions: The questions used online for the 2009 Interim Judicial Performance Survey asked respondents to use a grade of A, B, C, D, or F to assess the judge or justice’s performance on twelve aspects of judicial performance (see question list at the end of this report). These scores were then converted to a numerical value where A = 4, B = 3, C = 2, D = 1 and Fail = 0. Respondents were also asked to indicate how strongly they would recommend that the judge or justice be retained or not retained.

Comments: While the numerical (closed-ended) questions were the same from 2005 through 2009, the comment questions were different in 2009. In the 2009 survey the two comment questions asked for the justice’s strengths and the justice’s weaknesses. Prior to 2009 the comments questions asked for “Comments about (Justice) relating to any of your response to the previous (closed ended) questions?” The second comment question was asked after the retain/do not retain question and asked: “And why do you think that way about retaining or not retaining (Justice)?” Positive responses to these questions are included under Justice’s Strengths in the comments section and negative responses are included under Justice’s Weaknesses. These comments have been redacted to eliminate respondent identifying information. Most spelling and typographical errors have been fixed, but where the respondent entered a comment in all upper or all lower case, or without punctuation, the comment was not corrected.

Cooperation Rate: The overall response rate for the Attorneys Regarding Appellate Judges Survey is calculated as the number of completed survey evaluations (Supreme Court plus Court of Appeals) divided by the number of possible evaluations. An equivalent response rate for an individual justice is computed as the number of completed evaluations for that justice divided by the number of possible evaluations that could have been completed for the justice. A table of the overall response rate and the response rate for Justice Bender is shown below.

	Sent	No Response	Undeliverable	Completed Evaluations	Response Rate
Justice Bender	72	34	5	33	49.3%
All Supreme Court Justices	551	302	30	218	41.8%
All Appellate Judges (SC and COA)	6985	5191	155	1621	23.7%

The 2009 Interim Judicial Performance Survey was the first time in which the Attorneys Regarding Appellate Judges survey was conducted online. A total of 1,678 attorneys were asked to participate in the online survey and on average to evaluate 3.48 judges or justices each – a total of 5,834 potential survey evaluations – 257 Supreme Court and 5,577 Court of Appeals. Just over twenty-six percent (26.5%) of attorneys surveyed evaluated one or more appellate judges or justices. Fifty-four out of 165 attorneys who were asked to evaluate one or more Supreme Court justices did so (32.7%). Similarly, 445 attorneys who were

asked to evaluate one or more Court of Appeals judges completed the evaluation of at least one judge (29.4%). The average number of judges or justices evaluated per attorney was 2.59 for a total of 1,154 (19.8%) completed evaluations – 80 Supreme Court and 1,074 Court of Appeals. Note, these figures are only for the online survey (plus telephone follow-up interviews) and will not match the numbers in the All Appellate Judges response rate in the table above, which include evaluations from the prior mail surveys.

Projectability: Most surveys seen by the public are surveys that are intended to be projectable, that is the results from the sample of people surveyed can be used to estimate a percentage or value of the population sampled with a known probability of error. For example, a pre-election poll of 500 likely Colorado voters is used to estimate the percentage of voters who will vote for Candidate A on election day, plus or minus some number of percentage points. The plus or minus amount is usually what is known as the 95%-confidence interval (the known probability of error), or what the media often refers to as the margin-of-error.

The Colorado Judicial Performance Evaluation Survey is not projectable with a known probability of error because the results are calculated from a self-selecting sample that is self-selecting based on the content and subject matter of the survey. In other words, the potential respondent knows the purpose and content of the survey, and based on that, decides whether to respond to the survey.

While projectability within a known probability of error is a highly desirable attribute of a survey, it is often not feasible to achieve. Commercial market research often uses nonprojectable (and small) samples – the most well known of which are for focus groups. Moreover, the federal courts have long accepted, and do not expect, projectable samples for market confusion surveys used in trademark litigation. In other words, one can still use the results of the Judicial Performance Evaluation Survey to estimate how everyone who has observed a judge in the courtroom would grade him or her, just not with a known probability of error.

The Judicial Performance Evaluation Survey is a valuable means, perhaps the only practical means, for the Judicial Performance Commissions to have a summary of structured interviews with a number of people who have courtroom familiarity with the judge being evaluated, and who most often – albeit not always – are responding out of a desire to improve the performance of our state’s judicial system.

Survey Results: The report shows the survey results both graphically and in tables.

Tables: This section shows the percentage distribution of grades and the average numerical grade for each of the A through F scaled questions (A=4, B=3, C=2, D=1 and F = 0) for Justice Bender as compared to the average grade for all

justices excluding Justice Bender. For comparison purposes, the next two pages show the combined percentage distribution of grades and grade averages for all Supreme Court justices.

The overall averages shown in the graphs and tables are calculated by summing the average grade for each question and dividing by the number of questions summed. This gives each question equal weight in computing the overall averages.

