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Crossing the Bar: The Relationship of Nebraska's Supreme Court with the Bar

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Crossing the Bar: The Relationship of Nebraska's Supreme Court with the Bar

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I. INTRODUCTION

In today's world, all judges were once lawyers. Whether in private practice, government practice, or in some other legal position, they all took an oath to uphold justice, dealt with clients, and submitted matters to courts for decisions. No one comes out of law school and begins her career as a judge. Judges come up through the ranks of lawyers or law professors.

It has always been a mystery to the practicing bar as to how quickly some judges forget their roots after they ascend to the bench.

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Frequently, those judges seem to feel they have been anointed rather than appointed, with a lawyer's concerns now blissfully behind them. But it is a legal truism that there must be a partnership between lawyers and judges to administer justice successfully. Without the honest and intellectual assistance of the bar, judges could not function on their own.

Over the past 105 years, the relationship between the Nebraska Supreme Court and the Nebraska State Bar Association ("NSBA") has been generally cordial. But in the years between Robert Simmons' election to be chief justice in 1938, and the retirement of William Hastings as chief justice in 1995, many lawyers and bar leaders felt that the court deliberately distanced itself from involvement with the bar. This Article attempts to explore why some of that distancing may have occurred.

II. THE NEBRASKA BAR'S HISTORY

A. Voluntary to Mandatory

The NSBA was created as a voluntary bar association in January, 1900.¹ It continued in that form until integrated by order of the Nebraska Supreme Court in September, 1937,² a year before Robert Simmons was elected chief justice. Membership in the NSBA for lawyers admitted to practice in Nebraska has been mandatory since 1937.

The integrated, or mandatory, bar was the result of a petition filed by a committee of the voluntary bar asking to be integrated by court rule. The bar, before integration, was subject to public criticism because little had been done in disciplining wayward lawyers. The bar and court both felt that an integrated bar, known to the public to be part of the administration of justice, would restore public confidence in the profession. The lawyers of Nebraska, polled in a secret mail ballot, voted 595 to 155 in favor of integration.³ Justice Edward F. Carter worked diligently with the committee, and he wrote the opinion integrating the bar.

The Constitution of Nebraska is silent as to who has the power to define and regulate the practice of law. However, in his 1937 opinion, Justice Carter argued that since lawyers were an integral part of the judicial process, the court had *inherent* power under the constitution to regulate them. He laid out two principles in his opinion which guided the relationship between the bar and the supreme court for many years:

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1. Mark R. Ellis, *For the Advancement of Honor and Dignity of Our Profession: The Nebraska State Bar Association, 1900-2000*, NEB. LAW., Dec. 1999-Jan. 2000, at 7-16.
 2. *In re* Integration of the Neb. State Bar Ass'n, 133 Neb. 283, 275 N.W. 265 (1937).
 3. *Id.* at 284, 275 N.W. at 266.

We have overlooked the fact that the bench and bar are so intimately related that the problems of one are the problems of the other. We have come to the conclusion that the bar, of itself, can do little to better the situation. But, with a cooperating bench and bar, it appears to us that a more effective and efficient regulation of the bar would be the result. . . . We feel that it is our duty, especially where the request comes from so large a majority of the bar who participated in the referendum on the subject, to consider favorably the adoption of rules providing for the integration of the bar of this state by court rule under the powers lodged in this court by the Constitution⁴

Arguing that the constitution conferred powers on the court—powers that he previously declared were not set out in the constitution⁵—may have been a bit of a stretch for Justice Carter. But in regard to the relationship between the bench and bar, there can be no doubt that his heart was in the right place.

For many years Nebraska had a small bar membership, and the bar and the supreme court enjoyed a pleasant and non-controversial relationship. George H. Turner, clerk of the supreme court, served as secretary-treasurer of the NSBA from its inception, and he administered the bar from his desk in the clerk's office. Turner also served as the bar's state delegate to the American Bar Association House of Delegates from 1942 until he was defeated in a contested election in 1972.

B. Growing and Changing

In 1967, the Special Committee on Reorganization was established by the Executive Council of the NSBA to examine the structure, rules, and organization of the NSBA.⁶ In 1969, that committee recommended several sweeping new changes: the creation of an executive director of the NSBA; making the House of Delegates the principal governing body of the NSBA and the Executive Council subject to the House of Delegates; providing for the election of members of the House of Delegates and Executive Council and making the organization run by elected, rather than appointed members; and modernizing the rules of procedure of the House of Delegates.⁷ The recommendations were submitted to the House of Delegates in 1970, where they were favorably passed, and went into effect January 1, 1971.⁸ Burton Ber-

4. *Id.* at 290–91, 275 N.W. at 268–69. Some courts go much further in construing inherent judicial powers. *See, e.g.*, G. Gregg Webb & Keith E. Whittington, *Judicial Independence, the Power of the Purse, and Inherent Judicial Powers*, 88 JUDICATURE 12, 12–19 (2004).

5. *Integration of the Neb. State Bar Ass'n*, 133 Neb. at 285, 275 N.W. at 266.

6. Gary Trogdon, *For the Advancement of Honor and Dignity of Our Profession: The Nebraska State Bar Association the 1930s to the Present*, NEB. LAW. Oct. 2000, at 24, 33.

7. *See id.* at 26.

8. *Id.* at 33–34.

ger was selected as the bar's first executive director, and the NSBA opened an office in Lincoln's Sharp Building.⁹

As the NSBA grew larger and as its new structure began to take effect, it moved away from the extremely cozy relationship it had enjoyed with the court during the Simmons years when the clerk of the court was also the chief administrative official of the bar. Nonetheless, the court and bar enjoyed cordial relations during Paul White's term as chief justice from 1963 to 1978.

