



Commission on
Judicial Performance

The Honorable Michael H. Berger
2015 Judicial Performance Interim Report
Court of Appeals





May 29, 2015

The Honorable Michael H. Berger
Colorado Court of Appeals
2 East 14th Avenue
Denver, CO 80203

Dear Judge Berger:

I am pleased to make available to you the attached copy of your 2015 Judicial Performance Interim Survey Report. This report is based on a survey of attorneys who have had cases heard before a Court of Appeals panel of which you authored an opinion, concurrence, or dissent.

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

1. A brief summary of the results of the attorney survey.
2. The numerical results of the survey of attorneys 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.
3. The third section of the report discusses the methodology of the surveys.
4. The final section provides a copy of the attorney questionnaire.

If you have any questions about the methodology and how the survey was conducted, please feel free to contact me at 505-821-5454 or by email at sanderoff@rpinc.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, Kent Wagner, at 303-928-7779.

Best regards,

A handwritten signature in black ink that reads "Brian Sanderoff". The signature is written in a cursive, flowing style.

Brian Sanderoff
President

Summary of Results

Respondents rated judges on various questions using an A to F scale, in which the grades were then converted to numerical scores: A= 4, B=3, C=2, D=1 and F=0. An average score of 4.0 is the highest possible score and a 0.0 is the lowest possible score. Attorneys assigned Judge Michael H. Berger an overall average grade of 3.33.

Average Attorney Grades by Year		
Year	Judge Berger	
	Average Score	Sample Size
2007	NA	NA
2008	NA	NA
2009	NA	NA
2010	NA	NA
2011	NA	NA
2012	NA	NA
2013	NA	NA
2014	3.33	45
All Years	3.33	45

Table 1

The results presented in this report are based on data collected from 2007 through 2014. (See Methodology section for description of sampling process.) The table above shows Judge Berger's overall average grades from attorneys for up to eight years (for each year in which survey results are available.) Provisional judges will not have samples for the years prior to their appointment.

**Survey of Attorneys Regarding
Judge Michael H. Berger**

(Sample Size 45)

Survey of Attorneys Regarding Court of Appeals Judges

Judge Michael H. Berger Sample Size = 45							Average (0.0 to 4.0 scale)	
	A	B	C	D	Fail	DK/NA	Judge Berger	All COA Judges*

Question 2:

2a. Being fair and impartial toward each side of the case.	56%	26%	5%	9%	2%	2%	3.26	3.22
2b. Allowing parties to present their arguments and answer questions.	65%	14%	2%	7%	0%	12%	3.55	3.44
2c. Treating parties equally regardless of race, sex or economic status.	72%	12%	2%	2%	0%	12%	3.74	3.55
2d. Being courteous toward attorneys.	53%	19%	5%	2%	2%	19%	3.46	3.50
2e. Not engaging in ex parte communications.	58%	7%	0%	0%	0%	35%	3.89	3.81
2f. Being prepared for oral argument.	56%	9%	12%	0%	0%	23%	3.58	3.47
Question 2 Average Grade							3.58	3.50

Question 3:

3a. Writing opinions that are clear.	52%	26%	13%	3%	6%	0%	3.13	3.20
3b. Writing opinions that adequately explain the basis of the Court's decision.	48%	29%	6%	13%	3%	0%	3.06	3.13
3c. Issuing opinions in a timely manner.	61%	23%	10%	0%	0%	6%	3.55	3.38
3d. Making decisions without regard to possible criticism.	45%	26%	13%	3%	6%	6%	3.07	3.26
3e. Making reasoned decisions based upon the law and facts.	42%	19%	16%	13%	10%	0%	2.71	2.92
3f. Refraining from reaching issues that need not be decided.	45%	10%	23%	3%	6%	13%	2.96	3.10
Question 3 Average Grade							3.08	3.17

Overall Average Grade: 3.33 3.33

* Includes only the Court of Appeals judges evaluated during this interim cycle.

Note: Respondents rated judges on various questions using an A to F scale, in which the grades were then converted to numerical scores: A=4, B=3, C=2, D=1 and F=0. An average score of 4.0 is the highest possible score and a 0.0 is the lowest possible score. 'DK/NA' = Don't Know / Not Applicable.

Survey of Attorneys Regarding Court of Appeals Judges

Judge Michael H. Berger

Percentage

Judge Berger

All COA
Judges*

How strongly do you recommend that Judge Berger be retained in office, or not be retained in office?

