Commission on
Judicial Performance

The Honorable Robert D. Hawthorne

2011 Interim Judicial Performance Survey
Court of Appeals

Talmey-Drake
research & strategy, inc.

Talmey-Drake
research & strategy, inc.

May 18th, 2011

The Honorable Robert D. Hawthorne
Colorado Court of Appeals
101 West Colfax Avenue, Suite 800
2 East 14th Avenue
Denver, CO 80202

Dear Judge Hawthorne:

I am pleased to make available to you the attached copy of your 2011 Interim Judicial Performance Survey Report. The report is based on a survey of attorneys who have had cases before a Court of Appeals panel of which you were a member or who are knowledgeable about your judicial performance. In addition to this introduction, the report is divided into four sections:

1. A brief summary of the results of the survey, and a breakout of results by year since 2005 or when you were sworn in, whichever is most recent.
2. The numerical results of the survey in both tabular and graphical form. In addition to the numerical results, this section also contains comments attorneys made about your judicial performance. In some instances the comments have been redacted to eliminate respondent identifying information. A copy of the questionnaire is included in the final section of this report.
3. The third section of the Report discusses the methodology of the surveys.
4. The final section provides copies of the questions that were used for the survey.

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 303-866-6465.

Best regards,

Paul A. Talmey
President

enc:

100 Arapahoe, Suite One, Boulder, CO 80302
Phone 303.443.5300 Fax 303.447.9386

Summary of Results

Attorneys assigned Judge Robert D. Hawthorne an overall average grade of 3.30. The average attorney grade for all Court of Appeals Judges was 3.31. The results presented in this report are based on data collected from 2005 through the first quarter of 2011. (See Methodology section for description of sampling process.) The table below shows Judge Hawthorne's overall average grades from attorneys for each of these years.

Judge Hawthorne Average Attorney Grades by Year				
	Judge Hawthorne		All COA Judges	
Year	Average Score	Sample Size	Average Score	Sample Size
2005	3.65	3	3.61	163
2006	3.37	11	3.52	134
2007	3.46	30	3.43	357
2008	3.31	25	3.32	650
2009	3.12	46	3.28	995
2010	3.28	27	3.21	1,060
All Years	3.30	142	3.31	3,359

The results presented in this report are based on data from cases heard and closed from 2005 through 2010. (See Methodology section for description of sampling process.) Judges who were appointed after 2005 will not have sample for the years prior to their appointment.

Survey of Attorneys Regarding Judge Robert D. Hawthorne

(Sample Size 142)

Survey of Attorneys Regarding Appellate Judges

Judge Robert D. Hawthorne

Sample Size = 142

	A	B	C	D	Fail	DK/NA	Average: Judge Hawthorne	Average: All COA Judges
Question 2:								
2a. Being fair and impartial toward each side of the case.	57%	22%	6%	4%	5%	6%	3.29	3.23
2b. Allowing parties to present their arguments and answer questions.	53%	20%	6%	2%	1%	18%	3.47	3.41
2c. Treating parties equally regardless of race, sex or economic status.	61%	8%	5%	2%	1%	23%	3.61	3.52
2d. Being courteous toward attorneys.	66%	12%	4%	1%	2%	15%	3.64	3.51
2e. Not engaging in ex parte communications.	54%	3%	1%	1%	0%	42%	3.89	3.79
2f. Being prepared for oral argument.	49%	14%	8%	2%	3%	24%	3.36	3.41
Question 2 Average Grade							3.54	3.48
Question 3:								
3a. Writing opinions that are clear.	38%	29%	19%	3%	2%	9%	3.08	3.16
3b. Writing opinions that adequately explain the basis of the Courts decision.	32%	35%	13%	5%	5%	10%	2.92	3.06
3c. Issuing opinions in a timely manner.	46%	31%	16%	3%	2%	3%	3.21	3.30
3d. Making decisions without regard to possible criticism.	45%	13%	7%	3%	6%	27%	3.20	3.26
3e. Making reasoned decisions based upon the law and facts.	41%	22%	15%	6%	12%	3%	2.78	2.92
3f. Refraining from reaching issues that need not be decided.	42%	27%	9%	4%	4%	14%	3.14	3.16
Question 3 Average Grade							3.06	3.14
Overall Average Grade:							**3.30**	**3.31**