When Norman Krivosha was appointed chief justice in 1978, he instituted a program of meetings with bar leaders to discuss matters of common concern. Meetings were held frequently and they involved Chief Justice Krivosha (on behalf of the court), and the NSBA president, chairman of the House of Delegates, and executive director. Chief Justice Krivosha spoke frequently at bar meetings, addressed the House of Delegates regarding the state of the judiciary, and discussed mandatory continuing legal education with bar leaders, even though he did not favor such a program.

III. BAR RATING POLLS

In 1984, the NSBA instituted a program whereby lawyers rated the performance of the state's judges, so that the electorate would know how the bar viewed the performance of the judiciary. The program was cleared with the Nebraska Supreme Court before it was implemented. Judges who served less than a year on their current court were not to be rated. Judges were rated on such categories as knowledge of law, knowledge of procedure, absence of bias, quality and clarity of opinions, patience and courtesy to lawyers, health, and most importantly, whether they should be retained in office. Those lawyers who felt comfortable rating the judges and who were familiar with their opinions were encouraged to vote. The Appendix to this Article, Part VII, reprints the full 1984 to 1996 supreme court polls, which show in detail the ratings given each justice during those years.

A. Retention

Table 1, below, shows how the justices on the supreme court between 1984 and 1996 fared on the most important rating—the retention rating. Perhaps the most interesting ratings are those of Chief Justice Krivosha, who was rated lowest on his court both in 1984 and 1986, the only two years he was on the poll roster. His 1986 rating of

9. See NEBRASKA STATE BAR ASSOCIATION, DIRECTORY (1970) (on file with the NEBRASKA LAW REVIEW).

TABLE 1
 BAR POLLS ON RETENTION
 (SHOULD JUDGE BE RETAINED?)

	<u>Boslaugh</u>	<u>Caporale</u>	<u>Grant</u>	<u>Hastings</u>
'84	84.7	91.1	93.0	94.7
'86	85.0	85.5	93.0	89.1
'88	90.2	90.7	93.3	93.7
'90	91.5	91.4	93.1	91.9
'92	83.8	87.0		88.2
'94	75.8	83.9		79.5
	<u>Krivosha</u>	<u>Shanahan</u>	<u>C.T. White</u>	<u>Fahrnbruch</u>
'84	77.6	92.3	90.8	
'86	60.9	90.5	86.6	
'88		91.6	89.6	
'90		88.6	87.7	93.1
'92		88.8	89.4	88.2
'94			88.7	85.9
'96			61.1	65.7
	<u>Lanphier</u>	<u>Wright</u>	<u>Connolly</u>	<u>Gerard</u>
'84				
'86				
'88				
'90				
'92				
'94	92.5			
'96	72.8	91.1	91.8	95.3

60.9 was the lowest any justice received at any time during the first seven biennial polls.¹⁰

Bar leadership would undoubtedly have rated Chief Justice Krivosha significantly higher than did the bar as a whole. He was helpful, cooperative, and enthusiastic in dealing with the bar. It is difficult to understand why he earned such low ratings, unless lawyers as a group resented his public battles with Mike Royko over the court's striking of the death penalty in *State v. Hunt*.¹¹ Perhaps his death penalty dissents did him a disservice, or maybe it was his efforts to move tort law into the twentieth century. In any case, he was not a favorite of the rank and file, and the bar leaders must bear some of the blame for failing to make the membership more aware of his cooperation.¹²

B. Knowledge

The polls, although basically helpful, were filled with irregularities. For example, Justice Leslie Boslaugh, a man of unquestioned intellect and a member of the court since 1961, ranked last in every poll on knowledge and application of substantive law, except for the 1986 poll, where he barely edged Chief Justice Krivosha, 3.79 to 3.69 (out of a possible 5.0). Whatever flaws either justice may have possessed, no one who knew them would ever rank either of them as the two lowest-ranking members of the court as to their knowledge of the law.

Justices Caporale, White, and Shanahan placed in the top three as to knowledge of the law in every poll from 1984 to 1992. When Justice Shanahan left the court in 1993, Justice Lanphier, a newcomer to the court, moved into third place in the 1994 poll. And in 1996, when the

10. C. Thomas White received a rating of 61.1 in 1996, after he became chief justice, succeeding William C. Hastings. In 1996, all of the longer serving justices on White's court—White, D. Nick Caporale, Dale Fahrnbruch, and David Lanphier—received ratings below 75, while the three new justices, John Gerard, John Wright, and William Connolly, had ratings in the 90's. Undoubtedly, the four senior justices, all of whom were involved in the "bright line" rule as to lawyer disqualification and the second-degree murder/malice controversy (two notable issues that arose during the incumbency of William Hastings as chief justice, and both of which occupied court time and involved substantial controversy), suffered the bar's reaction to those issues, and their ratings suffered accordingly. Ironically, Lanphier, the justice who wrote the term limits opinion which led to his defeat in the 1996 election, rated highest among the four holdovers at 72.8.

11. 220 Neb. 707, 371 N.W.2d 708 (1985).

12. When interviewed sixteen years after the 1986 poll, Krivosha recalled without prompting that the bar had given Justice John T. Grant a higher health rating (81.9) than it gave Krivosha (81.4). Krivosha noted that in 1986, Grant had recently suffered a heart attack, while Krivosha, in excellent health, ran five miles a day at a seven minute per mile pace. Interview with Norman Krivosha, C.J., Neb. Sup. Ct., in Lincoln, Neb. (Aug.13, 2002) [hereinafter Krivosha Interview] (audio tape on file with the NEBRASKA LAW REVIEW).

holdover justices were all rated poorly on their retention question, they also lost ground as to their legal knowledge. The three new justices, Wright, Gerard, and Connolly, all finished tied for first, second, and third as to knowledge of the law. Apparently the new members of the court (or the more popular members of the court), were assumed to know more about the law than those who had been on the court for some time, and had shown, at least to many disgruntled litigants, that they did not know much law.

No one really knows what the justices of the supreme court think about the bar poll. But if, as many believe, relations between the bar and the court worsened in the last quarter of the twentieth century, the coldness may have some foundation in poll ratings which judges believe to be unfair.

