

IAALS Quality Judges Initiative Appellate Judicial Performance Evaluation



Focus Group Report

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Appellate Judicial Performance Evaluation

The Institute for the Advancement of the American Legal System (IAALS) at the University of Denver has worked in the area of judicial performance evaluation (JPE) since January 2006. JPE is typically used to provide constructive feedback to individual judges and to generate information for voters and other decision-makers who make judicial retention decisions. In states where JPE programs exist, they have been most commonly used in the evaluation of trial judges. There are fewer states, however, that currently evaluate appellate judges.

As a result, with a national conference on evaluating the performance of appellate judges in August 2011, IAALS began to focus on developing a more tailored evaluation process for judges of state appellate courts. Because the roles and responsibilities of trial and appellate judges differ in significant ways, IAALS identified the need for a model appellate judicial performance evaluation program that focuses on the specific functions of appellate judges within the court system. IAALS plans to offer the model program to states interested in developing a JPE program for appellate judges, as well as to states with existing programs that may benefit from improvement or expansion.

In consultation with a Task Force organized at the August 2011 conference, IAALS began to build a model appellate JPE program that will include direct opinion review, supplemented by surveys of respondents who are familiar with the judge's work. The proposed survey instruments will focus on three particular respondent groups: attorneys, trial judges, and court staff. The attorney version of the survey will include three subsets of questions, based on the level of professional contact the attorney has had with the judge being evaluated. Specifically, these subsets of questions will be directed to:

- attorneys who are members of the state bar and who have used the judge's opinion(s) in their work;
- attorneys who have appeared before the judge in oral argument; and
- attorneys in whose case(s) the judge has written an opinion for the court.

To ensure the development of the best possible survey instruments for the proposed model appellate JPE program, IAALS contracted with the Butler Institute at the University of Denver (Butler) in 2012 to conduct preliminary focus groups to help define possible performance measures for the surveys. The focus groups were also used to solicit input from attorneys and judges about the direct opinion review process, as well as possible process recommendations for states choosing to administer an appellate JPE program.

Butler conducted three focus groups in September and October 2012. The purpose, methodology, and results for these focus groups are detailed in the remainder of this report.

Purpose

Three focus groups were conducted with appellate attorneys and judges in Colorado to help IAALS: 1) define performance measures and appropriate survey categories and questions in accordance with these measures; 2) determine what subset of attorneys, judges, and/or court staff should ideally be included in the JPE process; 3) explore how to assess process-based (rather than outcome-based)

aspects of written opinions for purposes of evaluation and measurement; and 4) identify additional performance measures to consider in an appellate JPE program.

Methods

Butler staff conducted three separate focus groups to elicit feedback on how to define and ultimately evaluate appellate judicial performance. The three focus groups had the following composition:

Focus Group 1: Seven appellate attorneys, two of whom were former appellate judges

Focus Group 2: Seven appellate judges, including two current or former supreme court justices and five intermediate appellate court judges

Focus Group 3: Five attorneys (both appellate and trial), and one law professor

All participants were attorneys and judges practicing in Colorado who had previous connections with IAALS. In this sense, the participants were a “convenience sample.” Focus group participants all had some level of experience with judicial performance evaluation, either as a Colorado judge subject to evaluation or a Colorado attorney who had participated in the evaluation process.

Focus group facilitators spent two hours with each group. The first portion of the focus group time concentrated on identifying the behaviors that appellate judges are, or should be, accountable for in their professional performance. The second portion focused on identifying process-based standards for evaluating written opinions and exploring non-survey based tools that might be incorporated into the evaluation program. Focus group discussion guides are provided in the Appendix and contain the full list of questions asked of each group. Generally, however, the focus groups asked participants to consider:

- What aspects of appellate judge responsibilities should be part of a performance evaluation process; and
- What evaluators should look for in a well-written appellate opinion.

