



# Building Shared Expectations: Using Judicial Performance Evaluations to Promote Judicial Accountability<sup>1</sup>

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Over the last few years, judicial selection has become increasingly contentious, even in states that only hold retention elections, like Wyoming. The clearest example is the Iowa 2010 retention election in which three Justices were ousted for their participation in a unanimous 2009 opinion that held an Iowa law restricting marriage to a man and a woman as unconstitutional under the state constitution. Iowa, like Wyoming, does not have an official judicial performance evaluation (JPE) program, so the vast majority of information upon which the voters relied came from television and internet ads.

There is an important role for broad-based judicial performance evaluation in this climate. Efforts to unseat judges based upon one case or a group of controversial opinions is often couched as an effort to hold judges more accountable; “accountability” being defined (implicitly or explicitly) as adherence to the will of the majority. The public is increasingly being asked to hold judges accountable for the outcomes of specific cases, rather than the appropriateness of the process used to reach those outcomes. Without other information about the judge’s job performance, voters may be constrained in their effort to cast an informed vote.

It is clear that there is confusion about what “accountability” means and a lack of proper information about our judges. Accordingly, the time is ripe to return “judicial accountability” to its traditional, process-based role: a vital partner, along with “judicial impartiality,” in en-

suring an effective judicial branch.<sup>3</sup>

Seventeen states, plus the District of Columbia, employ some form of a judicial performance evaluation program. These programs vary in their specifics, for example, they may use slightly different criteria for measuring judges’ performance, or seek information from somewhat different sources, or share information with the public in different ways. As a general rule, all focus on whether judges are managing cases efficiently, deciding them on the basis of established facts and applicable law, explaining their decisions clearly, and exhibiting proper courtroom demeanor. In addition, regardless of the differences in their formats, JPE programs are uniformly process-oriented, as opposed to outcome-oriented; what matters is whether the judge handled a case in a balanced, fair, and efficient manner; not whether the ultimate decision in the case provoked limited or even widespread opposition.

Each judge is typically evaluated by an independent commission consisting both of attorneys and non-attorneys. The commission provides surveys to attorneys, jurors, and others who have interacted with the judge in a professional setting, asking for anonymous responses to questions about the judge’s professional skills. In more comprehensive programs, the commission also reviews the judge’s case management statistics and written opinions, solicits public comments on the judge’s performance, and conducts one or more interviews with the judge. The commission then uses the

collected information to measure each judge’s performance against predetermined criteria. Because appellate judges typically work more collectively and have different roles in the judicial system, they generally are subject to different criteria than trial judges or magistrates.

JPE programs have been most commonly used in retention election states where the only question on the ballot is “Should Judge X be retained in office?” In the 17 states in which JPE is in place, the results are not always provided to voters. In 7 states, performance evaluation results are provided to voters for use in retention elections; in 3 states and the District of Columbia, the results are provided to only those responsible for reappointing judges; in 2 states, summary results (no individual judge is identified) are provided to voters; and in 5 states, the results are only provided to the judges themselves for the purpose of self-improvement.


Judicial performance evaluations are likely to promote judicial accountability in three ways. First, JPE programs can provide a valuable source of information to voters about their judges and judicial candidates. The JPE data may be the only source of balanced information about the judge’s broad performance on the bench. Voters need that information, AND they are more likely to vote when they have it.<sup>4</sup>

JPE programs can also build shared expectations about the judiciary by educating the public about the specific qualities that make a good judge. JPE programs measure the characteristics expected

from an independent, knowledgeable judge: impartiality, temperance, knowledge of the law, fair application of the law, and efficiency. Voters who think of a judge in these terms, rather than as a robed policymaker, are arguably more likely to vote carefully and objectively in a judicial election.

Finally, judges themselves stand to benefit from the formal feedback of an evaluation. Each evaluated judge receives concrete information about the strengths and weakness of his or her performance, creating individualized opportunities for professional self-improvement. JPE programs can provide judges with feedback that simply could not, or would not, be captured through any other medium. This is particularly true for interpersonal performance issues, such as courtroom demeanor, which a judge cannot truly evaluate for him- or herself and which lawyers, jurors, and litigants are unlikely to comment upon except through formal, anonymous evaluations.<sup>5</sup>

Rarely does a process that has been in use for three decades qualify as an im-

portant “discovery,” but for the majority of courts, JPE is exactly that. It is an important component to balancing judicial accountability and judicial independence. It identifies the proper criteria by which to review a judge, without invading the province of judicial independence so critical to our democracy. And it serves as a valuable educational tool both for judges and the public they serve. For every court system in the United States, judicial performance evaluation is an idea whose moment has come. 

#### notes

- 1 Parts of this article first appeared in *Judicature*, and are reprinted here with permission. Rebecca Love Kourlis & Jordan M. Singer, *Using Judicial Performance Evaluations to Promote Judicial Accountability*, 90 *JUDICATURE* 5, 200 (2007).
- 2 IAALS, the Institute for the Advancement of the American Legal System, is a national independent research center based at the University of Denver.
- 3 See, e.g., S. REP. NO. 96-362, at 7 (1980), reprinted in 1980 U.S.C.A.N. 4315, 4321.
- 4 See Report of the Commission to Promote Public Confidence in Judicial Elections 38 (2004) (on file with authors), available at <http://www.courts.state.ny.us/reports/JudicialElectionsReport.pdf> (58% of New York voters said they did not vote in judicial elections because they lacked candidate information); see also Kenyon N. Griffin & Michael J. Horan, *Patterns of Voting Behavior in Judicial Retention Elections for Supreme Court Justices in Wyoming*, 67 *JUDICATURE* 68, 72 (1983) (finding a high rate of abstentions among voters who had no information on the judges facing retention).
- 5 See, e.g., Editorial, *The Judicial Survey*, 155 N.J.L.J. 748 (Feb. 15, 1999) (noting that “[t]he tradition of deference may serve to conceal that information [on courtroom demeanor] from the very person who needs it most, particularly if the judge’s problem is a lack of audience-sense or of the ability to put himself in the shoes of another person.”).



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