IV. RETENTION ELECTIONS

The bar poll aside, a larger problem that judges face is the retention election, which decides their future presence on the bench. Instead of being elected, Chief Justice Krivosha once stated that he felt judges should be appointed for life, or good behavior, as federal judges are.¹³ First, he believed their subconscious angst about retention negatively impacted their freedom to write opinions.¹⁴ But Chief Justice Krivosha also worried about interest groups skewing the results of a retention election, which happened in the case of Justice David Lanphier.¹⁵

A group called Citizens for Responsible Judges ("Citizens") opposed Justice Lanphier's retention because of his term limits and second-degree murder/malice votes, and because he wrote the 1994 opinion invalidating the 1992 term limits election.¹⁶ Since Justice Lanphier

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13. *Id.*; see also Edmund V. Ludwig, *Another Case Against the Election of Trial Judges*, PA. LAW., May-June 1997, at 33. Nebraska has refused to retain seven judges since the merit plan was adopted in 1962. The seven were Seward L. Hart, juvenile judge in Douglas County, defeated in 1972; Dennis A. Winkle, county judge in the 18th district, defeated in 1976; Francis J. Kneifl, district judge in the 20th district, defeated in 1984; Robert E. Wheeler, county judge in the 8th district, defeated in 1990; Richard A. Weaver, county judge in the 11th district, defeated in 1990; Thomas J. Gist, county judge in the 1st district, defeated in 1992; and David J. Lanphier, supreme court justice, defeated in 1996.
 14. Krivosha Interview, *supra* note 12. Krivosha stated during the interview that he believed, subconsciously, judges began to worry about what they wrote in their opinions in the year before their retention election. *Id.*
 15. *Id.*; see also John M. Scheb, II, *State Appellate Judges' Attitudes Toward Judicial Merit Selection and Retention: Results of a National Survey*, 72 JUDICATURE 170 (1988).
 16. *Duggan v. Beermann*, 245 Neb. 907, 515 N.W.2d 788 (1994). Lanphier's defeat sparked a good deal of editorial comment and periodical commentary. See, e.g., Traciell V. Reid, *The Politicization of Retention Elections: Lessons From the Defeat of Justices Lanphier and White*, 83 JUDICATURE 68, 68-77 (1999); Kent Bernbeck,

had to run in a district-wide retention election, rather than statewide, it was easier to mount an organized campaign against him. Citizens was successful in its efforts against Justice Lanphier, and he was defeated by a vote of 69,034 to 33,416, a losing percentage of 67.38%.¹⁷

Although the specter of special interest groups is a real one, in 4,588 judicial retention elections nationally between 1964 and 1998, only fifty-two judges were not retained.¹⁸ The trend is that more voters are voting in judicial retention elections and fewer judges are being defeated.

There is no doubt that Justice Lanphier deserved to be retained. His legal and judging skills were more than acceptable, and his defeat was definitely on policy grounds. The organized bar did not come to his defense per se, but a large group of lawyer supporters organized Nebraskans for an Impartial Judiciary and expended time and money on his behalf. They also blew the whistle on Citizens and spurred the Accountability and Disclosure Commission's action against it.¹⁹ The NSBA acted after Justice Lanphier had been defeated, expending considerable effort in trying to educate the public about the advantage of an independent judiciary. It may have been the classic case of closing the barn door after the horse had gone, but it should have convinced the court that the bar was trying to be a partner in the administration of justice.

Petition-rule Change Led to Judge's Ouster, OMAHA WORLD HERALD, Oct. 7, 2002, at 7B; Dick Herman, *Protecting Appellate Judges From Ouster Not Worth Changing System*, LINCOLN J. STAR, Apr. 27, 1998, at 7A; Editorial, *Sending Judges a Message*, WALL ST. J., Nov. 18, 1996, at A12.

17. NEB. SEC'Y OF STATE, ABSTRACT OF VOTES CAST IN GENERAL ELECTION (November 5, 1996). It was estimated that Lanphier's opponents spent over \$200,000 campaigning against him. Reid, *supra* note 16, at 72. Although Citizens refused to list its contributors, it is believed that most of the money came from United States Term Limits. *Id.* The Accountability and Disclosure Commission, believing the Nebraska Political Accountability and Disclosure Act applied to judicial retention elections, pursued Citizens, seeking a court order requiring it to list its contributors. Neb. Accountability & Disclosure Comm'n v. Citizens for Responsible Judges, 256 Neb. 95, 588 N.W.2d 807 (1999). Although the Act was amended in 1998 by the Nebraska Legislature to include judicial retention elections, the case was decided under the prior law and, in February of 1999, the supreme court upheld summary judgment in favor of Citizens, holding that a judge standing for retention is not a "candidate," and a judicial retention election was not a "ballot question" as defined by the Act. *Id.* Citizens disbanded after achieving their goal of defeating Lanphier.
18. Larry Aspin, *Trends in Judicial Retention Elections, 1964-1998*, 83 JUDICATURE 79, 79-81 (1999).
19. Reid, *supra* note 16, at 72-73.