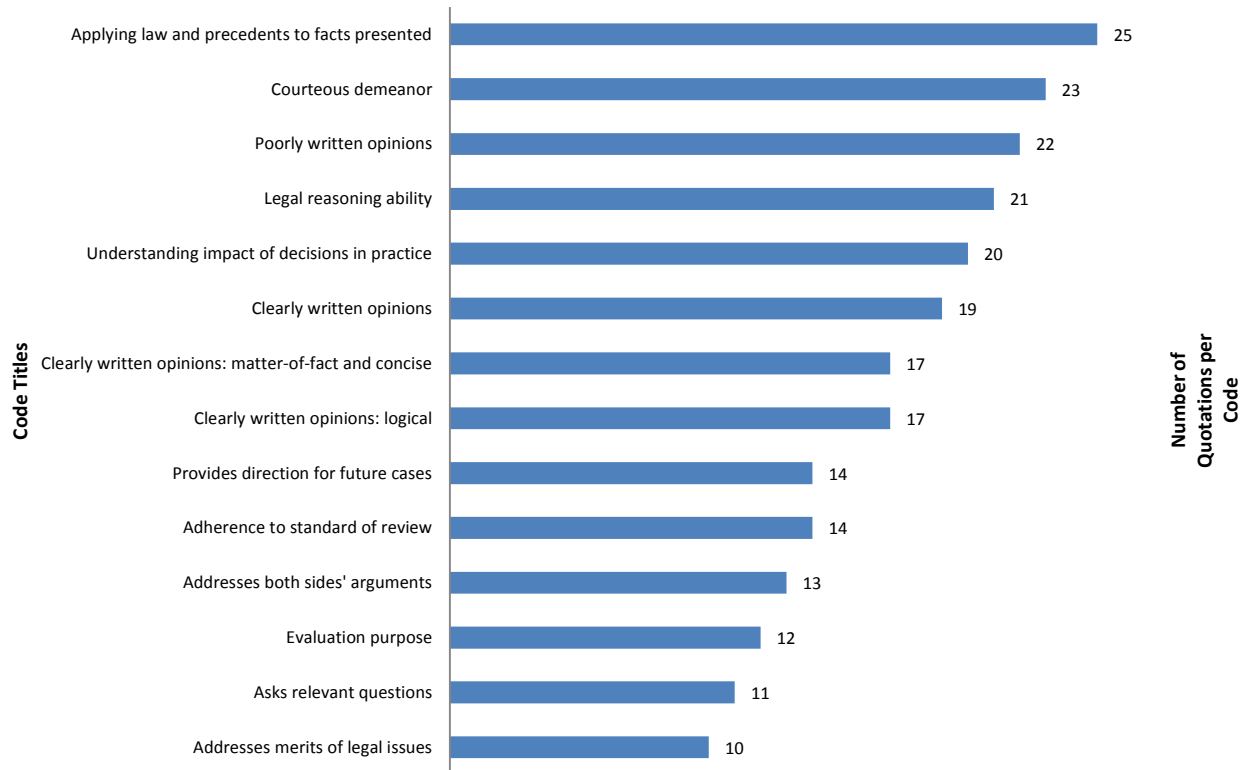
Focus group discussions were recorded and transcribed for analysis. Evaluators from the Butler Institute used Atlas-ti (a qualitative data analysis software package) to identify common themes from the transcripts, which are described in this report. Initial codes were developed based on expected themes that IAALS had drawn from existing JPE processes around the country. In addition, inductive coding was used to create new codes for ideas that were not previously identified through IAALS research but that evolved from the discussions nonetheless. “Code families” or umbrella categories were developed that grouped similar codes into broader themes that might be represented in an appellate JPE program.

Results

Qualitative analyses resulted in the identification of ninety-eight codes that described focus group participants’ discussions about appellate judge evaluations. The most frequently utilized codes are displayed in Figure 1, below.

