Shared Expectations

Judicial Accountability in Context

INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM

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INTRODUCTION AND EXECUTIVE SUMMARY

On September 22, 2006, the *Boston Globe* – a newspaper not generally known for widespread criticism of the judiciary – ran an editorial concerning Rhode Island Superior Court Judge Francis Darigan's decision to accept a lenient plea deal for two defendants in a high-profile manslaughter case. Noting the community's shock and outrage at the light sentences, the newspaper criticized Judge Darigan for failing to describe the reason for his decision to a stunned citizenry. Judicial independence, the *Globe* asserted, "demands accountability and transparency to the public…. [Judge Darigan] owes the public an explanation."

The *Globe*'s frustrated reaction to the Darigan decision was not uncommon. Across the country, the public is demanding more accountability from its judges. In some situations, such as the Rhode Island case, the request is simply for more accurate, thorough, and extensive explanations. Elsewhere, however, voters are demanding not just that their judges explain their decisions thoroughly, but that the decisions themselves fall in line with prevailing public sentiment.

In states where judges are elected, this means that a candidate's professional qualifications may be less important than his political leanings. In several states, judicial candidates have been asked to declare their personal positions on controversial issues ranging from assisted suicide to gay marriage, even though they might have to rule on cases involving those very same issues if elected. Elsewhere, voters are considering proposals to make it easier to remove judges whose decisions provoke anger or disagreement in the community. New initiatives have been proposed in Colorado to limit the terms of appellate judges (the practical effect of which would be to immediately oust Democratic appointees), and in Montana to give voters the ability to recall judges through special elections. Most severe of all, a South Dakota

ballot proposal called “JAIL 4 Judges” would strip that state’s judges of their traditional immunity for judicial decisions, and subject them to criminal and civil penalties for their actions on the bench.

Opponents of these proposals are not taking them lightly. They argue that such initiatives are assaults on the independence of the judiciary, and decimate a judge’s ability to protect minority interests through fair application of the law. Judges, the argument goes, must base their decisions on the existing law and Constitutional principles; they cannot merely bend to the popular will. Former Supreme Court Justice Sandra Day O’Connor, one of the more frequent speakers on the topic of judicial independence, has asserted that “We must be ever vigilant against those who would strong-arm the judiciary into adopting their preferred policies.”

The debate over the qualities that make a good judge seems intractable because there is no shared set of expectations about a judge’s role in society. Some accept as a political inevitability that judges are *de facto* legislators, and accordingly evaluate judges by the political impact of their decisions. Others expect judges to fight to the death to preserve their complete independence, as if any form of accountability to the public would pose a threat. Judges find themselves caught in the middle, disappointing a public that, to some large extent, does not know what it rightfully can and should expect of the judiciary. For the vast majority of state judges who periodically face voters at election time, this lack of shared expectations can mean a short tenure, inadequate funding, and increasing polarity between the judges and the people they serve.

The current philosophical tug-of-war is all the more dismaying because a fair and effective solution for reviewing judges is already available. It is called judicial performance evaluation, or JPE. Judicial performance evaluation is based on politically neutral expectations. Rather than asking, “Is Judge X a good judge because she reached a particular result in that

case?" it asks, "Is Judge X a good judge because she treated all parties fairly, reached a decision supported by existing law, and explained her decision clearly and thoroughly?" JPE looks at how a judge treats people in the courtroom, explains her decisions, manages her caseload, and adheres to existing law. It then measures each judge's performance in these areas both in absolute terms against established benchmarks, and relative to the performance of other judges.

Judicial performance evaluation works. Over the past thirty years, it has been officially introduced in twenty-one states and jurisdictions, and has proven to be a valuable resource both for judges and the public they serve. Further, it is a powerful tool for changing the debate about what the public must expect from its judges.

Comprehensive, apolitical judicial performance evaluation carries several significant advantages. First, every judge who is evaluated benefits from the feedback of the evaluation, and is given an opportunity for self-improvement. Due to the nature of a judge's professional relationship with attorneys, court staff, and litigants, it is often difficult for a judge to get constructive feedback on his performance. JPE allows for anonymous feedback so judges can learn about strengths and weaknesses they otherwise might not have recognized.

Second, JPE provides a valuable source of information to voters in states where judges must face an election to remain in office. In many cases, it is the only source of information. Voters typically have no experience with individual judges, much less a sense of which judges are doing a good job on the bench. As a consequence, voters tend to vote based on cues unrelated to a judge's performance, such as ethnicity or party affiliation, where that information is available. Providing judges' performance evaluation results to the public, however, allows voters to choose judges based on substantive criteria related to historic job performance. While JPE primarily has been used in states where judges stand for uncontested retention elections,

there is reason to be confident that it would work equally well in states with contested judicial elections.

A third benefit to judicial performance evaluation is the role it plays in civic education. Like most parties to the independence/accountability debate, voters tend to think of judges in terms of case outcomes. A good judge is frequently imagined as the one who reaches the "right" outcome with respect to a death penalty case, or a national security issue, or the voter's own speeding ticket. JPE helps change the terms of the discussion. By reviewing performance evaluations and absorbing the neutral criteria used to evaluate judges, the public is more likely to start thinking of a good judge as one who uses the right process, and who is fair, knowledgeable, prepared and judicious.

JPE is, at heart, no different than the routine performance evaluations that many Americans encounter in their own jobs. It is an opportunity to assess periodically a worker's strengths and weaknesses, and make sure that the "employee" and the "employer" are focused on the same goals. Just as an employee who performs well on her evaluation can congratulate herself on a job well done, judges who receive strong evaluations can be confident that their approaches to the job are effective. Conversely, just as an employee who rates poorly in some areas understands the need to improve, judges who do not perform well in certain areas will recognize the need to do better. Just as workplace evaluations lead to more efficient and more confident employees, judicial evaluations can lead to more effective and productive courts.

JPE would be an effective tool in every American court. To this end, we make the following summary recommendations toward developing a model JPE program, which are explained in detail in the full report:

- Each sitting judge should be evaluated on a regular schedule, at least twice during each term or, if there is no set term, at least once every three years.

- Evaluations should emphasize apolitical metrics of judicial performance, and should be based primarily on performance against predetermined benchmarks.

- An evaluation committee should gather a broad and deep set of information on the judge's performance, including survey data, review of case management skills and written opinions, courtroom observation, and information gained from interviews with the judge. The committee should issue a report concerning each judge's performance.

- The evaluation committee should be independent, and should consist both of lawyers and non-lawyers.

- The evaluation process should be transparent both to the judge being evaluated and to the public.

- Evaluation results, and information on the evaluation process itself, should be widely disseminated to the public.

The end of this report contains model materials for implementing these principles into a fully functioning JPE system, based on best practices gleaned from the states whose JPE programs are already well-established. These materials may be used to develop a new program from scratch, or to refine an existing program in order to improve assessment quality, transparency, or public access to information. More importantly, it is hoped that these materials will promote national and local dialogues about the right balance of judicial independence and judicial accountability, and will foster shared expectations about the role of judges in American society.

I. The False Dichotomy Between Judicial Independence and Judicial Accountability

The debate over the proper role of courts in American democracy has reached a fever pitch. Citing judicial decisions that cut against popular opinion, politicians and commentators increasingly claim that judges are "arrogant, out of control" and out of touch with the electorate, and must be held accountable.[1] In response, proponents of judicial independence argue that judges are not intended to be majoritarian, and are bound to enforce existing law whether or not it contradicts popular sentiment.[2] The terms of the debate pose a distasteful choice between "accountable" courts whose decisions are influenced – or even dictated – by the demands of the majority, and "independent" courts that should not be held responsible even for the most unrestrained flights of legal fancy. This dichotomy is exacerbated by the fact that most Americans do not really understand what their judges do, or what they should expect from them.

The harshness of the debate is dismaying, because the debate itself is entirely unnecessary. As one set of commentators put it, independence and accountability are simply "different sides of the same coin."[3] Moreover, they are both desirable – and desired – outcomes. A major public opinion research study in 2005 found that 94% of Americans strongly agree that their courts should be strong and "free from political influence,"[4] but 62% also agreed that courts should be held accountable to the Constitution and the law.[5] The court system is credible only if judges are free to reach decisions in individual cases without bending to a preordained result, but at the same time are constrained within accepted processes to assure a fair and reasonable resolution. In other words, we should be prepared to accept a certain range of

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[1] *See* Roger K. Warren, *Judicial Accountability, Fairness, and Independence*, 42 CT. REV. 4, 4 (2006). *See also* Bruce Fein & Burt Neuborne, *Why Should We Care About Independent and Accountable Judges?*, 84 JUDICATURE 58, 58 (2000).
[2] *See, e.g.*, Sandra Day O'Connor, *Remarks on Judicial Independence*, 58 FLA. L. REV. 1, 1-2 (2006).
[3] Stephen B. Burbank & Barry Friedman, *Reconsidering Judicial Independence* in JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH 15 (Stephen B. Burbank & Barry Friedman eds. 2002).
[4] JUSTICE AT STAKE CAMPAIGN, SPEAK TO AMERICAN VALUES 2 (2005).
[5] *See id*. at 4.

outcomes in a case, provided that the outcome is based on legitimate and accepted principles of adjudication.