V. THE BAR'S PERSPECTIVE

Several former presidents of the NSBA have commented on whether bar-court relationships have worsened over the years.²⁰ No clear consensus can be distilled from their statements. One former president noted:

I do believe that the relationship between the Supreme Court and the integrated bar has deteriorated over the years. This seemed to commence about the time of the Krivosha Court because, commencing at that time, the Supreme Court seemed to take more of a "hands-on" management of the bar association, and also of the bar commission, upon which I served.²¹

Another responded:

During the decades in question, I perceived a diminishing of the collegiality between the court and representatives of the organized bar. This was true even though both Chief Justices Krivosha and Hastings were readily available to the bar leadership. An example was the reluctance of the Court to approve the bench bar conference. After authorization was given, only Judge Hastings participated. Other examples were the difficulty in review of the Canons of Ethics, continuing legal education, and lack of open discussions with the Court on issues facing the community.²²

A third view reinforced these impressions:

From the bar's perspective, it is my sense that the White [C]ourt was largely "uninvolved" with the organized bar, whereas the Krivosha and Hastings [C]ourts, although much more involved, were often perceived by the bar as being authoritarian and not very easy to deal with. It did seem to me, however, that the relations between the court and the bar during those years were, for the most part, cordial. Unfortunately, I'm not sure the same can be said of those relations since Hastings' retirement.²³

A different perspective stated: "Hastings was very reticent and less aggressive. I believe it was during his tenure, that the Court began withdrawing into itself and treating those outside (to include the NSBA) as litigants."²⁴ Still another view analyzed as follows:

I believe that erosion of the Court-Bar relationship began with Judge Krivosha. Norm is a long-time friend of mine . . . Norm and I do not agree on many things. Norm's style of conduct is "take-charge." Applying his style to the Court's relationship with the Bar caused conflict and, in some cases,

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20. Former bar presidents who responded to the Author were John C. Brownrigg, Thomas R. Burke, Daniel D. Jewell, Thomas M. Davies, Theodore L. Kessner, Richard A. Knudsen, James A. Lane, Howard P. Olsen, Jr., and Edwin C. Perry. All were promised confidentiality and thus have not been identified as authoring specific letters. Copies of all of the letters have been furnished to the NEBRASKA LAW REVIEW.
 21. Letter from former Neb. Bar Ass'n President to James W. Hewitt (Sept. 25, 1998) (on file with the NEBRASKA LAW REVIEW).
 22. Letter from former Neb. Bar Ass'n President to James W. Hewitt (Sept. 24, 1998) (on file with the NEBRASKA LAW REVIEW).
 23. Letter from former Neb. Bar Ass'n President to James W. Hewitt (Sept. 14, 1998) (on file with the NEBRASKA LAW REVIEW).
 24. Letter from former Neb. Bar Ass'n President to James W. Hewitt (Sept. 15, 1998) (on file with the NEBRASKA LAW REVIEW).

downright anger. Judge Hastings repaired much of the damage. Judge T. White has harmed the relationship immeasurably²⁵

But others felt differently. "In my experience, relations between the organized bar and the court improved from 1938 to 1994."²⁶ A second view was:

With respect to relations with the bar, I thought they were good during the terms of White and Hastings. I don't know about relations with Simmons. I do feel the situation was strained at times under Krivosha, although I'm sure the intentions were good and it was probably mostly due to personality differences.²⁷

One of the older past presidents opined: "I don't believe the relations between the Court and Bar worsened between 1938 and 1994. It's always been like some of the Church systems, autocratic, and the odds are that it will continue that way."²⁸ And finally:

As for the relations between the organized Bar and the Court during that same period, I would have to say that they remained about the same with some improvement once Krivosha became Chief Justice. It was at that time that we began to sit down with the Court and talk rather than communicating through the filing of pleadings. . . . So I think the relation between the Court and the Bar is probably about the same—formal and strained. When the Bar petitions the Court for mandatory continuing legal education—in effect asking the Court to adopt a rule requiring our own members to maintain their legal education—and the Court declines, then there is something wrong with the relationship.²⁹

One thing can be gleaned from the responses of the former presidents. All who commented felt that the bar should work cooperatively with the court to solve problems of common import, and they felt the court was moving away from that approach. Chief Justice Krivosha acknowledged that there was no logic in the court's holding the bar at arm's length. However, a contrary view was related by Chief Justice William Hastings, who said that two members of his court thought it

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25. Letter from former Neb. Bar Ass'n President to James W. Hewitt (Sept. 11, 1998) (on file with the NEBRASKA LAW REVIEW).
 26. Letter from former Neb. Bar Ass'n President to James W. Hewitt (Oct. 5, 1998) (on file with the NEBRASKA LAW REVIEW).
 27. Letter from former Neb. Bar Ass'n President to James W. Hewitt (Oct. 2, 1998) (on file with the NEBRASKA LAW REVIEW).
 28. Letter from former Neb. Bar Ass'n President to James W. Hewitt (Sept. 24, 1998) (on file with the NEBRASKA LAW REVIEW).
 29. Letter from former Neb. Bar Ass'n President to James W. Hewitt (Oct. 14, 1998) (on file with the NEBRASKA LAW REVIEW). Justice Hale McCown, in an interview, thought that the bar-court relationship became much more strained when the court refused to adopt a policy requiring mandatory continuing legal education for bar members. Interview with Hale McCown, J., Neb. Sup. Ct., in Lincoln, Neb. (Oct. 13, 2000) (audio tape on file with the NEBRASKA LAW REVIEW).

was terrible that the court met with the bar to talk over problems, or even to socialize. He did not specify which two.³⁰

VI. I SWEAR TO TELL THE TRUTH

If the judicial evaluation polls are sticking in the court's craw, it may prove difficult to mend fences because the bar is committed to continuing the evaluations. It has received a great deal of favorable comment from the media concerning the educational benefit to the electorate from the poll,³¹ and the bar will not forego what it considers to be a significant public service opportunity. How the bar can remove bias from its poll is a matter of substantial concern, but it is not a problem unique to Nebraska.

In an article in *Judicature*, social scientist Theodore Koebel evaluated a judicial survey conducted by the bar of Louisville, Kentucky, in an attempt to detect possible bias in those lawyers who responded.³² The survey had been sent to area lawyers with the caveat that it was not to be completed by lawyers if they did not feel they had "substantial professional contact" with a judge.

Koebel attempted to evaluate whether such a survey is a good way to evaluate judges. He noted that there were certain quality controls built into the survey to ensure that they were accurate. For instance, his study eliminated punitive response sets (consistently negative evaluations on any individual question for all judges evaluated by any given respondent), which indicate that lawyers in Kentucky may well have been taking out their anger and frustration when rating judges.

