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## The Ideal Judge: How Implicit Bias Shapes Assessment of State Judges

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## Abstract

Judicial Performance Evaluation (JPE) is generally seen as an important part of the merit system, which often suffers from a lack of relevant voter information. Utah's JPE system has undergone significant change in recent years. Using data from the two most recent JPE surveys, we provide a preliminary look at the operation of this new system. Our results suggest that the survey component has difficulty distinguishing among the judges on the basis of relevant criteria. The question prompts intended to measure performance on different ABA categories are also indistinguishable. We find evidence that, on some measures, female judges do disproportionately worse than male judges. We suggest that the free response comments and the new Court Observation Program results may improve the ability of the commission to make meaningful distinctions among the judges on the basis of appropriate criteria.

## 1. Introduction

States have long been concerned with designing judicial selection systems that strike the right balance between independence and accountability. In the last several decades, many states have adopted a merit plan selection system (Gill 2013). This system pairs appointment by nonpartisan commission with retention by uncontested, nonpartisan election. A side effect of this arrangement is that voters are significantly less engaged in these noncompetitive elections (Bonneau and Hall 2009). This is due, in part, to the dearth of candidate information in noncompetitive elections (Klein and Baum 2001).

In contested partisan elections, voters will minimize the cost of voting by relying on partisan cues (Downs 1957). In contested nonpartisan elections, voters rely upon a

number of cues to serve as proxy measures for political party (Dubois 1984). Indeed, partisan considerations are an important part of nonpartisan elections (Hall 2001; Streb 2007). In both types of competitive elections, increased campaign spending is associated with higher voter participation, most likely because of the expensive campaign's ability to provide voters with information (Hall and Bonneau 2008).

Voters in retention elections generally have even less information available to them. Indeed, these voters will latch onto nearly any partisan cue in an attempt to formulate an opinion in these races (Squire and Smith 1988). In reaction to this problematic lack of information, many supporters of the merit system encourage the use of judicial performance evaluation (JPE) systems (Brody 2000; Dubofsky 2007; White 2001). The hope is that properly administered JPEs can increase electoral awareness, depoliticize the selection process, and provide some measure of judicial accountability to the voters (Kourlis and Singer 2007; Paynter and Kearney 2010; White 2009). Indeed, some even recommend the use of JPEs in competitive judicial elections (Singer 2007, but see Gill and Lazos 2009).

Others have expressed deep concern about the use of JPEs as a part of the official process of judicial retention (Durham 2000; Griffin 1994; Gill and Retzl 2014). Such studies have noted that administering official state-sanctioned JPEs can threaten the impartiality of the judicial election process. Many other works have emphasized the lack of question uniformity and reliability in these JPEs (Aynes 1981; Bernick and Pratto 1995; White 2001). Similar concerns ultimately led the American Bar Association to create a set of guidelines for JPEs. Despite the existence of these guidelines (American Bar Association 2005), scholars still find numerous problems with the design and

implementation of modern JPEs (Elek, Rottman, and Cutler 2012; Gill 2014; Sterling 1993).

There have been few careful studies of state-sponsored JPEs, and these have been conducted in only a couple of states (Gill and Retzl 2014; Sterling 1993). As a result, we have precious little information about how well these systems operate in practice. Here, we add to this small but growing body of knowledge. Using an original database of JPEs in Utah (2012-2014), we look at the validity and reliability of the questionnaires. We also probe for evidence of gender disparities in the survey results. Our findings suggest that the survey component has difficulty distinguishing among the judges on the basis of relevant criteria. We do find evidence of female judges being ranked lower on various categorical evaluations such as communication skills, administrative capacity, and professionalism. Finally, our analysis of the qualitative portion of Utah's JPE provides support for the idea that social cognition theory explains the disparity of how male and female judges are evaluated.

## **2. Issues in JPE Design**

The diversity of judicial selection systems across the American states represents the variety of ways in which states attempt to balance the core values of judicial accountability and judicial independence. While all American systems provide accountability at least for judicial misconduct, most of them also try to hold judges accountable for the quality of their work (Gill 2013). To do this, the relevant decision makers must have access to some information about the quality of judge's work (Dubois 1980). Information relating to the quality of judicial performance can serve as a heuristic for voters. In addition, such information is important as feedback to help judges improve their performance (Aynes 1981; Chauvin 1989).

Since 1985, the American Bar Association has provided a series of guidelines (American Bar Association 2005) for evaluating judges. It set out several performance dimensions on which judges should be rated. Although they do not provide verbatim recommended questions, the guidelines do recommend the use of behavior-based evaluation instruments to “generate more meaningful information about judicial behavior” (American Bar Association 2005, 13). This is where things seem to go wrong (Bernick and Pratto 1995; Elek, Rottman and Cutler 2012; Gill 2014).

Most states with official JPE programs have realized this. As a result, there has been a movement to supplement the longstanding practice of polling the bar (Feeney 1987) by including multiple sources and types of information in the evaluation process (Mahoney 1989; Woolf and Yim 2011). For example, JPEs in Alaska, Arizona, and Utah now include surveys administered to court employees, jurors, peace officers, and fellow judges. Recently, Utah adopted a qualitative approach to JPEs by relying on observation analysis of judicial performance during court proceedings. The observations are conducted by volunteers, thus involving members of the public in the evaluation process. Still, the survey of local attorneys remains the centerpiece of the JPE systems (Brody 2000), especially as performance evaluation commissions increase the number of laypeople involved in conducting the evaluations (Olson and Batjer 1999).

Another pressing issue with JPEs is their potential to disadvantage groups who have traditionally been underrepresented on the bench. Much of the concern about bias in JPEs has centered on their propensity to result in substantially lower scores for female judges. Gender discrimination has traditionally been understood as products of explicit biases driven by conscious motive or intent (Krieger 1995). More recently, scholars have identified the influence of implicit biases on the perception of performance in gender-stereotyped jobs (Gill, Lazos, and

Waters 2011; Gill 2014). Male professionals tend not to perceive it (Coontz 1995), but social science research has influenced even the U.S. Supreme Court to recognize the role implicit bias plays in employment decisions<sup>1</sup>.

Implicit bias is driven by our innate drive as humans to simplify and categorize the people in our environment (Lee 2005). Social cognition theory explains how we are programmed to apply cognitive schemes, derived from our shared cultural experience, to aspects of our interpersonal relationships. We use situational stereotypes as shortcuts to understanding the physical world; we also use them to organize our interactions with other people. This happens implicitly, meaning that it is below the level of our conscious awareness-and often against our conscious intentions (Cleeremans 2003). This is what gives rise to implicit bias.