The extent to which a judge follows accepted principles is fully measurable, if the metrics are carefully selected. Judges are not legislators, and the measures of judicial accountability must be different from measures of legislative (or executive) accountability. Legislators are measured in the public eye by the policies they advocate and the laws they pass or oppose. Judges, by contrast, are tasked not with making new laws or advocating policies, but with applying existing law fairly and accurately to the facts of each case. A judge therefore should be measured not by an "outcome-determinative litmus test,"[6] but by the process used to arrive at that outcome. Did the judge give each party the opportunity to make his case? Did he treat everyone in the courtroom with dignity? Did he clearly and accurately explain the facts relevant to his decision, or give clear and accurate instructions to the jury? Did he have a strong command of the relevant law and apply it consistent with established precedent? Did he move the case along at all times, avoiding unnecessary time and expense?

Measuring judicial accountability by such neutral, process-oriented standards does not impede judicial independence. Rather, it bolsters that independence by focusing the public on the process of judging and away from the occasional controversial outcome. Citizens who are educated about the qualities of a good judge – legal knowledge, patience, fairness, clarity and efficiency – are less likely to be outcome-oriented and more likely to place each decision in the context of the court's overall role in our system of government.

The means of measuring judicial performance along neutral standards is already in place in several jurisdictions. Judicial performance evaluation programs developed in the 1970s as a compromise between the need for an independent judiciary and the desire to hold judges

[6] Fein & Neuborne, *supra* note 1, at 58.

accountable to the public whom they serve. For thirty years, these programs have been expanded and refined to include components of judicial self-improvement and voter education. JPE programs have also expanded their geographic reach to include twenty-one states and jurisdictions by 2006. In so doing, they have proven to be remarkably adaptable to different systems of judicial selection, and remarkably well-received by both judges and the public. Simply put, judicial measurements have worked. The time has come to implement judicial performance evaluation programs in every state and federal jurisdiction in the United States.

This paper proceeds as follows: Part II examines the various methods by which judges are initially selected and retained, including qualification requirements and any statutory limitations on judicial service. Part III sets out the fundamentals of a judicial performance evaluation program and explains how a well-functioning program benefits both judges and the public.[7] Part IV examines the historical experience of performance evaluation in states that have implemented it in a significant and robust manner. Part V describes some of the challenges that a JPE program must address to function properly. Finally, Part VI proposes a model for judicial performance evaluation, based on the lessons learned from existing programs.

II. Judicial Selection and Service

A. Approaches to Initial Selection

States are free to set up their judicial systems in any manner they see fit. As a result, there is considerable variance among states with respect to the process for selecting judges and the requirements for holding judicial office. With these variations come different approaches to

[7] Judicial performance evaluation measures individual judges, and should not be confused with court performance evaluation, which most frequently measures the performance of an entire court system. *See, e.g.*, National Center for State Courts, CourTools, http://www.ncsconline.org/D_Research/CourTools/tcmp_courttools.htm (last visited Sep. 27, 2006). Nor should judicial performance be confused with judicial conduct, which relates to a judge's behavior within the relevant codes of judicial ethics. The scope of this paper is limited to judicial performance evaluation only.

accountability. This section explores the different systems of initial selection with an eye to the advantages and challenges each system poses for judicial performance evaluation.

1. Partisan Elections

In partisan elections, judicial candidates run for office with the official endorsement of a political party. Although partisan elections were once the most common form of judicial selection in the states,[8] they are now used as the primary means of judicial selection in only eight states.[9] Proponents of popular elections argue that judges, like legislators, are policymakers, and must be directly accountable to the electorate in the same way legislators are.[10] Critics, however, contend that partisan elections are the most likely way to politicize the judiciary, and increase the risk of selecting non-meritorious candidates.[11]

2. Nonpartisan Elections

As their name implies, nonpartisan elections pit candidates for judicial office against each other, but without partisan labels on the ballot. This approach emerged at the start of the twentieth century, as an effort to combat widespread political corruption and the influence of

[8] Partisan elections emerged as the preferred method in the 1830s, when Jacksonian populism aimed to democratize all aspects of the political process. This approach remained popular throughout the rest of the nineteenth century. In the years immediately following the Civil War, for example, twenty-two of the thirty-four states chose their judges through partisan election. *See* Jona Goldschmidt, *Selection and Retention of Judges: Is Florida's Present System Still the Best Compromise?*, 49 U. MIAMI L. REV. 1, 6 (1994).

[9] States continuing to use partisan elections to select all or some of their judges are Alabama, Illinois, Louisiana, Michigan (Supreme Court only), Ohio, Pennsylvania, Texas and West Virginia. In addition, specific trial courts in Indiana, Kansas, Missouri, New York and Tennessee employ partisan elections to select their judges. *See* American Judicature Society, Judicial Selection in the States: Appellate and General Jurisdiction Courts (on file with author), *available at* http://www.ajs.org/js/JudicialSelectionCharts.pdf (hereinafter "Judicial Selection in the States").

[10] *See* JAN WITOLD BARAN, METHODS OF JUDICIAL SELECTION/ELECTION, June 2006, at 4 (on file with author), *available at* http://www.instituteforlegalreform.com/resources/Judicial%20Selection%20White%20Paper-FINAL.doc.

[11] Anecdotal examples abound. For instance, in the mid-1980s one candidate was elected to the Circuit Court of Cook County, Illinois even after it was disclosed in federal court that he had been implicated in corrupt payments to judges in that same county. Darrell McGowen, *Life Tenure – An Indispensable Ingredient to an Independent Judiciary*, 75 ILL. B.J. 620, 620-21 (1987). Another report notes that during an election in Minnesota, "an inexperienced candidate of questionable competence" nearly unseated a respected sitting judge, and a fresh law school graduate with an arrest record for domestic violence received over 100,000 votes for district court judge even though he ran against a highly qualified and respected opponent. LEAGUE OF WOMEN VOTERS OF MINNESOTA EDUCATION FUND, CHOOSING MINNESOTA'S JUDGES (1998) (on file with author), *available at* http://www.lwvmn.org/EdFund/ChoosingMinnesotasJudges.asp.

party bosses.[12] Twelve states continue to use nonpartisan elections as the primary vehicle for selecting judges.[13]

3. Appointment Without Nominating Commission

In contrast to elections, six states allow for appointment of judges directly by the governor or legislature without direct popular input.[14] An appointment system relieves would-be judges from the cost and time of campaigning, and increases the likelihood that marginal or unqualified candidates will be eliminated from consideration. However, detractors raise the specter of cronyism in the appointment process, particularly where the decision lies solely with a governor.[15] Appointment by the legislature somewhat reduces the likelihood of political favoritism, but poses its own difficulties. Virginia's requirement that judges be interviewed and approved by both the state House and Senate each time they seek reappointment to the bench, for example, came under fire in 2003 when legislators began quizzing judges on specific outcomes of controversial cases, prompting fears of a judicial litmus test.[16]

4. Merit Selection Through Nominating Commission

A compromise between appointment and elections is merit selection through a nominating commission. Under this method, a nominating commission screens candidates and forwards names to the governor for ultimate selection. Judges chosen through merit selection usually serve a short, provisional term on the bench before facing a retention election. This is

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[12] *See* DAVID W. NEUBAUER & STEPHEN S. MEINHOLD, JUDICIAL PROCESS: LAW, COURTS, AND POLITICS IN THE UNITED STATES 191 (3d ed. 2004).

[13] These states are Arkansas, Georgia, Idaho, Kentucky, Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Oregon, Washington and Wisconsin. *See* "Judicial Selection in the States," *supra* note 9. Selected courts in Arizona, California, Florida, Indiana, Michigan, Oklahoma, and South Dakota also employ nonpartisan elections. *See id*.

[14] These states are California (governor), Maine (governor), New Hampshire (governor), New Jersey (governor), South Carolina (legislature), and Virginia (legislature). *See id*.

[15] *See* LEAGUE OF WOMEN VOTERS, *supra* note 11.

[16] *See, e.g*., Steven Ginsberg & Michael D. Shear, *In Virginia, Fears of a Judicial Litmus Test*, WASH. POST, Jan. 16, 2003, at B1. Notably, Virginia created a task force for judicial performance evaluation the following year. *See infra* Part IV.B.2.

commonly known as the Missouri Plan, because Missouri was the first state to adopt it in 1940.[17] The judge runs uncontested, and the only question on the ballot is, "Should Judge X be retained in office?"[18] If the sitting judge wins a majority of affirmative votes, [19] he will continue to hold the office for another full term.

