

## *Judicial Evaluations—A Proposition*

by Sidney B. Brooks



### ***About the Author***

*Hon. Sidney B. Brooks was appointed to the U.S. Bankruptcy Court, District of Colorado, in 1988 and has served as a judge and Chief Judge.*

***This essay discusses a proposition that all trial judges—federal and state—be made subject to performance evaluations by attorneys with respect to their demeanor, judgment, fairness, quality of opinions, and timeliness of work.***

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Most judges in state judicial systems are periodically evaluated and then, in one manner or another according to the state's system, are retained, reappointed, reelected, or removed. However, this doesn't happen in federal courts. Routine, objective, reliable, and anonymous evaluations of federal trial judges<sup>1</sup> is almost never done.

I submit these questions:

> Why shouldn't the federal judiciary—or the Bar, with the cooperation of the federal Bench—conduct periodic, statistically reliable judicial performance surveys among attorneys?

> Why shouldn't all trial judges be subject to periodic, objective, fair, and anonymous performance evaluations by attorneys who have appeared before them?

## **Purpose of Judicial Performance Evaluations**

Performance evaluations have two principal purposes: (1) to provide information to employers, colleagues, or clients who are responsible for measuring job performance and quality of work product; and (2) to provide candid, objective information to the employee for improvement of skills and conduct. Judicial performance evaluations are used to maintain—or improve—the quality of judges and the caliber of courts.

Colorado, Connecticut, and Utah are among the states that employ judicial evaluations.

> As stated on the Colorado Judicial Commission's website, Colorado courts use judicial evaluations to

provide voters with fair, responsible and constructive evaluations of trial and appellate judges and justices seeking retention in general elections, . . . and provide judges with information that can be used to improve their professional skills as judicial officers.<sup>2</sup>

> According to information available on its judicial branch website, the state of Connecticut has a judicial performance evaluation program whereby:

[q]uestionnaires are distributed to attorneys who appeared before the judge for a proceeding that lasted at least one hour. . . . The attorney questionnaire measures a judge's . . . performance based upon select characteristics.<sup>3</sup>

Once answers to the questionnaires have been culled,

1) a court administrator meets with judges to review the responses;

2) educational programs for judges are designed based on the responses; and

3) responses are given to the Judiciary Committee and Judicial Selection Commission for use during reappointment processes.<sup>4</sup>

> Utah state courts conduct an evaluation of judges every two years. The judicial evaluations are used to provide:

- 1) "each judge with information for his or her self improvement"; and
- 2) the public with information "to make knowledgeable decisions regarding retention election."<sup>5</sup>

## **Weighing the Arguments Against Evaluations**

Various arguments are advanced for opposing judicial evaluations or otherwise failing to conduct performance evaluations of judges. These arguments frequently are made by federal judges<sup>6</sup> and may include the following:

- Judicial evaluations will impinge on judicial independence.
- Judges will become more concerned with receiving positive evaluations than with being fair and merit-oriented.
- Judges won't change their methods of conducting court and decision-making as a consequence of attorney evaluations.
- Performance evaluations of judges by attorneys won't be accurate or reliable; they will simply be a platform for attorneys to unfairly attack and berate judges they don't like or who have ruled against them.
- It is inappropriate to hold judges up to public scrutiny, or possible public embarrassment.

I submit that these reasonings bear closer resemblance to excuses than sound arguments. In my view, they rest on false assumptions or otherwise attribute to judges too little principle and integrity. They also may ascribe to attorneys too much bad faith or lack of judgment and professionalism. Each argument will be briefly addressed below.

### ***Evaluations Will Impinge on Judicial Independence***

Evaluating a judge on performance criteria—that is, the way he or she manages cases, renders decisions, conducts trials and hearings, writes opinions, treats attorneys and litigants in court, and administers court—will not compromise a judge's independence. Performance evaluation gauges skills, knowledge, temperament, timeliness, respect, demeanor, and other judicial abilities and conduct. It does not—and need not—assess matters that would induce a judge to be biased or unfair. I am aware of no study that proves a correlation exists between evaluating a judge's skills and professional conduct and a judge's

independence.

### ***Focus of Judges Will Be Redirected***

Similarly, I have not found documentation to suggest that judges would sacrifice sound decisions for popularity. I believe judges will not permit a desire to get good evaluations to override basic fairness and merit-driven decisions. Judges who do their jobs effectively and professionally will receive positive evaluations by attorneys; judges who fall short in some areas will receive evaluations ranging from positive to negative, and all degrees in between.

