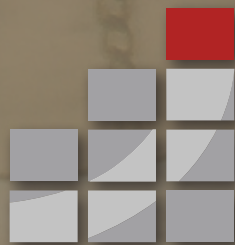


AN OPINION ON OPINIONS:

Report of the IAALS Task Force on Appellate Opinion Review



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I. Background

In August of 2011, the Institute for the Advancement of the American Legal System (IAALS) at the University of Denver convened a national conference on appellate judicial performance evaluation (JPE)—*Evaluating Appellate Judges: Preserving Integrity, Maintaining Accountability*. Throughout the course of the conference, participants returned to the issue of evaluating appellate opinions. In a pre-conference survey, 89% of appellate judges indicated that opinion review should be part of the evaluation process. Participants agreed that, as the primary work product of appellate judges, written opinions should be reviewed as part of the evaluation process. What was less clear was exactly how such a review should be undertaken, by whom, and using what criteria. A few states with official JPE programs have processes in place for direct opinion review, but the majority of states with JPE programs for appellate judges rely primarily on indirect opinion review, which consists of survey questions for attorneys, judges, and court staff on the clarity and quality of judges' written opinions.

In response to the need voiced at the IAALS conference for an impartial, efficient and meaningful method for evaluating appellate opinions as part of the JPE process, IAALS formed a Task Force on Appellate Opinion Review. Membership consists of the following individuals:

- Honorable Richard Gabriel, *Colorado Court of Appeals*
- Jane Howell, *Colorado Office of Judicial Performance Evaluation, Executive Director*
- Honorable Steve Leben, *Kansas Court of Appeals*
- Professor Penelope Pether, *Villanova University School of Law, Professor of Law*
- Stephen Portell, *Arizona Commission on Judicial Performance Review, Vice Chair & Attorney Member*

Facilitated by IAALS, the Task Force was charged with considering existing opinion review processes, discussing the merits of various approaches, and establishing guidelines and recommendations for both states with existing programs for opinion review and those interested in establishing such a program. Given the diversity in state JPE programs with respect to size of the evaluation commission, diversity of commission membership, the number of evaluated judges in each cycle, and the number of opinions to be reviewed for each judge, the Task Force decided against a "one size fits all" approach to evaluating appellate opinions. Rather, what follows is a set of recommendations and guidelines concerning how opinions might be selected, who should undertake the review, and according to what criteria the opinions should be reviewed.

II. Underlying Assumptions

These recommendations and guidelines are equally applicable to independent JPE commissions, state judicial branches, and other evaluating bodies that have been state sanctioned to undertake judicial performance evaluation. For the purposes of this report, the term “commission” is used to signify any of these evaluating bodies.

If not directly undertaken by the full commission or a subset of commission members, opinion review should be managed by the official performance evaluation commission, to ensure adequate training of reviewers, consistency in the process, and objectivity of the review.

Opinion review should supplement other methods of performance evaluation for appellate judges and justices, such as surveys of attorneys and court staff, courtroom observation, and self-evaluation.

It is essential that any program for opinion review be structured to focus on the quality and clarity of the written opinion rather than the particular outcome(s) reached in the case.

III. Recommendations & Guidelines

Selection of Opinions:

The number of opinions selected for review may vary depending on the size of the commission. Larger commissions might consider identifying ten opinions for review, while smaller commissions may find five opinions more manageable. The Task Force recommends that at least five opinions be reviewed for each judge/justice.

The judge, commission, or both may select opinions for review. Where the judge is tasked with selecting all opinions for review, the commission should retain the right to ask for additional opinions, or choose additional opinions on its own initiative, where doing so would be beneficial to the evaluation.

The opinions chosen by the judge for review should be representative of the judge’s work and ideally should address a variety of case types. It is recommended that one of the opinions is a dissent or concurrence and, for intermediate appellate judges, one is an unpublished opinion. Where evaluated judges are required to complete self-evaluations or where interviews of evaluated judges are undertaken, the commission should consider asking judges why they selected the opinions they did.