Survey of Attorneys Regarding Appellate Judges

Judge Robert D. Hawthorne

Sample Size = 142

6. How strongly do you recommend that Judge Hawthorne be retained in office, or not be retained in office?

[Percentages excluding undecided responses.]

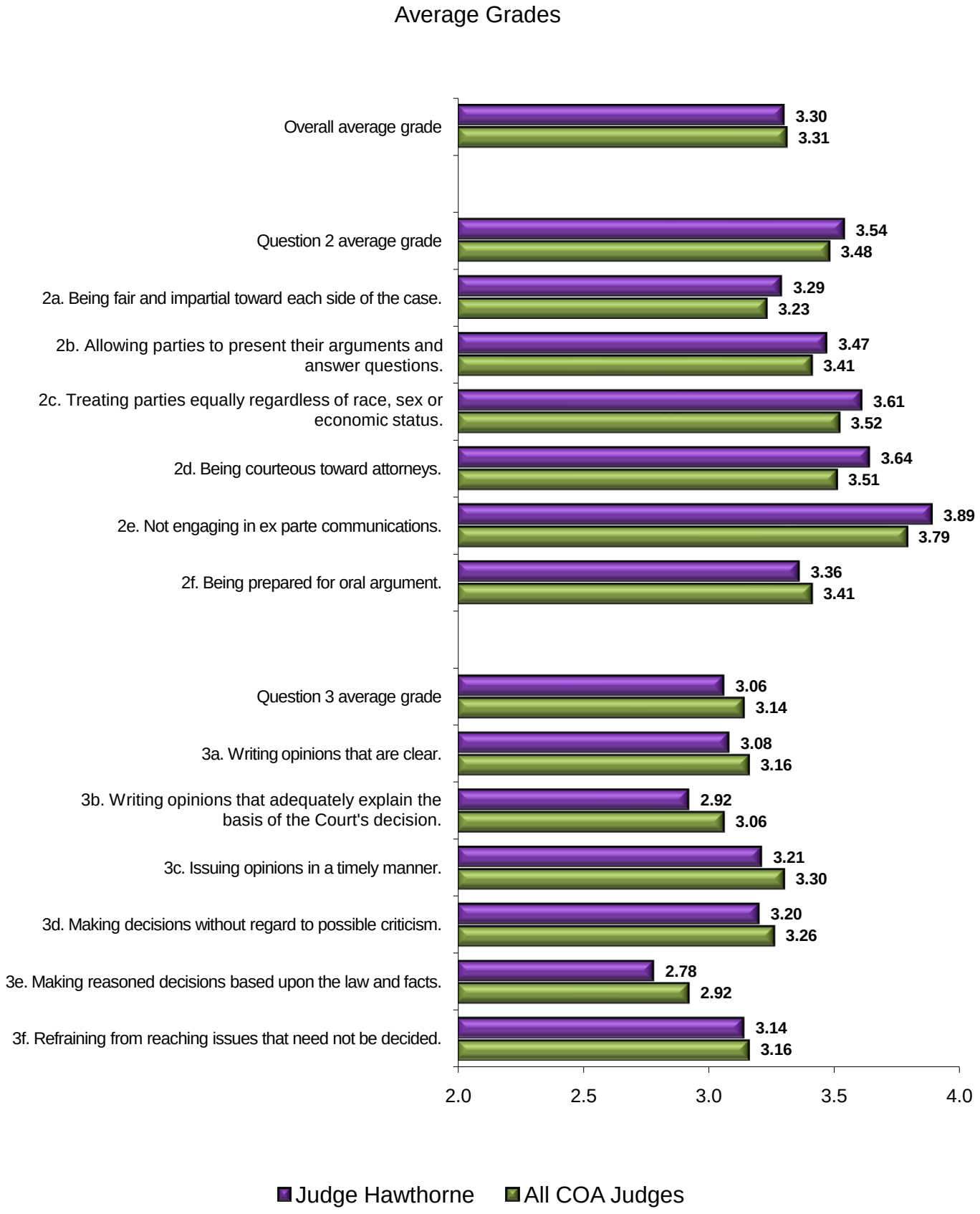
	Percentage	
	Judge Hawthorne	All COA Judges
Strongly recommend retain	70%	66%
Somewhat recommend retain	16%	18%
Somewhat recommend not retain	5%	7%
Strongly recommend not retain	9%	9%
Total Retain	86%	84%
Total Not Retain	14%	16%

