

A FRESH LOOK AT JUDICIAL PERFORMANCE EVALUATION IN CALIFORNIA

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A Fresh Look at Judicial Performance Evaluation in California

By Rebecca Love Kourlis and Jordan M. Singer

Chief Justice Ronald George recently announced the formation of the Commission for Impartial Courts, a new state commission that will study ways to protect California courts from attacks on their independence while at the same time ensuring the impartiality and accountability of all state judges. The establishment of the Commission comes as efforts nationally to politicize and undermine public confidence in the judiciary are pervasive and growing. The “JAIL 4 Judges” initiative that plagued South Dakota in 2006 appears headed for the Idaho ballot in 2008. Alabama, Illinois and Wisconsin have recently weathered ugly judicial election campaigns fueled by special interest dollars. And the Governor of Missouri (supported by various politically-motivated interest groups) has issued an ongoing public challenge to that state’s nearly seventy-year-old system for selecting appellate judges. In the wake of these examples, and many more like them around the country, the Commission for Impartial Courts will utilize task forces to examine judicial selection and retention, and public information and education, in California.

That examination should also include a careful look at judicial performance evaluation (JPE). JPE is a time-tested method of evaluating judicial performance along apolitical measures, such as freedom from bias, temperament on the bench, and communication skills. Now in use in nineteen states and under consideration in several more, a well-designed JPE program has the benefit of informing both the public and the courts about the strengths and weaknesses of individual judges, and educating the public about the role of judges generally. And perhaps of more immediacy, JPE has the

potential to help dissipate attacks on judicial impartiality and independence by focusing the public on process-oriented judicial skills and away from specific case outcomes. It is no coincidence that the most successful efforts to target judges for removal from the bench in the past twenty years – including the targeting of three supreme court justices in California in 1986 – came in states that did not have JPE programs, while states with JPE programs rarely see focused efforts to remove a judge during a retention election.

JPE In A Nutshell

When properly designed and implemented, judicial performance evaluation programs have the potential to be positive, valuable resources for both judges and the public. First, by openly embracing judicial accountability for a fair, understandable, and reasonably efficient *process*, judges are less likely to be subject to calls that they be held “accountable” for divisive or unpopular case *outcomes*. In this sense, JPE is an effective shield against politically driven attacks.

But JPE is also a sword – a tool for voter education. Across the country, many fewer voters cast ballots in judicial retention elections than in elections for higher-profile offices like President, Governor or Senator. California is no exception. One of the key contributors to this phenomenon is lack of familiarity with the judges seeking retention. Indeed, even those individuals who do vote for judges often admit to doing so blindly, casting their votes on the basis of the judge’s name, gender, or perceived ethnicity, or voting for or against all judges. Broadly disseminated evaluation information may combat this trend by educating voters both about the skills of the individual judges

standing for retention and about the skills that every member of the public should expect from a good judge. Only an informed voter can produce an informed vote.

A third, and equally important, benefit to JPE is the opportunity it provides for professional development and training of judges. On an individual level, JPE confirms for each judge the strengths he or she brings to the bench, and informs the judge about areas or skill sets that may require more attention. The advantage to this sort of professional evaluation should not be underestimated – in studies across the country, judges who were initially skeptical of JPE later praised its effects on their job performance by bringing to light information that they could not have otherwise obtained. Similarly, collected data from multiple judicial evaluations can help an entire court decide how to allocate resources and focus judicial training.

What makes a “properly designed and implemented” JPE program? Last year, the Institute for the Advancement of the American Legal System at the University of Denver released a survey of existing JPE programs around the nation, as well as recommendations for best practices for judicial performance evaluation.¹ The study concluded that the most fair and effective JPE programs include: (1) a set of predetermined, process-oriented criteria by which to evaluate sitting judges; (2) a balanced and thoughtful evaluation commission; (3) an evaluation process that collects a wide range of data on the judge’s performance and allows each judge to have a voice in his or her own evaluation; and (4) dissemination of evaluation results to the public. The first three elements are necessary to assure the fairness, integrity, and accuracy of each evaluation. The fourth element is necessary to educate the public about the role of judges

¹ INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, SHARED EXPECTATIONS: JUDICIAL ACCOUNTABILITY IN CONTEXT (2006), *available at* <http://www.du.edu/legalinstitute/form.html>.

generally, as well as about how each individual judge is performing. We shall return to these practices in a bit.

A Short History of JPE in California

Concerted efforts to bring judicial performance evaluation to California stretch back almost twenty-five years. In 1983, State Bar President Anthony Murray first proposed the creation of a panel that would evaluate appellate justices who were facing serious election challenges. The evaluation was to have been based on the judges' integrity, diligence, and judicial ability. Despite initial support within the bar, the proposal failed. It had neither the support of the state judges nor the state legislature, the latter of which went so far as to pass a bill prohibiting the state bar from conducting evaluations. Ultimately, a special committee of the state bar concluded that an evaluation process was premature, and that instead the bar ought to focus on developing "objective criteria by which the performance of appellate judges should be evaluated."² However, nothing specific came of that recommendation.