William G. Ross, writing about factors that influence the judicial reputation of United States Supreme Court Justices, opined that "[s]ince the work of the Court is inextricably related to politics, the political predilections of the persons who evaluate the justices inevitably influence their rankings."³³ He stated that Justice Clarence Thomas had received a very low rating in a 1993 survey, placing third

30. Krivosha Interview, *supra* note 12. *But see* Interview with William Hastings, C.J., Neb. Sup. Ct., in Lincoln, Neb. (Feb. 24, 2000) (audio tape on file with the NEBRASKA LAW REVIEW).

31. *See, e.g.*, Op-Ed., *Bar's Survey Has Impact*, LINCOLN J., Aug. 6, 1986, at 12; Sharon Dietz, *Judicial Poll 'A Real Awakening'*, SCOTTSLUFF DAILY STAR-HERALD, July 31, 1986, at 1, 3; Editorial, *Judging the Judges*, THE SIDNEY TELEGRAPH, June 20, 1986, at A4. Dick Herman, editorial page editor at the *Lincoln Journal*, was a very strong advocate of the bar polls, believing the public had a vested right to know the bar's ratings. Interview with Dick Herman, Editorial Page Editor, *Lincoln Journal*, in Lincoln, Neb. (Apr. 25, 2001) (audio tape on file with the NEBRASKA LAW REVIEW).

32. C. Theodore Koebel, *The Problem of Bias in Judicial Evaluation Surveys*, 67 JUDICATURE 225, 225-33 (1983).

33. William G. Ross, *The Ratings Game: Factors That Influence Judicial Reputation*, 79 MARQ. L. REV. 401, 405 (1996).

from the bottom, even though he had been on the Court for less than two years, and stated "it is difficult to use any measure other than politics to account for the very low ranking"³⁴ He also concluded that since lawyers were generally more conservative than scholars, their rankings tended to place conservative judges higher than did the rankings by academics.³⁵

Conceding, for the purposes of argument, that there are flaws in the bar evaluation polls, and that judges have the right to be skeptical of the claims of lack of bias and public benefit, there can be little justification for the court, individually or en banc, refusing to deal with the NSBA except at hearings in open court. Difficult decisions are best hammered out in private, removed from the glare of the media and the public. Nebraska's "open meetings" law allows public bodies to go into closed session when discussing matters of legal import. The bar and the court should be allowed the same privacy when discussing matters concerning the practice of law or court rules that may have an unintended impact, such as the bright line rule for lawyer disqualification or mandatory continuing legal education.

Whether or not relations had deteriorated over the approximately fifty-seven years encompassed by the terms of Justices Simmons, White, Krivosha, and Hastings,³⁶ the fact remains that the court, with the exception of Chief Justice Krivosha's tenure, had done little to enhance the relationship or to reach out to its co-laborers in the legal vineyards. It is not difficult to value and respect the admirable qualities of those with whom one works in concert. It is also not difficult to point out the flaws and defects of a superior being who is constantly intent on establishing that superiority. Good bar-court relationships, like any successful marriage, depend to a great extent on communication and enlightened give and take. If Nebraska is to defend bar-court relationships, as it now defends marriage, each of the parties must do its part. But in 2005, with a new hand on the tiller and a new crew on board since the court of Chief Justice C. Thomas White, hopes for a synergistic relationship are definitely on the rise.

34. *Id.* at 407.

35. *Id.*

36. Minutes of Meeting of Chief Justice Krivosha and Bar Officers (June 12, 1981) (on file with the NEBRASKA LAW REVIEW). Krivosha said the relationship between the bench and bar is not good. Krivosha Interview, *supra* note 12. Nebraska is not alone in strained relationships. See R. Rucker Smith & Robert D. Ingram, *Stop the Fighting: Bench & Bar Relations*, GA. B.J., June 1997, at 10-12.

VII. APPENDIX
1984 Judicial Evaluation Poll³⁷

Nebraska Supreme Court

- 5 = **Excellent** (performance is outstanding)
- 4 = **Good** (performance is above average)
- 3 = **Satisfactory** (performance is adequate)
- 2 = **Deficient** (performance is below average)
- 1 = **Very Poor** (performance is well below average and unacceptable)

Characteristics	Leslie Bostlaugh*	D. Nick Caporale	John T. Grant	William C. Hastings	Norman M. Krivosha	Thomas M. Shanahan	C. Thomas White	
	Average Scores							
1. Knowledge and application of substantive law	3.84	4.25	4.09	4.07	4.00	4.10	4.11	
2. Knowledge and application of rules of evidence and procedure	3.80	4.29	4.16	4.10	4.06	4.10	4.19	
3. Ability to perceive factual and legal issues	3.82	4.22	4.16	4.03	4.10	4.18	4.22	
4. Awareness of recent legal developments	3.88	4.29	4.16	4.13	4.38	4.22	4.29	
5. Absence of bias or prejudice in civil cases	3.92	3.95	4.11	4.07	3.69	4.10	3.92	
6. Absence of bias or prejudice in criminal cases	3.63	3.89	4.06	3.86	3.69	4.06	3.89	
7. Absence of bias or prejudice in domestic relations cases	3.81	3.86	3.98	4.01	3.83	4.03	3.91	
8. Not influenced by nature of case	3.67	3.92	3.92	3.97	3.47	4.00	3.74	
9. Not influenced by identities of lawyers involved	3.93	4.06	3.96	4.10	3.78	4.12	3.97	
10. Not influenced by identities of litigants involved	3.85	4.02	4.02	4.10	3.76	4.09	3.97	
11. Not influenced by improper, ex parte approaches	4.24	4.38	4.32	4.35	4.10	4.33	4.31	
12. Quality and clarity of written opinions	3.66	4.16	3.90	3.88	3.83	3.94	4.01	
13. Patience and courtesy to lawyers	4.14	3.87	4.16	4.14	3.47	4.22	3.36	
14. Absence of undue personal observations or criticisms of litigants, judges, and lawyers from the Bench or in written opinions	4.12	3.79	4.05	4.19	3.45	4.18	3.56	
A. Is the judge's health such that the judge can effectively discharge the duties of judicial office?	% Yes	80.2	80.6	87.5	84.7	90.3	90.3	88.4
	% No	1.7	2.2		.9	.7	1.0	.8
	% N.Op.	17.9	17.1	12.5	14.2	8.8	8.6	10.7
B. In your opinion, should this judge be retained in office?	% Yes	84.7	91.1	93.0	94.7	77.6	92.3	90.8
	% No	10.5	6.5	3.7	3.2	20.9	4.0	8.0
	% N.Op.	4.7	2.3	3.2	2.0	1.3	3.6	1.0
Approximate number of persons who rated this judge:	255	260	243	247	291	221	273	