This does not mean judges will abandon their principles and integrity. On the contrary, I contend that mediocre judges—or judges with some room for improvement in one area or another—may seek to achieve higher ratings in a given skill or conduct area. However, that is not necessarily synonymous with judges abdicating their core principles and professional integrity to attain positive evaluation scores.

### ***Evaluations Will Affect Judges' Methods***

In my experience, the majority of judges are diligent, responsible, and hard-working professionals who care deeply about the quality of their work. Most will seriously regard fair comment and feedback. Of course, there may be a handful of jurists who choose to ignore legitimate, constructive criticism. To oppose judicial evaluations because of these judges is to reward the arrogance of a few over the good faith of many.

### ***Evaluations Are Not Accurate or Reliable***

It is possible that vindictive or bitter attorneys could use surveys to unfairly attack judges; however, these attorneys would represent only a small fraction of the Bar community. More likely, judicial evaluations would be a reliable barometer of the Bar's reasoned judgment and constructive comment. A confidential survey of attorneys who know a judge through first-hand experience could produce some unduly harsh or personal commentary and some laudatory platitudes or unearned plaudits. However, this largely would occur at the margins. Any commentary viewed as extreme and unrepresentative could be discounted or ignored.

The results of a well-crafted and fairly administered judicial performance evaluation survey of attorneys generally will be thoughtful and informative. To assume otherwise is to denigrate the fairness and professionalism of the vast majority of attorneys.

## ***Judicial Evaluations Are Inappropriate***

I also do not agree with the argument that it is inappropriate to publicly scrutinize a judge's job performance or to suggest that evaluations might embarrass a judge. We live in a merit-based society where virtually everyone, directly or indirectly, is subject to job performance evaluation. What I do find inappropriate is that federal judges are not among them. From the President of the United States to the local county clerk; from teachers, police officers, architects, and doctors to lawyers, civil servants, and plumbers—one way or another, everyone gets evaluated at what they do and everyone gets feedback to improve job performance.

It is important for judges to be reminded that they have a reputation in the community. They may be regarded as fair, patient, respectful, courteous, timely, efficient, articulate, and well-versed in the law; or their reputations may be less than stellar. That reputation is already well known and established in the local legal community. It may be that the judge is the only one who doesn't know what that reputation is.

<p style="text-align: center;"><b>Judicial Conference Committee on the Administration of the Bankruptcy System Sample Survey Statements</b></p>
<p>The Federal Judicial Center, at the request of the Judicial Conference Committee on the Administration of the Bankruptcy System, has drafted an extensive and detailed sample judicial performance survey and guide. The sample includes thirty-nine statements that are rated on a five-point scale: never, sometimes, usually, always, and total.</p>
<p>&gt; The following samples are illustrative of the statements to be rated in the areas of intellectual integrity and impartiality:</p> <p>The Judge:</p> <ul style="list-style-type: none"><li>• rendered rulings without regard to popular sentiment, media attention, or prospects of criticism</li><li>• was open minded to arguments of counsel and facts of the proceeding</li><li>• issued rulings that were influenced by the identity of lawyers or law firms involved</li></ul> <p>&gt; The following samples are illustrative of the statements to be rated in the area of legal ability:</p> <p>The Judge:</p>

- demonstrated an understanding of the Federal Rules of Bankruptcy Procedure
- demonstrated an understanding of substantive bankruptcy law
- issued oral rulings that were substantively sound

> The following samples are illustrative of the statements to be rated in the areas of professionalism and work habits:

The Judge:

- helped ensure the steady progress of a case or proceeding
- ruled promptly on matters
- prepared adequately for hearings and trials
- exhibited too little patience toward attorneys and parties during proceedings

## Proposition

I propose that all trial judges, and federal trial judges in particular, participate in occasional job performance evaluations. Carefully drafted survey questionnaires should be submitted to and returned by a statistically reliable number of attorneys who remain anonymous, and then administered by an independent and unbiased organization such as the local bar, a law school, or a similarly respected organization. I propose that this should be adopted in all jurisdictions.

The performance evaluation should measure the quality of the judge's skills; knowledge of the law and procedure; case management and court procedures; courtroom demeanor; treatment of attorneys, litigants, and court-related personnel; timeliness of opinions; and quality of work product.<sup>7</sup>

Evaluations can consist of giving grades to judges in specific areas of job performance and should allow for comments by counsel.<sup>8</sup> The results can be made available to the general public,<sup>9</sup> in whole or in part, or kept confidential.