Supporters of the merit system argue that it promotes quality on the bench, a stable court, and public confidence in the judiciary, because there are multiple checks on appointment, as well as an opportunity to remove underperforming judges.[20] Critics of the Missouri Plan counter that retention elections are not meaningful because nearly all incumbent judges are returned to office, usually by healthy margins.[21] Still, merit selection has won increasing acceptance. Twenty-two states and the District of Columbia look to merit selection as a primary means of selecting new judges.[22] Furthermore, in recent years, several states employing contested elections have actively considered switching to the Missouri Plan or a variant thereof.[23]

B. Qualifications for and Limitations on Judicial Service

Most jurisdictions set qualifications for their judges beyond mere ability to navigate the selection process. Twenty states set minimum ages for some or all judges, ranging from eighteen in New York to thirty-five in certain courts in New Mexico, Tennessee and Texas.[24] As a practical matter, however, a judicial candidate would have to be at least thirty years old in order to possess the necessary experience to be qualified in most states. Thirty jurisdictions also have

[17] NEUBAUER & MEINHOLD, *supra* note 12, at 197.
[18] *Id*.
[19] Two states, Illinois and New Mexico, require a supermajority to secure retention. *See infra* Part IV.A.4.
[20] *See* LEAGUE OF WOMEN VOTERS, *supra* note 11.
[21] *See* NEUBAUER & MEINHOLD, *supra* note 12, at 198.
[22] Merit selection states are Alaska, Arizona, Colorado, Connecticut, Delaware, D.C., Florida, Hawaii, Indiana, Iowa, Kansas, Maryland, Massachusetts, Missouri, Nebraska, New Mexico, New York (selected courts), Oklahoma, Rhode Island, Tennessee (appellate courts only), Utah, Vermont, and Wyoming. *See* "Judicial Selection in the States," *supra* note 9.
[23] *See id*.
[24] States with age minimums for at least one court include Arizona , Arkansas, Georgia, Idaho, Kansas, Maryland, Mississippi, Missouri, Nebraska, Nevada, New Mexico, New York, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Utah, West Virginia and Wyoming. *See id*.

maximum or mandatory retirement ages for their judges, which vary between the ages of seventy and seventy-five.[25] While it would be reasonable to assume that states electing their judges are less likely to impose age restrictions than appointment or merit selection states (because of fewer concerns about judges remaining in office with diminished physical or mental capacity), there does not appear to be any correlation between a state's system of initial selection and whether it has adopted age restrictions.

Most states also have requirements relating to residency and judicial experience.[26] Nearly every state requires that judicial candidates be licensed to practice in the state, be members of the state bar, or both; several also require a minimum period of active practice before an applicant may seek a judicial position.[27]

With the exception of federal judges and those in Massachusetts, New Hampshire, and Rhode Island, all judges in American courts serve at least one term of specific duration and must prevail in an election or otherwise be reappointed in order to continue in office for another term.[28] The initial term varies greatly from jurisdiction to jurisdiction, for as long as fifteen years (in the District of Columbia) or as little as until the next general election (in New Mexico and Tennessee).[29] To date, no state has instituted term limits for its judges.[30]

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[25] These jurisdictions are Alabama, Arizona, Colorado, Connecticut, D.C., Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, South Dakota, Vermont, Virginia, Washington, Wisconsin and Wyoming. *See id*.

[26] *See* Appendix B.

[27] *See id*.

[28] *See* "Judicial Selection in the States," *supra* note 9.

[29] *See id*.

[30] In 1996, Nevada voters rejected a constitutional initiative that would have effectively limited judges to two terms on any given court. *See* Ed Vogel, *Assembly Committee Requests Bill on Repealing Term Limits*, LAS VEGAS REV.-J., Mar. 12, 1997, at 5B. More recently, a bill to eliminate life tenure for state judges and impose sixteen-year term limits for judicial appointments failed to make it out of the Rhode Island Senate. *See* S.B. 2005-S0043 (R.I. 2005). Colorado placed a judicial term limits initiative on the November 2006 ballot, an initiative that has been strongly opposed because, among other things, the state already has a well-functioning JPE program and regular retention elections. *See, e.g.*, Citizens to Protects Colorado Courts, http://www.protectcoloradocourts.org (last visited Sep. 27, 2006). In addition, there have been certain strictly academic proposals to create term limits for federal judges,

III. The Multi-Faceted Benefits of Judicial Performance Evaluation

Irrespective of a state's system of initial selection, judicial performance evaluation promotes both accountability and independence by measuring process rather than outcome. By setting objective, measurable, apolitical standards for judges, it is easier for the public to identify the qualities that make a good judge (regardless of the case in front of her), and easier to distinguish between judges whose performance is outstanding and those whose performance needs improvement. Put another way, judicial performance evaluation properly changes the argument from "She is a good judge because of the way she ruled on issue X" to "She is a good judge because her ruling is carefully considered, clearly explained, and based on accepted law."

A. Improving Voter Knowledge

Judicial performance evaluation plays a critical role in educating the public. Multiple studies have shown that the voter participation in retention elections is dramatically lower than in elections for legislative or executive positions.[31] The same dismal participation levels are seen in contested judicial elections.[32] These low levels of participation cannot be merely chalked up to voter apathy. In significant part, decisions not to vote in judicial elections are based on voters' rational conclusion that they lack sufficient knowledge to cast an informed vote. The Feerick Commission study in New York in 2004 found that 58% of voters did not vote in that state's

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notwithstanding the life tenure provisions of Article III of the U.S. Constitution. *See, e.g.*, Steven G. Calebresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered* in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 15 (Roger C. Cramton & Paul D. Carrington eds. 2006). Of course, every jurisdiction has instituted methods for removing judges from the bench for cause.

[31] The circumstance in which voters vote for candidates at the top of the ballot (such as President or Governor) but decline to vote for any other races is known as "roll-off" and is well-documented. The roll-off effect is particularly strong in judicial elections. *See* Steven Zeidman, *To Elect or Not to Elect: A Case Study of Judicial Selection in New York City 1977-2002*, 37 U. MICH. J.L. REFORM 791, 822-23 (2004); Nicholas P. Lovrich et al., *Citizen Knowledge and Voting in Judicial Elections*, 73 JUDICATURE 28, 30 (1989).

[32] In the 2002 judicial elections in New York, for example, voter participation for civil court judges was no higher than 22% in the four counties encompassing New York City. *See* Zeidman, *supra* note 31, at 823-35. *See also* Bridget E. Montgomery & Christopher C. Conner, *Partisan Elections: The Albatross of Pennsylvania's Appellate Judiciary*, 98 DICK. L. REV. 1, 20 (1993) (finding that only 29% of Pennsylvania's registered voters voted for judicial candidates in the state's 1993 primary).

partisan judicial elections specifically because they lacked information about the candidates.[33] Similarly, a study of retention elections for two Supreme Court justices in Wyoming in 1980 found that nearly one-third of voters who had no information on a justice standing for retention chose to abstain or could not recall their vote when asked.[34] By contrast, those familiar with the judicial candidate(s) appearing on the ballot are far more likely to vote. A study in Washington State in 1989 concluded that "voter knowledge is indeed of primary importance in the dynamics of electorate formation in non-partisan primary elections where most contested judicial races are played out."[35]

Moreover, voters are thirsting to acquire the necessary knowledge about their judges. More than two-thirds of voters in a 2004 poll agreed that "receiving a nonpartisan voter guide containing background information on judicial candidates would make them more likely to vote in judicial elections."[36] A recent poll among New York's registered voters found that an astonishing 88% "believe that voter guides are a useful way to educate the public about judicial elections."[37] These recent polls are consistent with earlier studies in states with well-established judicial performance evaluation programs, suggesting that between 64% and 72% of voters were more likely to vote in a judicial election as a result of receiving official evaluation information.[38]

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[33] *See* Report of the Commission to Promote Public Confidence in Judicial Elections 38 (2004) (on file with author), *available at* http://www.courts.state.ny.us/reports/JudicialElectionsReport.pdf (hereinafter "Feerick Commission Report"); *see also* William H. Manz, *Who's Who – Researching Judicial Biographies*, 78 FEB. N.Y. ST. B.J. 11, 12 (2006).

[34] Kenyon N. Griffin & Michael J. Horan, *Patterns of Voting Behavior in Judicial Retention Elections for Supreme Court Justices in Wyoming*, 67 JUDICATURE 68, 72 (1983).

[35] Lovrich, *supra* note 31, at 33.

[36] *See* Zogby International Survey of 1,204 American voters, commissioned by Justice at Stake and conducted March 17-19, 2004, *cited in* Randall T. Shepard, *Electing Judges and the Impact on Judicial Independence*, 42-JUN TENN. B.J. 23, 25 & n.16 (2006).

[37] Feerick Commission Report, *supra* note 33, at 39.

[38] *See* Kevin M. Esterling, *Judicial Accountability the Right Way*, 82 JUDICATURE 206, 210 (1999); *see also* Charles H. Sheldon & Nicholas P. Lovrich, Jr., *Knowledge and Judicial Voting: The Oregon and Washington Experience*, 67 JUDICATURE 235, 239-40 (1983) (concluding that Oregon and Washington voters preferred, and relied upon, voter information pamphlets as their primary source of information on candidates in contested nonpartisan elections). *But see* B. Michael Dann & Randall M. Hansen, *Judicial Retention Elections*, 34 LOY. L.A. L. REV.

Dissemination of additional information about the judges appearing on the ballot carries the prospect not only of producing *more* voters, but *more informed* voters. Esterling and Sampson's seminal 1998 study on JPE programs in Alaska, Arizona, Colorado and Utah reported that the majority of voters in those states voted, at least in part, on the basis of the performance evaluation information they received.[39] The same voters agreed that the official information added to their confidence in the quality of judicial candidates.[40]

The figures in the Esterling and Sampson study are particularly significant in light of voter behavior when information about judges is lacking. Without accurate and relevant knowledge about the specific judges at issue, voters are prone to base their decisions on factors such as ethnicity,[41] gender,[42] name recognition,[43] party affiliation,[44] or length of time on the bench.[45] Even worse, without information to inform their choices, a significant number of voters apparently cast a vote without any rationale whatsoever. For example, in the Wyoming study, 38% of those surveyed who had just cast a vote in one retention election could provide no

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1428, 1431 (2001) (arguing that rolloff rates "do not necessarily respond to programs intended to educate voters about judicial retention elections").

