

AN INFORMED OPINION: Direct Opinion Review and Appellate JPE

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Judicial performance evaluation (JPE) provides a mechanism for measuring and assessing the performance of judges on the bench. JPE programs collect behavior- and process-oriented data to provide a broad-based and politically neutral assessment of a judge's performance. These programs focus on the process used to reach judicial decisions, rather than on the outcomes themselves.

Official JPE programs—authorized by constitution, statute, or court rule—are in place in 17 states and the District of Columbia. Some of the most comprehensive JPE programs operate in states where voters make retention decisions. In these states—Alaska, Arizona, Colorado, Missouri, New Mexico, Tennessee, and Utah—the programs make detailed evaluation results public, providing substantive information to assist citizens in casting an informed vote. In jurisdictions like the District of Columbia and Vermont, results are provided to the judiciary and the legislature for judges seeking reappointment.

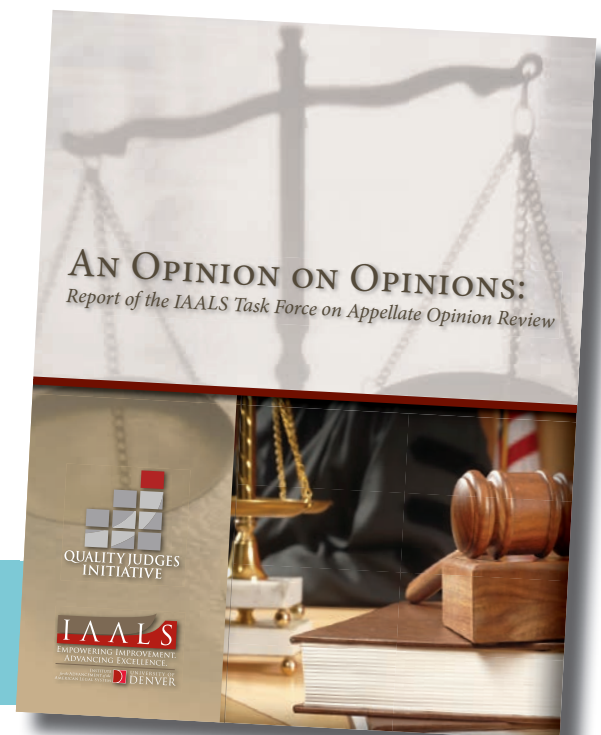
JPE, however, serves purposes beyond informing retention and reappointment decisions. It also facilitates self-improvement and professional development, offering judges constructive feedback that is often difficult, if not impossible, to obtain through other means. For example, in Hawaii and New Hampshire, JPE results are made public solely for the purpose of enhancing public trust and confidence in the courts.