[Percentages including undecided responses.]

Strongly recommend retain	58%	59%
Somewhat recommend retain	13%	16%
Undecided or Don't Know	18%	11%
Somewhat recommend not retain	4%	7%
Strongly recommend not retain	7%	8%
Total Retain	71%	75%
Undecided/Don't Know	18%	11%
Total Not Retain	11%	15%

Judge Robert D. Hawthorne

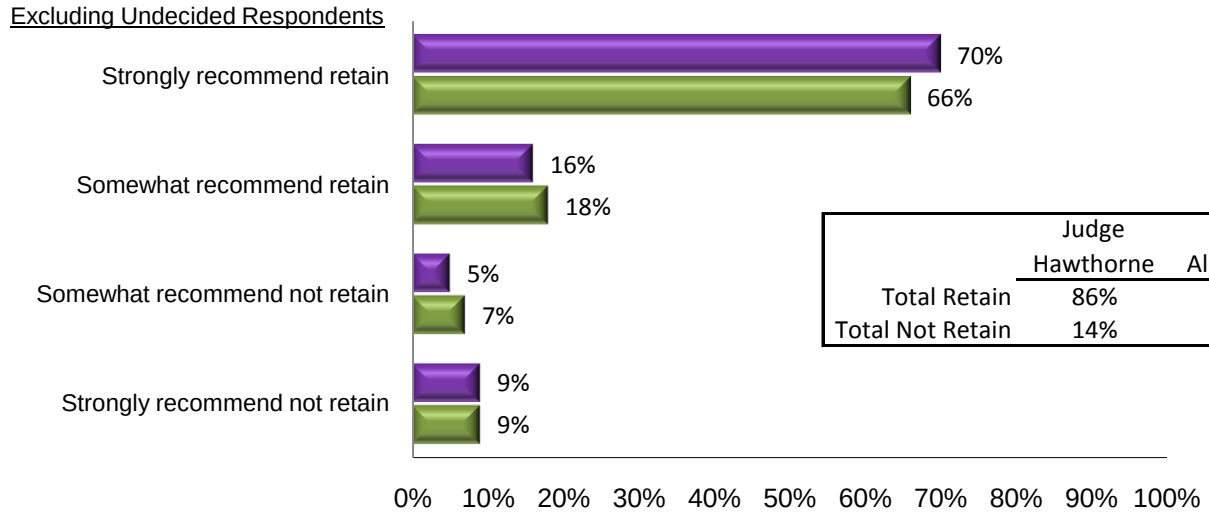
Survey of Attorneys Regarding Appellate Judges