Figure 1

Top Codes: IAALS Focus Groups 2012



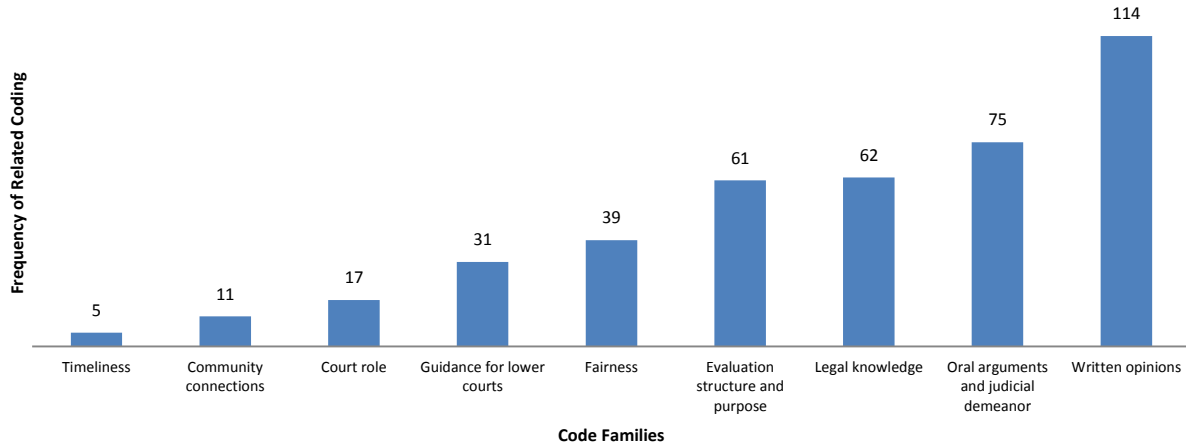
Specific codes that addressed similar themes were grouped into code families, which are broader categories of related ideas. The analysis revealed nine code families or themes into which comments fell across all three focus groups. These were:

- Written opinions
- Oral arguments and judicial demeanor
- Legal knowledge
- Evaluation structure and purpose
- Fairness
- Guidance for lower courts
- Court role
- Community connections
- Timeliness

Figure 2 displays the frequency counts for comments within each of these nine categories. All three focus groups identified an appellate judge's demeanor and written opinions as key areas for assessment in the judicial evaluation process, followed next by the extent to which appellate judges display a command of legal knowledge. These categories and the rest that were identified in the analysis are detailed and discussed in greater depth below.

Figure 2

Code Families: IAALS Focus Groups 2012



Written Opinions

The focus group design was developed, in part, to identify aspects of an appellate judge’s written opinion that should be considered as part of a JPE process, so it is not surprising that the most represented code family was “written opinions.” However, the individual codes within this family provide detailed information about those aspects of a written opinion that make it stand out as particularly well-written and useful. In particular, participants indicated that well-written opinions avoid extraneous information, language inconsistencies, and “showing off.” Instead, they are matter-of-fact, concise, and logical: “Simple, but not simplistic.”

As one participant put it, “...it comes down to what’s the purpose of writing an opinion; [it should] be as clear as possible, and using words that most people don’t know makes that more difficult.” Several

“So the qualities that I would identify...are just the directness and efficiency, the use of everyday language, and the willingness to use innovative techniques to make it easier on the reader.”

participants gave specific examples of writing elements that can make an opinion more readable, including the use of sub-headings throughout the document and the willingness to use unusual communication devices, such as photographs.

In addition to describing the ideal writing style that can make an opinion readable, focus group participants also identified several factors that can make an appellate opinion more usable for attorneys and lower courts. Specifically, participants cited opinions that make a clear statement on the holding and articulate relevant facts of the case up-front as particularly easy to follow and apply. One participant said that “the holding of the case ought to be stated once and stated as clearly and succinctly as possible.”

Similarly, according to the focus group participants, those opinions that are linear and logical and cite the law are preferable to those that contain inconsistencies regarding specific details or chains of logic.

Oral Arguments and Judicial Demeanor

While focus group participants indicated that a relatively small portion of an appellate court’s time in each case is devoted to oral arguments, they nevertheless also said that a judge’s behavior at oral arguments is important. Participants from the two focus groups representing attorneys were especially aware of the impact of judicial demeanor during oral arguments, with most comments on this topic coming from those stakeholders. In particular, participants indicated that appellate judges who equitably address both sides of a legal case during oral arguments were perceived as being more fair and impartial.

“So if I’m being grilled that just goes with the territory. I suppose I might feel differently if only I were being grilled and they weren’t dishing it out to everybody.”

Additionally, participants suggested that plaintiffs and attorneys were more likely to understand and appreciate written opinions from those judges who

actively give a voice to all parties during oral arguments. As one judge put it, “I think [it]’s very important that people perceive that they have been heard, regardless of the outcome. If they lose, I think they’re much more willing to accept an outcome if they think they’ve been heard and treated with respect.”