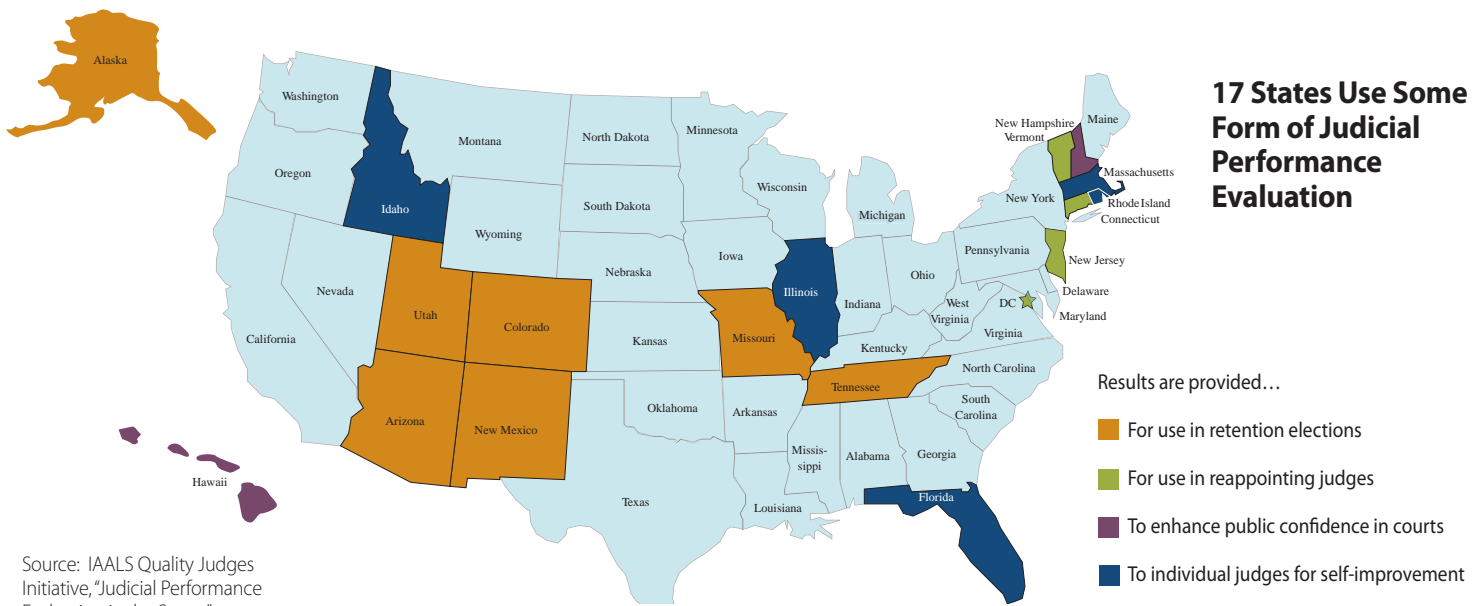
APPELLATE JPE: A DIFFERENT DYNAMIC

While certain aspects of JPE programs may be consistent for trial and appellate judges, evaluation programs for appellate judges must be designed for their particular role and responsibilities and the environment in which they operate.

TREND

The written opinion is the primary work product of appellate judges and justices and should, therefore, be the central focus of a performance evaluation program for the appellate bench. This article proposes one model for direct opinion review.





Source: IAALS Quality Judges Initiative, "Judicial Performance Evaluation in the States," at <http://iaals.du.edu/initiatives/quality-judges-initiative/implementation/judicial-performance-evaluation>.

A trial court judge's role is courtroom-centric, and over the life of any given case, an individual trial judge may perform a variety of duties, including holding case management conferences, ruling on motions, conducting hearings, issuing pretrial orders, presiding over the trial, settling evidentiary issues, or rendering a judgment in the case of a bench trial. Furthermore, trial judges potentially come into contact with a number of individuals who have valuable perspectives on their performance, including counsel, parties, witnesses, experts, and jurors. In some instances, the contact is repeated and long lasting.

In contrast, the role of the appellate court is to review the trial court findings of fact and application of law to those facts. In fulfilling this role, an appellate judge reviews the trial record and party briefs, may participate in an oral argument, takes part in discussions with other members of the panel, and produces a written opinion or joins the opinion of a colleague. An appellate judge's only exposure to those outside the court is during oral argument, which is strictly limited in length and in which only counsel participate.

These differences in the work of trial and appellate judges have important implications for a performance evaluation process:

Expectations. Differences in role and responsibilities create different expectations for the two benches. For example, consider expectations concerning preparation. Trial judges often first encounter an issue in the courtroom, hear evidence or argument, and even rule from the bench. Appellate judges come into the courtroom for oral argument, having had access to the trial record and appellate briefs. Hence, the degree of "preparation" for the issues may vary, and the window into that level of preparation may vary, particularly for purposes of a performance evaluation.

Exposure. While observing and assessing the performance of the trial judge, there are many points of contact during a case, and there are often a variety of individuals

who have that contact. This is not the case with the appellate judge, who performs most, if not all, duties outside of the view of the public. The type and number of data sources, therefore, differ.

Work Product. Given the variety of duties trial judges may perform over the life of a case, there are many aspects of performance on which they may be evaluated. The actual work product of appellate judges, however, is limited to the written opinion (which may or may not even be published). This opinion is the sole means through which appellate judges communicate the legitimacy of their decisions to the parties to the case and the public more broadly.

It is becoming increasingly more likely that an appellate judge will face retention challenges based on one or a few decisions that address hot-button issues.

These distinctions require that different criteria and tools be used to evaluate the performance of trial and appellate judges, and that an appellate JPE program be appropriately tailored to the role and responsibilities of the appellate judge.

Additionally, evaluations of appellate judges' performance may be ever more important in today's political climate. It is becoming increasingly more likely that appellate judges will face retention challenges based on one or a few decisions that address hot-button issues. During the 2010 retention cycle, campaigns mobilized to oppose the retention of appellate judges in Alaska, Colorado, Florida, Kansas, Illinois, and Iowa. The effort in Iowa was the most well-organized and well-funded, and it was successful in unseating three Iowa Supreme Court justices based on a single unanimous ruling. In three states—Alaska, Colorado, and Kansas—justices cited their performance evaluation results in response to their critics, and the justices retained their seats. Similarly, in 2012, opposition formed against the retention of another Iowa Supreme Court justice for the same decision at issue in 2010, and in Florida, three justices were targeted based on a handful of allegedly activist rulings. Supporters of the justices countered the anti-retention campaigns in these states, and none of the 2012 challenges were successful. But these recent efforts may be a harbinger of things to come, and they highlight the need for broad-based, trustworthy, and objective evaluation of appellate judicial performance.