*Stands for retention in 1984

37. *Results: 1984 Judicial Evaluation Poll*, NSBA NEWS (Neb. State Bar Ass'n, Lincoln, Neb.), Aug., 1984, at 5 (reprinted with permission).

1986 Judicial Evaluation Poll³⁸

Nebraska Supreme Court

- 5 = **Excellent** (performance is outstanding)
 4 = **Good** (performance is above average)
 3 = **Satisfactory** (performance is adequate)
 2 = **Deficient** (performance is below average)
 1 = **Very Poor** (performance is well below average and unacceptable)

Characteristics	Leslie Boslaugh	D. Nick Caporale*	John T. Grant*	William C. Hastings	Norman M. Krivosha	Thomas M. Shanahan*	C. Thomas White*	
	Average Scores							
1. Knowledge and application of substantive law	3.79	4.16	4.02	3.85	3.69	4.10	4.05	
2. Knowledge and application of rules of evidence and procedure	3.80	4.18	4.06	3.89	3.74	4.05	4.07	
3. Ability to perceive factual and legal issues	3.75	4.07	4.01	3.82	3.67	4.04	4.03	
4. Awareness of recent legal developments	3.80	4.18	4.08	3.95	3.96	4.13	4.12	
5. Absence of bias or prejudice in civil cases	3.91	3.79	4.01	3.92	3.11	3.93	3.80	
6. Absence of bias or prejudice in criminal cases	3.66	3.72	3.99	3.67	3.11	3.94	3.79	
7. Absence of bias or prejudice in domestic relations cases	3.86	3.87	4.00	3.90	3.36	3.94	3.89	
8. Not influenced by nature of case	3.72	3.64	3.90	3.75	2.93	3.81	3.69	
9. Not influenced by identities of lawyers involved	3.88	3.83	3.93	3.94	3.26	3.99	3.87	
10. Not influenced by identities of litigants involved	3.87	3.87	4.03	3.95	3.30	4.04	3.92	
11. Not influenced by improper, ex parte approaches	4.18	4.20	4.26	4.21	3.75	4.23	4.22	
12. Quality and clarity of written opinions	3.61	3.97	3.89	3.71	3.47	3.96	3.88	
13. Patience and courtesy to lawyers	4.05	3.86	4.16	4.06	3.21	4.16	3.45	
14. Absence of undue personal observations or criticisms of litigants, judges, and lawyers from the Bench or in written opinions	4.09	3.84	4.06	4.06	3.13	4.04	3.59	
A. Is the judge's health such that the judge can effectively discharge the duties of judicial office?	% Yes	75.3	78.3	81.9	79.6	81.4	83.0	80.3
	% No	1.9	2.4	1.0	1.1	1.6	.8	1.4
	% N.Op.	22.6	19.1	16.9	19.1	16.8	16.0	18.1
B. In your opinion, should this judge be retained in office?	% Yes	85.0	85.5	93.0	89.1	60.9	90.5	86.6
	% No	8.8	11.5	4.3	7.1	35.1	7.4	9.3
	% N.Op.	6.1	2.8	2.5	3.6	3.9	2.0	4.0
Approximate number of persons who rated this judge:	487	526	505	487	586	499	515	

*Stands for retention in 1986

38. *Results: 1986 Judicial Performance Evaluation*, NSBA NEWS (Neb. State Bar Ass'n, Lincoln, Neb.), Aug., 1986, at 18 (reprinted with permission).

1988 Judicial Evaluation Poll³⁹

Nebraska Supreme Court

- 5=Excellent (performance is outstanding)
 4=Good (performance is above average)
 3=Satisfactory (performance is adequate)
 2=Deficient (performance is below average)
 1=Very Poor (performance is well below average and unacceptable)

Characteristics	Leslie Bostough	D. Nick Caporale	John T. Grant	William C. Hastings	Thomas M. Shanahan	C. Thomas White	
	Average Scores						
1. Knowledge and application of substantive law	3.97	4.26	4.00	4.05	4.15	4.13	
2. Knowledge and application of rules of evidence and procedure	3.97	4.26	4.07	4.11	4.17	4.14	
3. Ability to perceive factual and legal issues	3.92	4.20	4.05	4.09	4.21	4.14	
4. Awareness of recent legal developments	4.00	4.24	4.17	4.15	4.32	4.21	
5. Absence of bias or prejudice in civil cases	4.09	3.95	3.97	4.08	3.99	3.87	
6. Absence of bias or prejudice in criminal cases	3.83	3.86	3.97	3.87	4.06	3.89	
7. Absence of bias or prejudice in domestic relations cases	3.98	3.96	3.98	3.94	4.08	4.00	
8. Not influenced by nature of case	3.91	3.82	3.86	3.92	3.90	3.73	
9. Not influenced by identities of lawyers involved	4.11	4.05	4.01	4.08	4.07	4.00	
10. Not influenced by identities of litigants involved	4.13	4.04	4.05	4.12	4.06	4.00	
11. Not influenced by improper, ex parte approaches	4.35	4.35	4.31	4.35	4.36	4.35	
12. Quality and clarity of written opinions	3.78	4.07	3.84	3.90	4.04	3.95	
13. Patience and courtesy to lawyers	4.29	3.91	4.17	4.20	4.22	3.59	
14. Absence of undue personal observations or criticisms of litigants, judges, and lawyers from the Bench or in written opinions	4.23	3.91	4.04	4.16	4.07	3.67	
A. Is the judge's health such that the judge can effectively discharge the duties of judicial office?	% Yes	79.4	80.9	81.6	80.2	84.0	82.9
	% No	2.3	1.7	2.7	1.7	1.4	1.5
	% N.Op.	18.2	17.2	15.5	17.9	14.4	15.5
B. In your opinion, should this judge be retained in office?	% Yes	90.2	90.7	93.3	93.7	91.6	89.6
	% No	6.5	7.1	5.6	4.5	6.9	9.3
	% N.Op.	3.1	2.0	.9	1.6	1.3	.9
Approximate number of lawyers who rated this judge:	410	431	424	416	432	416	

