

# NATIONAL CONFERENCE ON EVALUATING APPELLATE JUDGES:

*Preserving Integrity, Maintaining Accountability*

## POST-CONFERENCE REPORT





INSTITUTE *for the* ADVANCEMENT  
*of the* AMERICAN LEGAL SYSTEM



## ***Evaluating Appellate Judges: Preserving Integrity, Maintaining Accountability*** **Post-Conference Report**

### **I. Overview**

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) from IAALS' inception in January 2006. In August 2008, IAALS convened its first conference on JPE—*Judicial Performance Evaluation: Strategies for Success*—which focused on the development, structure, and improvement of JPE programs across the nation. On August 11 and 12, 2011, IAALS convened its second national conference, this time focusing on appellate JPE, in response to the heightened profile of appellate judicial retention elections and the need for more tailored means of evaluating appellate judges and justices.

Over 70 state court judges, practitioners, academics, state JPE program coordinators from across the nation, and other leaders in the field attended the conference. The two-day discussion engaged panelists and participants on the roles and responsibilities of an appellate judge, appropriate measures and methods for evaluation, challenges and obstacles encountered in establishing and implementing JPE programs, strategies for improving existing performance evaluation programs, and the role of JPE in the growing contentiousness and politicization of appellate judicial retention elections. Conference participants engaged in an open and honest dialogue that was focused on the overarching importance of appellate JPE and the identification of concrete and meaningful improvements that can be made to the evaluation process.

In advance of the conference, IAALS administered a survey of appellate judges and justices in eight of the eleven states that have official appellate JPE processes.<sup>1</sup> The results of this survey helped to both shape the agenda for the conference and shed light on potential areas for improvement in the process. Drawing from these survey results, conference materials, and participant dialogue, this post-conference report discusses the various approaches currently in place for evaluating appellate judges and justices, and identifies themes, recommendations, and areas for future work in appellate JPE.

### **II. Judicial Performance Evaluation for Appellate Judges**

Judicial performance evaluation (JPE) for appellate judges and justices appears in a variety of contexts. In states where appellate judges are retained by voters (e.g., Alaska, Arizona, and Colorado) or reappointed by decision makers (e.g., Hawaii and Vermont), JPE programs provide relevant information to those making retention or reappointment decisions. JPE is also used for purposes other than retention or reappointment. In New Hampshire and Massachusetts, where state court

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<sup>1</sup> The survey is appended to the Post-Conference Report. Sixty-four appellate judges responded to the survey, from the following states: Alaska (6), Arizona (10), Colorado (10), Massachusetts (3), Missouri (10), New Mexico (6), Tennessee (4), and Utah (6), along with 9 judges who did not identify their state.

judges have life tenure (until age 70), JPE is used for the purposes of enhancing public confidence in the courts and self-improvement, respectively.

Bar associations in a number of states—for example, Florida, Iowa, and Wyoming— have established unofficial JPE programs in which judges are rated by attorneys and results are made public. In some states, independent organizations undertake evaluations that rate or evaluate judges in accordance with the organization’s mission—be it political, religious, or some other perspective. These independent evaluation efforts can co-exist with official programs. For example, the Massachusetts Judicial Branch undertakes performance evaluations of judges while the Massachusetts Bar Association conducts an independent evaluation. In Iowa, the Iowa State Bar Association conducts a statewide judicial plebiscite prior to retention elections and makes results public, while an independent organization known as Iowa Judicial Watch issues evaluations in which “ideology makes up a substantial portion of the grade.”<sup>2</sup> Similar organizations are active in Colorado and Florida. Clear the Bench Colorado identifies justices who “demonstrate a consistent pattern of deciding cases in contravention of the Colorado Constitution, established statutory law, legal precedent, & ‘rule of law’ principles,” while Florida Judicial Review “provides common sense, citizen analysis of judges [sic] decisions and promotes an independent, originalist judiciary.”<sup>3</sup>