The opinions chosen by the commission for review, if any, should be selected at random, but it is recommended that they be representative of the judge or justice’s full term (e.g., selected across a term, rather than within a two-year period).

Individuals Undertaking the Review:

It is recommended that more than one commission member be charged with reviewing the opinions for each judge. The Task Force was divided as to whether the full commission or a subset of the commission should be tasked with reviewing opinions. For the most comprehensive review, each commission member may independently read and assess the opinions of each evaluated judge. There

were concerns, however, among some members of the Task Force that, depending on the number of opinions reviewed per judge and the number of judges being evaluated, this arrangement could create a significant workload for individual commissioners. Other members of the Task Force thought a more manageable, yet also thorough and careful evaluation, would entail a two- or three-person team—selected randomly and assigned to judges randomly—that would review the opinions of particular judges and report back to the full commission. The Task Force recognizes that some commissions, by virtue of statute or court rule, may be unable to delegate this task to a subset of the full commission.

Having a combination of attorneys and non-attorneys review the opinion is optimal. Non-attorneys are in the unique position of being able to assess whether an opinion is clear to laypersons and can best ascertain whether the judge or justice's opinions may be understood by the parties to the case. Attorneys are best able to gauge whether the legal issues were sufficiently addressed and explained in the opinion.

Where not precluded by statute or court rule, commissions might consider using independent reviewers (i.e., a legally trained reviewer who does not run the risk of having to appear before the judge/justice subject to evaluation). For example, law professors are capable of reviewing appellate opinions on a level commensurate with attorneys. The Task Force recommends that law professors involved in the opinion review process should be limited to those who have practical appellate court experience. A commission might also consider using retired judges as reviewers, either from the same jurisdiction as the judge/justice being evaluated or from a different jurisdiction. It is optimal for the retired judge reviewers to have sat on an appellate bench during their judicial tenure. Commissions might also consider recommending the appointment of law professors and/or retired judges as members.

Criteria for Evaluating Opinions:

To ensure thorough and consistent review, the commission should develop criteria for opinion review. Pre-established criteria provide a consistent framework for all reviewers to follow in addition to serving as a useful training tool.

The criteria for opinion review should focus analysis of the opinion on clarity, structure and adequate explanation, among other criteria. Model criteria developed by the Task Force are attached as Appendix A. Opinion review criteria should *not* touch on the merits of the opinion, which is the sole province of a higher court, or on agreement or disagreement with the case outcome.

Commissions and evaluators may want to consult the National Center for State Courts' *Writing Opinions and Orders in Controversial Cases* course and accompanying materials. Specifically, "Basic Principles for Writing All Opinions, Highly Controversial or Not," "Checklist for Writing an Opinion in a Highly Controversial Case," and "Checklist for Critiquing an Opinion" may prove useful background materials for commissions during the opinion review process.

Training for Opinion Reviewers:

Coordinators of performance evaluation programs should provide adequate training to opinion evaluators, to ensure consistency both in conducting the evaluation and in understanding the purpose of the evaluation—i.e., to assess the quality and clarity of the opinion rather than to revisit the particular outcome(s) reached.

Special consideration should be given to each type of evaluator (lay, attorney, professor, etc.) during the training process. For lay evaluators, the commission should consider providing a glossary of legal terms included in the opinion review criteria—e.g., standard of review, fact-finding, case law, etc., as well as terms the evaluators may commonly encounter in appellate opinions—e.g., precedents, remanded, concurrence, etc. The commission might also educate lay evaluators on appellate court functions and the opinion-writing process, and might consider bringing in retired justices and judges for this purpose. Attorney and law professor evaluators should be reminded to focus on the evaluation criteria and not substantive issues raised by the opinion or outcome(s).

During training, the commission should encourage all evaluators to be active and vocal participants in the review process, so that all perspectives are represented.

One possible approach to training is to work through sample opinions as a group and discuss the application of the pre-established opinion review criteria to the opinions. The commission might consider bringing in retired judges and justices to assist with this process.