[39] Sixty-six percent of those polled in Alaska responded that official information helped or solely decided their vote; for Arizona, Colorado and Utah the figures were 66.1%, 76.3%, and 73.0%, respectively. *See* KEVIN M. ESTERLING & KATHLEEN M. SAMPSON, JUDICIAL RETENTION EVALUATION PROGRAMS IN FOUR STATES: A REPORT WITH RECOMMENDATIONS 39 (1998).

[40] *See id*.

[41] *See* Larry Aspin et al., *Thirty Years of Judicial Retention Elections: An Update*, 37 SOC. SCI. J. 1, 3 (2000). *See also* Susannah A. Nesmith, *16 Judge Seats Draw 35 Candidates*, MIAMI HERALD, Sep. 1, 2006, at 6B (noting the electoral advantage of Hispanic and Jewish-sounding surnames in Florida judicial elections).

[42] *See* Marie Hojnacki & Lawrence Baum, *Choosing Judicial Candidates: How Voters Explain Their Decisions*, 75 JUDICATURE 300, 308-09 (1992) (noting voter reliance on low-information cues, including gender of the candidates, in elections for associate justices of the Ohio Supreme Court in 1986 and 1988).

[43] In an extreme case of (misplaced) name recognition, candidate Don Yarborough won election to the Texas Supreme Court in 1976 even though he claimed he took his instructions from God and was the subject of a disbarment suit just two weeks before the election. Yarborough's name was similar to that of a former senator and a former gubernatorial candidate. *See* Anthony Champagne & Greg Theilemann, *Awareness of Trial Court Judges*, 74 JUDICATURE 271, 271 (1991).

[44] *See* Anthony Champagne, *Tort Reform and Judicial Selection*, 38 LOY. L.A. L. REV. 1483, 1492 (2005) (discussing "'party sweeps' in which popular top-of-the-ticket candidates have swept judges of the opposing party out of office and elected judges of a popular candidate's party for no other reason than that the judges shared the popular candidate's party affiliations").

[45] *See* Goldschmidt, *supra* note 8, at 14; Griffin & Horan, *supra* note 34, at 74.

articulable reason why they had voted the way they did.[46] Similarly, one estimate suggests that approximately 30% of voters will vote against sitting judges in any retention election, without regard for who the candidate is.[47] Yet another study concluded that voters rarely differentiate between judges on a retention ballot, voting yes for all or no for all.[48] Providing concrete information to voters about the judges on the ballot will help defray at least some of these disturbing trends.

B. Promoting Judicial Independence

Beyond informing voters about the performance of particular judges, widely disseminated performance reviews can also enhance judicial independence by educating the public about the specific qualities that make a good judge. If popular commentary is any indication, the most fundamental threat to judicial independence today is the perception that too many judges are merely "legislators from the bench," and that judicial opinions are examples of policymaking rather than application of existing law.[49] This sentiment has been exacerbated by the cries of some politicians against "activist" judges and the U.S. Supreme Court's decision in *Republican Party of Minnesota v. White*, which held that candidates for elective judicial office were not barred by the canons of judicial ethics from "announcing their views on disputed legal or political issues."[50] As a consequence, voters are increasingly being asked to "hold judges

[46] *See* Griffin & Horan, *supra* note 34, at 73-74.
[47] *See* Jacqueline R. Griffin, *Judging the Judges*, 21 LITIGATION 5, 62 (1995); Richard C. Kearney, *Judicial Performance Evaluation in the States*, 22 PUB. ADMIN. Q. 468, 472 (1999).
[48] *See* Anne Rankin Mahoney, *Citizen Evaluation of Judicial Performance: The Colorado Experience*, 72 JUDICATURE 210, 212 & n.10 (1989).
[49] *See, e.g.*, Warren Veith et al., *A Supreme Court Nominee*, L.A. TIMES, Jul. 20, 2005, at A1 (quoting President Bush as saying John Roberts "will strictly apply the Constitution and law, not legislate from the bench.").
[50] *Republican Party of Minnesota v. White*, 536 U.S. 765, 768 (2002).

accountable" for politically unpopular outcomes of specific cases,[51] or to vote for judges based on the judicial candidates' personal opinions on hot-button political issues.[52]

Although they are a poor and dangerous measure of judicial performance, outcomes of specific cases remain the most prominent and most easily accessible metric available to the public to evaluate judges. Widespread use of judicial performance evaluations can change that. The characteristics measured by judicial performance evaluations are the traits expected from an independent, knowledgeable judge: impartiality, temperance, knowledge of the law, fair application of the law, and efficiency. Voters who think of judges in these terms, rather than as robed policymakers, are arguably more likely to vote carefully and objectively in a judicial election. In short, JPE has the potential to broaden the public's perspective of good judging

[51] In one of the most extreme examples, a 2006 South Dakota ballot initiative known as "JAIL 4 Judges" seeks to subject state judges to criminal and civil penalties for a host of vague offenses incurred while in office, including "blocking of a lawful conclusion of a case" and "deliberate disregard of material facts." If convicted three times by a special grand jury, a judge would be automatically removed from the bench, and would lose half his retirement benefits. Not only would the initiative strip judges of immunity for their official actions – a tradition dating back centuries – but it would deny them the right to a public defender in any action brought before the special grand jury. To add an ironic twist, persons enforcing the findings of the special grand jury would themselves be immune from civil or criminal liability for their actions. *See* South Dakota Amendment E, http://www.southdakotajudicialaccountability.com/amendment.html (last visited Sep. 27, 2006). A similar proposal has been floated in Idaho several times since 2002, but proponents have failed to gather enough signatures to get the initiative on the ballot. *See* Idaho Secretary of State, 2006 Proposed Ballot Initiatives, http://www.idsos.idaho.gov/ELECT/INITS/06init02.htm (last visited Sep. 27, 2006).

[52] After *White*, more and more state judges are being requested to declare their opinions publicly on controversial issues, with the half-hearted caveat that *of course* they would be expected to follow existing precedent. In Iowa, for example, candidates for judicial office in the fall of 2006 were asked by one conservative coalition to fill out a six-page questionnaire indicating their personal positions on (among other things) abortion, gay marriage and civil unions, assisted suicide, homosexual relationships, and the display of the Ten Commandments in public buildings and schools. *See* Iowans Concerned About Judges, 2006 Judicial Voters' Guide Questionnaire for Judicial Candidates (on file with author), *available at* http://www.iowansconcernedaboutjudges.org/doc/Survey.pdf. As of September 27, 2006, sixteen judges had responded to the survey. Each declined to answer questions concerning the controversial issues, instead encouraging voters to look to factors such as "the judge's knowledge of the law, fairness, demeanor, timeliness of decisions, etc." Letter from Hon. Kurt L. Wilke, District Court Judge, Iowa Second Judicial District, to Daniel Dlouhy, Iowans Concerned About Judges (Aug. 21, 2006) (on file with author), *available at* http://www.iowansconcernedaboutjudges.com/doc/Wilke.pdf. In Florida, where state judicial candidates were asked to answer a similar questionnaire, 120 of 238 candidates refused to respond at all, and another 77 declined to answer one or more questions because they believed that doing so would ethically obligate them to recuse themselves from any proceeding concerning the issue. *See* Florida Family Policy Council's 2006 Statewide Judicial Candidate Questionnaire, http://www.flfamily.org/uploadfile/upload/Florida_Final.pdf (last visited Sep. 27, 2006).

beyond the final outcome of a case, by laying the groundwork of civic education about the proper role of the courts in American democracy.

Moreover, performance evaluation helps judges put their own responsibilities in perspective, ensuring a more effective use of judicial independence. As one commentator has noted, "Judicial independence does not excuse the courts from compliance with appropriate standards of accountability: it merely helps define the standards of accountability that are appropriate."[53]

C. Improving Judicial Performance

Judicial performance evaluation does not just benefit the public. It also provides concrete feedback to sitting judges about their strengths and weaknesses on the bench, creating ongoing opportunities for improvement. For this reason, JPE is appropriate for every judge, including those with life tenure. In particular, performance evaluations may provide judges with constructive criticism that could not, or would not, be captured through any other medium. This is particularly true for interpersonal performance issues, such as the judge's clarity of instructions and orders and treatment of people in the courtroom. As one commentary put it:

> A judge who fails on the job because he or she does not fill out all the required … forms will find out soon enough, but one who needlessly insults lawyers or litigants may not. The tradition of deference may serve to conceal that information from the very person who needs it most, particularly if the judge's problem is a lack of audience-sense or of the ability to put himself in the shoes of another person.[54]

Performance evaluation has the potential to contribute to self-improvement far beyond courtroom demeanor, of course. Jurors and witnesses, who otherwise are unlikely to share their impressions with the court, may comment on the judge's clarity in giving instructions, explaining the trial proceedings, or allowing testimony to come in smoothly. Similarly, litigants may offer

[53] Warren, *supra* note 1, at 5.
[54] Editorial, *The Judicial Survey*, 155 N.J.L.J. 748 (Feb. 15, 1999).

their perception of the judge's fairness and control over the litigation process.[55] Moreover, and importantly, JPE allows the judge to receive *positive* feedback about his or her performance, which a lawyer or litigant might otherwise withhold for fear it will be interpreted as an improper attempt to curry favor with the court.