There are also national websites that invite attorneys and other court users to rate both federal and state appellate judges.<sup>4</sup> RatetheCourts.com invites site visitors to anonymously evaluate any state or federal judge, according to survey criteria recommended in the American Bar Association’s Guidelines for the Evaluation of Judicial Performance and used by the Colorado Commission on Judicial Performance.<sup>5</sup> Its sister site, CourthouseForum.com, encourages the public “to freely and candidly post and discuss information and opinions about the nation’s courts, judiciary and cases.”<sup>6</sup> RobeProbe.com allows both lawyers and litigants to rate the performance of judges and bankruptcy trustees and identifies the “best” and “worst” judges based on those ratings.<sup>7</sup>

These examples illustrate that a variety of approaches are taken to evaluating appellate judicial performance. However, certain characteristics are common to many programs, particularly those that are state-sponsored. Surveys are usually distributed to attorneys who have appeared before the judge, as well as to court staff, clerks, and/or other judges, both at the trial or appellate level. Judges may fill out self-evaluation questionnaires and/or be interviewed by the evaluating body. In some states, a predetermined number of appellate opinions authored by the judge are reviewed, and evaluators may take into account reversals on appeal and caseload statistics.

Official JPE programs employ similar criteria in the evaluation as well. Although survey questions and evaluation guidelines differ by state, the following criteria are commonly used: legal ability, integrity and impartiality, communication skills, temperament and demeanor, and administrative performance and skills.

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<sup>2</sup> IOWA JUDICIAL WATCH, <http://www.iowajudicialwatch.org> (last visited Nov. 7, 2011).

<sup>3</sup> CLEAR THE BENCH COLO., <http://www.clearthebenchcolorado.org> (last visited Nov. 7, 2011); FLA. JUDICIAL REVIEW, <http://www.floridajudicialreview.com> (last visited Nov. 7, 2011).

<sup>4</sup> One national site, The Robing Room, is limited to attorney evaluations of federal district court judges and magistrate judges. THE ROBIN ROOM, <http://www.therobingroom.com> (last visited Nov. 7, 2011).

<sup>5</sup> RATE THE COURTS, <http://www.ratethecourts.com> (last visited Nov. 7, 2011).

<sup>6</sup> COURTHOUSE FORUM, <http://www.courthouseforum.com> (last visited Nov. 7, 2011).

<sup>7</sup> ROBEPROBE.COM, <http://www.robeprobe.com> (last visited Nov. 7, 2011).

The extent to which evaluation results are distributed and with what level of detail depends largely on the purpose and goals of the program. In states where JPE programs are designed to provide information to voters or other decision makers, the evaluation results are generally made available in substantial detail, although they may be initially presented in summary form with full survey results and additional information available for those interested. In New Hampshire, only summary JPE results for the evaluated court are provided to the public, and in Massachusetts, where JPE is solely for self-improvement purposes, evaluation results are provided only to the evaluated judge.

### **III. Broad Conference Themes**

#### **A. Importance of Judicial Performance Evaluation**

Conference panelists and participants affirmed the importance of JPE. As a vital component for ensuring public trust and confidence in the judiciary, JPE programs demonstrate a willingness on behalf of individual judicial officers and the judiciary as a whole to be accountable for their performance. The value of the JPE process, according to John Broderick, Jr., Dean of the University of New Hampshire School of Law, “is to make sure that the public [that judges] serve ... has confidence in the service they are giving.” Clear the Bench Colorado Director Matt Arnold echoed this sentiment: “Providing substantive information is not only important for the judges...It is absolutely critical to cementing respect for the process and respect for the rule of law.”

JPE may have an additional role in states interested in moving from contested elections to a commission-based appointment and retention election system. Sarah Walker, President of the Minnesota Coalition for Impartial Justice, described public performance evaluation as the “most critical tool in passing a comprehensive reform package.” Without this component, according to Walker, the progress made to date by the Coalition—which is working toward performance evaluation with merit selection and retention elections for all Minnesota judges—would not have been possible.

Well-designed and well-implemented evaluation programs bring transparency to the judiciary by measuring those aspects of the appellate process that are observable. After all, public trust and confidence should ultimately turn on the appearance of *how* the result was achieved, not *what* particular result was achieved. At the conference, Professor Jordan Singer of New England Law|Boston presented his research on the mind of the judicial voter, which suggests that voters are motivated primarily by procedural fairness considerations, rather than by policy preferences or case outcomes. Kansas Court of Appeals Judge Steve Leben echoed Professor Singer’s comments, telling conference participants that procedural fairness drives both litigants and citizens generally in how they think about their court system. Conference participants also agreed that performance evaluation does not pose a threat to judges’ decisional independence simply because it holds judges accountable for their work. According to the IAALS pre-conference survey, appellate judges agree, with 73 percent of respondents indicating that the evaluation process has no impact on their independence as a judge/justice. In fact, 16 percent reported that the process “enhances independence.”