Implicit bias is a problem in performance evaluation, especially when we are evaluating performance in a job that is traditionally seen as a man's job (Heilman 1983). Judging is certainly one of these. As a result, women judges often find themselves in a "double blind," where they must conform to societal norms about a woman's role while also conforming to the profession's norms about what it means to be a judge.

The particular characteristics of judicial performance evaluations only exacerbate this problem. These evaluations are conducted anonymously, which decreases the awareness of respondents to the operation of their own gender stereotypes as frames to their responses (Hekman et al. 2010). Attorneys generally speed through these evaluations, which increases the brain's reliance on cognitive shortcuts to assemble a viable response to the question prompt (Carnes et al. 2005). The questions are also subjective, vague, and/or abstract (Choi, Gulati, and Posner 2009), which compounds the problem of gender stereotyping (Rhode 2001). The long lag

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<sup>1</sup>Price Waterhouse v. Hopkins (1989) 490 U.S. 228.

time between the observation and evaluation of the behavior, which in Utah's JPEs is up to six or ten years, can make behavior that is inconsistent with unconscious social stereotypes to be more easily accessible in the brain, leading to a magnification of this information (Barlett 1932). In all, surveys of judicial performance may be even more likely than other performance evaluations to suffer from unconscious gender bias (Gill, Lazos, and Waters 2011; Gill and Retzl 2014; Gill 2014).

### **3. Utah: A Case Study**

Utah adopted a merit-based judicial selection system on July 1, 1985. This method uses a system of Judicial Nominating Commissions to assemble a pool of qualified candidates. Each judicial district has its own nominating commission comprised of attorneys and non-attorneys selected by the governor. After reviewing the records and interviewing prospective candidates, the commissions refer a list of candidates (five for district courts and seven for appellate courts) to the governor. The governor selects an individual from the list to stand for confirmation by the Utah Senate (Administrative Office of the Courts 2010).

Following the appointment, the judge must stand for a retention election at the first general election held more than three years after appointment. If the judge is retained following the initial election, then the judge will stand for subsequent retention elections every six years (or every ten years for supreme court justices). However, prior to standing for these retention elections, the Utah Judicial Council (UJC) assesses the performance of judges and renders a finding on the qualifications of each judge. The performance evaluation reports are summarized and distributed publicly. The state's largest newspaper, the Salt Lake City Tribune, periodically publishes the results of the JPE, thereby providing an avenue for the electorate to use the information in their voting calculus.

The JPE program was first introduced in 1986, and the first evaluation cycle commenced in 1990. The purpose of the program was primarily to provide reliable information for voters. It was also intended to provide a channel for judicial self-improvement. Initially, the UJC was charged with administering the performance evaluation survey. At the time, the UJC was comprised of thirteen commissioners, twelve of whom were judges and one of whom was a member of the bar commission (Esterling and Sampson 1998). The centerpiece of these early evaluations was the attorney survey of judicial performance. The analysis of these surveys was conducted by consultants, and the UJC would meet to vote on retention recommendations in light, primarily, of the survey results.

This practice continued for almost twenty years. In 2008, the Utah legislature created the Judicial Performance Evaluations Commission (JPEC). The JPEC differed from its predecessor in that it included significant non-judge membership. The thirteen member JPEC now includes appointees by the Utah Supreme Court, the state legislature, and the governor. Expansion of the JPEC to non-judicial members has transformed it to a more professionally diverse committee. The JPEC now evaluates respondent surveys from attorneys, court staff, and jurors. The JPEC has also implemented a ground-breaking courtroom observation program that focuses heavily on maintaining procedural fairness and objectivity (Woolf and Yim 2011). The JPEC uses a set of evaluation criteria that resemble somewhat the American Bar Association (American Bar Association 2005) guidelines. These are presented in Appendix A.

#### **4. Perception of JPEs in Utah**

The JPEs in Utah pursue the dual objectives of enhancing voter decision making and facilitating judicial self-improvement. While voters tend to be relatively happy with the contribution of JPEs to their information profiles of the judges, the judges themselves are far less

enthusiastic about the system. In their work analyzing JPEs across four states, Esterling and Sampson (1998) found a generally positive assessment of JPEs by voters in Salt Lake City. Around fifty percent of the respondents were familiar with UJC, and another forty percent had obtained a copy of the evaluation report it produced. Of those who had knowledge of the report, seventy-three percent said their vote function was either partially or fully influenced by the survey. This suggests that judicial retention evaluations are serving their purpose of lowering the cost of information gathering for voters.

While the administered survey found that the public had a positive impression of the evaluations, a survey of Utah judges yielded much different results. Judges were overwhelmingly skeptical of the process, despite acknowledging the benefit of marginal information that is created by JPEs. Only about a quarter of the judges surveyed reported that evaluations would increase voter turnout in retention elections, while 29% agreed that voters rely on JPEs towards their vote choice. Interestingly, these figures were the lowest across the four states in the Easterling and Sampson (1998) analysis.

The skepticism and negativity present in the Esterling and Sampson (1988) survey may be associated with the procedural mechanisms and fairness of the JPE process. When asked if judges have access to a fair appeals process if they disagreed with the report, only a third agreed. A common complaint is the fact that only negative evaluations could request an interview with the commission. In addition, half of the judges interviewed thought the evaluation process undermined their judicial independence. For Esterling and Sampson (1998), the responses from Utah's judges warranted additional investigation. In a follow-up interview, judges voiced their concern of the attorney monopoly present in JPEs at that time.

## **5. Data & Methodology**

Since 1990, Utah has administered JPE surveys every two years to a portion of its judges. Because each individual judge is evaluated only once every six (or ten) years, each individual year's administration evaluates approximately a third of the sitting judges in the state. After undergoing a major overhaul in 2008, the JPEC began conducting the attorney, staff, and juror surveys online. For this reason, the JPEC has collected and maintained electronic data only for the 2012 and 2014 administrations of the evaluations. These data are available across all levels of the Utah judiciary, including the Utah Supreme Court.

Utah's judiciary is overwhelmingly white and male. A total of twenty-four judges stood for retention in 2012. In 2014, forty-seven judges stood for retention. In all, sixteen of these judges (23%) were women. Only two judges during this period were categorized by the JPEC as non-white. Both of these judges were of Asian descent. This comes as little surprise, given the findings of the most recent U.S. Census that Utah's population in 2013 was approximately 92% white (U.S. Census Bureau 2014). A total of nine judges during these election cycles were considered part-time, and they were excluded from the JPE process.

## **5.1. Data Sources**

The 2012-2014 Judicial Performance Evaluation survey results were obtained in response to a Utah Government Records Access and Management Act (GRAMA) request. Data on judicial demographics including gender, race, education, law school, and court type were obtained from the American Bench Database (The American Bench 2014). These data were supplemented through official biographies on the Utah Courts Website.<sup>2</sup>

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<sup>2</sup>These biographies can be found here: <http://www.utcourts.gov/judgesbios>. Last accessed March 28, 2015.