Guidelines for Narrative Profiles:

The portion of the narrative profile that addresses opinion review should be tailored to each judge/justice, rather than following a pre-determined formula that is applied to all judges. For example, if the reviewers of the opinions do not identify weaknesses (or strengths) in a judge's opinion writing, they need not feel obligated to include weaknesses (or strengths) in the narrative profile purely as a matter of form. The value of the opinion review process recommended here is that the opinions of each judge/justice can be thoroughly and carefully examined, and that areas in which the judge excels and/or needs improvement can be identified, with the ultimate goal being to provide useful information to the judge being reviewed and the citizens who will vote on the judge's retention.

The profiles should be substantive and closely tied to the opinion review criteria, but there should not be a numerical rating or grade applied to the criteria.

Supplementing Direct Opinion Review:

In addition to the product-based criteria (i.e., criteria relating to the appellate opinion itself) discussed above, commissions might also consider criteria relating to the opinion writing process. For example, process-based criteria might include adherence to court rules for publishing opinions, use of law clerks, and ensuring reasonable training and supervision of court staff. Though not traditionally considered in the judicial performance evaluation process, these criteria speak to larger accountability and court culture issues. Commissions interested in incorporating this aspect in appellate judicial performance evaluation can do so through relevant questions in surveys, judge/justice interviews and self-evaluations (discussed below). They may also consult the work of Villanova Law Professor and Task Force member Penelope Pether on this topic.¹

Commissions should consider including questions relating to the quality and clarity of appellate opinions in performance evaluation surveys for various respondent groups. Commissions should

¹ For an example of Professor Pether's scholarship on this topic, see *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. ST. L.J. 1 (2007).

consider the following respondents, each of whom offers a unique perspective on the appellate opinion:

- **Attorneys** who appear before appellate judges/justices are in a unique position to comment specifically on the opinions issued in their case(s). Attorneys more broadly can also be a helpful resource, as both trial and appellate attorneys must interpret and cite to appellate opinions in the course of their practice; however, the Task Force recognizes the problem with low response rates for this group of respondents. Model survey questions for attorney respondents regarding appellate opinions are attached as Appendix B.
- **Trial judges** must apply appellate opinions and can provide a judicial perspective in assessing opinions. Trial judges whose rulings have been appealed can speak specifically to the attributes of the opinions issued in these cases. Recommendations for questions relating to appellate opinions that may be incorporated into JPE surveys of trial judges are attached as Appendix C.
- **Peer judges** can provide a judicial perspective on opinions. They are also in a unique position to speak to how their peers' perform their primary authorship and participant responsibilities. Sample questions that may be asked of peer judges about written opinions are attached as Appendix D.

Commissions should consider having the judge/justice subject to evaluation undertake a self-evaluation that includes questions on his/her written opinions and approach to opinion writing. Such an evaluation can include similar questions asked in surveys of other respondents, allowing the judge/justice to compare his/her own performance assessment on certain factors against the assessments of other respondents. Doing so can highlight disconnects in how the judge/justice views his/her performance in this area and how others view that performance. The self-evaluation might also contain open-ended questions allowing the judge/justice to provide detailed explanation. Such questions are particularly useful when the evaluation process has an interview component. Examples of both types of questions relating to opinions that may be incorporated into a self-evaluation questionnaire are attached as Appendix E.

IV. Conclusion

This report represents the consensus of the Task Force, which was in full agreement that the appellate opinion review process is a vital component of appellate judicial performance evaluation and, if done appropriately, can be an essential tool for self-improvement and an invaluable source of information for voters and other decision makers. Ultimately, programs for appellate opinion review will necessarily be tailored to the specific circumstances and needs of individual jurisdictions. It is the hope of the Task Force and IAALS that jurisdictions looking to establish or improve an existing process can take these guidelines into consideration and use them as a tool to assist in developing/improving/perfecting this aspect of judicial performance evaluation programs.

IAALS commends Task Force members for their diligence and thorough consideration of the issues involved in reviewing appellate opinions and for their commitment of time and effort to this project.