Judicial performance evaluation also serves a critical educational component, by providing voters and decision makers with an essential tool for assessing judges. Of the appellate judges surveyed by IAALS, 71 percent viewed evaluation results (and recommendations, if made) as having “some influence” on voters’ decisions in retention elections and 17 percent describing them as having “a lot of influence.” Conference panelists agreed that in states where judges stand for

retention, it is vital that voters receive objective information about a judge's performance. Just as the judiciary has an obligation to the public to strive for the highest levels of quality, the public—when given the opportunity through retention elections—in turn has an obligation to promote quality by casting an educated vote. Judicial performance evaluation, according to Colorado Court of Appeals Judge Russell Carparelli, raises for the public the “expectation that they are part of the process and that they should be informed and they should seek to be informed.”

But JPE accomplishes more than simply educating voters, other decision makers, and/or the general public on the performance of individual judges and justices. It can also provide broader education on the proper role of judges and the role of the courts. This component is of growing importance, as appellate judges and justices are increasingly coming under fire for decisions in particular cases. In this respect, JPE can focus the public on the right indices of quality judicial performance, as opposed to inappropriate or non-objective standards—i.e., individual case outcomes or political ideology. According to Rebecca Love Kourlis, IAALS Executive Director, JPE “suggests to voters that they should be making decisions about judges on the basis of how well they do their job, not on the basis of one hot-button opinion.”<sup>8</sup>

Furthermore, these programs benefit the judges and justices subject to evaluation by identifying areas in which their performance is deficient. Because of ethical and professional rules that limit communication and other interaction with individuals who appear in their courtrooms, judges are often unable to get candid feedback on their performance. At the conference, Judge Leben highlighted a disconnect between how judges view their performance and how the public views judges' performance:<sup>9</sup> “We are out of touch with how we are doing in anybody else's eyes and ... the longer we are on the bench, the more we tend to grow out of touch with what regular people are thinking.” When asked about the extent to which the evaluation process had been beneficial or detrimental to their professional development, 53 percent of appellate judge respondents to the IAALS survey believed it was “somewhat beneficial” and 10 percent found JPE “significantly beneficial,” while only three percent described the evaluation process as “somewhat detrimental.” Although one out of three respondents felt that it had no effect on their professional development, JPE programs have the potential to promote subconscious improvement in judges' performance, based on the simple awareness that they are being evaluated. An analysis of the IAALS survey comments shows that the primary benefit respondents see in JPE is self-improvement, provided that the evaluations give constructive feedback on potential areas of improvement. The comments also suggest that more frequent evaluations—i.e., not just during election years—would be especially helpful for self-improvement purposes.

## **B. Need to Tailor Performance Evaluations for Appellate Judges/Courts**

Conference participants recognized that the role and responsibilities of trial and appellate judges differ in marked ways and that such differences have important implications for JPE processes.

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<sup>8</sup> *How Should Appellate Court Judges Be Evaluated?*, KUVU THE TAKE AWAY (Aug. 10, 2011), <http://soundcloud.com/nheffel/kuvos-nathan-heffel-and>.

<sup>9</sup> Citing a 2001 Justice at Stake survey of state court judges nationwide and a national population sample which found that 40 percent of the general public described courts in their state as “poor” or “fair” while none of the judges surveyed described courts as “poor” and only four percent described them as “fair.”