The sample size is shown at the beginning of the section and on each of the tables. This is the number of respondents who answered most or all of the questions in the questionnaire. It should be noted, however, that the number of responses for individual questions can vary from the overall sample size.

Graphs: The graphs visually display the average numerical grade for each of the A through F scaled questions (A=4, B=3, C=2, D=1 and F = 0) for the report-justice compared to the average grade for all justice excluding Justice Bender . In addition to the grade-scale graphs, the question regarding retention is also graphed.

Survey of Attorneys Regarding Appellate Judges

All Supreme Court Justices Sample Size = 218							Average Grade
	A	B	C	D	Fail	DK/NA	

Question 2:

2a. Being fair and impartial toward each side of the case.	60%	20%	9%	3%	6%	3%	3.26
2b. Writing opinions that are clear.	52%	27%	9%	7%	4%	0%	3.08
2c. Writing opinions that adequately explain the basis of the Courts decision.	52%	26%	9%	7%	5%	1%	3.13
2d. Issuing opinions in a timely manner.	54%	29%	6%	4%	1%	6%	3.36
2e. Allowing parties to present their arguments and answer questions.	62%	16%	9%	4%	1%	8%	3.41
2f. Making decisions without regard to possible criticism.	56%	18%	3%	3%	4%	17%	3.42
2g. Making reasoned decisions based upon the law and facts.	56%	15%	11%	11%	8%	0%	2.92
2h. Refraining from reaching issues that need not be decided.	48%	20%	7%	5%	8%	12%	2.98
2i. Treating parties equally regardless of race, sex or economic status.	65%	6%	2%	1%	3%	22%	3.71
2j. Being courteous toward attorneys.	66%	20%	5%	3%	1%	5%	3.58
2k. Not engaging in ex parte communications.	57%	4%	0%	0%	0%	39%	3.91
2l. Being prepared for oral argument.	59%	16%	7%	2%	1%	14%	3.53

Overall Average Grade: 3.36

Survey of Attorneys Regarding Appellate Judges

All Supreme Court Justices

Sample Size = 218

Average
Grade

5. How strongly do you recommend that the Justice be retained in office, or not be retained in office?

[Percentages excluding undecided responses.]

Strongly recommend retention	69%
Somewhat recommend retention	14%
Somewhat recommend not to retain	8%
Strongly recommend not to retain	9%
Total Retain	83%
Total Not Retain	17%

[Percentages including undecided responses.]

Strongly recommend retention	64%
Somewhat recommend retention	13%
Undecided or Don't Know	7%
Somewhat recommend not to retain	7%
Strongly recommend not to retain	8%
Total Retain	77%
Undecided/Don't Know	7%
Total Not Retain	15%

Questionnaires

Colorado Judicial Performance Attorneys Regarding Appellate Judges Survey Questions

1. *[This question asked for each judge evaluated.]* Which of the following types of cases have you appealed to the **[Court of Appeals/Supreme Court]** in which **[Judge/Justice Last Name]** authored the decision, concurred or dissented? *(Please check all that apply.)*

Civil	1
Criminal	2
Domestic	3
Juvenile	4
Other.....	5

2. Using a grade scale, where an “A” is excellent along with B, C, D or F for fail, please grade the **[Judge/Justice]** on the following. If, for a specific question you feel that you do not have enough information to grade the **[Judge/Justice]**, please check DK/NS for Don’t Know/Not Sure.

a.	Being fair and impartial toward each side of the case.	A	B	C	D	F	DK/NS
b.	Writing opinions that are clear.	A	B	C	D	F	DK/NS
c.	Writing opinions that adequately explain the basis of the Court’s decision.	A	B	C	D	F	DK/NS
d.	Issuing opinions in a timely manner.	A	B	C	D	F	DK/NS
e.	Allowing parties to present their arguments and answer questions.	A	B	C	D	F	DK/NS
f.	Making decisions without regard to possible criticism.	A	B	C	D	F	DK/NS
g.	Making reasoned decisions based upon the law and facts.	A	B	C	D	F	DK/NS
h.	Refraining from reaching issues that need not be decided.	A	B	C	D	F	DK/NS
i.	Treating parties equally regardless of race, sex or economic status.	A	B	C	D	F	DK/NS
j.	Being courteous toward attorneys.	A	B	C	D	F	DK/NS
k.	Not engaging in ex parte communications.	A	B	C	D	F	DK/NS
l.	Being prepared for oral argument.	A	B	C	D	F	DK/NS

3. What would you say are Judge (*Last Name*)'s strengths?

4. What would you say are Judge (*Last Name*)'s weaknesses?

5. Keeping in mind your responses to each of the previous questions, how strongly do you recommend that Judge [*Last Name*] be retained in office, or not retained in office?

- Strongly recommend **the judge** be retained in office 5
- Somewhat recommend **the judge** be retained in office..... 4
- Undecided or don't know enough to make recommendation..... 3
- Somewhat recommend **the judge** not be retained in office 2
- Strongly recommend **the judge** not be retained in office 1