Finally, judicial performance evaluation permits a judge to see how he has performed against predetermined benchmarks, and relative to his peers on the court, again to identify areas of strength and weakness. Judges in many different JPE programs have commented positively on the feedback – both praiseworthy and critical – that they have received, and have acknowledged that such feedback would not have been possible except through formal, anonymous evaluations.[56]

IV. The Measuring Experience: Judicial Performance Evaluation in Practice

The benefits of judicial performance evaluation were initially recognized in the 1970s. The first state-run JPE program began in Alaska in 1975. Since then, nineteen states, the District of Columbia and Puerto Rico have instituted official judicial performance evaluation programs in some or all of their courts. Several other states have experimented with pilot programs. While the general principle of measuring neutral, objective data about a judge is consistent throughout the programs, the approach to conducting evaluations, and more importantly, to disseminating results of those evaluations, varies significantly by state according to the method by which judges are initially selected. As a general rule, states using some variation of the Missouri Plan are most likely to implement robust, official programs with broad dissemination of individual results to the public; states appointing judges without a nominating commission are more likely

[55] For further discussion of the importance litigants place on their perception of fairness, *see infra* Part V.D.
[56] *See infra* Part V.G.

to keep results confidential or merely disseminate summary information; and states using elections are least likely to use JPE at all.

A. JPE Programs in Missouri Plan States

Six Missouri Plan states – Alaska, Arizona, Colorado, New Mexico, Tennessee and Utah – currently have wide-scale, official programs for judicial performance evaluation and may be considered the leaders of the comprehensive JPE movement. Each of the six states utilizes evaluation committees, anonymous surveys, and public information campaigns as part of the evaluation process. Approaches differ as to committee composition, information collected, setting of performance standards, and how evaluation results are disseminated to the public. This section seeks to identify the strengths and weaknesses of each program, with an eye toward developing best practices for future programs.

1. Alaska

Alaska was the first state in the country to institute formal performance reviews of its judiciary, in 1975.[57] Judges are evaluated at the end of each term in office by the Alaska Judicial Council, a seven-member commission consisting of three attorneys, three non-attorneys, and the Chief Justice of the Supreme Court.[58] Performance is measured according to eleven criteria:

1) *Surveys of professionals*. The Judicial Council creates surveys for three separate groups of professionals who interact with the judge: members of the bar; peace and probation officers; and other professionals such as social workers, guardians ad litem, and court-appointed special advocates.[59] Each group is asked to evaluate judges in the same nine areas of performance: legal ability; impartiality/fairness; integrity; judicial temperament; diligence;

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[57] *See* ESTERLING & SAMPSON, *supra* note 39, at 23.
[58] Press Release, Alaska Judicial Council, Retention Election Evaluation of Judges by Judicial Council (Jun. 27, 2006) at 2-3 (on file with author), *available at* http://www.ajc.state.ak.us/Retention2006/PressReleaseVote.pdf.
[59] *See* UNIVERSITY OF ALASKA ANCHORAGE BEHAVIORAL HEALTH RESEARCH AND SERVICES, ALASKA JUDICIAL COUNCIL RETENTION SURVEY 1 (2004) (on file with author).

special skills; respect for parties, attorneys, and staff; reasonable promptness in making decisions; and overall performance.[60] However, survey questions are tailored to the courtroom experience of each group. Survey participants are requested to rate only those judges for whom they have an actual basis for evaluation; evaluations based on criteria other than professional interaction (*i.e.*, professional reputation or social contacts with the respondent) are accepted but noted as such in the final evaluation.[61] In addition, the Judicial Council provides definitions of survey ratings to respondents, in an effort to increase the uniformity of responses. The 2004 surveys used the following rating scale:[62]

1.	Poor	Seldom meets minimum standards of performance for this court.
2.	Deficient	Does not always meet minimum standards of performance for this court.
3.	Acceptable	Meets minimum standards of performance for this court.
4.	Good	Often exceeds minimum standards of performance for this court.
5.	Excellent	Consistently exceeds minimum standards of performance for this court.
6.	Insufficient Knowledge	Insufficient knowledge to rate this judge (justice) on this criteria.

While more helpful than no definitions at all, this rating scale suffers from vague definitions. Uniformity of ratings in survey responses would be greatly improved by a clear definition of the phrase "minimum standards of performance for this court." Still, the scale gives some sense of perspective to survey respondents, lessening the effect of an otherwise unusually harsh or unusually lenient reviewer.

2) *Surveys of jurors.* Alaska also surveys its jurors. Jurors are requested to provide some background data on the type of case on which they served (criminal or civil, number of days served), and to evaluate the judge on the same scale as above in six different areas: impartiality, respectfulness, attentiveness, control over proceedings, intelligence and skill as a

[60] *Id.*
[61] *Id.* at 2. Direct professional experience is considered the strongest basis for evaluation, and most respondents have had this experience.
[62] *See* UNIVERSITY OF ALASKA ANCHORAGE, *supra* note 59, at 2.

judge, and overall performance.[63] Prior to July 2003, survey questionnaires were mailed directly to jurors. Since that time, however, postcard-sized questionnaires have been handed out to jurors at the end of each trial, allowing jurors to complete the short survey before leaving the courthouse.[64]

3) *Surveys of court staff*. The Alaska Judicial Council began sending surveys to court staff in 1996.[65] Each staff member is sent one survey booklet, with no follow-up mailings. Staff are first asked to describe their basis for evaluating a judge – whether direct professional experience, professional reputation, or social contacts.[66] They are then asked to evaluate each judge on the same scale as professionals and jurors in eight categories: treating court staff with respect, treating other people with respect, effective caseload management, diligence, integrity, impartiality, control over the courtroom, and overall performance.[67]

4) *Appellate review of a judge's decisions*. The Judicial Council also conducts a detailed evaluation of how each trial judge's rulings stand up on appeal, a part of the JPE process that appears to be unique to Alaska. A Judicial Council staff member (usually the staff attorney) reviews every published appellate decision to determine how many issues in each case were on appeal and how many of those issues were specifically affirmed.[68] While the Judicial Council is aware that this is difficult to measure properly (in part because issues may not be divided our cleanly in appellate opinions), the Council may take notice at a high rate of rulings being overturned.

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[63] *See* Memorandum from Alaska Judicial Council to Staff on Juror Survey Report (Apr. 16, 2004) at 4 (on file with author), *available at* http://www.ajc.state.ak.us/Retention04/Juror%20Survey/Juror%20SurveyGeneral.pdf.
[64] *See id*.
[65] Memorandum from Alaska Judicial Council Members to Staff on Court Employee Survey Report (Apr. 15, 2004) at 1 (on file with author), *available at* http://www.ajc.state.ak.us/Retention04/CtEmpSurvey/CtEmp2004general.pdf (hereinafter "Alaska Court Staff Survey Report").
[66] *Id*. at 2.
[67] *Id*. at 3.
[68] Memorandum from Alaska Judicial Council to Staff on Appellate Evaluation of Judges Eligible for Retention in 2004 (May 24, 2004) at 1 (on file with author), *available at* http://www.ajc.state.ak.us/Retention04/aplReview.pdf.

5) *Detailed questionnaires issued to selected counsel*. Each trial judge being evaluated is asked to identify three jury trials, three non-jury trials, and any other matters of importance that took place during the period for evaluation. The Judicial Council sends special questionnaires to the attorneys involved in those cases, seeking more specific information than is provided in the regular attorney surveys.[69]

6) *Judge's self-evaluation*. Each judge is asked to provide information on the type and number of cases he handled during the evaluation period, as well as the level of satisfaction with his own work.[70]

7) *Interview with the judge*. While an interview with the Judicial Council is not mandatory, it is available at the request of the judge.

8) *Recusal rates*. The Judicial Council looks at recusal rates as part of the overall evaluation process, on the theory that the number of recusals indicates both whether a judge appropriately steps down in the event of a conflict and whether a judge must recuse himself so frequently that he cannot handle his caseload effectively.[71] The Council has recognized that "[o]nly very high disqualification rates should trigger an inquiry about whether a judge is comporting him or herself so as to perform his or her judicial duties effectively."[72]

9) *Peremptory challenge rates*. Similar to recusal rates, the Judicial Council examines the number of peremptory challenges a judge has faced.[73] The Council acknowledges that peremptory challenge rates are far from a perfect indicator of a judge's fitness on the bench,

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[69] *See* Alaska Judicial Council, Retention Evaluation Information, http://www.ajc.state.ak.us/Retention/retent.htm (last visited Sep. 27, 2006) (hereinafter "Retention Evaluation Information").
[70] *See id*.
[71] Memorandum from Alaska Judicial Council to Staff on Recusal Records for Judges Eligible for Retention in 2004 (May 24, 2004) at 1 (on file with author), *available at* http://www.ajc.state.ak.us/Retention04/recusalmemo.pdf.
[72] *Id*. at 2.
[73] *See* Memorandum from Alaska Judicial Council to Staff on Peremptory Challenge Rates for Judges Eligible for Retention in 2004 (May 26, 2004) at 1 (on file with author), *available at* http://www.ajc.state.ak.us/Retention04/disqual%202004.pdf.

and "should only be used as a signal of a potential issue with a judge."[74] Particular caution is warranted because Alaska permits one peremptory disqualification as of right in each case; by rule, the parties may not specify the grounds for the disqualification.[75] Accordingly, one or more disqualifications may be entirely unrelated to concerns about bias or efficient handling of the case.