The essential function of both trial and appellate court judges, said Judge Russell Carparelli, is to ensure fair and impartial application of the rule of law. Where the public misperception begins, however, is with the distinction between the trial court's role of fact finding and the appellate court's function of reviewing the trial court findings and application of law to those facts. The difference in purpose and manner in which trial and appellate court judges carry out these roles also creates difficulties in the evaluation process, as judges encounter different responsibilities and expectations. For instance, the trial judge initially knows very little about a case when it comes before her, as opposed to the appellate judge who has access to the full trial record and appellate briefs. There is, therefore, a different expectation of how prepared a trial judge can and must be, as opposed to the preparation expected of an appellate judge. There is also a significant difference in a trial judge's versus an appellate judge's exposure to the parties and counsel. Over the course of the pretrial and trial process, the trial judge may have substantial interactions with parties and counsel. At the appellate level, this interaction is generally confined to an oral argument that is strictly limited in length and in which only counsel participate. This difference in exposure potentially handicaps those responsible for evaluating the demeanor and preparation of appellate judges.

Fundamentally, the work product of the trial judge and the appellate judge is different. The trial judge oversees trial proceedings, including ruling on motions, conducting hearings, settling evidentiary issues, and in the case of a bench trial, rendering a judgment. The trial judge may also have conducted case conferences, issued pretrial orders, and resolved interparty disputes, depending on the point at which the judge became involved with the case. These pretrial and trial activities comprise the trial judge's work product. The appellate judge, on the other hand, reviews the trial record and party briefs, might participate in an oral argument, and then produces a written opinion—which may or may not be published. The primary work product generated by an appellate judge or justice, therefore, is the written opinion. Although a few programs review opinions as part of a broader evaluation process, there is no general agreement as to how this review should be conducted, as will be covered in detail below. As the principle work product of appellate judges, and the primary—if not only—way in which appellate judges communicate the legitimacy of their decisions, conference participants were unanimous in expressing a need for some sort of opinion review, based upon appropriate criteria, as part of the JPE process.

There is another important institutional difference between trial and appellate judges that further complicates any review of appellate opinions. Unlike trial court judges who operate individually, appellate judges work in panels. While the written opinion issued by the court may list a primary author, the opinion itself is often a collective effort. Whereas the trial court judge acts unilaterally, thus making it appropriate to evaluate his individual performance, the line becomes more blurred with respect to the appellate judge, whose performance has both a collaborative and individual component. In this interactive working environment, court culture can play an important role in an appellate judge's performance, and understanding that culture can be a factor in the evaluation. To wit, one respondent to the IAALS survey of appellate judges commented that the evaluating body should solicit more “input from the judges as to how their opinions are formulated and the environment they are in.”

#### **IV. Recommendations for Improving Appellate Performance Evaluation**

In the IAALS survey of appellate judges and justices, a total of 62 percent of respondents described themselves as “very satisfied” (29 percent) or “somewhat satisfied” (33 percent) with the process for evaluating their performance. However, 24 percent said that they were neither satisfied nor dissatisfied, and a total of 14 percent reported being “somewhat” or “very” dissatisfied—thus

indicating that there is room for improvement in appellate judicial performance evaluation programs. With regard to specific aspects of the performance evaluation process that could be improved upon, the second most frequently given answer (by 44 percent of respondents) was “additional bases for evaluation—for example, opinion review, workload statistics, self-evaluation, etc.” IAALS drilled down on this topic both in the survey and in conference panel discussions.

## **A. Additional Bases for Evaluation**

### *Courtroom Observation*

More than three-fourths (76 percent) of respondents to the IAALS survey agreed that courtroom observation should be part of the evaluation process for appellate judges. As one respondent noted, “[i]t is not only that litigants are entitled to a fair and impartial hearing, they are also entitled to the appearance of a fair and impartial hearing. The demeanor and conduct of the judges during oral arguments is the most direct evidence of the latter.” Another respondent replied that “[b]eing part of a multi-judge appellate bench is so much different than sitting on the bench as a solo trial judge, and I think we are much less sensitive to how we are being perceived and experienced individually when part of an appellate bench.” In this sense, ongoing observation from someone without a stake in the outcome of the case could provide valuable feedback to appellate judges. On the other hand, survey respondents expressed concern that courtroom observers would mistake a lack of questions from a justice or judge during oral arguments as a lack of preparation, which has the potential to lead judges to ask questions purely for the sake of showcasing their knowledge of the case.