In addition to this, we investigated the disciplinary records of the judges in our sample using publically available data from the Utah Judicial Conduct Committee. There were no disciplinary records for the judges in our sample during the time periods relevant to their evaluation by the JPEC. This does not seem to be the result of perfectly exemplary behavior on the part of Utah's judges. Instead, the problem is the short time span in our sample and the short time that has elapsed since then. In addition, the Utah Judicial Conduct Committee only publishes information about complaints it deems to be substantiated, which further limits our ability to glean information about the number and type of complaints lodged.

Recently, Utah has seen a few episodes of less-than-professional judicial behavior. In 2010, Lehi County Judge Garry Sampson removed a gun from his holster while on the bench. He pointed it in the direction of his bailiff. Despite protestation that this brandishing of a firearm was done in a "joking manner," Judge Sampson was reprimanded for his actions (Carlisle 2010). Also in 2010, Judge Ronald R. Hare was charged with exposing himself in a restroom at a local park. In 2011, the state supreme court censured the judge and he resigned shortly thereafter (Falk 2011). A case of sexual harassment is still ongoing involving a now retired Weber County justice court judge, Craig Storey. Storey is accused of making unwanted advances and authoring sexually explicit poems to his office manager (Gurrister 2015). The woman's claims were met with inaction by the Judicial Conduct Commission in 2010 (Gurrister 2015).

Clearly, the official judicial conduct records do not tell the full story about the scandals and criticism that befall Utah's judges. For this reason, we supplement this information with a content analysis of newspaper coverage of the judges in our sample. Media coverage about the judges was compiled using judge name searches of the major newspaper in the state.<sup>3</sup>

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<sup>3</sup>These newspapers include the Salt Lake City Tribune and the Deseret.

## 5.2. Measures of Judicial Performance

We aim to measure the impact of judicial characteristics on the results of judicial performance evaluations in Utah. As such, our dependent variables are operationalized as responses to specific groups of questions on the 2012 and 2014 JPEC surveys. In 2012, the survey consisted of fifty-eight questions; in 2014, these questions were pruned by almost half to a total of twenty-nine. The full text of these questions is provided in Appendix B. There, we also show how we have aggregated these questions into categories defined by the American Bar Association (2005) guidelines.

Previous research has made clear that problems common to JPE survey design can compromise the validity, reliability, and perceived fairness of the resulting evaluations (Elek, Rottman, and Cutler 2012; Gill 2014). We begin by looking for some of the warning signs in the Utah JPEC survey data. The inter-dimensional correlation matrix in Table 1 shows a high alpha level among the categories and high, significant correlations among all five of the dimensions of judicial performance. Table 2 shows that most of the bivariate correlation within the dimensions are lower than the inter-dimensional correlations. The alpha scores show a similar pattern. This shows that, in terms of measuring distinct concepts, the questions within each ABA category are not any more similar to each other than they are to the questions in other categories.

Table 1: Inter-Dimensional Correlation Matrix

Category	Legal Ability	Integrity	Communication	Professionalism	Administrative
Legal Ability	1.000				
Integrity & Impartiality	0.846***	1.000			
Communication Skills	0.880***	0.809***	1.000		
Professionalism	0.839***	0.902***	0.832***	1.000	
Administrative	0.807***	0.801***	0.822***	0.878***	1.000

Average inter-item covariance = 0.539,  $\alpha = 0.96$

Overall, attorneys tended to rate judges very highly on all of the measures of judicial performance. Table 3 summarizes the performance ratings and the individual respondent level, as well as after these responses have been aggregated by judge. The range of scores is from one (inadequate) to five (outstanding).<sup>4</sup> The JPEC lists different minimum requirements for 2012 and 2014. In 2012, the judges must score at least a 3.0 out of 5.0 on at least 80% of the individual questions. In 2014, the JPEC requires a 3.6 in each of the evaluation categories<sup>5</sup> as the minimum for the presumption of retention. None of the judges fell below these standards in either year. Table 3 does not show this directly. However, the minimum scores in all of the aggregate data are above the center value on the scale (which is 3).

Table 2: Intra-Dimensional Analysis Summary Table

Category	# Qs	N Range	Avg. Cov.	Alpha	Corr. Range
2012 Questions					
Legal Ability	10	781-1505	0.765	0.979	0.696-0.922
Integrity & Impartiality	6	1383-1963	0.616	0.956	0.676-0.863
Communication Skills	2	1148-1734	0.741	0.935	0.831
Professionalism	3	1483-1752	0.681	0.985	0.698-0.775
Administrative Capacity	5	1062-1973	0.561	0.920	0.602-0.755
2014 Questions					
Legal Ability	6	548-2818	0.796	0.974	0.789-0.897
Integrity & Impartiality	4	540-3835	0.738	0.954	0.685-0.842
Communication Skills	5	545-3856	0.511	0.941	0.553-0.914
Professionalism	5	2780-3821	0.528	0.943	0.681-0.836
Administrative Capacity	7	3213-5092	0.370	0.931	0.551-0.792

<sup>4</sup>The JPEC Reports, in which the retention scores are summarized, do not indicate that the anchors were for the scores 2-4. They give only the first and last anchor, which are inadequate and outstanding, respectively. It is not clear whether additional anchors appeared on the actual survey. See Gill (2014) for a discussion of the importance of these anchors.

<sup>5</sup> Here, the JPEC refers to its own categories, which we summarize in Appendix A.

Full intra-dimensional correlation tables available from authors by request. Some questions listed in Appendix B are asked only of state supreme court judges. These questions yield 500 or fewer responses, and are omitted from this summary table.

The JPEC survey also includes a section that prompts respondents to select from a list of adjectives those that best described the judge. The list included adjectives with both positive and negative connotations. The adjectives are listed in **Error! Reference source not found.**, along with individual level and aggregate level descriptive statistics. Taken together with the scorers from Table 3, this provides strong evidence of a halo effect. Respondents selected positive adjectives between 20 to 43 percent of the time, while they used negative adjectives just 1 to 5 percent of the time.

### **5.3. The Judge-Level Control Variables**

In order to assess the JPE's ability to distinguish among judges on the basis of their on-the-job performance, we need to provide measures of judicial quality to see if they predict JPE scores. To do this, we include a number of observable proxy variables. Descriptive statistics for these variables are included in

Table 5. We include a measure of the prestige of the judge's law school alma mater, which we operationalize as an ordinal variable based upon groupings the 2014 U.S. News and World Report rankings. The distribution of the ranking of the judges' alma maters is displayed in Figure 1.<sup>6</sup> These measures are intended to serve as proxy variables for qualities like legal ability, communication skills, and administrative skills (Gill, Lazos, and Waters 2011). We also include each judge's years of experience on the bench at the time of the evaluation.