39. *Results: 1988 Judicial Performance Evaluation*, NSBA NEWS (Neb. State Bar Ass'n, Lincoln, Neb.), Aug., 1988, at 10 (reprinted with permission).

1990 Judicial Evaluation Poll⁴⁰

Nebraska Supreme Court

- 5 = Excellent (performance is outstanding)
- 4 = Good (performance is above average)
- 3 = Satisfactory (performance is adequate)
- 2 = Deficient (performance is below average)
- 1 = Very Poor (performance is well below average and unacceptable)

Characteristics	Leslie Boslaugh*	D. Nick Caporale	Dale E. Fahrbruch	John T. Grant	William C. Hastings*	Thomas M. Shanahan	C. Thomas White	
	Average Scores							
1. Knowledge and application of substantive law	3.86	4.15	3.95	3.95	3.97	4.13	4.06	
2. Knowledge and application of rules of evidence and procedure	3.95	4.19	4.00	4.01	4.03	4.15	4.11	
3. Ability to perceive factual and legal issues	3.91	4.15	3.96	4.00	3.94	4.12	4.08	
4. Awareness of recent legal developments	3.96	4.20	4.02	4.07	4.08	4.31	4.17	
5. Absence of bias or prejudice in civil cases	4.06	3.94	3.98	3.96	4.03	3.93	3.79	
6. Absence of bias or prejudice in criminal cases	3.86	3.90	3.81	4.00	3.88	4.11	3.96	
7. Absence of bias or prejudice in domestic relations cases	3.92	3.92	3.90	3.99	3.95	4.11	3.99	
8. Not influenced by nature of case	3.85	3.76	3.79	3.78	3.82	3.73	3.68	
9. Not influenced by identities of lawyers involved	4.06	4.02	3.98	3.97	4.03	4.03	3.94	
10. Not influenced by identities of litigants involved	4.06	4.00	4.04	4.02	4.07	4.00	3.97	
11. Not influenced by improper, ex parte approaches	4.35	4.37	4.31	4.31	4.33	4.38	4.33	
12. Quality and clarity of written opinions	3.73	4.02	3.81	3.86	3.84	3.95	3.94	
13. Patience and courtesy to lawyers	4.20	3.88	3.88	4.12	4.15	4.16	3.64	
14. Absence of undue personal observations or criticisms of litigants, judges, and lawyers from the Bench or in written opinions	4.22	3.96	4.00	4.07	4.14	3.94	3.75	
A. Is the judge's health such that the judge can effectively discharge the duties of judicial office?	% Yes	73.5	77.2	74.0	77.9	77.7	79.7	78.9
	% No	2.4	1.5	2.3	2.1	1.8	1.4	2.1
	% N.Op.	24.0	21.2	23.5	19.9	20.4	18.7	18.9
B. In your opinion, should this judge be retained in office?	% Yes	91.5	91.4	93.1	93.1	91.9	88.6	87.7
	% No	6.9	7.6	5.6	5.6	6.3	10.5	10.7
	% N.Op.	1.4	.8	1.2	1.1	1.7	.8	1.4
Approximate number of lawyers who rated this judge:	345	351	320	351	349	360	352	

*Stands for retention in 1990

40. Results: 1990 Judicial Performance Evaluation, NSBA NEWS (Neb. State Bar Ass'n, Lincoln, Neb.), July, 1990, at 17 (reprinted with permission).

1992 Judicial Evaluation Poll⁴¹

Nebraska Supreme Court

- 5 = **Excellent** (performance is outstanding)
- 4 = **Good** (performance is above average)
- 3 = **Satisfactory** (performance is adequate)
- 2 = **Deficient** (performance is below average)
- 1 = **Very Poor** (performance is well below average and unacceptable)