During the conference, Utah Judicial Performance Evaluation Commission member and retired district court judge Anthony Schofield discussed Utah’s developing program for courtroom observation. Although Utah has not yet addressed appellate courtroom observation, Judge Schofield told conference participants that it was clear to him that citizens want procedural fairness, and a courtroom observation program is well suited to spotting, understanding, evaluating, and reporting on this issue.

### *Appellate Opinion Review*

As previously mentioned, conference participants agreed that review of written opinions is an essential component of the evaluation process. Similarly, nearly nine out of ten respondents (89 percent) to the IAALS survey believed that opinion review should be part of the evaluation process. As one respondent explained, “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.” This point, which resonated throughout the conference, has become even more relevant in light of the rising number of self-represented parties.<sup>10</sup> Dean Broderick told conference participants, “[i]f there was ever a need to be more explanatory, more transparent—it’s now.” Judge Leben agreed that appellate opinions have to be understandable by lay readers, noting that the judiciary is a branch of government and citizens should be able to know what the courts are doing and to evaluate whether they are fair.

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<sup>10</sup> For a discussion of the substantial increase in self-represented litigants in appellate courts, see Thomas H. Boyd, *Minnesota’s Pro Bono Appellate Program: A Simple Approach That Achieves Important Objectives*, 6 J. APP. PRAC. & PROCESS 295 (2004).

The precise metrics for evaluating opinions and the process through which such an evaluation should occur was the topic of much debate during the course of the conference. Conference participants generally agreed upon certain criteria—e.g., whether an opinion uses simple and declarative language, is easily understood, and sets forth the reasoning and rationale for the particular outcome. Some participants proposed additional criteria, such as the approach offered by Professor Muti Gulati of Duke University School of Law. Professor Gulati and the co-authors of his article, *“Not that Smart”: Sonia Sotomayor and the Construction of Merit*,<sup>11</sup> use citation rates to appellate opinions by other courts and in law journals (along with other measures, such as authorship and publication rates) as a measure of relative performance. A possible downside to this measure, particularly among state court judges, is the fact that it depends to some extent on whether the case is on the cutting edge of the law, or simply requires the application of existing principles—which would make it less likely to achieve prominence.

Another point of discussion related to who is best suited to review opinions—e.g., non-attorneys, attorneys, law professors, and/or other judges. Considering each in turn, many participants favored review by non-attorneys, as these individuals—having no legal background or familiarity with legal terms—could provide an honest analysis of the clarity of the opinion. However, a number of the comments in the IAALS survey of appellate judges expressed concern that non-attorney evaluators would lack the requisite legal knowledge and skills to review an opinion. Attorney reviewers are better suited to assess the adequacy of the reasoning given in the opinion for the outcome; however, conference participants and judges surveyed by IAALS expressed concern with having their opinions reviewed by individuals who may have a stake in the outcome (attorneys and non-attorneys alike). One respondent to the IAALS survey suggested that it would be more helpful to have a broad-based group of attorneys review opinions, rather than only those who have appeared before the court. Conference participants agreed that law professors would be able to assess the sufficiency of the analysis and clarity, even if they were not familiar with the substantive area of law addressed in the opinion. In fact, unfamiliarity with the area of law might be preferable in order to lessen the danger that a law professor would review an opinion based on its substantive outcome. Identifying and defining the line between reviewing an opinion for clarity, structure, and adequate explanation versus reviewing an opinion on the merits—the latter of which is solely the province of a higher court—was a shared concern, regardless of who the reviewers were.

The IAALS survey of appellate judges and justices suggested another category of individuals who might be well-suited to reviewing appellate opinions—other judges, both peer and trial court judges. One IAALS survey respondent suggested that “the work of the intermediate appellate judges should be reviewed by the state supreme court, which of necessity reads all opinions and deals with the quality of the court’s analysis when considering petitions for review.” Rafael Gomez, counsel for RobeProbe.com, suggested using retired judges. Some states already tap other judges for evaluation of their peers.

No clear direction emerged from the conference as to the approaches that should be taken in evaluating appellate opinions. Accordingly, IAALS established a task force to study this issue in detail and formulate recommendations for states interested in changing an existing, or incorporating a new, system for appellate opinion review as part of the judicial performance evaluation process.

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<sup>11</sup> Available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1907724](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1907724).