10) *Information obtained from public hearings*. The Judicial Council holds statewide public hearings for all judges standing for retention, both in person and by teleconference.[76]

11) *Reports from judicial observers*. Finally, Alaska has a sophisticated program of independent judicial observers, who compile annual reports on each judge.[77] Multiple observers – often as many as fifteen – are assigned to each judge.[78] The observers are given approximately forty hours of advance training, and are instructed to sit in on court proceedings at unscheduled intervals.[79] They observe both civil and criminal cases, and review all courtroom activities, from jury trials to motion hearings and arraignments. Observers provide both numerical evaluations and written comments in response to straightforward questions about the judge's behavior, such as "Did the judge pay close attention to the testimony?" and "Did you understand the judge's explanations and decisions, or did you leave feeling confused?"[80] For each judge, data from all the observers is compiled into a one-page evaluation. The evaluation sets out the total number of hours observed, the number of observers, the types of cases observed, and the average rating the

[74] *Id*. at 3.
[75] ALASKA CIV. R. 42(c). *See also* Marla N. Greenstein, *Judicial Disqualification in Alaska Courts*, 17 ALASKA L. REV. 53, 61-62 (2000).
[76] *See* Retention Evaluation Information, *supra* note 69.
[77] *See* ALASKA JUDICIAL OBSERVERS 2006 BIENNIAL REPORT, at 1 (on file with author), *available at* http://www.ajc.state.ak.us/Retention2006/JudicialObservers2006.pdf.
[78] *See id*. at 3.
[79] *See id*. at 2.
[80] *Id*. at 5-6.

judge received in each category.[81] This information is submitted to the Alaska Judicial Council to include in its overall evaluation of the judge.[82]

Alaska's system is highly developed, but it is not perfect. One significant problem is the low return rate of surveys. In 2004, over 4700 professionals were sent surveys, but the overall return rate was less than 34%.[83] In addition, a small number of surveys were returned without a valid signature, and had to be disregarded.[84] Moreover, as discussed above, rating scales on surveys need to be clearer.

Furthermore, survey responses based solely on the judge's professional reputation or the respondent's social interaction with the judge should be approached with heavy caution. Other states with JPE programs limit survey data to respondents who have interacted with the judge directly and professionally. Alaska's decision to broaden the bases for evaluating a judge assures a larger survey group, but risks skewing data. Survey responses based on professional reputation, for example, are essentially hearsay, and a judge's reputation may not be consistent with her current skills and behavior. Likewise, a judge's behavior at social events is not necessarily a proxy for her skills in the courtroom. Alaska segregates this less reliable data in its final report, but whether it should be included at all is debatable.

Some of the evaluation criteria used by the Alaska Judicial Council have also come under scrutiny. The Council freely admits, for example, that its current process of reviewing a trial judge's decisions for affirmance on appeal has several flaws, among them the difficulty of dividing out all separate issues in an appellate opinion, the challenge of getting complete information on appellate decisions (particularly those that are unpublished), and changes in the

[81] *Id*. at 8.
[82] *See id*. at 2.
[83] UNIVERSITY OF ALASKA ANCHORAGE, *supra* note 59, at 5.
[84] *See id*.

makeup of the appellate courts over time.[85] It also presumes, of course, that the appellate court is correct. Similarly, for the reasons discussed above (among others), the Judicial Council acknowledges that recusal and peremptory challenge rates are imperfect indicators of a judge's ability to judge efficiently and impartially.

Finally, while the Judicial Council distributes evaluation information broadly to voters, there is still a need to attract voter attention. A study of the 1996 elections found that just 58% of voters in Anchorage reported awareness of judicial performance evaluation reports, and that even fewer considered the reports as a source of information.[86]

The Alaska Judicial Council makes formal retention recommendations on the state's judges. From 1984 to 1998, the Judicial Council recommended the retention of all but one judge, and no judge seeking retention has been defeated at the polls since 1982.[87] In 2006, the Judicial Council recommended the retention of thirty of thirty-one judges. Data from 1976 to 2004 shows a correlation between the strength of the Judicial Council's recommendation and the judge's performance in the retention election.[88]

2. Arizona

Arizona is currently the only state in which judicial performance evaluation is constitutionally mandated.[89] This was not initially the case. In 1974, Arizona voters adopted a

[85] Other admitted flaws include assigning equal weight to each issue regardless of its significance to the overall case, recognizing special challenges for administrative appeals, the relatively small number of cases for some trial judges, and the fact that appellate courts affirm some types of cases with greater frequency than others. *See* Memorandum on Appellate Evaluation of Judges, *supra* note 68, at 2-3.
[86] *See* ESTERLING & SAMPSON, *supra* note 39, at 37.
[87] Tillman J. Finley, *Judicial Selection in Alaska: Justifications and Proposed Courses of Reform*, 20 ALASKA L. REV. 49, 65 (2003); *see also* ESTERLING & SAMPSON, *supra* note 39, at 72.
[88] *See generally* links at http://www.ajc.state.ak.us/Retention/retent.htm (last visited Sep. 27, 2006).
[89] The constitutional provision reads: "The supreme court shall adopt, after public hearings, and administer for all justices and judges who file a declaration to be retained in office, a process, established by court rules for evaluating judicial performance. The rules shall include written performance standards and performance reviews which survey opinions of persons who have knowledge of the justice's or judge's performance. The public shall be afforded a full and fair opportunity for participation in the evaluation process through public hearings, dissemination of evaluation reports to voters and any other methods the court deems advisable." ARIZ. CONST. art. VI, § 42.

merit selection system for all state appellate judges, as well as all superior court judges in Pima and Maricopa Counties.[90] In connection with this vote, the State Bar of Arizona and a number of state politicians promised the public that they would attempt to provide performance ratings for judges to assist voters in retention elections.[91] From 1976 to 1992, performance evaluations were limited to bar poll results. Following a comprehensive series of committee meetings and a pilot project in 1992, however, state voters approved a new constitutional amendment to require comprehensive judicial performance evaluation with public input.[92]

The evaluation program is run by Arizona's Commission on Judicial Performance Review. The Commission currently has thirty members, eighteen of whom are members of the public, making the Commission one of the largest of its kind in the country. All members of the Commission are appointed by the state Supreme Court. Commission members serve four-year, staggered terms, and may serve a second term.[93] Any member may become chair of the Commission, but the ultimate selection rests with the Chief Justice of the Arizona Supreme Court.[94] The current structure of the Commission was implemented in 1996, after earlier experiments with a decentralized structure of state and local commissions.[95]

The Commission's geographic scope is limited to the scope of the merit selection system; that is, review is conducted for appellate judges statewide and Superior Court judges in Pima and Maricopa Counties only.[96] Judges are evaluated every two years whether or not they are up for

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[90] *See* A. John Pelander, *Judicial Performance Review in Arizona: Goals, Practical Effects and Concerns*, 30 ARIZ. ST. L.J. 643, 654 (1998). Pima and Maricopa counties are the most populous in the state, containing the metropolitan areas of Tucson and Phoenix, respectively.

[91] The former chair of the State Committee on Judicial Evaluation stated, "Merit selection without judicial evaluation is like one hand clapping without the other – it's the flip side of the coin." *See id*. at 655 & n.80.

[92] *See id*. at 668.

[93] *See* ARIZ. SUP. CT. R. 2(c).

[94] *See* Pelander, *supra* note 90, at 683.

[95] *See id*.

[96] *See* Press Release, Arizona Commission on Judicial Performance Review, Commission to Vote on Performance of Justices and Judges on 2006 General Election Ballot (Jun. 28, 2006) (on file with author).

retention, although mid-term evaluations are confidential and are used for self-improvement only.[97] In addition to formal evaluations, a judge's case management skills are evaluated on an ongoing basis, with negative incentives if cases linger on the docket.[98]

Like Alaska, Arizona begins formal evaluations with an extensive review of survey data. Surveys are distributed to attorneys, jurors, litigants, witnesses, and court administrative staff,[99] and participants are asked to evaluate judges by answering specific questions on legal ability, integrity, communication skills, judicial temperament, administrative performance, administrative skills, and settlement activities.[100] For each question, survey participants rate each judge from four points ("Superior") to zero points ("Unacceptable"). Commission members then compare the compiled survey data against two threshold standards.[101] First, a judge must have an average score higher than 2.0 in each category from every group of respondents. Second, no more than 25% of any respondent group may rate the judge as "Unacceptable" (zero points) or "Poor" (one point) in any category.[102]

If either survey threshold is not met, or if the thresholds are met but other information collected about the judge (including written and oral comments from the public, information obtained from the Commission on Judicial Conduct, and the court to which the judge is assigned) raises concerns about the judge's performance, any Commissioner may ask the Commission Chair to write a letter asking the judge to address the concerns, either in person or in writing.[103]

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[97] *See* ESTERLING & SAMPSON, *supra* note 39, at 86.
[98] Interview with the Hon. Ruth V. McGregor, Chief Justice, Arizona Supreme Court, in Phoenix, Ariz. (Jun. 28, 2006).
[99] Pelander, *supra* note 90, at 673.
[100] ARIZONA COMMISSION ON JUDICIAL PERFORMANCE REVIEW, EVALUATING JUDGES' JOB PERFORMANCE: JUDICIAL PERFORMANCE STANDARDS (undated) (on file with author).
[101] Settlement activities are rated but not subject to the threshold standards because of the difficulty of evaluation in this category. *See id*. at 2.
[102] *See id*.
[103] *Id*. at 1-2.