APPENDIX A

Model Opinion Review Criteria

Individuals designated to review the opinions of appellate justices and judges should do so based on the following criteria:

- **Adherence to standard of review**
 - Does the opinion follow an applicable standard of review for the case?
- **Clarity of expression**
 - Are the facts necessary to decide the case clearly and understandably presented?
 - Is the ruling readily understandable or ambiguous?
 - Is there minimal legalese so that a layperson can make sense of it?
 - Could a layperson understand the reasons for the court's ruling?
 - Is the ruling clear and concise?
- **Logical reasoning**
 - Is the decision adequately supported by the facts presented?
 - Does the opinion acknowledge the losing party's arguments and explain why they were rejected?
 - Does the opinion logically show how B follows from A, or does the justice or judge assert something without explaining how he or she got there?
- **Application of the law to the facts presented**
 - Does the opinion contain a fair statement of the pertinent facts and a discussion of the applicable legal principles and case law?
 - Does the judge or justice adequately explain how important facts relate to the law?
 - Does the application of the law to the facts of the case reasonably support the result?

APPENDIX B

Model Attorney Survey Questions on Appellate Opinions

- Writes opinions that are clear.
- Writes opinions that adequately explain the basis of the Court's decision.
- Writes opinions that address the merits of the legal issues advanced by the parties.
- Writes opinions that set forth rules of law to be used in future cases.
- Writes opinions that refrain from reaching issues that need not be decided.
- Writes opinions that clearly present the facts needed to decide the case.
- Writes opinions that fairly address the issues raised by the parties.
- Writes opinions that follow an applicable standard of review for the case.
- Writes opinions that are faithful to evidence in the record.

APPENDIX C

Model Trial Judge Survey Questions on Appellate Opinions

- Writes opinions that are clear.
- Writes opinions that adequately explain the basis of the Court's decision.
- Writes opinions that address the merits of the legal issues advanced by the parties.
- Writes opinions that set forth rules of law to be used in future cases.
- Writes opinions that provide clear direction to trial court when reversed in whole or part.
- Writes opinions that refrain from reaching issues that need not be decided.
- Writes opinions that appear fairly to address the issues raised by the parties.
- Writes opinions that follow an applicable standard of review for the case.

APPENDIX D

Model Peer Judge Survey Questions on Appellate Opinions

- Writes opinions that are well structured and clear.
- Writes opinions that clearly address the merits of the legal issues advanced by the parties.
- Writes opinions that clearly set forth rules of law to be used in future cases.
- Performs primary authorship responsibilities with diligence.
- Performs primary authorship responsibilities with proficiency.
- Performs participant responsibilities with diligence.
- Performs participant responsibilities with proficiency.
- Approaches cases with an open mind.
- Gives and receives feedback constructively.
- Engages in collegial decision-making/discussion.
- Follows court guidelines regarding whether to publish or not publish opinions.
- Satisfies minimum court-adopted requirements for content in issuing unpublished and shorter opinions.

APPENDIX E

Model Self-Evaluation Survey Questions on Appellate Opinions

Scaled Questions (consistent with respondent survey questions):

- Writes opinions that are clear.
- Writes opinions that adequately explain the basis of the Court's decision.
- Writes opinions that address the merits of the legal issues advanced by the parties.
- Writes opinions that set forth rules of law to be used in future cases.
- Writes opinions that are faithful to evidence in the record.
- Writes opinions that refrain from reaching issues that need not be decided.
- Performs primary authorship responsibilities with diligence and proficiency.
- Performs participant authorship responsibilities with diligence and proficiency.
- Approaches cases with an open mind.
- Gives and receives feedback constructively.
- Engages in collegial decision-making/discussion.
- Follows court guidelines regarding whether to publish or not publish opinions.
- Satisfies minimum court-adopted requirements for content in issuing unpublished and shorter opinions.

Open-Ended Questions:

- What do you think makes a clear written opinion?
- Please describe how you manage your workload to ensure that opinions are issued promptly?
- To what extent do you conduct your own legal research and write your own opinions, and to what extent do you rely on law clerks and other personnel for those tasks?
- What has been the greatest challenge during your term and how did you meet it?
- Please describe your overall performance over the current team.