While judicial demeanor was a factor that came up in the context of oral arguments, it showed up in focus group conversations outside of that context as well. Focus group participants, for instance, suggested that “...in discussion with fellow panel or court members about the case, [judges should] try to suppress the competitive instincts and seek the correct resolution.” Similarly, another participant described positive judicial demeanor as “Not constantly interrupting, not raising their voice, not pounding on the table, not turning their chair around.”

Legal Knowledge

In addition to the overall quality of written opinions, focus group participants also identified an appellate judge’s legal knowledge as an important construct for inclusion in any JPE process. Participants indicated that a judge’s ability to address the merits of legal issues and apply law and precedents to the presented facts is an important judicial characteristic. Those judges that have substantive knowledge of the law, use scholarly legal analysis, and adhere to the standard of review were considered more capable by focus group participants than judges that do not demonstrate these same qualities.

“I think impeccable scholarship is important. I think that means that we have to spend as much time as necessary to understand the legal principles that are in play and also to apply those.”

Evaluation Structure and Purpose

The focus group discussions were not only intended to capture thoughts about what should be included in an appellate JPE process, but also to collect information about how the process might ideally be structured. Participants in the appellate judges’ focus group, in particular, expressed some concern

about how certain concepts or behaviors might be effectively and fairly measured. According to one participant, “it’s so important that the surveys be right because if, for example, you ask is the judge well-prepared for oral argument, you’re going to get different behaviors than if you ask is the judge respectful of the parties and his or her colleagues in oral argument.”

Similarly, participants identified some aspects of an appellate judge’s role that might not be appropriate for inclusion in an evaluation process, such as community service and supreme court reversal rates. Said one participant, “[the] reversal rate really doesn’t tell you anything. All it says is that that particular issue was of interest to the court..., but it doesn’t necessarily measure the intermediate appellate judges.”

The question of who should participate in the appellate JPE process was discussed in each of the focus groups as well. Participants considered the potential for fellow appellate judges, trial judges, appellate lawyers, and court staff to play a role in the JPE process.

Generally, there seemed to be support for an array of parties to bring different perspectives to the evaluation. Participants mentioned, for instance, that

“From my standpoint, I think everybody should be involved in the evaluation process, but at the same time, it’s interesting just to see the groups and how it is that their personal position affects the outcome of their evaluations.”

peer judges on the appellate court could bring a unique perspective to an evaluation because of their access to their fellow judges in a range of settings: “So it seems to me...that [peer judges] would be the most crucial one because...they see them in conference, they see them on the bench, they see the drafts, they talk to their clerks.”

Finally, the focus groups considered the ultimate purpose behind an appellate JPE program. Most participants cited three primary purposes for judicial evaluation at the appellate level, including:

- providing feedback and guidance to individual judges,
- generating objective information for the public to use in making retention decisions, and
- identifying any instances of egregious judicial performance.

Fairness

While issues of fairness were raised as part of focus group discussions about oral arguments and judicial demeanor, the topic of fairness arose as its own category as well. The attorney groups, in particular,

“One specific example of something that makes me feel that the judge, the panel has been biased in some fashion, or partial, is when the opinion is internally inconsistent.”

discussed the importance of having appellate judges address both sides of legal arguments, in written opinions as well as at oral arguments. With regard to demonstrating impartiality in written opinions, one participant

said, “[Judges] need to...say why they prefer one solution over another or one outcome over another and...articulate their reasons and not hide behind some verbal formulations.”

Participants also talked about the apparent timing of decisions and the impact that can have on the perception of fairness. For instance, participants mentioned that, for efficiency reasons, draft opinions are frequently written before oral arguments and that those draft opinions can impact a judge’s openness to arguments that contradict the draft. According to one participant, “[T]here’s no doubt about it. The one judge, I think, that’s written [the draft opinion], apart from the rare case I talked about where they’ve written it two ways, is somewhat vested in the opinion.”

Guidance for Lower Courts

According to the focus group participants, one of the primary purposes of written opinions is to provide trial courts and attorneys with guidance in deciding or arguing future cases. As such, focus group discussions indicated that appellate judges should be evaluated, in part, on the extent to which their decisions provide this guidance for future interpretation of the law.

“If it’s a case that’s assigning new law...they ought to be thinking about deciding this case in a way that means something for the broader legal system in the area that’s involved.”