The letter and the judge's response are kept confidential, unless the judge chooses to appear in person before the Commission.[104]

After all material has been collected and each judge has been given an opportunity to respond to any concerns, the Commission holds a Public Vote Meeting, where each member votes on whether each judge up for evaluation "Meets" or "Does Not Meet" judicial performance standards.[105] Importantly, the Commission's role is strictly limited to determining whether the judge meets performance standards; it does not make any formal recommendation on whether the judge should be retained. The judge is entitled to review the Commission's report and submit comments, either oral or written, before the report is disseminated to the public.[106] The results of each vote are published in a voter information guide distributed to the public. The voter information guide also indicates the bench assignments of Superior Court judges, reports the number of surveys distributed and returned, and shows the total score the judge received in each evaluation category.[107] The Commission also encourages major newspapers to publicize its findings prior to each election.[108]

Beyond voter education, Arizona has instituted JPE measures specifically to focus on judicial self-improvement.[109] Each judge being evaluated is asked to complete a confidential self-evaluation, which is reviewed by a "conference team" consisting of another judge, a member of the state bar, and a member of the public.[110] The judge then meets with the conference team

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[104] *Id*. at 2.
[105] *Id*. If a judge up for evaluation also serves on the Commission, he may not vote on his own performance finding. However, he may vote on the performance of the other judges being evaluated. *See* Minutes of Public Vote Meeting (Jul. 12, 2006) (on file with author), *available at* http://www.supreme.state.az.us/jpr/2006%20PUBLIC%20VOTE%20TABLE%20-%20COMPLETED.pdf.
[106] *See* Pelander, *supra* note 90, at 704.
[107] *See* ARIZONA COMMISSION ON JUDICIAL PERFORMANCE REVIEW, *supra* note 100, at 2.
[108] *See* Pelander, *supra* note 90, at 690.
[109] *See id*. at 690.
[110] The self-evaluation is solely for the purpose of professional self-improvement, and is not considered in the overall evaluation/retention process. *See id*. at 692.

to discuss her strengths, weakness, and areas for improvement based upon her self-evaluation, the survey results, and public comments. Together, the judge and conference team prepare and sign a written self-improvement plan.[111] By Supreme Court rule, conference teams are prohibited from "participat[ing] in formulating any finding as to whether a judge or justice meets judicial performance standards."[112]

According to Arizona Chief Justice Ruth McGregor, since Arizona moved to a merit selection system in 1974, voters have chosen not to retain two judges, one on the trial court and one on the court of appeals. In addition, three trial court judges chose not to stand for retention because of low marks in their evaluations.[113]

3. Colorado

Judicial performance evaluation in Colorado has always been closely tied to the state's merit retention system.[114] In 1988, the state legislature instituted an official JPE program and created the state's Commissions on Judicial Performance.[115] One commission has statewide jurisdiction to conduct evaluations and make retention recommendations for appellate judges, while twenty-two local commissions bear the same responsibilities with respect to trial judges in each Judicial District. Each commission has ten members, consisting of four attorneys and six-non-attorneys.[116] Commission members serve staggered four-year terms,[117] and are appointed by the Chief Justice, Governor, President of the Senate or Speaker of the House.[118]

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[111] *See id*. at 693.
[112] R. P. JUD. PERF. REV. ARIZ. 6(f)(2), *quoted in* Pelander, *supra* note 90, at 693 (alteration in Pelander).
[113] *See* Minutes of Special Meeting, Arizona House of Representatives Committee on Appropriations (Apr. 11, 2006) (on file with author), *available at* http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/47leg/2R/comm_min/House/041106+APP+P.DOC.htm.
[114] Colorado amended its constitution to adopt a process of merit selection, coupled with regular retention elections, in 1966. For a historical synopsis, *see generally* Gregory J. Hobbs, Jr., *Colorado Judicial Merit Selection – A Well-Deserved 40th Anniversary Celebration*, 36-APR COLO. LAW. 13 (2006).
[115] *See* COLO. REV. STAT. § 13-5.5-101 *et seq*.
[116] *See id*. §§ 13-5.5-102(1)(a) & -104(1)(a). *See also* Colorado Judicial Branch, Judicial Performance Fact Sheet, http://www.courts.state.co.us/panda/judicialperformance/jpfacts.htm (last visited Sep. 27, 2006).

Judges are evaluated each time they face retention. Although each local commission is responsible for conducting performance evaluations in its judicial district, the process is identical for each district. Prior to initiating the evaluation process, each commission must request a meeting with the Chief Judge of its district for an informational briefing.[119] The commission then distributes surveys by direct mail to randomly selected attorneys, litigants, jurors, crime victims, law enforcement personnel, social service case workers, probation officers, court personnel, and deputy sheriffs assigned to the courthouse.[120]

Survey results are the primary basis of each commission's evaluations and recommendations on retention. Survey participants are asked to evaluate judges in a number of categories on a numerical scale of 0-4, where zero is equivalent to the letter grade of "F" and 4 is equivalent to the letter grade of "A."[121] Commissions are instructed that if a judge receives an average score of 2.0 or higher (equivalent to a grade of "C") on both the attorney and non-attorney surveys, the commissions should strongly consider a recommendation of "Retain."[122] If a judge receives below a 2.0 average on either survey, the commission is instructed to strongly consider a "Do Not Retain" recommendation unless one or more mitigating factors apply.[123]

Survey data, however, is not the sole determining factor. Each commission must also consider each judge's self-evaluation (which in 2006 consisted of a lengthy evaluation asking the

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[117] *See* COLO. REV. STAT. §§ 13-5.5-102(1)(a) & -104(1)(a).
[118] The Chief Justice and Governor each appoint one attorney and two non-attorneys, and the Speaker of the House and President of the Senate appoint one attorney and one non-attorney each. *See id*. §§ 13-5.5-102(1)(a) & -104(1)(a).
[119] The state commission likewise must meet with the Chief Justice of the state Supreme Court and the Chief Judge of the state Court of Appeals. *See* Commissions on Judicial Performance, Rules Governing Commissions on Judicial Performance, Rule 4(a), http://www.courts.state.co.us/panda/judicialperformance/jprules.htm (last visited Sep. 27, 2006) (hereinafter "Colorado Commission Rules").
[120] *See id*., Rule 2(a).
[121] *See, e.g*., Commission on Judicial Performance Sample Appellate Questionnaire (on file with author).
[122] *See* Colorado Commission Rules, *supra* note 119, Rule 13(b).
[123] These factors include an unusually heavy caseload, a survey sample that is too small or otherwise appears inaccurate, particularly strong independent evaluations, or the determination that the judge would benefit from more time on the bench and specific instruction as to addressing weaknesses. *See id*.

judge to grade herself and provide comments and goals for development with respect to her legal ability, integrity, communication skills, temperament, administrative skills, community reputation, community service, and philosophy),[124] the information gleaned from a mandatory interview with the judge (after the commission's initial review of is complete),[125] and courtroom observation (taken from at least one on-site visit).[126]

Commissions may also (but are not required to) consider a number of other factors, including caseload statistics,[127] oral interviews of those appearing before the judge on a regular basis,[128] and information gleaned from public hearings and documentation from interested parties.[129] Commissions also review a judge's behavior for conformance with the Code of Judicial Conduct, and in the case of appellate judges, the state commission now reviews three written opinions selected by the judge.[130]

Each commission is required to provide the Chief Judge of its district with a statistical report for each judge it evaluates.[131] If the commission finds a particular weakness with a judge, it may forward recommendations for improvement.[132]

Commissions must write a narrative profile with a retention recommendation for each judge they evaluate. Commission members are generally prohibited from voting on a retention

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[124] *See id*., Rule 2(g). *See also* Commission on Judicial Performance, COURT OF APPEALS JUDGE 2006 SELF-EVALUATION (on file with author).
[125] *See* Colorado Commission Rules, *supra* note 119, Rules 2(b) & 11.
[126] *See id*., Rule 2(h).
[127] These statistics may include the number of bench trials and trial days, the number of jury trials and trial days, sentence modifications, open case reports and case aging reports. *See id*., Rule 2(c).
[128] The judge is permitted to review the results of any such interview, but the anonymity of the interviewee is preserved during the judge's review. *See id*., Rule 2(d). All interviews must be completed at least fifteen days before the commission's scheduled interview with the judge. *Id.*
[129] All public hearings must be made known to the local news media in advance, and must be conducted at least fifteen days before the scheduled interview with the judge. Likewise, any documentation received from the public must be received fifteen days before the scheduled interview and must contain the author's name and address. *See id*., Rule 2(f).
[130] At least one of these opinions should be a concurrence or a dissent. *See id*., Rule 2(i).
[131] *See id*., Rule 4(b).
[132] *See id*., Rule 4(c).

recommendation unless they have participated in the interview of the judge and have performed courtroom observation.[133] Although the commission may issue a recommendation of "No Opinion," this recommendation is to be used only where the collected information does not provide any clear conclusion.[134] Use of the "No Opinion" recommendation is very rare in Colorado. Over the last five election cycles, only 3 of 457 trial judge evaluations have resulted in a "No Opinion," and no such recommendation has been issued for a Colorado appellate judge during that time.[135]

Narrative profiles are to be limited to three or four short paragraphs, focusing on the commission's vote count for or against retention of the judge and the reasons for the commission's recommendation.[136] The narrative profile may also include biographical and community service information as necessary.[137] A draft profile and recommendation are sent to the judge for review; the judge may respond to the draft within ten days of receipt, and may request an additional interview if he feels the commission should revise the evaluation.[138] If the commission concludes even after the judge's response that a judge should receive a "Do Not Retain" recommendation, the judge may attach a statement of her position to the narrative profile.[139] The completed profile must be released to the public at least forty-five days prior to the retention election; in 2006, Colorado's profiles were released in mid-August, almost ninety days before the election.