In 1985, the American Bar Association recommended establishing formal, state-sponsored JPE programs, designed not only to assist voters in retention elections but also to promote judicial self-improvement. A number of states did implement formal JPE programs over the next several years, but California was not among them. This omission may have impacted the 1986 retention election, when three justices on the state supreme court were targeted for removal. With no objective criteria from a JPE program to point to as evidence of their performance on the bench, the targeted justices were forced to base

² Report of the Ad Hoc Committee Concerning Whether to Implement an Appellate Justices Evaluation Committee (June 15, 1984) at 5 (on file with authors).

their case for retention on the rather esoteric merits of judicial independence. The strategy did not work, and none of the three justices were retained.

In the wake of the 1986 election, the Los Angeles County Bar Association began developing its own judicial evaluations. First released in 1990, these evaluations were based primarily on surveys of lawyers and a personal data questionnaire completed by each judge. Judges were rated as either “qualified” or “not qualified.” The L.A. Bar continues to evaluate judges and judicial candidates in advance of elections, and to release those evaluations to the public. It is an important step, but in the end, it is a bar survey, not a comprehensive JPE program.

A Fresh Look at JPE in California

Previous attempts to implement JPE in California had the right motivation, but were doomed by the details. In the early 1980’s, the concept of JPE was still in its infancy, and not enough thought had been given nationally to what a well-functioning program should look like. Fortunately, in the last twenty-five years many varieties of JPE programs have been implemented across the country, and best practices have been identified. This section examines the lessons learned from earlier efforts to introduce JPE in California, and what can be done today to develop a JPE program that benefits the courts and the public alike.

Lesson #1: Evaluations must be designed to educate both judges and the public.

Judicial performance evaluations can inform the judges about their own strengths and weaknesses, and the public about what they should expect of their judges. A great JPE program must do both. With respect to judges, JPE should clearly identify strengths and

weaknesses to help guide professional development. With respect to the public, evaluations should never rank judges, but should discuss individual strengths and weaknesses in the context of the criteria for evaluation. This helps reinforce that a good judge is one who works to ensure a fair, efficient and clear process rather than one who reaches a specific case outcome.

Judicial performance evaluations are particularly critical when judges face retention elections, because the JPE process often provides the only information to voters about the skill and commitment of their judges to providing a fair, efficient and courteous courtroom experience. Accordingly, JPE information prior to retention elections should be widely disseminated to the voting public, through newspapers, voter guides, and the internet. Alaska's Judicial Council has even run radio ads to alert voters about the presence of JPE information and to encourage voters to learn about their judges prior to Election Day.

Lesson #2: Evaluation criteria must be predetermined, objective and clear.

Good evaluations start with the right criteria. In a best practices JPE program, those criteria reflect the qualities that a litigant (or juror, or witness) would expect of a judge when walking into court for the first time: knowledge of the substantive law and applicable procedural rules, integrity and freedom from bias, appropriate courtroom demeanor, the ability to handle caseloads effectively and without undue delay, and clear explanations of rulings and instructions. Such criteria all go to the *process* of judging, not the outcome of any particular case. Focusing on the adjudicative process rather than case outcomes not only helps to protect the independence and impartiality of the courts, but also better reflects the desires of individual litigants for a fair and efficient process.

Indeed, significant research has shown that for individual litigants, the opportunity to be fairly heard and “have their day in court” is more important than the ultimate case outcome. A strong JPE program must measure what counts. And of course, judges should know the evaluation criteria well before any evaluations begin.

Lesson #3: The evaluation commission must elicit the confidence of judges and the public. The integrity of judicial evaluations is only as high as the integrity of those performing them. To this end, a successful JPE program must utilize a respected, qualified and balanced evaluation commission. While commissions vary greatly in size around the country, the most effective commissions strike a balance in their membership between lawyers and non-lawyers, along partisan lines, and in the means by which commission members are appointed. The ten-member state commission that evaluates all appellate judges in Colorado, for example, consists of six non-lawyers and four lawyers. Commission members serve staggered four-year terms, with two or three members each being appointed by the governor, chief justice, speaker of the house, and president of the senate. This balance helps assure that a wide range of voices are heard with respect to each judicial evaluation.

The inclusion of non-attorneys on the evaluation commission has other significant benefits. First, the active participation of lay citizens on the commission helps build public trust in the evaluation process because evaluations are not seen merely as the work of legal insiders. This has been one of the criticisms of bar association surveys: even though they may be conducted in good faith and employ the same process-oriented criteria for measuring judicial performance, any evaluation (especially a strong one) may be seen by the public as lawyers and judges simply protecting one of their own. Bringing

non-lawyers into the fold – and indeed, having them comprise a majority of the evaluation commission – helps alleviate that perception. Second, and as important, the inclusion of non-lawyers plays a critical educational role. Studies have shown that lay citizens who participated on evaluation commissions walked away from the experience with a much deeper appreciation of the role of the judge and the challenges that judges face.