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<sup>6</sup>We have coded these as follows: Top 14 = 1; 15-50 = 2; 51-100 = 3; 100-end of rankings = 4; unranked = 5, and no J.D. = 6. We have opted to follow the U.S. News and World Report convention and leave the most prestigious schools with low scores and the least prestigious schools with high scores.

Table 3: Responses over ABA Categories

Variable	Mean	Std. Dev.	Min.	Max.	N
Individual Level					
Legal Ability	4.208	0.904	1	5	4354
Comm. Skills	4.445	0.801	1	5	5887
Admin. Capacity	4.470	0.685	1	5	5914
Integ. & Imp.	4.460	0.820	1	5	5906
Pro. & Temp.	4.477	0.774	1	5	5914
Aggregate Level 2012					
Legal Ability	4.087	0.199	3.668	4.394	24
Comm. Skills	4.330	0.170	3.909	4.559	24
Admin. Capacity	4.338	0.185	3.923	4.618	24
Integ. & Imp.	4.420	0.178	3.995	4.708	24
Pro. & Temp.	4.345	0.202	3.807	4.685	24
Aggregate Level 2014					
Legal Ability	4.266	0.248	3.468	4.712	47
Comm. Skills	4.496	0.196	3.994	4.830	47
Admin. Capacity	4.528	0.160	4.051	4.784	47
Integ. & Imp.	4.458	0.254	3.746	4.808	47
Pro. & Temp.	4.528	0.210	3.955	4.823	47

We also include measures of the amount and nature of the media coverage of each of the judges. We derive these measures from the local newspapers. The measures are counts of the number of articles about the judge. Each article was subjected to a simple content analysis by human coders to determine the tone of the article. Several categories of content were derived. Critical articles are those that expressed dissatisfaction with how the judge discharged official duties related to judicial decision making. Our original coding scheme distinguished these from articles tying the judge to some sort of scandal, which would include accusations of misconduct or insinuations that the judge is involved in some sort of personal shenanigans. Positive articles are those that mention the judge in a positive light, be it for the decisions the judge made or the contributions the judge has made to society.

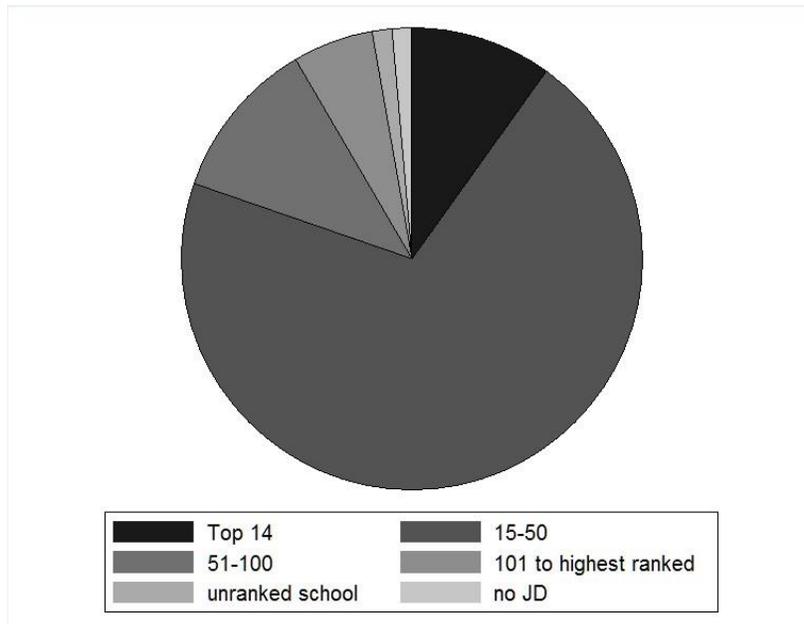


Figure 1: Law School Rank of Utah Judges Evaluated 2012-2014

We also collected the raw number of neutral mentions of the judges in order to control for the possibility that name recognition is enhanced by mention of the judge’s name in print.<sup>7</sup> Finally, we include an indicator for whether the judge was serving as a member of the state supreme court bench at the time of the evaluation. This allows us to control for differences in media coverage volume, visibility, and other unobserved sources of variation associated with

Table 4: Adjective Prompts

Variable	Mean	Std. Dev.	Min.	Max.	N
<i>Individual Level: Positive Adjectives</i>					
knowledgeable	0.429	0.495	0	1	6881
Intelligent	0.432	0.495	0	1	6881
Attentive	0.402	0.490	0	1	6881
Considerate	0.336	0.472	0	1	6881
Calm	0.309	0.462	0	1	6881
Confident	0.265	0.441	0	1	6881
Patient	0.277	0.448	0	1	6881
Consistent	0.218	0.413	0	1	6881

<sup>7</sup> We have also collected data about official reprimands. On our sample, only one of the seventy-one judges had ever been reprimanded, and that reprimand happened years before the sample period.

Polite	0.352	0.478	0	1	6881
Receptive	0.213	0.410	0	1	6881
<i>Individual Level: Negative Adjectives</i>					
Impatient	0.044	0.204	0	1	6881
Defensive	0.023	0.149	0	1	6881
Rude	0.013	0.112	0	1	6881
Cantankerous	0.017	0.129	0	1	6881
Indecisive	0.025	0.155	0	1	6881
Dismissive	0.045	0.208	0	1	6881
Arrogant	0.046	0.210	0	1	6881
Disrespectful	0.017	0.129	0	1	6881
Flippant	0.016	0.125	0	1	6881
<i>Aggregate: Positive Adjectives</i>					
knowledgeable	0.436	0.140	0.157	0.814	71
Intelligent	0.433	0.132	0.184	0.770	71
Attentive	0.410	0.107	0.143	0.617	71
Considerate	0.343	0.129	0.093	0.611	71
Calm	0.316	0.116	0.111	0.583	71
Confident	0.271	0.109	0.070	0.552	71
Patient	0.283	0.131	0.019	0.684	71
Consistent	0.231	0.104	0.060	0.583	71
Polite	0.361	0.137	0.102	0.722	71
Receptive	0.220	0.083	0.056	0.472	71
<i>Aggregate: Negative Adjectives</i>					
Impatient	0.046	0.052	0	0.191	71
Defensive	0.024	0.023	0	0.082	71
Rude	0.013	0.022	0	0.102	71
Cantankerous	0.019	0.033	0	0.163	71
Indecisive	0.025	0.030	0	0.149	71
Dismissive	0.044	0.042	0	0.185	71
Arrogant	0.048	0.068	0	0.337	71
Disrespectful	0.019	0.028	0	0.163	71
Flippant	0.016	0.022	0	0.09	71

occupying the highest bench in the state. Similarly, and because of the significant changes in the survey between 2012 and 2014, we include an indicator variable for the year of the survey.<sup>8</sup>