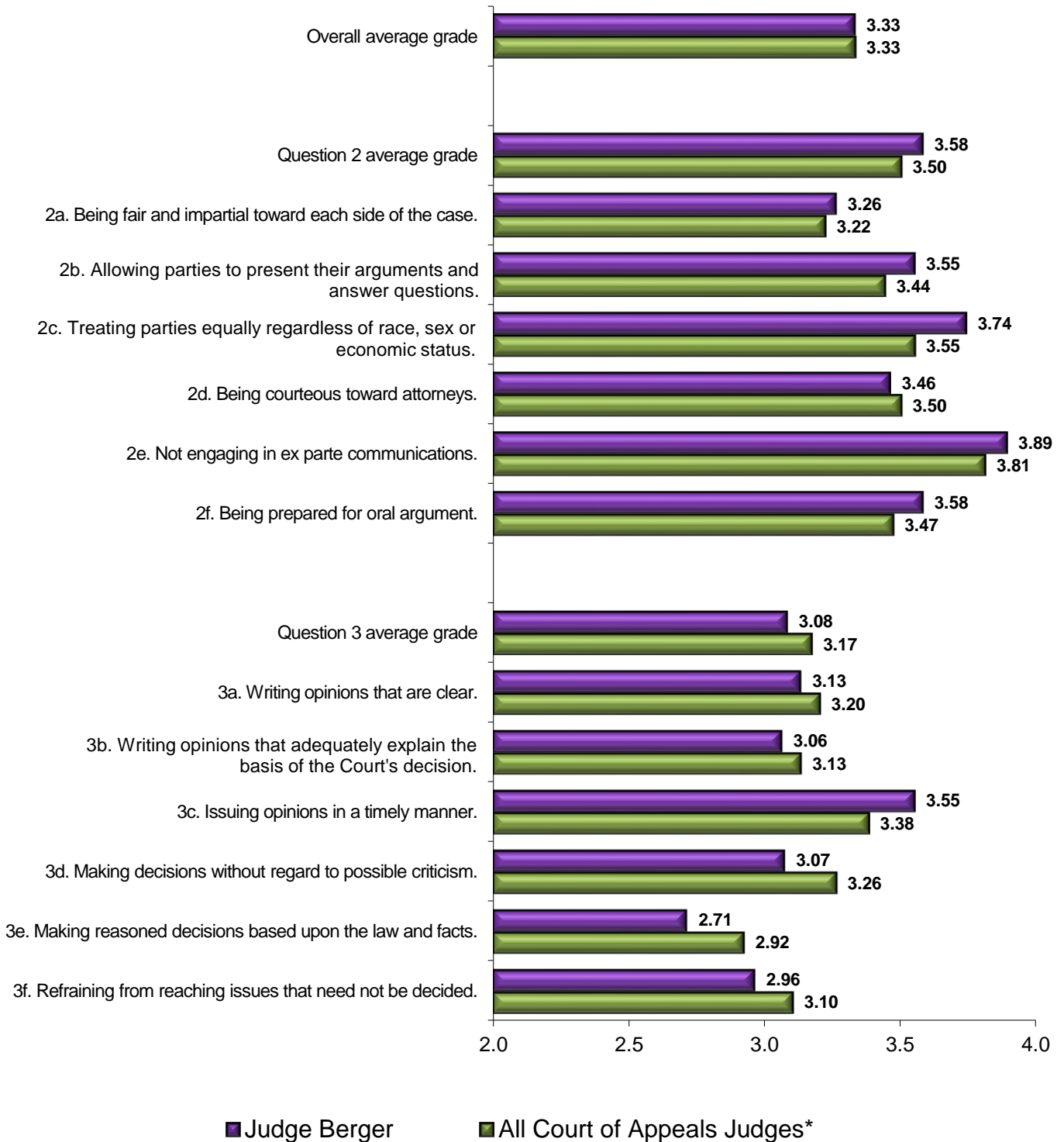
Strongly recommend retain	46%	48%
Recommend retain	32%	27%
Neither recommend nor not recommend retain	10%	12%
Recommend not retain	7%	7%
Strongly recommend not retain	5%	6%
Total Retain	78%	75%
Neither	10%	12%
Total Not Retain	12%	13%

* Includes only the Court of Appeals judges evaluated during this interim cycle.