	Leslie Bostlaugh, Lincoln	D. Nick Caporale, Lincoln*	Dale E. Fahrbruch, Lincoln*	William C. Hastings, Lincoln	Thomas M. Shanahan, Lincoln*	C. Thomas White, Lincoln*
	Average Scores					
1. Knowledge and application of substantive law	3.74	4.16	3.81	3.84	4.21	4.05
2. Knowledge and application of rules of evidence and procedure	3.76	4.12	3.88	3.88	4.21	4.07
3. Ability to perceive factual and legal issues	3.69	4.07	3.85	3.81	4.22	4.06
4. Awareness of recent legal developments	3.73	4.12	3.90	3.88	4.35	4.14
5. Absence of bias or prejudice in civil cases	3.85	3.79	3.78	3.79	3.95	3.81
6. Absence of bias or prejudice in criminal cases	3.65	3.76	3.58	3.59	4.07	3.90
7. Absence of bias or prejudice in domestic relations cases	3.79	3.78	3.67	3.75	4.04	3.91
8. Not influenced by nature of case	3.75	3.68	3.66	3.66	3.87	3.77
9. Not influenced by identities of lawyers involved	3.89	3.92	3.85	3.83	4.07	3.99
10. Not influenced by identities of litigants involved	3.90	3.93	3.85	3.84	4.12	3.98
11. Not influenced by improper, ex parte approaches	4.23	4.31	4.21	4.21	4.39	4.29
12. Quality and clarity of written opinions	3.53	4.00	3.67	3.64	4.09	3.92
13. Patience and courtesy to lawyers	4.09	3.83	3.75	3.99	4.17	3.69
14. Absence of undue personal observations or criticisms of litigants, judges and lawyers from the Bench or in written opinions	4.10	3.87	3.85	3.99	3.80	3.95
A. Is the judge's health such that the judge can effectively discharge the duties of judicial office? (Y)yes, (N)no	% Yes 90.8	94.6	92.0	94.3	96.6	96.2
	% No 9.1	5.3	7.9	5.6	3.3	3.7
B. In your opinion, should this judge be retained in office? (Y)yes, (N)no	% Yes 83.8	87.0	88.2	88.2	88.8	89.4
	% No 16.1	12.9	11.7	11.7	11.1	10.5
Approximate number of lawyers who rated this judge	325	334	311	323	347	337

* Stands for retention in 1992

41. *Results: 1992 Judicial Performance Evaluation*, NSBA News (Neb. State Bar Ass'n, Lincoln, Neb.), July, 1992, at 14 (reprinted with permission).

1994 Judicial Evaluation Poll⁴²**Nebraska Supreme Court**

- 5 = Excellent (performance is outstanding)
 4 = Good (performance is above average)
 3 = Satisfactory (performance is adequate)
 2 = Deficient (performance is below average)
 1 = Very Poor (performance is well below average and unacceptable)

Characteristics	Leslie Boslaugh, Lincoln	D. Nick Caporale, Lincoln	Dale E. Fahrbruch, Lincoln	William C. Hastings, Lincoln	David J. Lanphier, Lincoln	C. Thomas White, Lincoln	
	Average Scores						
1. Knowledge and application of law	3.6	4.0	3.7	3.7	3.9	4.0	
2. Ability to perceive factual and legal issues	3.6	4.1	3.7	3.7	3.9	4.0	
3. Not influenced by nature of case	3.5	3.5	3.6	3.5	3.8	3.7	
4. Not influenced by outside factors	3.7	3.6	3.7	3.6	3.8	3.8	
5. Does not engage in improper ex parte communications	4.2	4.3	4.2	4.1	4.3	4.2	
6. Attentiveness to oral arguments	3.2	4.1	3.8	3.8	4.0	4.1	
7. Quality and clarity of written opinions	3.4	3.8	3.6	3.5	3.7	3.8	
8. Patience and courtesy to litigants, witnesses, jurors and lawyers	4.0	3.8	3.7	3.9	4.1	3.6	
9. Absence of undue personal observations or criticisms of litigants, judges, and lawyers from the Bench or in written opinion	4.0	3.8	3.8	3.9	4.1	3.8	
10. In your opinion, should this judge be retained in office?	% Yes	75.8	83.9	85.9	79.5	92.5	88.7
	% No	24.1	16.0	14.0	20.4	7.4	11.2
Approximate number of persons who rated this judge	325	335	324	342	254	340	

42. *Results: 1994 Judicial Performance Evaluation*, NSBA NEWS (Neb. State Bar Ass'n, Lincoln, Neb.), July, 1994, at 16 (reprinted with permission).

1996 Judicial Evaluation Poll⁴³

Nebraska Supreme Court

Please read all instructions before beginning your evaluation.

Please rate each judge with whom you have professional experience on items #1-10 by writing one number or letter in the appropriate space. Use this scale:

- 5 = Excellent (performance is outstanding)
- 4 = Good (performance is above average)
- 3 = Satisfactory (performance is adequate)
- 2 = Deficient (performance is below average)
- 1 = Very Poor (performance is well below average and unacceptable)

Characteristics

		101	102	103	104	105	106	107
		D. Nick Caporale	William M. Connolly	Dale E. Fahrbruch	John M. Gerrard	David J. Laphier	C. Thomas White	John F. Wright
1. Knowledge of the law		3.8	4.0	3.4	4.0	3.4	3.5	4.0
2. Ability to perceive factual issues and apply the law		3.5	3.9	3.2	3.9	3.3	3.4	3.9
3. Not influenced by nature of case		3.2	3.8	3.1	3.9	3.2	3.0	3.8
4. Not influenced by outside factors		3.3	3.8	3.2	3.9	3.2	3.0	3.8
5. Attentiveness to oral arguments		3.8	4.0	3.4	4.1	3.7	3.5	4.1
6. Quality and clarity of written opinions		3.6	3.9	3.3	3.9	3.3	3.3	3.9
7. Patience and courtesy to litigants and lawyers		3.5	4.1	3.3	4.2	3.8	3.0	4.0
8. Absence of undue personal observations or criticisms of litigants, judges and lawyers from the Bench or in written opinions		3.5	4.0	3.4	4.0	3.7	3.1	4.0
9. Does the judge appear to devote adequate time to judicial duties?	%Y	92.9	96.3	89.1	97.7	92.2	88.7	96.9
	(Yes (N)o	%N	7.0	3.6	10.8	2.2	7.7	11.2
								3.0
10. In your opinion, should this judge be retained in office?	%Y	70.3	91.8	65.7	95.3	72.8	61.1	91.1
	(Yes, (N)o, or (N.Op) No Opinion	%N	29.6	8.1	34.2	4.6	27.1	38.8
								8.8

43. Results: 1996 Judicial Performance Evaluation, STATE BAR (Neb. State Bar Ass'n, Lincoln, Neb.), Aug., 1996, at 12 (reprinted with permission).