APPELLATE JPE IN THE STATES: AN OVERVIEW

Several states with official JPE programs do evaluate appellate judges, either as a standalone appellate program or as part of a broader JPE program that includes trial judges. Although no two appellate JPE programs are identical, there are certain characteristics that are common to many. The table depicts the features of appellate JPE in seven states that have comprehensive programs.

FEATURES OF APPELLATE JPE IN SEVEN STATES THAT HAVE COMPREHENSIVE PROGRAMS

	Surveys	Self-Evaluation	Opinion Review	Courtroom Observation	Other
Alaska	· Attorneys · Court staff	Yes	No	Yes	· Interviews · Judge statistics · Public hearing
Arizona	· Attorneys · Other judges	Yes	No	No	· Public hearing
Colorado	· Attorneys · Court staff · Other judges	Yes	Yes	Yes	· Interviews · Judge statistics
Missouri	· Attorneys	No	Yes	No	· Public input
New Mexico	· Attorneys · Court staff · Other judges	No	Yes	No	· Interviews
Tennessee	· Attorneys · Court staff · Other judges	Yes	Yes	No	· Caseload statistics
Utah	· Attorneys	No	Under development	No	· Caseload statistics

Surveys are a widely used tool, and respondents typically include attorneys who appeared before the evaluated judge or members of the appellate bar more broadly; other members of the appellate bench; trial judges; and court staff. Other frequently used evaluative tools include self-evaluations and interviews. Some state programs consider reversal and recusal rates, public comments, or case management statistics, and a small number of state programs incorporate a courtroom observation program. Finally, a few state programs use direct opinion review.

It is important to distinguish between this direct-opinion-review process and the inclusion of questions in the various survey instruments that pertain to the opinions of the evaluated judge. Both provide a valuable perspective on appellate opinions and can be vital components of appellate JPE; however, direct opinion review can offer the evaluated judge and the public a more in-depth perspective on the quality and clarity of the judge's opinions, beyond the assessment of lawyers who appeared before the judge or even members of the appellate bar more broadly. Commenting on the importance of direct opinion review, a respondent to a 2011 IAALS survey of appellate judges said, "Written opinions provide the explanation for a particular outcome and the rationale for that outcome. If a judge cannot explain the reasons for the decision, public support for the judiciary and for its impartiality tends to erode."

COMPREHENSIVE APPELLATE JPE PROGRAMS

In states with a direct-opinion-review component, the process involves a careful and thorough review of a small number of opinions that the evaluated judge authored. Members of the commission that oversees and administers the judicial performance evaluation program undertake the review. In some states it is the full membership; in others, it is a subset of the commission. The review is inherently structural, rather than outcome-based, focusing on such issues as clarity, organization, legal reasoning, and apparent fairness of the opinion.

Direct Appellate Opinion Review: A Model

Although a few state programs have a direct-opinion-review process, there is fairly extensive variation in how this review is conducted, and furthermore, the details and logistics of the process are often episodic and internal. To assist states that are considering developing an appellate JPE program using direct opinion review, and in hopes of creating some uniformity and transparency in the process, IAALS (the Institute for the Advancement of the American Legal System at the University of Denver) proposes one model for appellate opinion review as part of broader recommendations for a comprehensive appellate JPE program.

IAALS has worked in judicial performance evaluation from its inception in January 2006. In August 2011, IAALS convened a *National Conference on Evaluating Appellate Judges: Preserving Integrity, Maintaining Accountability* to explore issues, challenges, and opportunities in appellate JPE. Conference participants broadly agreed that review of written opinions was an essential component of the evaluation process, and based on this consensus, IAALS formed a task force to consider recommended practices for evaluating appellate opinions. In early 2012, the task force released *An Opinion on Opinions: Report of the IAALS Task Force on State Appellate Court Opinion Review*, setting forth guidelines for conducting an opinion review process.

From this foundation, IAALS began developing a model program for appellate JPE that suggests a process for direct opinion review, offers sample questionnaires that include questions relevant to a judge's written opinions, and provides procedural rules to conduct such a program from start to finish. To guide the development of this model program, IAALS convened focus groups of appellate attorneys and judges in the fall of 2012. We are currently working with social scientists at the University of Denver to develop questionnaires in line with best practices in survey development.