In a similar vein, focus group participants discussed the need for

the judges on the appellate courts to specifically identify when their decisions contradict or change an earlier appellate court ruling, so that lower courts can know which opinion applies. As one participant put it, “[T]he court of appeals ... [should] acknowledge when their opinion conflicts with other decisions... Because otherwise we end up, as litigants, stumbling upon these decisions and saying ‘oh wait, that isn’t any way controlling because we’ve got another opinion from two years ago that appears to conflict.’”

Court Role

This code family reflects input from focus group participants around the standard of review as a possible subject for JPE review. Comments

“You recognize what the standard of review is that you’re going to abide by and... if you don’t, then you’re basically off in the yonder doing what you’re not supposed to do, which is ... substituting your own views”.

suggested that JPE processes might be able to include a determination of whether the appellate judge being evaluated cited and consistently applied the correct standard of review in their decisions. One focus group

participant said, “[I]n the Court of Appeals, our primary focus is on error correction, which means that we’re not there primarily to announce new rules of law. We’re there primarily to apply the rules that have already been set down by statute or other opinions.” Additional discussion explored how the JPE process might determine whether the appropriate standard had been applied, with some indicating that

a simple and clear statement of the standard of review in the written opinion should be sufficient evidence and others suggesting that an accompanying explanation and analysis should also be included.

Community Connections

Some focus group participants considered whether appellate judges should be evaluated on their relationship with the public, either through community involvement activities or through behavior on the

“It’s become an important part of our job; part of the transparency and accountability of being a part of the judicial department is to bring what we do out to schools, to rotary clubs, things like that.”

bench. Generally, while there seemed to be some consensus that community involvement and positive representation of the judiciary to the public are important, there was less certainty that this was something that could or should be included in the JPE process. According to one participant, “I think you want them in the community...because I do think they need to stay in touch with the people. I just don’t think I would put that on the accountability check because I’m not sure how you would do that.”

Timeliness

The final code family that was created in the analysis of the focus groups reflects participants’ expectations for appellate judges to perform various judicial responsibilities in a timely fashion. These comments included discussions of punctuality for proceedings and the timely hearing of cases, as well as

“I think timing is very important, both as a court having your docket up to speed and current so that litigants will be heard in a timely fashion...[and] in getting an opinion out.”

the timing of when written opinions are issued. This latter issue is reflected in the following comment: “I think parties are entitled to prompt, timely decisions. We really shouldn’t have a family law case that is waiting for a decision six

months, nine months... I think they’re entitled to know where they stand.”

Next Steps

The focus groups discussed in this summary were an initial step in IAALS’ efforts to develop a model judicial performance evaluation process for appellate judges. The primary goals of the focus groups were to:

- Define possible performance measures;
- Identify appropriate evaluation survey categories and questions;
- Determine the parties (e.g., attorneys, judges, court staff) to be included in an appellate JPE process; and
- Explore how to assess written opinions for purposes of evaluation and measurement.

Next steps in the development of a model appellate JPE program include developing survey tools and opinion evaluation rubrics. These tools will draw on the results of the focus groups and will be tested before the model process is rolled out.

Appendix: Focus Group Discussion Guide

First, thank you to everyone for making the time to be here today. The purpose of our discussion is to explore how best to evaluate appellate judicial performance and ultimately how that evaluation should be structured. We are not exploring the wisdom of JPE; rather, we are trying to figure out how to do it better. So for purposes of this discussion, let's assume JPE is in place. The goal for today is to understand what appellate judges are truly accountable for in terms of performance standards and how we go about defining that accountability for purposes of constructing an evaluation. The comments and suggestions you provide today will help shed light on future recommendations.

Over the next two hours, we will be taking notes on and recording our discussion. Only Butler and IAALS staff will have access to the recording and our notes, and both will be destroyed at the conclusion of the program. Our discussion today is confidential and we ask that you respect the confidentiality of your fellow participants by not discussing participation or other information with outside individuals or groups. If you could refrain from using your cell phone during this time, we would very much appreciate it.

It is important that everyone gets a chance to talk and contribute as the intention of our meeting is to get as much insight and diversity of thought on the topic as we can over the next two hours. You will also notice that there is a sheet of paper in front of you. Throughout our conversation you will be asked some very specific questions, and you can write down your immediate thoughts on this paper so you don't forget anything before you have an opportunity to speak.

