

# NORTH CAROLINA LAWYERS WEEKLY

## **Booting bias: NCBA tweaks new judge survey to guard against hidden prejudices, stereotypes**

By: [Phillip Bantz](#) December 16, 2015

Lawyers who responded to the North Carolina Bar Association's latest performance evaluation of district and superior court judges who are up for re-election probably noticed that something was different about the preamble to this year's survey.

The message included a sentence in bold font advising that respondents "make more accurate performance evaluations when they take a few minutes to think about specific aspects of the person's performance rather than simply relying on their general impressions of the person."

The survey takers were then instructed to spend a few moments recalling some of the positive and negative aspects of their experiences with the judges they were about to rate.

The judicial performance evaluation asks lawyers to grade judges with whom they have had some type of professional "personal interaction," either inside or outside the courtroom, on a one-to-five scale in the following categories: integrity and impartiality; legal ability; professionalism; communication; and administrative skills.

The preamble is an effort to guard against hidden or unconscious biases typically connected to gender or race. And the exercise it asks respondents to perform before diving into the survey is known as "structured free recall," said Malia Reddick of the Institute for the Advancement of the American Legal System at the University of Denver.

The NCBA modeled the new preamble language after a survey introduction first used in Illinois and later recommended by the IAALS.

While some states send targeted surveys to lawyers who have appeared before certain judges, North Carolina releases its performance evaluations to virtually every practicing attorney in the state. And some of them could have "an axe to grind" or "vague impressions" of the judges they rate, Reddick said.

"It opens up the opportunity for biases to come in there as well," she added.

**Are lawyers more biased?**

Determining the extent of the role that hidden biases play in judicial ratings is not an exact science. But an IAALS study of several election cycles of data from judge surveys in four states (North Carolina was not included) produced encouraging results, according to Reddick.

She said the study revealed very few indications of bias based on a comparison of the scores of female and minority judges with the ratings of white male judges.

However, she added that the few possible instances of bias were detected in surveys that lawyers completed, while responses from court staff, law enforcement and other non-attorneys showed no evidence of bias.

North Carolina's surveys are based solely on the opinions of lawyers.

So it makes sense that the NCBA, which has been looking for ways to improve its judicial performance evaluations since a pilot survey was released more than six years ago, has turned its attention to preventing hidden biases from skewing the judge ratings.

“For the last 18 months or so we’ve had a subcommittee that has focused on survey bias issues, trying to get feedback and take a step back from the survey,” said Charles Raynal, a partner at Parker Poe in Raleigh who chairs the NCBA’s Judicial Performance Evaluation Committee.

Luellen Curry, an associate professor at Wake Forest University School of Law who teaches a seminar on race and the law and serves on the subcommittee that altered the preamble, stressed that she and others who were involved in the effort did not approach the survey believing it was biased and needed to be fixed.

“It was a matter of wanting to make sure we’ve done everything we can to design a survey that reduces the possibility of bias affecting the results,” she said. “The more you can have someone think of specific interactions with judges or candidates, that’s less likely to happen. It’s the general impressions that lead to problems.”

### **‘Certain grudge factor involved’**

Guarding against hidden biases is difficult. But preventing judge candidates from manipulating the survey results to benefit their campaigns is even more of a challenge.

Some candidates who have scored poorly on the NCBA’s evaluations have suggested that opponents or their opponents’ supporters were behind the results, implying that lawyers had been encouraged to trash them in the surveys.

The second-worst-rated district court judge on the latest performance evaluation, William Marsh of Durham County, had an overall rating of 2.92, which straddles the border between “below average” and “average.”

But in 2012, the last time he was facing re-election, he had a respectable overall rating of 3.35, placing him between “average” and “good.”

Marsh was running unopposed during the first survey. Now, he has an opponent, Shamioka Rhinehart, an assistant district attorney in Durham.

“It’s curious that whenever someone is challenged the numbers look very interesting,” he said.

Marsh believed there was a “certain grudge factor involved” in the survey and added that he heard in advance of the publication of the results that he was going to have a poor rating.

Rhinehart could not be reached for comment.

David Bohm, assistant executive director of the NCBA, said he asked the statistician who reviews the survey results “point blank” if the ratings were being manipulated and was told they were not.

Raynal also dismissed the notion that the evaluations were being gamed for use as campaign weapons.

“It doesn’t make much sense to me,” he said. “When we look at the number of respondents for particular judges, these are high numbers. The statistician looks at the outlier figures and takes that into account when evaluating the responses. You’d really have to have a high percentage of activated voices.”

The total number of responses from lawyers who evaluated Marsh in the NCBA’s most recent survey is on par with the numbers from his prior survey, between 120 and 157.

Marsh revealed in late November that he has been treated for alcoholism, according to a report from The Herald-Sun. But he made that announcement several weeks after the survey responses were due Oct. 26.

The only other potential red flag occurred in 2013, when Marsh and his wife filed for Chapter 13 bankruptcy.

Marsh did not seem overly concerned about the survey sinking his chances of being re-elected. He said he puts his “trust in the hands of voters, not lawyers who want to have their way in the courthouse.”

He received his lowest ratings in the “professionalism” category, as did the judge with the worst overall rating this year: Rob Wilkins of Asheboro. He had the second-worst rating in 2012, though that did not stop him from defeating his opponent to retain his seat on the bench.

Interestingly, many judge hopefuls who received low ratings in the 2012 evaluation ended up taking the highest number of votes in their races, beating out opponents who were viewed as better jurists by thousands of lawyers who participated in the survey.

Wilkins did not respond to multiple requests to discuss his ratings in the new survey. But during an interview in 2012, he guessed that his facial expressions could be partly to blame for his low rating.

“I’m not even aware I’m doing it, but apparently I’m frowning or whatever and some folks are interpreting my expressions,” Wilkins had said.

But around that same time, he posted a comment on a blog in which he criticized the survey as being “biased.” He also wrote that he “realized that there was something going on other than a fair and accurate evaluation of my performance.”

The NCBA will distribute surveys for the candidates challenging the incumbent trial judges on Dec. 23 and publish the results before the end of February, ahead of the March 15 primary.

North Carolina is one of two states in the country that have judicial challenger surveys. The other is Idaho.

### **Everyone gets a rating**

The juxtaposition of the survey and election results indicates that voters either did not see the judicial performance evaluations or they knew about the ratings and disregarded the information.

Little can be done about the latter possibility.

“Some people probably don’t care what lawyers think,” said Nancy Norelli, a former district court judge and past chair of the NCBA’s Judicial Performance Evaluation Committee. She still serves on the committee.

But the NCBA has been doing all it can do, within the constraints of a limited budget, to drum up publicity for the surveys and encourage voters to consider the ratings before they head to the polls.

Aside from being a voter education tool, the surveys have the added benefit of making judges more self-aware, which improves the state’s judicial system, according to Norelli.

“If it keeps everybody more on their toes, that’s a good thing,” she said. “We live in a society where almost all members are rated in one way or another, whether it’s your supervisor or your peer group.”

“I don’t think judges should feel that they are above that,” she added.

Judicial performance evaluation survey results are available at [electncjudges.org](http://electncjudges.org).