## Benefits of Judicial Evaluations

The potential benefits of judicial performance evaluations exceed the potential problems and disadvantages of conducting such surveys. Any time informed and useful feedback can be provided to a professional—particularly to public servants—it is a good thing.

To its credit, the Federal Judicial Center, at the request of the Judicial Conference Committee on the Administration of the Bankruptcy System,<sup>10</sup> has established guidelines to assist federal bankruptcy

judges in conducting performance surveys of members of the Bar in their district.<sup>11</sup> The guidelines include sample survey questionnaires (see accompanying sidebar) and recommended procedures to conduct anonymous, reliable judicial performance surveys, which are designed to measure and provide feedback to judges in the following areas of judicial performance: intellectual integrity and impartiality, legal ability, professionalism and work habits, and overall assessment.

Unfortunately, the Federal Judicial Center performance survey is seldom used by bankruptcy judges.<sup>12</sup> The Federal Judicial Center performance survey is never used by U.S. District Court judges or other federal trial court judges.

## Conclusion

The federal judiciary prides itself on independence, transparency, and judicial excellence. These are characteristics that have helped the United States maintain a reputation as, perhaps, the preeminent judicial system in the world. That standard can be best maintained if federal judges, like other jurists, are periodically subjected to fair and reliable—and unvarnished—judicial performance evaluations.

## Notes

1. Information available at the Library of Congress website states there are 2,400 federal trial judges, including district, bankruptcy, magistrate, court of claims, tax court, administrative law, and other judges. See [www.loc.gov/index.html](http://www.loc.gov/index.html).

2. See State of Colorado, Judicial Performance Commission, [www.cojudicialperformance.com](http://www.cojudicialperformance.com).

3. State of Connecticut Judicial Branch, Testimony of Judge Robert C. Leuba, Chief Court Administrator: Program Review and Investigations Committee Public Hearing (Oct. 10, 2000), available at [www.jud.state.ct.us/external/news/press036.html](http://www.jud.state.ct.us/external/news/press036.html).

4. *Id.*

5. Utah State Courts Judge Selection and Evaluation, [www.utcourts.gov/knowcts/judsel.htm](http://www.utcourts.gov/knowcts/judsel.htm).

6. Many of the positions taken in this essay have derived from private conversations I've had over the years with my colleagues on the Bench of the district and bankruptcy courts.

7. I underwent an evaluation in 2007. The evaluation was created by me and the Bankruptcy Court Clerk, and culled from a variety of judicial evaluation sources, including Federal Judicial Center guidelines. The evaluation consisted of a survey questionnaire submitted to 500 randomly selected attorneys who had appeared in my court during the eighteen months prior to the survey. The survey was mailed by the Clerk to participating attorneys. Responses, which were anonymous, were returned to the Clerk, who turned them over to a visiting graduate foreign law student at the University of Denver Sturm College of Law to tabulate the results.

8. An example of grading—A through F, excellent through fail—can be found on my performance questionnaire, which comprises twenty-nine questions covering issues such as judicial temperament, impartiality, communication skills, diligence, application of the law, courtesy, and integrity.

9. My 2007 judicial performance evaluation is available at [www.cob.uscourts.gov/brooks/judicialsurvey.htm](http://www.cob.uscourts.gov/brooks/judicialsurvey.htm). I found the evaluation to be satisfying and informative, sometimes unvarnished, but almost always respectful and businesslike. The evaluation was of great benefit in helping identify my strengths and weaknesses as a judge, as well as the perception of my fairness, demeanor, skill, and quality of work held by the attorneys who have appeared before me—which had never been communicated to me.

10. Information about the Judicial Conference Committee on the Administration of the Bankruptcy System is available at [www.uscourts.gov/judconf\\_jurisdictions.htm](http://www.uscourts.gov/judconf_jurisdictions.htm).

11. The Federal Judicial Center guidelines are not available to the public.

12. There are some exceptions to this statement. Judge James Starzynski, New Mexico Bankruptcy Court, and Judge Colleen Brown, Vermont Bankruptcy Court, for example, have established judicial performance liaison officers (independent, nonjudicial academic, or nonbankruptcy attorneys) to receive comments and complaints from attorneys, scrub them to ensure anonymity, and then convey the information to the judge.