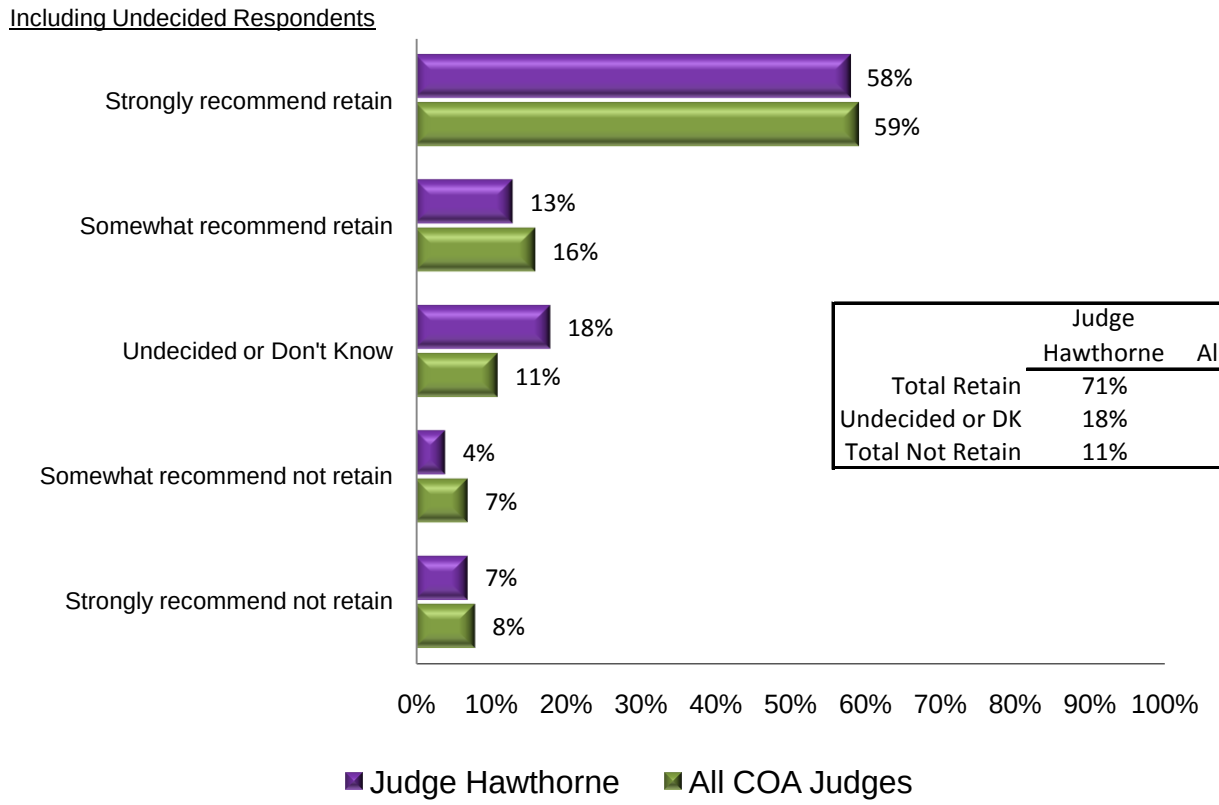
Judge Robert D. Hawthorne

Survey of Attorneys Regarding Appellate Judges

Q6. How strongly do you recommend that Judge Hawthorne be retained or not retained in office?



	Judge Hawthorne	All COA Judges
Total Retain	86%	84%
Total Not Retain	14%	16%



	Judge Hawthorne	All COA Judges
Total Retain	71%	75%
Undecided or DK	18%	11%
Total Not Retain	11%	15%

Methodology

Methodology

The results shown in the 2011 Interim Judicial Performance Survey Report are based on the survey of Attorneys Regarding Appellate Judges. Below is a description of the methodology used for this survey.

I Attorneys Regarding Appellate Judges

a. Sample:

The Attorneys Regarding Appellate Judges sample comes from a list of issued Supreme Court opinions provided by the Clerk of the Supreme Court and a similar list of Court of Appeals opinions provided by the Clerk of the Court of Appeals. These lists included the names of the attorneys associated with the cases and the names of the judges who authored opinions, concurrences or dissents for those cases.

i. **Prior to 2009**, the survey of Attorneys Regarding Appellate Judges was conducted using paper questionnaires mailed to the attorneys' offices. All attorneys from the Supreme Court opinions list and the Court of Appeals opinions list were assigned to evaluate justices or judges subject to the following rules applied in the order shown.