## *Appropriate Judicial Role*

Villanova University School of Law Professor Penelope Pether spoke to conference participants about areas in which appellate judges and justices are not held appropriately accountable, and should be.<sup>12</sup> For example, inadequate screening in some courts—particularly intermediate appellate courts that grant appeal as a matter of right—may result in a certain subset of cases (e.g., cases in which the government is a defendant) being decided by court staff with little or no judicial supervision. A related practice that, in Professor Pether’s view, should be examined in evaluating appellate courts and judges is whether judges sign opinions without being familiar with the record. Pether also expressed concern about the failure of some appellate courts to adhere to jurisdictional rules for non-publication of opinions and non-precedential status. She suggested that these are largely structural issues and that courts can, and should, take on their own auditing and evaluation processes for ensuring accountability and greater transparency in these areas.

## *NCSC Appellate CourTools*

Dan Hall, Vice President of Court Consulting Services at the National Center for State Courts (NCSC), spoke to conference participants about court performance, which is one component of accountability that is particularly applicable to the appellate court context where it is more difficult to assign individual responsibility for caseload outcomes. The NCSC *Appellate CourTools* are performance indicators for measuring how appellate courts handle cases, treat those that come before them, and interact with court employees.<sup>13</sup> Hall suggested that these indicators could be applied to measure performance for individual appellate judges and justices: 1) time from case filing to disposition, 2) clearance rates of cases, 3) age of active pending caseload, 4) employee satisfaction, 5) constituent satisfaction, and 6) reliability and integrity of case files. Although surveys of ‘constituents’ and employees are already undertaken in most official JPE programs, fewer programs consider clearance rates or age of pending caseload.

## **B. Evaluation Surveys**

### *Survey Respondents*

Forty-one percent of respondents to the IAALS survey of appellate judges indicated that survey respondent groups were an aspect of the performance evaluation process that could be improved upon and should be revisited. The issue of surveying attorneys who appear before appellate judges—the most commonly surveyed respondent group in the appellate evaluation process—came up in several contexts during the conference. Participants questioned whether this respondent group was in a position to evaluate the performance of a judge objectively, given their stake in the outcome. One survey respondent noted that “[r]espondents, by definition, are usually those with strong feelings either for or against.” Echoing this concern, another IAALS survey respondent opined that “because survey respondents self-select, the data collected ... is often skewed in favor of the disgruntled people who are more likely to respond than others.” This observation may be as applicable to JPE for trial court judges as it is to appellate JPE.

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<sup>12</sup> 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 ARIZONA STATE LAW JOURNAL 1 (2007).

<sup>13</sup> Available at [http://www.ncsconline.org/D\\_Research/CourTools/index.html#](http://www.ncsconline.org/D_Research/CourTools/index.html#).

Conference participants expressed conflicting opinions about whether attorneys appearing before appellate judges on a regular basis are a positive or negative component of performance evaluation. On the one hand, repeat players have increased exposure to appellate judges, which provides more opportunity to observe levels of preparation and demeanor. On the other hand, this increased exposure has the potential to strengthen any existing biases for or against a particular appellate judge. According to one IAALS survey respondent:

Many attorneys surveyed have appeared multiple times before a judge who is being evaluated. Their comments (either in favor of retention or against it) tend to skew the responses. Perhaps ensuring that only one response from each attorney is taken into account would help this concern.

Another IAALS survey respondent suggested that the attorney respondent pool be expanded to include all attorneys who rely on appellate opinions, rather than only those who appear before the judge.

The surveying of other judges on appellate judge performance was also raised by IAALS survey respondents. A number of respondents indicated that this group might be able to provide a valuable perspective, particularly with respect to appellate opinions. As noted, this theme arose in other parts of the conference discussion as well.

#### *Survey Response Rates*

The statistical validity of evaluation surveys was a significant concern shared by evaluated judges and JPE program coordinators alike. Just over half (52 percent) of IAALS survey respondents indicated that survey response rates were an aspect of the process that could be improved upon. Appellate judges are concerned with both low response rates to evaluation surveys and self-selection of respondents, as both issues may skew the results. Several IAALS survey respondents suggested providing evaluation survey respondents with some type of an incentive to fill out the survey, to increase the sample size and reduce the effect of potential respondent bias.