Table 5: Independent Variables

Variable	Mean	Std. Dev.	Min.	Max.	N
Individual Level Data					

<sup>8</sup> Because the shortest possible time span between retention elections is six years, we have no judges in the sample who appear in more than one year's survey.

female	0.209	0.407	0	1	6881
minority	0.019	0.137	0	1	6724
law school rank	2.129	0.759	1	6	6881
years on bench	9.874	7.096	2	32	6881
supreme court	0.03	0.172	0	1	6881
Media Coverage:					
scandal	0.013	0.113	0	1	6881
critical	0.2	0.507	0	3	6881
positive	0.466	0.739	0	3	6881
neutral	21.007	19.996	0	86	6881
year	2012	n=2883	2014	n=3998	N=6881
Aggregate Data					
female	0.225	0.421	0	1	71
minority	0.029	0.168	0	1	70
law school rank	2.225	0.865	1	6	71
years on bench	9.745	7.052	2	32	71
supreme court	0.028	0.167	0	1	71
Media Coverage:					
scandal	0.014	0.119	0	1	71
critical	0.197	0.521	0	2.958	71
positive	0.479	0.753	0	3	71
neutral	18.577	18.696	0	86	71
year	2012	n=24	2014	n=47	N=71

We are particularly interested in the role that immutable characteristics play in shaping how judges are evaluated. To determine the judge’s gender, we relied upon the pronouns used in the official judge biographies. Our indicator variable is for female judges, such that they are coded as ‘1’. We also coded a race variable, which was derived in part from the raw survey database we were provided by the JPEC. That dataset had an indicator for judges who were considered by the JPEC to be of a minority race or ethnic group. In all, there were only two judges in this category, and both were of Asian descent. We omit this variable from the analysis for lack of variation.

Unfortunately, the survey designers declined to collect important demographic data about the survey respondents. For this reason, we are unable to make any determinations about the interaction between respondent gender and judge gender in predicting outcomes. However, the

designers did collect a few pieces of information about the respondents. All of these measures are relevant only to the attorney respondents. They include the number of years in legal practice (grouped into six categories) and the number of trials the attorney has argued (also grouped into six categories). It also includes dummy variables to indicate the fields of law in which the respondent attorney specializes in. These fields include collections, family law, criminal law, civil trials, or other. We also include a dummy variable for whether the respondent was an attorney or a layperson. These variables are summarized in Table 6.

Table 6: Respondent Characteristics

Variable	Mean	Std. Dev.	Min.	Max.	N
Years Exp.	5.036	2.970	0	8	5508
No. Trials	1.555	1.488	0	5	5507
Collections	0.034	0.182	0	1	6282
Domestic	0.182	0.386	0	1	6282
Criminal	0.274	0.446	0	1	6282
Civil	0.380	0.486	0	1	6282
Other Area	0.061	0.239	0	1	6282
Attorney	0.751	0.432	0	1	6881

## 6. Analyses of JPE Outcomes

We begin by trying to determine the criteria respondents use to distinguish among the judges. We have assembled a number of different measures that we hypothesize will be related to the judge evaluation by category. We construct a series of multivariate models with the scores on the various ABA Guidelines categories as the dependent variables. These models are summarized in Table 7. The models perform relatively poorly. They explain only a tiny sliver of variance in the dependent variables.

A few patterns do emerge. Figure 2 presents a summary of the coefficients for the models of the scores by the ABA Guidelines (American Bar Association 2005) category. The scores seem to depend heavily upon the characteristics of the respondent. Recall that the performance is evaluated on a five-point scale. Overall, lawyers rate judges more harshly than laypeople. This is especially true when it comes to legal ability, where lawyers rate judges nearly three-quarters of a point lower. Lawyers who practice in criminal law even harsher than their peers, especially in their rating on the integrity and impartiality scale.

The prestige of the judge's law school, one of the stronger proxy variables of performance on several of the ABA categories, is completely unrelated to evaluation scores. This may be due to the lack of variance in judge's law schools. Nearly two-thirds of the judges evaluated held law degrees from one of the two in-state law schools. More time on the bench does not appear to help judicial performance scores, except when it comes to ratings of professionalism and temperament. The most damaging variable is the scandal variable. In all five models, having a scandal reported in the newspaper is associated with lower performance scores. That said, there was only one reported scandal in the dataset. It involved Judge Kevin Allen of the first district court. During a committee hearing, Judge Allen's financial obligations were brought to light including several legal decisions against him. In addition, Judge Allen's real estate dealings were also questioned including his recent rezoning dispute over a farmland in Smithfield City. Despite voicing skepticism on how Judge Allen can meet his financial obligations with a judges' salary, the committee ultimately confirmed Judge Allen.