1. No attorney would be asked to evaluate the same justice or judge in a 24-month period.
2. Attorneys would only be asked to evaluate justices or judges who had written an opinion, concurrence or dissent in one of their cases.
3. If an attorney was eligible to evaluate both a Supreme Court justice and a Court of Appeals judge, the attorney was assigned to evaluate the justice.
4. If at this point there were still several justices or judges the attorney could potentially evaluate, the attorney was assigned the justice or judge with whom he or she had had the most cases with opinions issued during the sampling time frame.
5. If there were still several justices or judges the attorney could evaluate, he or she was either randomly assigned to one of them, or assigned to the justice or judge with the smallest sample in order to even out sample sizes.

Attorneys were mailed a questionnaire, and if they did not respond they were sent a reminder postcard followed by a second questionnaire and in some cases a second reminder postcard. Questionnaires were barcoded, and if an attorney mailed back two questionnaires, the second one was deleted from the data file. Attorneys who did not complete the second request were then telephoned and asked to complete the survey by phone.

ii. **In 2009** the Attorneys Regarding Appellate Judges Survey moved from being a paper survey mailed to potential respondents to an online survey. Moving the survey to online permitted asking individual attorneys to evaluate up to seven Supreme Court

justices or COA judges, and with the exception of the effects of the modified assignment rules 1 through 5 below, it became a survey of all attorneys who had cases before either the Supreme Court or the Court of Appeals. Allowing an attorney to evaluate up to seven justices or judges, entailed slightly modifying the assignment rules:

1. No attorney would be asked to evaluate the same justice or judge in a 24-month period.
2. Attorneys would only be asked to evaluate justices or judges who had written an opinion, concurrence or dissent in one of their cases.
3. The list of seven justices or judges could include both justices and judges. If an attorney had more than seven possible justices or judges he or she could potentially evaluate, Supreme Court justices were assigned to that attorney first.
4. If there were more than seven justices or judges who could be assigned to the attorney, the attorney was assigned the justices or judges with whom he or she had had the most cases with opinions issued during the sampling time frame.
5. If there were still more than seven justices or judges the attorney could evaluate, justices or judges were either randomly assigned to available list slots or were assigned to the justices or judges with the smallest sample sizes.

Attorneys were first mailed a letter about the online survey to let them know that they would soon receive an email with a link to the survey. The Web address of the survey and a password were included in the letter if the attorney wanted to complete the survey immediately. A week after the first email was sent, a follow-up email was sent. Potential respondents who did not complete the survey after the second email were then telephoned and asked to either complete the survey then by phone, or to please complete it online.

iii. In 2010 rule #2 above was changed so that an attorney would be asked to evaluate all seven justices if the case was heard by the Supreme Court, and the full three-judge panel if the case was heard by the Court of Appeals—not just the justices or judges who had written the opinion, concurrences or dissents. Because some of the survey questions refer specifically to the justice's or judge's legal writing, a question was added to the questionnaire asking "Would you say you are sufficiently knowledgeable about Justice/Judge's legal writings to have formed an opinion about them?" If the respondent answered "No" or "Don't Know" to this question he or she was not asked about the justice's or judge's writings. A copy of the list of the Attorney Regarding Appellate Judges questions is reprinted in the last section of this report.

In addition to attorneys who had cases before either the Supreme Court or Court of Appeals, COA staff attorneys were also surveyed in 2010.

The results shown in the 2011 Interim Judicial Performance Survey Report are based on the combined data collected from January 2005 through March 2011 for those questions that have been consistently asked of attorneys during that time period.