In response to this concern, Nancy Norelli, Vice President of the North Carolina Bar Association Judicial Performance Evaluation Committee, explained to conference participants that her program sought to maximize response rates by mobilizing the bar to spread the word about forthcoming JPE surveys. State Bar Counselors serving as “JPE ambassadors” emailed colleagues and local bar associations, describing the program and urging all attorneys to complete the surveys. Specialty and local bars also urged their members to complete surveys by making announcements at bar and section meetings. According to Norelli, it was critical that local attorneys, rather than JPE Committee members, conveyed this message. (It is important to note that all members of the bar are surveyed in North Carolina, whereas JPE programs in other states identify a pool of potential survey respondents based on recent interaction with the evaluated judge. IAALS is examining this issue and potential modifications.)

### **C. Dissemination of Evaluation Results**

Almost one-third (32 percent) of IAALS survey respondents felt there was room for improvement with respect to the dissemination of evaluation information to the public. Two themes emerged from the IAALS survey on this point—one relating to the format and content of the

narratives prepared by the evaluating body, and the other relating to the manner and extent to which these narratives are disseminated to the public. Some of the criticisms—sometimes conflicting—offered by survey respondents on these issues included the following:

- [T]he narrative reports seem to be somewhat formulaic (short bio, say something good, say something bad), and reading the reports in the blue book only emphasizes how formulaic they are. I think this tends to undermine their credibility.
- The narrative is so general that it fails to provide the voter with anything meaningful.
- As to report format, while the evaluation panel was plainly concerned to be even-handed in providing evaluations, the danger is that their reports became too similar across judges, and therefore appeared “boilerplate,” unpersuasive, and superficial.
- All [the narrative report] does basically is parrot the unreliable data returned by the attorneys, and throw in some subjective comments on quality of opinions which may or may not be accurate.
- [T]he narrative report places too much emphasis on raw data and scores or grades, and these ... are continually misused.

These issues were discussed in some detail during the conference. The importance of evaluation results (and recommendations, where made) is not lost on appellate judges. Over two-thirds (71 percent) of those surveyed by IAALS prior to the conference described the evaluation results as having “some influence” on voters’ decisions in retention elections while 17 percent believed they have “a lot of influence.” Based on his analysis of social science data, Professor Singer argued that what citizens (voters) want when they go to the polls is simple, straightforward information about judges, much like the information provided in JPE narratives in many states. This suggests that too much detail in these narratives might put off voters. On the other hand, it is clear that short, formulaic narratives are also not particularly useful.

With respect to disseminating JPE results widely, Jane Howell, Executive Director of the Colorado Office of Judicial Performance Evaluation, shared Colorado’s “Know Your Judge” website with conference participants. The site was designed in 2010 as an easy-to-use online tool through which voters could quickly locate the judges on their ballot and the JPE results for those judges. A public service announcement (PSA) accompanied the website and, according to Howell, “gave voters, for the first time—who might not read their Bluebook but watch TV or listen to the radio—information about judges and where to go.” Between August and October of 2010, the PSA ran 14,000 times on 35 television stations and 270 radio stations.

Availability of objective and informative judicial performance evaluation results is becoming more and more important, as retention battles are heating up around the country and tending to focus on one or a few opinions that address hot-button issues. The 2010 election cycle in both Iowa and Alaska, among other states, saw organized opposition campaigns against the retention of one or more supreme court justices based on the outcome of particular cases. Chief Justice Mark Cady, three of whose colleagues on the Iowa Supreme Court were voted out in 2010 based on a single, unanimous decision, delivered the keynote address at the conference, in which he warned that “no state should think they are immune to what occurred in Iowa.” Alaska Supreme Court Justice Dana

Fabe, who was successful in countering a retention challenge during the 2010 election cycle, told conference participants that she relied on her JPE results in defending her performance on the bench, leaving the opposition campaign to contend with the pro-retention recommendation issued by the Alaska Judicial Council. Thus, it is clear that accurate, thoughtful performance evaluation of appellate judges can, in fact, be a buffer against ideological attacks.