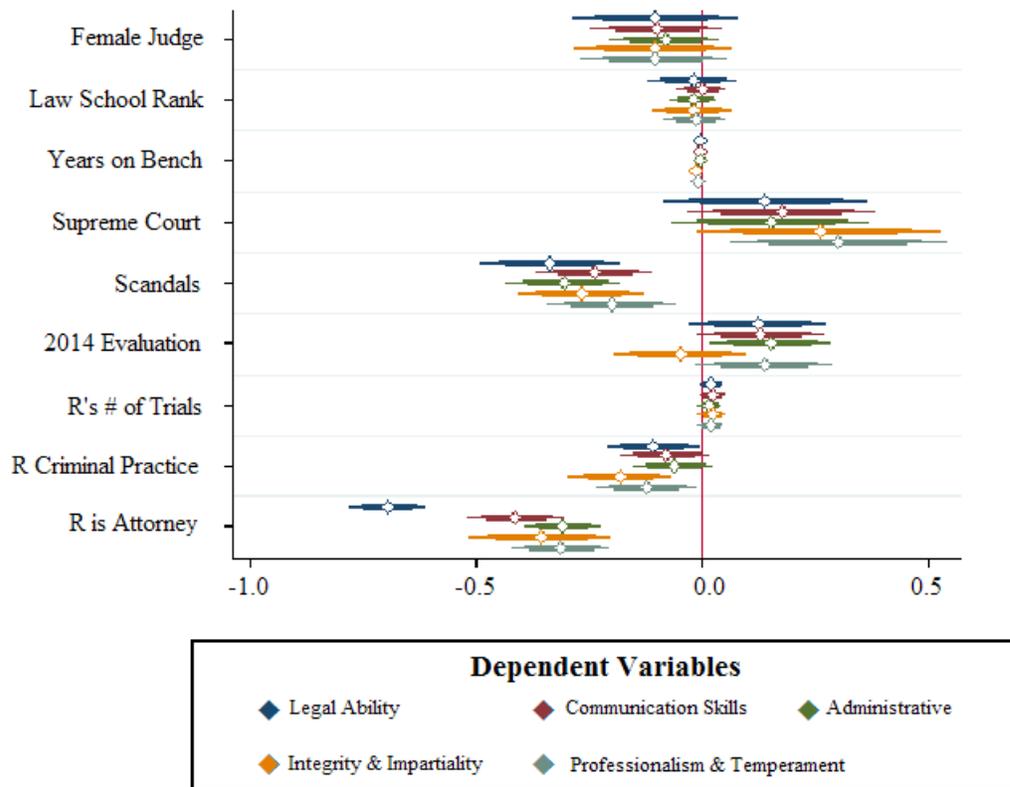


Figure 2: Model Summaries for ABA Category Scores

The influence of gender on performance scores is mixed. Although the magnitude is relatively small, female judges are rated lower on communication skills, administrative capacity, and professionalism/temperament. This is in keeping with previous research (Burger 2007; Gill Lazos and Waters 2011; Gill and Retzl 2013). As social cognition theory would predict, the

Table 7: Models of Judicial Performance on JPEC Survey by ABA Category: OLS with Huber-White Standard Errors

	Legal Ability		Communication		Administration		Integrity/Impartiality		Professionalism	
Female Judge	-0.106	(0.070)	-0.114*	(0.056)	-0.102*	(0.048)	-0.120	(0.068)	-0.130*	(0.064)
Law School Rank	-0.019	(0.036)	-0.004	(0.021)	-0.024	(0.020)	-0.027	(0.032)	-0.023	(0.025)
Years on Bench	-0.004	(0.004)	-0.005	(0.003)	-0.003	(0.002)	-0.011	(0.011)	0.286*	(0.003)
Supreme Court	0.145	(0.086)	0.167*	(0.076)	0.146	(0.083)	0.229**	(0.052)	0.286**	(0.088)
Scandal in News	-0.315***	(0.061)	-0.207**	(0.045)	-0.305***	(0.043)	-0.228***	(0.051)	-0.181***	(0.048)
2014 Survey	0.128*	(0.058)	0.132**	(0.044)	0.144***	(0.043)	-0.016	(0.052)	-0.181**	(0.050)
R No. of Trials	0.021	(0.010)	0.026*	(0.011)	0.017	(0.009)	0.025*	(0.011)	0.020	(0.011)
R Criminal Practice	-0.110**	(0.039)	-0.080*	(0.038)	-0.061	(0.034)	-0.178***	(0.043)	-0.119**	(0.043)
R is Attorney	-0.698***	(0.031)	-0.425***	(0.035)	-0.333***	(0.030)	-0.337***	(0.047)	-0.340***	(0.038)
Constant	4.915***	(0.111)	4.730***	(0.066)	4.711***	(0.067)	4.916***	(0.094)	4.789***	(0.081)
N (Judges)	4354 (71)		5887 (71)		5914 (71)		5906 (71)		5914 (71)	
Adjusted R <sup>2</sup>	0.02		0.06		0.06		0.05		0.06	
Root MSE	0.896		0.775		0.663		0.920		0.751	