Judge Michael H. Berger

Survey of Attorneys Regarding Court of Appeals Judges

Average Grades

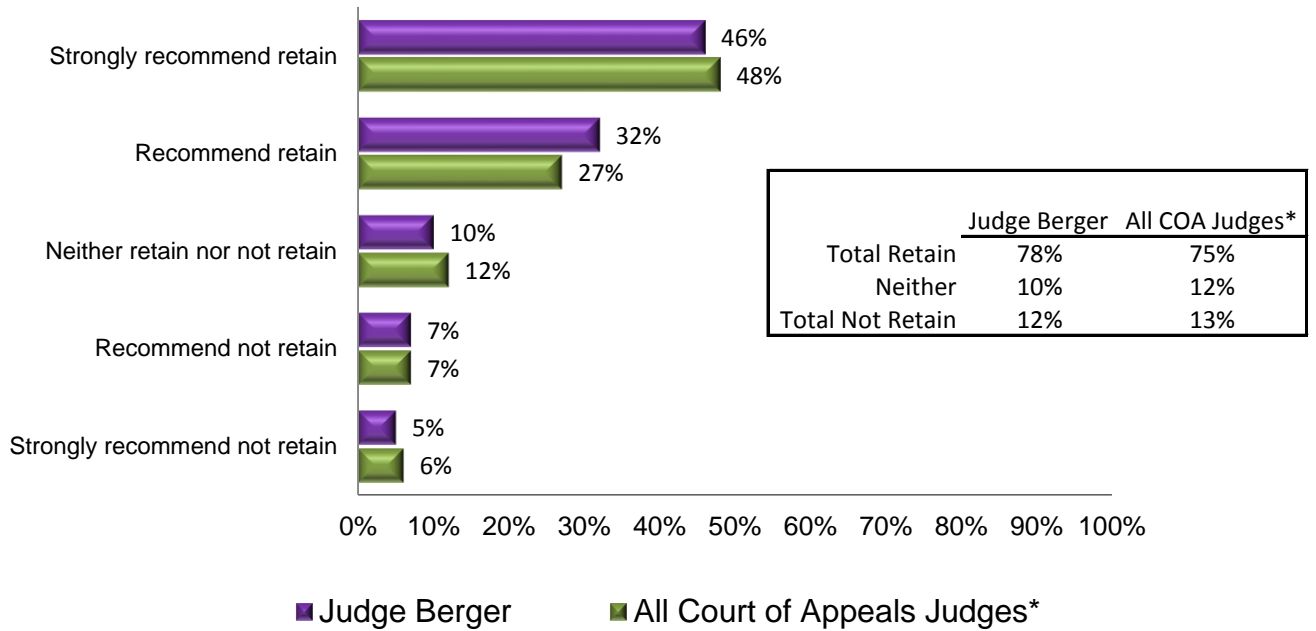


* Includes only the Court of Appeals judges evaluated during this interim cycle.

Judge Michael H. Berger

Survey of Attorneys Regarding Court of Appeals Judges

How strongly do you recommend that Judge Berger be retained or not retained in office?



* Includes only the Court of Appeals judges evaluated during this interim cycle.

Methodology

Methodolgy

The results shown in the 2015 Judicial Performance Interim Survey Report are based on the survey of Attorneys Regarding Appellate Judges. Below is a description of the methodologies used for this survey.

Attorneys Regarding Court of Appeals Judges

a. Sample:

The Attorneys Regarding Court of Appeals Judges sample comes from a list of Court of Appeals opinions provided by the Clerk of the Court of Appeals. This list 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.

Only judges and justices that are due to receive an interim evaluation in 2015 were evaluated during this reporting cycle. The intent was to increase the number of completed attorney evaluations for each judge and justice by excluding those not due to receive an interim evaluation in 2015. The number of possible judges and justices that attorney respondents could evaluate was 10.

Attorneys are first mailed a letter inviting them to complete the survey online. The letter provides the link to the online survey, as well as a unique password to access the survey. Approximately one week later, attorneys are sent an email invitation to complete the online survey, which also provides the Web address and their unique password. About a week after the first email is sent, a reminder email is sent, providing the same information. Potential respondents who do not complete the survey after the second email are then telephoned and asked to either complete the survey by phone, or to complete it online.

Since 2010, the Judicial Performance Survey reports are 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 and eight years for a COA judge. To use a Court of Appeals judge as an example: as survey data is collected it is pooled together for eight years. After eight years, as new data is added to the judge's survey results, the oldest data in the pool will be deleted.

b. Questions:

Respondents evaluated judges on 17 aspects of judicial performance using a grade scale of A, B, C, D, or F. (See Questionnaire section.) These grades were then converted to a numerical score 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.