## **V. Conclusion**

*Evaluating Appellate Judges: Preserving Integrity, Maintaining Accountability* was a unique gathering of individuals dedicated to improving processes for evaluating the performance of appellate courts and judges. There were two clear areas of consensus, which guide IAALS in its future work. First, conference participants (and IAALS survey respondents) firmly believe that performance evaluation of appellate judges can be a key component in achieving appropriate accountability while protecting impartiality. Second, the evaluation process for appellate judges needs improvement, particularly with respect to opinion review.

Thanks to the unique perspectives of judges, academics, interested citizens, and JPE program coordinators, IAALS has identified areas of opportunity in the appellate JPE process and is working toward concrete recommendations for improving the processes used by states across the nation. Two projects stemming from the August 2011 conference are underway:

### **1) Recommendations for Appellate Opinion Review**

In the wake of the conference, IAALS formed a task force to consider recommended practices for evaluating appellate opinions. The task force consists of two appellate judges, two representatives from state JPE commissions, and a law professor. The principal charge to the task force is to develop a model for opinion evaluation, in terms of how the evaluated opinions should be selected, who should evaluate the opinions, and what the evaluation criteria should be. The task force will also address ways in which opinion quality should be factored into other aspects of the evaluation process, including survey items, survey respondents, and the self-evaluation. Finally, the task force will consider how institutional differences between courts of last resort and intermediate appellate courts should be taken into account in evaluating the work of appellate judges.

### **2) Pilot Appellate JPE Projects**

IAALS is working with two other national organizations to introduce pilot appellate JPE programs in a few states. Our intention is to work with bar associations and/or court administrative offices, and with the support of appellate court judges, in these states to implement our recommended practices for evaluating appellate judicial performance and providing information to retention election voters.

IAALS hopes to build on the relationships formed and the collaborations initiated at the conference in carrying out this work.



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## APPENDIX

### Survey of Appellate Judges on Judicial Performance Evaluation

1. **Overall, how satisfied are you with the process for evaluating your performance?**
  - Very satisfied
  - Somewhat satisfied
  - Neither satisfied or dissatisfied
  - Somewhat dissatisfied
  - Very dissatisfied
2. **In your opinion, which of the following aspects of the performance evaluation process could be improved upon? (will be asked to explain)**
  - Evaluation criteria (e.g., legal knowledge, integrity, communication skills, etc.)
  - Survey respondent groups
  - Survey response rates
  - Survey instruments/questionnaires
  - Additional bases for evaluation (e.g., opinion review, workload statistics, self-evaluation, etc.)
  - Format of narrative report
  - Dissemination of evaluation information to the public
3. **Is courtroom observation part of the evaluation process for appellate judges in your state?**
  - Yes
  - No
4. **In your view, should courtroom observation be part of the evaluation process for appellate judges?**
  - Yes
  - No (will be asked to explain)
5. **Is opinion review part of the evaluation process for appellate judges in your state?**
  - Yes
  - No
6. **In your view, should opinion review be part of the evaluation process for appellate judges?**
  - Yes
  - No (will be asked to explain)

**7. To what extent has the evaluation process been beneficial or detrimental to your professional development?**

- Significantly beneficial (will be asked to explain)
- Somewhat beneficial (will be asked to explain)
- No effect
- Somewhat detrimental (will be asked to explain)
- Significantly detrimental (will be asked to explain)

**8. What impact, if any, does the evaluation process have on your independence as a judge/justice?**

- Enhances my independence as a judge/justice
- Has no impact on my independence as a judge/justice
- Undermines my independence as a judge/justice

**9. Are appellate judges in your state subject to retention elections?**

- Yes
- No

**If yes, survey continues. If no, survey ends here.**

**Retention election states only:**

**10. How much impact do you believe the evaluation results (and recommendations, if made) have on voters' decisions in retention elections?**

- A lot of influence
- Some influence
- No influence

**11. Does the evaluation report provide information that has enabled you, or would enable you if necessary, to defend yourself against attacks by special interests?**

- Yes
- No (will be asked to explain)

**12. Could the evaluation report be modified to better enable you to defend yourself, if necessary, against attacks by special interests?**

- Yes (will be asked to explain)
- No

**13. May we share your responses with your state JPE commission?**

- Yes (*will be asked what state*)
- No