An additional check on the commission is to allow each evaluated judge to appeal the initial recommendation before it is released to the public. In Colorado, for example, evaluated judges are given a draft of the evaluation 120 days before the retention election; if a judge disputes any aspect of the evaluation, he or she may schedule a second interview with the commission to discuss the matter, at which point the commission may change its evaluation or recommendation. If the commission stands by its previous work, the judge may compose his or her own statement to the public, which is published together with the commission's evaluation.

Lesson #4: Evaluations must be based on a wide range of information about the judge's performance, not just attorney surveys. Surveys are important tools for gauging reaction to judicial performance, but they must be used properly in order to draw beneficial conclusions. First, surveys should be developed and sent to more than just attorneys: jurors, witnesses, court staff, and litigants have valuable observations about the judge's performance that are not likely to be captured by an attorney survey. Second, each survey must be tailored to its specific audience: the questions asked of a lawyer who has appeared before the judge will naturally diverge somewhat from the questions asked of jurors or court staff. In addition, surveys must be distributed and completed in

sufficient number to draw statistically fair and reasonable conclusions, and respondents' anonymity must be protected so that they feel free to voice concerns. Data based on a self-selected or too-small survey sample benefits no one. To this end, states using JPE typically use an independent survey company to distribute the surveys, collect and compile responses, and assure the integrity and anonymity of responses.

But surveys are just the start. The evaluation commission should extend a wide net to collect information consistent with the evaluation criteria in order to get the best possible sense of the judge's performance. Specifically, in addition to surveys, the commission should consider information gleaned from: (1) the judge's case management statistics; (2) direct observation of the judge in the courtroom; (3) one or more interviews with the judge being evaluated; (4) a review of selected orders or opinions from the judge to ascertain clarity of communication (again, not with an eye to the case outcome); (5) a judicial self-evaluation; and (6) public comments. Obviously, the type of information sought may vary according to the judge's bench assignment.

Once the relevant information is collected, it is the role of the evaluation commission to analyze the data and reach conclusions about the strengths and weaknesses of each judge's performance. Most jurisdictions using JPE leave that analysis up to the members of the commission, although Utah and Colorado instruct the commission to conduct its analysis and base any retention recommendation in light of specific benchmarks for judicial performance. In any event, the evaluation should take into account all relevant information about the judge consistent with the evaluation criteria, in order to get the fullest possible sense of the judge's performance.

Lesson #5: Evaluations must involve all judges, and take place regularly. A best practices JPE system evaluates judges not only at the end of each term, but also during the course of the term. The benefits to regular evaluation are substantial. First, each sitting judge receives feedback on his or her strengths and weaknesses on the bench prior to a retention election, allowing for professional development and improvement out of the public eye. In addition, multiple evaluations prior to a retention election reduce the possibility of a single evaluation skewing public perception. One recommended practice is to keep midterm evaluations confidential until a retention election, when all evaluations conducted during that term are released to the public.

Evaluation of all judges may reasonably be extended to judicial candidates as well. The Los Angeles County Bar Association already evaluates trial judge candidates and makes a recommendation as to their qualification for the position they seek. The L.A. Bar's evaluation process for candidates is similar to its process for judges, and there is no reason why similar, much more comprehensive evaluations, cannot be developed for aspiring candidates that would mirror a comprehensive evaluation process for judges.³ The benefits to judicial candidates and the public are the same: highly or poorly qualified candidates are identified before the election, and all successful candidates have information about their colleagues' perceptions of their strengths and weaknesses before they even take the bench.

Lesson #6: Judges themselves need to be on board. One of the major contributing factors to the failure of bar-sponsored JPE in the 1980's was the perception – real or otherwise – that the judges themselves did not support performance evaluation.

³ See Jordan M. Singer, *Knowing Is Half the Battle: A Proposal for Prospective Performance Evaluations in Judicial Elections*, 29 U. ARK. LITTLE ROCK L. REV. 755 (2007).

But the growing public outcry for judicial accountability across the country underscores the need for courts to accept proper accountability measures, and better yet, to embrace such measures as ways to improve their own performance.

California will not be alone in this endeavor. Interest in JPE programs across the country is real and growing. In Minnesota, a Commission headed by former Governor Al Quie recently recommended that all state judges take part in judicial performance evaluation as part of a larger move to merit selection and retention elections. The North Carolina Bar Association is pushing for JPE in that state, and is beginning pilot programs. New Hampshire, Utah and Colorado, all of which have had JPE programs for many years, are actively exploring how to make their programs even better. The time is ripe for California to join the growing chorus of states that want judicial accountability the right way. We invite you to explore the myriad advantages of JPE, and to consider how to best implement it to the benefit of California judges and California citizenry.

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