Since 2010, the Judicial Performance Survey reports have been based on a moving average, or rolling sample, of data collected over a period of time equal to the justice's or judge's term of office: ten years for a Supreme Court justice, eight years for a COA judge, six years for a district judge and four years for a county judge. To use a district judge as an example: as survey data is collected it is pooled together for six years. After six years, as new data is added to the judge's survey results in the first quarter of the seventh year, the oldest quarter of data in the pool is deleted.

The current data for all judges only goes back as far as 2005—or the year the judge took the bench—therefore the rolling of the data only affects the county judge sample in the 2011 Interim reports.

b. <u>Questions:</u>

The survey questions asked respondents to use a grade of A, B, C, D, or F to assess the justice or judge's performance on twelve aspects of judicial performance (See Questionnaire section.) These grades were then converted to a numerical scores where A = 4, B = 3, C = 2, D = 1 and Fail = 0. The A through F scale was chosen because it is almost universally recognized and understood. This makes it easy for respondents to complete their questionnaire, and for the public to interpret the results.

In a final question, respondents were asked to indicate how strongly they would recommend that the justice or judge be retained or not retained in office.

c. <u>Comments:</u>

In addition to the A through F questions, respondents were also asked what they considered to be the justice's or judge's strengths and what they considered to be the justice's or judge's weaknesses. By statute these comments are confidential and only provided to the justice or judge and the State Commission on Judicial Performance. They are not released to the public when the rest of the report is released. Before being given to the justice or judge and the Commission, an attempt is made to redact all respondent identifying information from the comments.

Since 2005 there have been changes to the number of comment questions, though the strengths and weaknesses questions have been asked in every survey.

The number to the left of each comment refers to the same attorney respondent in both the strengths section and the weaknesses section.

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.

d. Analysis:

The Attorneys Regarding Appellate Judges section first shows a table of the percentage distribution for each of the A through F questions, including "don't know" responses. The next column to the right shows the judge's average grade for each question. For comparison purposes, averages were also computed for all COA judges and are shown in the furthest right column on the page. Tables showing the percentage distribution for all questions for all COA judges are located at the end of this methodology section.

The overall question averages are calculated by adding up the averages for each question and dividing by the number of questions.

The next table shows the percentage distribution of the responses to the question about recommending retention. The first column of percentages is for the report-judge and the second column displays the percentages for all Court of Appeals judges. The percentages are shown both including and excluding "don't know/undecided" responses.

The next page displays the question averages in horizontal bar-graph form. The percentage distribution to the retention question is then presented in the graph on the next page.

The third part of the Attorneys Regarding Appellate Judges section of the report lists the comments the attorney made about the judge's strengths and weaknesses.

e. Cooperation Rate:

The overall response rate for the Attorneys Regarding Appellate Judges Survey is calculated as the number of completed survey-evaluations (the number of judges an attorney chose to evaluate) divided by the number of possible evaluations **(**the number of judges the attorney could have evaluated) resulting in an overall response rate of 22.0% for Supreme Court justices and 17.4% for Court of Appeals. An equivalent response rate for an individual judge is computed as the number of completed survey-evaluations for that judge divided by the number of possible evaluations that could have been completed for the judge.

A table of the overall response rate and the response rate for Judge Hawthorne is shown below.

	Requested Evaluations	No Response	Undeliv-erable	Completed Evaluations	Cooperation Rate
Judge Hawthorne	882	721	15	142	16.4%
All Court of Appeals Judges	19,604	15,913	295	3,359	17.4%
All Appellate Judges (SC and COA)	25,254	20,265	358	4,588	18.4%

Since 2009 attorneys have generally been asked to evaluate multiple judges per survey cycle, which affects the way cooperation rates are calculated. From 2005 to 2008 a total of 1,963 unique attorneys were asked to participate in the Judicial Performance mail surveys regarding appellate justices and judges. Nine hundred and thirty (930), or 47.4%, responded with a completed questionnaire. Correspondingly, from 2009 through the first quarter 2011 Talmey-Drake asked 6,681 unique attorneys to participate in the Judicial Performance online survey regarding appellate justices and judges, of which 22.5% (1500 attorneys) responded with one or more completed survey-evaluations of a justice or judge. On average each attorney responding to the online survey request evaluated 2.4 judges.[1]

[1] Because Talmey-Drake deletes survey results associated with judges who are no longer on the bench, the counts used in this paragraph refer only to data collected regarding justices and judges who are active at this writing.