To begin, it would be nice to have everyone introduce themselves to the group. Let us know your preferred nickname if you'd like, and to help break the ice tell us what you would be doing professionally if you weren't currently a judge/attorney or what you might have liked to have done otherwise if you are currently retired from that profession.

[Introductions]

Great, so now I'd like to get you thinking very broadly about how we should hold appellate judges accountable for their performance on the bench. When you think about appellate judicial responsibilities, what would you say are the most important obligations that an appellate judge has? Please go ahead and take a moment to write down a couple of ideas/thoughts and then we'll begin the discussion.

- **Grouping:** As feedback on responsibilities comes in, we can put these ideas on post-its. We will then work to group them into similar categories on larger post-its. We can title these "responsibility" groups and define them. We will then ask what is missing from certain groups and write that in. Finally, we will identify and rank items within groups and the groups themselves in terms of importance as accountability standards. Be sure to cover:
 - Legal ability/Knowledge of the law
 - Impartiality/ Fairness
 - Professionalism
 - Communication skills

- Management/Administrative skills
- What do each of these characteristics look like in terms of behavior? In other words, how would you describe a judge who is better than average on these performance indicators versus someone who is lacking/inferior? As you consider this question, think about an appellate judge you know who embodies the ideal or whom you would define as exhibiting exemplary judicial behavior, and how would you describe that person. Do you know a judge who is far from ideal? What makes you feel that way about that judge?
- What do you think might be good indicators of success for each of these areas for an evaluation?
- If you were to consider evaluating judges using these performance indicators, are there any of these that you feel are not a fair benchmark or is beyond the control of judges and that they should not be accountable for/to? Are there other broad categories or specific things not on this list that judges should be held accountable for?

Now let's start thinking about the written opinions of appellate judges. To begin this part of the discussion I want you to first imagine a really great opinion that you have personally read—based not on the outcome of the case but on the structure and content of the opinion. You must have used some standards to gauge it as “exemplary.” If you imagine that particular written opinion, I want you to think about what components made it stand out as better than average. Go ahead and write down your thoughts and we'll begin talking in a few minutes.

(Important to keep discussion on the positive as much as possible here.)

- **Grouping:** As feedback on opinions comes in, we can put these ideas on post-its. We will then group them into similar categories on larger post-its. We can title these “opinion” groups and define them. We will then ask what is missing from certain groups and write that in. Finally, we will identify and rank items within groups and the groups themselves in terms of importance as accountability standards.
- How do you define well-written? What does that mean in layman's terms? How do you define clarity? What does that mean to the average lawyer or judge? How do we know what these qualities are when we see them?
- Be sure to specifically get feedback on defining what this looks like when it is done extremely well:
 - Clarity of expression
 - Adherence to standard of review
 - Logical reasoning
 - Application of the law to the facts presented
- Is there anything missing? Is there anything that doesn't belong here? Are we covering the four categories above well? Are there additional or different categories?
- We may try triangulation, asking what is similar about two of the items/factors within a group but what makes them both different from a third? If I were to look only at these three components of this group, what would you say two have in common that is different from the third factor? What makes them distinct?

So if we can flip our thinking about the written opinions of appellate judges, I want you to now imagine a poorly written opinion—again, based not on the outcome of the case but on the structure and content of the opinion. You must have used some standards to gauge it as “inferior or severely lacking.” If you imagine that particular legal opinion, I want you to think about what components made it stand out as worse than average. Go ahead and write down your thoughts and then we’ll begin talking again.

- ***Return to groupings identified above:*** Where do they fall? If it looks this way at one extreme, how we are identifying the other extreme?
- Do all ideas/factors fit in the previous groups? Did we identify any new groups or decide that previous ones are no longer relevant?
- Are there components of a written opinion that are actually part of the process of arriving at the opinion and writing it? Are there factors that we haven’t identified because they are behind-the-scenes/unobservable? Are they important/relevant? Is there a way to evaluate them or identify them for review?

To wrap up our time today, I’d like to make sure we get any additional thoughts you may have in regards to evaluating appellate judicial performance. Are there important big picture ideas that we may not have touched on yet today? Are there any concerns that may have arisen while discussing these other ideas? Something that has been left unsaid?