Respondents were also asked to indicate how strongly they would recommend that the judge be retained or not retained in office.

c. Analysis:

The Attorneys Regarding Court of Appeals Judges section first shows a table of the percentage distribution for each of the A through F questions, including “don’t know/not applicable” 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 Court of Appeals judges receiving an interim evaluation in 2015 and are shown in the furthest right column on the page. Tables showing the percentage distribution for all questions for all Court of Appeals 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 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 last part of the Attorneys Regarding Court of Appeals Judges section of the report lists the comments the attorneys made about the judge’s strengths and weaknesses.

d. Comments:

Respondents were also asked what they considered to be the judge’s strengths and weaknesses. By statute, these comments are confidential and only provided to the 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 judge and the Commission, an attempt is made to redact all respondent identifying information from the comments.

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 corrected.

e. Cooperation Rate:

The overall cooperation rate for the Attorneys Regarding Court of Appeals Judges Survey is calculated as the number of completed survey-evaluations divided by the number of possible evaluations, resulting in an overall cooperation rate of 25.9% for Judge Berger. Undeliverable surveys have been excluded from the cooperation rates.

Looking at only the 2014 results, the cooperation rate for Judge Berger is 25.9% (not shown below).

A table of Judge Berger's cooperation rate is shown below. This cooperation rate is based on data collected from 2014 through 2014.

	Requested Evaluations	No Response	Undeliv-erable/Not Applicable	Completed Evaluations	Cooperation Rate
Judge Berger	343	129	169	45	25.9%

Survey of Attorneys Regarding Court of Appeals Judges

All Court of Appeals Judges* Sample Size = 2268							Average Grade (0.0 to 4.0 scale)
	A	B	C	D	Fail	DK/NA	

Question 2:

2a. Being fair and impartial toward each side of the case.	56%	20%	9%	6%	5%	5%	3.22
2b. Allowing parties to present their arguments and answer questions.	57%	19%	6%	3%	2%	12%	3.44
2c. Treating parties equally regardless of race, sex or economic status.	62%	10%	4%	3%	3%	19%	3.55
2d. Being courteous toward attorneys.	61%	16%	6%	3%	2%	12%	3.50
2e. Not engaging in ex parte communications.	53%	4%	2%	0%	1%	40%	3.81
2f. Being prepared for oral argument.	56%	16%	6%	2%	2%	17%	3.47
Question 2 Average Grade							3.50

Question 3:

3a. Writing opinions that are clear.	50%	26%	11%	4%	4%	4%	3.20
3b. Writing opinions that adequately explain the basis of the Court's decision.	50%	24%	11%	7%	4%	4%	3.13
3c. Issuing opinions in a timely manner.	54%	25%	9%	2%	2%	8%	3.38
3d. Making decisions without regard to possible criticism.	51%	17%	9%	5%	4%	15%	3.26
3e. Making reasoned decisions based upon the law and facts.	49%	19%	13%	10%	8%	1%	2.92
3f. Refraining from reaching issues that need not be decided.	47%	18%	11%	5%	6%	14%	3.10
Question 3 Average Grade							3.17

Overall Average Grade:							3.33
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* Includes only the Court of Appeals judges evaluated during this interim cycle.

Note: Respondents rated judges on various questions using an A to F scale, in which the grades were then converted to numerical scores: A= 4, B=3, C=2, D=1 and F=0. An average score of 4.0 is the highest possible score and a 0.0 is the lowest possible score.

Survey of Attorneys Regarding Court of Appeals Judges

All Court of Appeals Judges*

Average
Grade
(0.0 to 4.0 scale)

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

Strongly recommend retain	48%
Recommend retain	27%
Neither recommend nor not recommend retain	12%
Recommend not retain	7%
Strongly recommend not retain	6%
Total Retain	75%
Neither	12%
Total Not Retain	13%

* Includes only the Court of Appeals judges evaluated during this interim cycle.

Questionnaire

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 judge/justice, please check DK/NA for Don't Know/Not Applicable.

- 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 **[Judge/Justice Last Name]** 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/Justice Last Name]'s** strengths?

5. What would you say are *[[Judge/Justice Last Name]]*'s weaknesses?

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

- Strongly recommend retain in office..... 5
- Recommend retain in office 4
- Neither recommend nor not recommend retain in office..... 3
- Recommend not retain in office 2
- Strongly recommend not retain in office 1