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 versus Candidate B 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.

Neither the Attorneys Regarding Appellate Judges nor the District Judges Regarding Appellate Judges is 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 justice or 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 or justice 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 of Attorneys Regarding Appellate Judges

All Court of Appeals Judges Sample Size = 3359	A	B	C	D	Fail	DK/NA	Average Grade
Question 2:							
2a. Being fair and impartial toward each side of the case.	56%	18%	9%	6%	5%	7%	3.23
2b. Allowing parties to present their arguments and answer questions.	53%	17%	6%	3%	3%	18%	3.41
2c. Treating parties equally regardless of race, sex or economic status.	58%	9%	4%	3%	3%	24%	3.52
2d. Being courteous toward attorneys.	58%	14%	6%	2%	2%	18%	3.51
2e. Not engaging in ex parte communications.	51%	4%	2%	0%	1%	43%	3.79
2f. Being prepared for oral argument.	50%	14%	7%	2%	2%	24%	3.41
Question 2 Average Grade							3.48
Question 3:							
3a. Writing opinions that are clear.	47%	26%	11%	6%	3%	7%	3.16
3b. Writing opinions that adequately explain the basis of the Courts decision.	46%	24%	12%	8%	5%	7%	3.06
3c. Issuing opinions in a timely manner.	50%	26%	11%	3%	2%	8%	3.30
3d. Making decisions without regard to possible criticism.	47%	16%	7%	4%	4%	22%	3.26
3e. Making reasoned decisions based upon the law and facts.	49%	19%	11%	10%	9%	2%	2.92
3f. Refraining from reaching issues that need not be decided.	47%	19%	10%	4%	5%	15%	3.16
Question 3 Average Grade							3.14
Overall Average Grade:							**3.31**

Survey of Attorneys Regarding Appellate Judges

All Court of Appeals Judges

Sample Size = 3359

Average Grade

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

[Percentages excluding undecided responses.]

Strongly recommend retain	66%
Somewhat recommend retain	18%
Somewhat recommend not retain	7%
Strongly recommend not retain	9%
Total Retain	84%
Total Not Retain	16%

[Percentages including undecided responses.]

Strongly recommend retain	59%
Somewhat recommend retain	16%
Undecided or Don't Know	11%
Somewhat recommend not retain	7%
Strongly recommend not retain	8%
Total Retain	75%
Undecided/Don't Know	11%
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 [***Judge/Justice Last Name]*** on the following. If, for a specific question you feel that you do not have enough information to grade the justice, please check DK/NS for Don't Know/Not Sure.

a. Being fair and impartial toward each side of the case.
b. Allowing parties to present their arguments and answer questions.
c. Treating parties equally regardless of race, sex or economic status.
d. Being courteous toward attorneys.
e. Not engaging in ex parte communications.
f. Being prepared for oral argument.

Would you say you are sufficiently knowledgeable about [***Judge/Justice Last Name]'s*** legal writings to have formed an opinion about them?

Yes (Ask Q3a to Q3f)
No (Skip to Q4)
Don't know (Skip to Q4)

3. Please evaluate Justice Roy Bean on the following topics.

a. Writing opinions that are clear.
b. Writing opinions that adequately explain the basis of the Court's decision.
c. Issuing opinions in a timely manner.
d. Making decisions without regard to possible criticism.
e. Making reasoned decisions based upon the law and facts.
f. Refraining from reaching issues that need not be decided.

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

_____
_____
_____

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

_____

_____

_____

6. 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