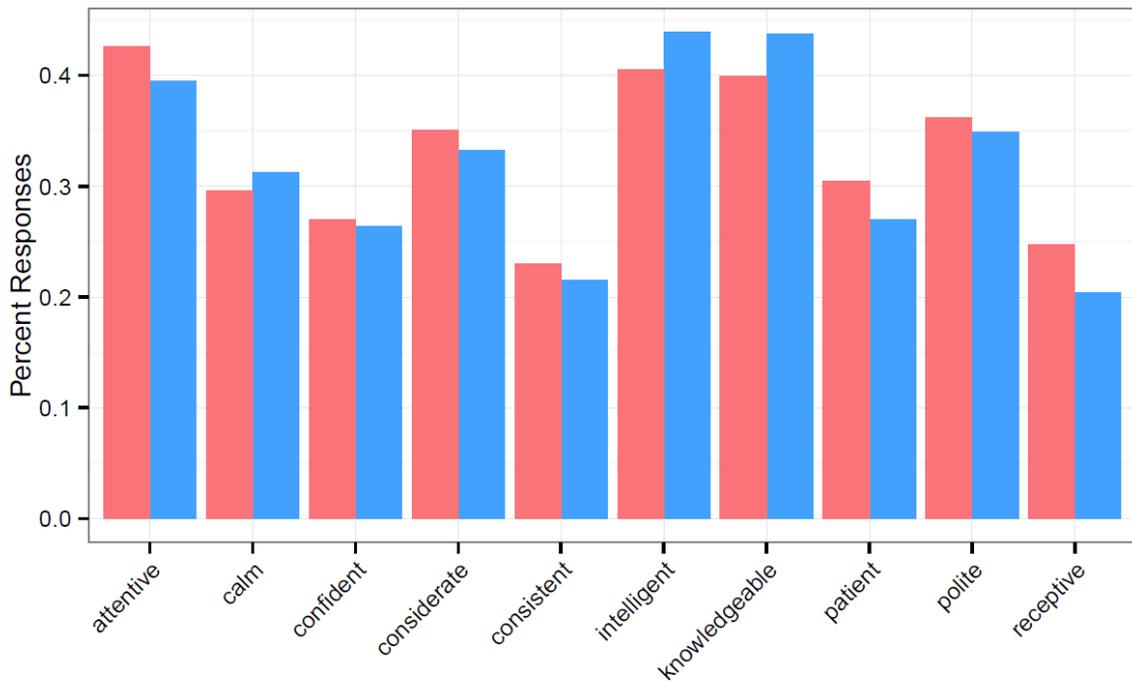


Figure 3: Use of Positive Adjectives by Judge Gender

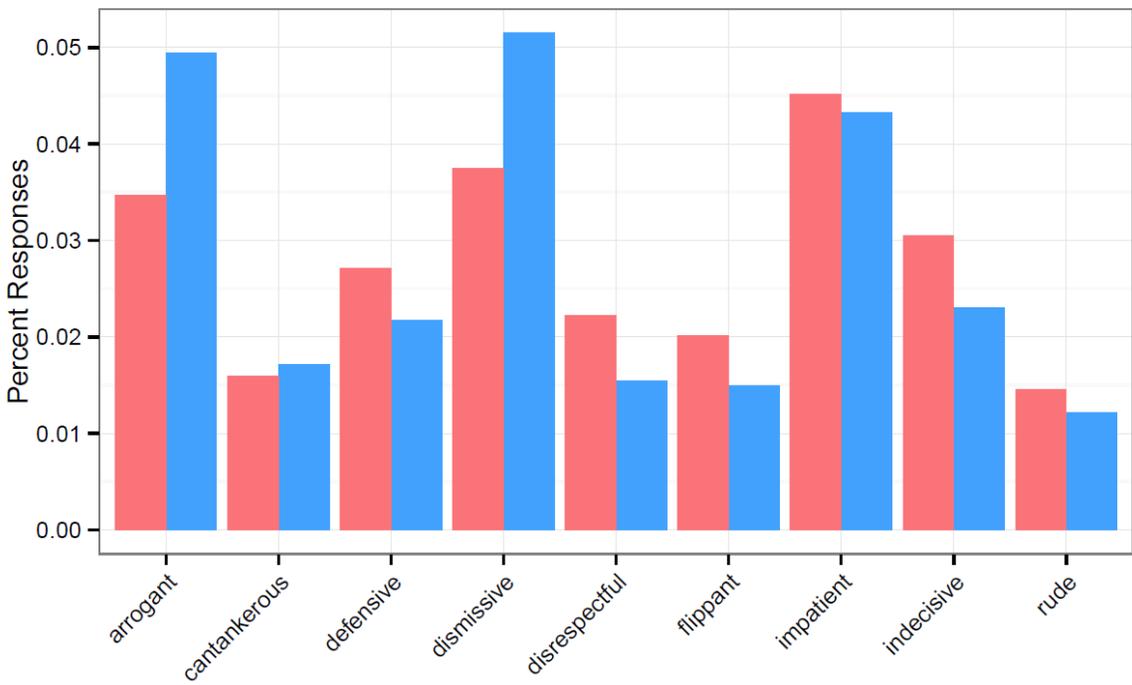


Figure 4: Use of Negative Adjectives by Judge Gender

assignment of some of these descriptive labels varies by gender of the judge. Figure 3 and Figure 4 show the usage rates broken down by gender. Male judges are significantly more likely to be described as knowledgeable and intelligent, while female judges are significantly more likely to be described as attentive, patient, and receptive. This fits with societally constructed stereotypes about men and women. Overall, respondents are far less likely to use negative adjectives to describe the judges. When respondents do choose negative adjectives, male judges are significantly more likely to be described as dismissive and arrogant. The differences in the use of negative adjectives are relatively small in magnitude, of course, because so few respondents chose to use these adjectives to describe judges.

## **7. Discussion**

In all, the JPEC's judicial performance evaluation survey results in very little distinction among the judges. The halo effect is pronounced on the measures intended to capture the performance outlines in the ABA Guidelines. The most obvious covariates of judicial behavior explained very little of the variation in the ratings, perhaps because there was so little variation to begin with. Only 8% of respondents indicated that they felt the judge should not be retained. Despite this fact, the gender disparity survives in some of the measures of judicial performance.

It is also possible that more information is hidden in the other parts of the survey. For example, the adjective prompts yield some interesting differences between the evaluation of female and male judges. In future research, we hope to explore the content of the free response and adjective questions. In addition, Utah's newly implemented COP program may prove to contain rich qualitative data about how judges are perceived by trained, neutral observers (Woolf and Yim 2011).

Although our results show gender bias that is not as pervasive as what other studies have found (Burger 2007; Gill et al. 2011; Gill 2014; Tomsich and Guy 2012), it is still cause for

concern. This is a particularly acute problem given the dearth of women on the bench in Utah. Women can face significant difficulties in gaining appointment to the bench (Githens 1996). Many of these difficulties are the result of gender stereotypes, both implicit and explicit (Rhode 2001). This problem, which also faces women in other male-stereotyped careers, happens when a female applicant is seen as part of cohesive group that lacks the male-stereotyped characteristics necessary for success in the field (Glick et al. 1988; Heilman 1983; Johnson et al. 2008). This effect is exacerbated with hiring committees are dominated by male decision makers (Gorman 2005). When women are underrepresented in institutions like the judiciary, this “compounds gender stereotypes and retards the pace of equalization” (Reynolds 1999, 549). In other words, more women on the bench can encourage JPE respondents to see judging as less of a sex-stereotyped job, thereby discouraging the kind of gender-based discounting of performance we see in some of the models displayed in Table 7.

When it comes down to it, however, the JPEC evaluations from 2012 to 2014 recommended retention for every single judge it evaluated. Perhaps this is because the judges are of uniformly high quality. Indeed, performance evaluations systems like this avoid erring on the side of harshness in recommendations. This is likely an attempt to preserve the independence of the judiciary and to encourage cooperation from the judges being evaluated. This makes a good deal of sense, especially in light of Esterling and Sampson’s (1998) findings. As well, if the proper role of the JPE is to act as a warning alarm for particularly low-performing judges, the exercise may not be in vain. However, this JPE survey yields precious little actionable feedback by distinguishing among the judges on the ABA evaluative categories.

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## Appendix A: JPEC Criteria for Evaluation

### Knowledge and Understanding of Law

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- a. The issuance of legally sound decisions;
- b. Understanding of the substantive, procedural, and evidentiary law of the state;
- c. Attentiveness to the factual and legal issues before the court;
- d. The proper application of judicial precedents and other appropriate sources of authority.

### Ability to Communicate

---

- a. Clarity of bench rulings and other oral communications;
- b. Quality of written opinions with specific focus on clarity and logic, and the ability to explain clearly the facts of a case and the legal precedents at issue;
- c. Sensitivity to impact of demeanor and other nonverbal communications.

### Preparation, Attentiveness, Dignity, and Control over Proceedings

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- a. Courtesy to all parties and participants;
- b. Willingness to permit every person legally interested in a proceeding to be heard, unless precluded by law.

### Skills as a Manager

---

- a. Devoting appropriate time to all pending matters;
- b. Discharging administrative responsibilities diligently;
- c. Sensitivity to impact of demeanor and other nonverbal communications.

### Punctuality

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- a. The prompt disposition of pending matters;
- b. Meeting commitments on time and according to the rules of the court;
- c. Compliance with the case processing time standard established by the Council.

### Service to the Profession and the Public

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- a. Attendance at and participation in judicial and continuing legal education programs;
- b. Consistent with the Code of Judicial Conduct, participation in organizations devoted to improving the judicial system;
- c. Consistent with the highest principles of the law, ensuring that the court is serving the public and the justice system to the best of its ability and in such a manner as to instill confidence in the court system;
- d. Service within the organizations of the judicial branch of government and in leadership positions within the judicial branch of government, such as presiding judge, Judicial Council, Boards of Judges, and standing and ad hoc committees.