25 YEARS AGO

Judicial Performance Evaluation

In 1985 the American Bar Association published *Guidelines for the Evaluation of Judicial Performance*. The basic premise is that any judicial performance evaluation program should serve primarily to help judges improve their judicial performance. They secondarily consider other potential uses of judicial performance evaluation, such as more effective assignment of judges and improved design and content of judicial education programs. The guidelines place the ultimate responsibility for developing and implementing judicial evaluation programs with the jurisdiction's highest court or body having responsibility for judicial administration.

We recognize that there may be pros and cons of any direct opinion review process and that there are a variety of ways to structure such a process. IAALS offers one approach here, based on our prior work in this area and the input we have received from appellate court users. We describe below the components of this model process.

Evaluation Teams. IAALS recommends that two- or three-person teams (depending on the size of the evaluation commission and the number of judges to be evaluated) be assigned to review each judge's opinions to ensure a manageable workload for commission members and to provide a more careful and tailored review. Each team should be composed of one attorney and one nonattorney, with an additional attorney or nonattorney as needed for a three-person team. Where the membership of the evaluation commission includes retired judges, these individuals should not be assigned to an evaluation team, but rather should be available to all teams to consult on matters that would benefit from a judicial perspective.

Opinion Selection. The IAALS model process calls for each judge to select five opinions for the evaluation team to review. One of these opinions should be a dissent or concurrence, and for intermediate appellate judges, one should be an unpublished opinion. The opinions should be chosen from throughout the judge's entire term (or term since the last evaluation) and be representative of a variety of case types and complexity of issues. While five opinions represent only a snapshot of an appellate judge's output, we must be mindful of the time constraints that the volunteer evaluators face, and we prioritize here the quality of the review over the quantity of opinions. At the same time, the limited number of opinions to be reviewed heightens the importance of careful and thoughtful selection of those opinions.

Criteria for Review. The criteria used in reviewing the written opinions must focus on the quality and clarity of the opinion rather than the particular outcomes reached in the case. Broadly speaking, criteria such as legal analysis and reasoning, fairness, and clarity will focus evaluators on appropriate metrics. Criteria should be established at the outset, and discussed with evaluators before the evaluation cycle, to ensure consistency across the evaluation teams in their understanding and application of the criteria. The evaluation commission should also develop a training program for commission members on direct opinion review.

Review Process. IAALS's recommended review process takes place in two stages. In the first stage, each member of the evaluation team reads and assesses the submitted opinions individually. The team then meets and discusses the individual assessments of each opinion—and the judge's opinions as a whole—and prepares a joint report to the commission summarizing their assessment. The report should highlight particular strengths or particular weaknesses, as applicable, and make specific reference to any areas of disagreement between the attorney and nonattorney evaluators.

Public Narrative. The evaluation team should share their assessment with the full evaluation commission and answer any questions that commission members may have. Commission members should consider the evaluation team's assessments of the judge's opinions alongside the results of the various survey questions pertaining to the judge's opinions and draft the public narrative on those bases. The narrative should summarize all evaluation sources, referencing specific areas in which the judge has excelled and any areas where improvement may be needed. The evaluated judge should be given an opportunity to review the draft public narrative and discuss it with the commission before publication.



Quality Judges Initiative website, Institute for the Advancement of the American Legal System

Individual Narrative. One of the fundamental purposes of JPE is to provide judges with feedback on their performance that will foster professional development. IAALS recommends, therefore, that the evaluated judge be given the evaluation team's full assessment of his or her opinions. This information should be presented to the judge, along with all of the information amassed during the evaluation process.

CALL TO ACTION

Judicial performance evaluation provides much-needed information to both the public and judges themselves on performance-related issues. Although JPE is important for every level of the judiciary, it is becoming increasingly essential for appellate courts whose judges may face issue-based attacks on their records during retention elections. JPE can play a significant role in informing the public about individual judges' performance on the bench and in educating the public more broadly about the function and responsibilities of appellate judges and courts.

IAALS encourages states interested in direct opinion review to incorporate this process into a broader performance evaluation program for appellate judges. To assist in this effort, IAALS is developing a model for a comprehensive appellate JPE program that will include a process for direct opinion review. IAALS will make this program available to states as a resource and would be pleased to work with those interested in developing either a direct-opinion-review process or a broader appellate JPE program.

REFERENCES

Institute for the Advancement of the American Legal System (2012). *An Opinion on Opinions: Report of the IAALS Task Force on State Appellate Court Opinion Review*. Denver: University of Denver. <http://iaals.du.edu/initiatives/quality-judges-initiative/recommended-models/an-opinion-on-opinions-report-of-the-iaals-task-force-on-state-appellate-co>

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