### Effectiveness in Working with Judges, Commissioners, Personnel

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- a. When part of a multi-judge panel, exchanging ideas and opinions with other judges during the decision-making process;
- b. Critiquing the work of colleagues
- c. Facilitate the administrative responsibilities of other judges and commissioners;
- d. Effectively working with court staff.

## Appendix B: JPEC Questions and ABA Categories

Survey Questions (2012)	ABA Category
The judge makes sound rulings.	5-1: Legal Ability
The judge properly applies the rules of civil procedure.	5-1: Legal Ability
The judge properly applies the rules of criminal procedure.	5-1: Legal Ability
The judge's sentencing fits the offenses.	5-1: Legal Ability
The judge makes appropriate findings of facts.	5-1: Legal Ability
The judge appropriately applies the laws to the facts.	5-1: Legal Ability
The judge follows legal precedent.	5-1: Legal Ability
The judge only considers evidence in the record.	5-1: Legal Ability
The judge's written decisions are clear and logical.	5-3: Communication
The judge's written opinions offer meaningful legal analysis.	5-1: Legal Ability
The judge was fair and impartial.	5-2: Integrity
The judge avoids impropriety and the appearance of impropriety.	5-2: Integrity
The judge avoids improper ex parte communications.	5-2: Integrity
The judge's behavior demonstrated equal treatment of all persons or classes of persons.	5-2: Integrity
The judge appears to consider both sides of an argument before rendering a decision.	5-2: Integrity
The judge holds attorneys accountable for inappropriate conduct.	5-5: Administrative
The judge's oral communication while in court is clear and logical.	5-3: Communication
The judge promotes public trust and confidence in the courts through his or her conduct on the bench.	5-4: Professionalism
The judge respects the time of the participants and understands the personal and financial costs they may be incurring.	5-4: Professionalism
The judge is prepared for argument and hearings.	5-5: Administrative
The judge treats all attorneys with equal courtesy and respect.	5-2: Integrity
The judge rules in a timely manner.	5-5: Administrative
The judge realistically manages his or her calendar.	5-5: Administrative
The judge convened court without undue delay.	5-5: Administrative
The judge provides the parties due process; namely, advance notice of issues to be heard an adequate opportunity to prepare and a meaningful opportunity to be heard.	5-4: Professionalism
The judge acts to ensure that linguistic/cultural differences or disabilities do not unfairly limit access to the justice system.	5-5: Administrative
The judge is willing to make difficult or unpopular decisions.	5-2: Integrity
The judge did not allow his or her personal beliefs to inappropriately influence the proceedings.	5-2: Integrity
The judge explains the reasons for his or her decisions, when appropriate.	5-3: Communications
The judge works with pro se litigants fairly and effectively.	5-4: Professionalism
The judge's personal life does not impair his or her judicial performance.	5-2: Integrity
The judge maintains diligent work habits.	5-5: Administrative
The judge's interactions with court staff are professional and constructive.	5-5: Administrative
The judge is an effective manager of his or her staff, operations, and business.	5-5: Administrative

<b>Survey Questions (2012)</b>	<b>ABA Category</b>
The judge appropriately enforces deadlines and court orders	5-5: Administrative
The judge is appropriately accessible to court personnel.	5-5: Administrative
The judge made sure that everyone's behavior in the courtroom was proper.	5-5: Administrative
The judge reasonably accommodates changing technology.	5-5: Administrative
The judge paid attention to the proceedings in the courtroom.	5-5: Administrative
The judge is collegial with other members of the court.	5-4: Professionalism
When the judge explained to the jury the reasons for his or her decision, I understood.	5-3: Communication
Based on the judge's explanations, I clearly understood my role and responsibility as a juror.	5-3: Communication
The jury instructions from the judge were clear and understandable.	5-3: Communication
Based on the judge's explanations, I understood the evidence I could or could not consider.	5-3: Communication
The judge demonstrated courtesy toward the attorneys, court staff, litigants, and others in the courtroom.	5-4: Professionalism
The judge made me feel that the court system is fair.	5-2: Integrity
The judge took the case seriously.	5-4: Professionalism
The judge treated the jury with respect.	5-4: Professionalism
The judge provided recesses (breaks) in the trial that were adequate.	5-5: Administrative
My experience with the judge helped me to understand the role of the jury in the legal system.	5-4: Professionalism
<b>Survey Questions (2014)</b>	<b>ABA Category</b>
The judge follows the applicable legal rules (e.g., civil procedure, criminal procedure, evidence, juvenile, appellate) that apply to the case.	5-1: Legal Ability
The judge makes appropriate findings of fact and applies the law to those facts.	5-1: Legal Ability
The judge follows legal precedent or clearly explains departures from precedent.	5-1: Legal Ability
The judge only considers evidence in the record.	5-1: Legal Ability
The judge's written opinions/decisions offer meaningful legal analysis.	5-1: Legal Ability
The judge's written opinions contain a fair statement of the pertinent facts.	5-2: Integrity
The judge's written opinions contain a discussion of the applicable legal principles and controlling case law.	5-1: Legal Ability
The judge's written opinions clearly address the merits of the legal issues advanced by the parties.	5-3: Communication
The judge's written opinions provide clear guidance to trial court judges and practitioners.	5-3: Communication
The judge's written opinions contain a readily understandable, concise ruling.	5-3: Communication
The judge's written opinions reflect a neutral, professional tone.	5-2: Integrity
The judge makes sure that everyone's behavior in the courtroom is proper.	5-5: Administrative
The judge appears to pay attention to what goes on in court.	5-4: Professionalism

<b>Survey Questions (2014)</b>	<b>ABA Category</b>
The judge's personal life or beliefs do not impair his or her judicial performance.	5-2: Integrity
The judge demonstrates respect for the time and expense of those attending court.	5-4: Professionalism
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.	5-5: Administrative
The judge is prepared for court proceedings.	5-5: Administrative
The judge's interactions with courtroom participants and staff are professional and constructive.	5-4: Professionalism
The judge is an effective manager.	5-5: Administrative
The judge convenes court without undue delay.	5-5: Administrative
The judge rules in a timely fashion.	5-5: Administrative
The judge accommodates changing technology.	5-5: Administrative
The judge maintains diligent work habits.	5-5: Administrative
The judge's oral communications are clear.	5-3: Communication
The judge's written opinions/decisions are clear and logical.	5-3: Communication
The judge treats all courtroom participants with equal respect.	5-2: Integrity
The judge is fair and impartial.	5-2: Integrity
The judge promotes public trust and confidence in the courts through his or her conduct.	5-4: Professionalism
The judge provides the parties with a meaningful opportunity to be heard.	5-4: Professionalism