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[133] *See id*., Rule 13(e).
[134] *Id*., Rule 13(d).
[135] *See* Archives of Recommendations for Judicial Retention, http://www.cojudicialperformance.com/main.cfm?webdiv=523&top=182 (last visited Sep. 27, 2006).
[136] *See* Colorado Commission Rules, *supra* note 119, Rule 14.
[137] *See id*.
[138] *See id*., Rule 15(b).
[139] *See id*. For an example of a judge's response statement, *see* Tenth Judicial District Commission on Judicial Performance, Evaluation of Honorable Adele K. Anderson (2000), http://www.cobar.org/static/judges/nov2000/10CNTYaanderson.htm (last visited Sep. 27, 2006).

Since 1998, Colorado's judicial performance evaluation commissions have collectively recommended 478 of 485 judges for retention, and have issued four recommendations of "Do Not Retain." Dozens of other judges have chosen not to stand for retention at the end of their terms after receipt of their evaluative data, raising the inference that at least some of them may have received poor evaluations and chosen not to stand for retention.[140] Since 1990, Colorado voters have elected not to retain six judges, all on the trial courts.

4. New Mexico

New Mexico's judicial performance evaluation system is colored by its unusual rules about judicial selection and retention. The state had a partisan election system for all of its judges until 1988, when voters approved a constitutional amendment shifting to a merit selection system roughly based on the Missouri Plan.[141] As in traditional Missouri Plan states, judges are selected by a bipartisan nominating commission and appointed by the governor. However, following appointment, all New Mexico judges must prevail in one partisan election before they are eligible to participate in retention elections.[142] In 1994, the state added the requirement that a sitting judge receive a supermajority vote of 57% rather than a simple majority in order to be retained.[143] As a result, New Mexico is one of only two states that requires a sitting judge to receive more than a simple majority to secure retention (the other is Illinois, with a 60% threshold).[144]

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[140] Twenty-three of 131 judges eligible to stand for retention in 2006 chose not to do so, and 26 of 131 eligible judges similarly stepped down of their own accord in 2002. *See, e.g.*, Howard Pankratz, *State Panel Endorses Judges but Has Reservations*, DENVER POST, Aug. 9, 2006, at B2 (noting that some judges may have resigned rather than address poor evaluation results in the media); Karen Abbott, *Road Less Gaveled: 26 of 131 State Judges Facing Retention Vote Choose to Step Down*, ROCKY MTN. NEWS, Aug. 5, 2002, at 4A.

[141] *See* Sarah Elizabeth Saucedo, *Majority Rules Except in New Mexico: Constitutional and Policy Concerns Raised by New Mexico's Supermajority Requirement for Judicial Retention*, 86 B.U. L. REV. 173, 180-83 (2006).

[142] *See id*. at 180-81 and corresponding footnotes.

[143] *See id*. at 183-84. The unusual 57% figure appears to have been a compromise between those who sought a 65% supermajority and those who wished to maintain a simple majority for retention. *See id*. at 184.

[144] *Id*. at 178.

In connection with the move to merit selection, the New Mexico Supreme Court created the Judicial Performance Evaluation Commission (JPEC) in 1997.[145] The primary purpose of the JPEC is to "provid[e] voters with fair, responsible, and constructive evaluations of judges and justices seeking retention."[146] The JPEC consists of seven lawyers and eight non-lawyers, all of whom are selected by the state Supreme Court from nominations offered by the Governor, Chief Justice of the Supreme Court, Speaker of the House, Senate Pro Tem, House Minority Leader, Senate Minority Leader and President of the State Bar.[147]

The JPEC reviews judges both at midterm and before a retention election. Midterm reviews are solely for the purpose of identifying areas for self-improvement, and the results are not released to the public.[148] Results of an evaluation before a retention election, however, are made available to the public.[149] Judges running in partisan elections are not reviewed.[150]

The JPEC reviews judges based on seven criteria: fairness, legal ability, communication skills, preparation, attentiveness, temperament, and control over proceedings.[151] Assessments are based on self-evaluations as well as confidential written surveys.[152] New Mexico, however, distributes surveys to a wider range of participants than most states, including law clerks and law professors (for appellate judges) and courtroom interpreters and psychologists (for trial

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[145] *See* N.M. SUP. CT. ORDER NO. 97-8500 (Feb. 12, 1997), amended by N.M. SUP. CT. ORDER NO. 99-8500 (Aug. 25, 1999).
[146] JUDICIAL PERFORMANCE EVALUATION COMMISSION, INFORMATION ON JUDICIAL PERFORMANCE EVALUATION at 1 (2000).
[147] *See* Judicial Performance Evaluation Commission, Who Can Serve on the JPEC?, http://www.nmjpec.org/who (last visited Sep. 29, 2006).
[148] *See* Judicial Performance Evaluation Commission, Evaluation Process, http://nmjpec.org/process (last visited Sep. 29, 2006) (hereinafter "N.M. Evaluation Process").
[149] *See id.*
[150] *Id.*
[151] *See* Judicial Performance Evaluation Commission, How We Evaluate Judges – Overall Factors, http://www.nmjpec.org/factors (last visited Sep. 29, 2006).
[152] N.M. Evaluation Process, *supra* note 148.

judges).[153] Survey questions are carefully tailored to each participant group. For example, law professors are asked to evaluate appellate judges on the clarity and accuracy of their published opinions, including knowledge of substantive law and procedure, and scholarly analysis.[154] The judge's current and former law clerks are surveyed on the judge's attentiveness, preparation, legal ability and communication skills.[155]

After the survey results have been tabulated by an independent research firm and the JPEC has reviewed the judge's self-evaluation, the JPEC conducts an interview with each judge being evaluated.[156] Following the interview, the JPEC issues a draft evaluation with a recommendation of "Retain," "Do not retain," "No opinion" (*i.e.*, there is not enough information available to make a recommendation) or "No recommendation" (*i.e*., the judge does not have sufficient time in his or her current position to warrant a recommendation).[157] The draft evaluation is sent to the judge for review, and the judge is given fourteen days to comment. The JPEC reviews the comments, if any, before issuing a final report.[158] The JPEC must release its final report to the public at least forty-five days before the general election.[159]

Only two New Mexico judges were up for retention statewide in 2004. In 2002, however, eighty judges were up for retention. Of that group, the JPEC recommended that four

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[153] In all, appellate court surveys are distributed to current and former law clerks, lawyers who have had direct interaction with appellate judges, law professors, court staff attorneys, other court staff, trial court judges whose cases have been appealed, and other appellate judges. Trial court surveys are distributed to lawyers who have appeared before the judge, jurors, court staff (except those who serve at the will of the judge), law enforcement personnel, probation officers, psychologists, citizen review volunteers, social workers, court-appointed special advocates and interpreters. *See, e.g.*, Judicial Performance Evaluation Commission, How We Evaluate Judges: Supreme Court Justices, http://www.nmjpec.org/supreme_court (last visited Sep. 29, 2006).
[154] *See* JUDICIAL PERFORMANCE EVALUATION COMMISSION, *supra* note 146, Law Professor Survey.
[155] *See id*., Court Staff Attorney/Law Clerk Survey (November 2005).
[156] *See* N.M. Evaluation Process, *supra* note 148.
[157] *Id.*
[158] *Id.*
[159] Press Release, Commission Releases Recommendation and Information on 2 Judges Standing for Retention in November Election (Sep. 17, 2004) (on file with author), *available at* http://www.nmjpec.oeg/news/#092104.

judges not be retained, and three of the four were in fact not retained by the voters.[160] One of those judges, District Court Judge Paul Onuska, was felled by the state's supermajority requirement, falling just shy of the 57% retention threshold.[161] Neither of the other two judges who were not retained garnered even 50% of yes votes for retention.[162]

5. Tennessee

Tennessee conducted its first judicial performance evaluation in 1998.[163] Like New Mexico, the timing and structure of Tennessee's performance evaluations are influenced by the state's procedure for judicial selection. Tennessee uses a modified version of the Missouri Plan known as the Tennessee Plan. Adopted in 1994, the Tennessee Plan allows the governor to appoint judges to the appellate courts, while trial judges continue to be chosen in partisan elections.[164] Each appellate judge must face a retention election at the first statewide general election after appointment. Furthermore, all appellate judges must face retention elections at concurrent eight-year intervals (including 2006). Because all appellate judges are up for retention every eight years, the possibility of significant turnover in the appellate ranks at one time is higher than in any other jurisdiction.

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[160] *See* Judicial Performance Evaluation Commission, Judicial Evaluations Quick View, http://www.nmjpec.org/quick/?year=2002 (last visited Sep. 29, 2006).

[161] Onuska received 18,572 yes votes of the 33,175 votes cast in the Eleventh Judicial District (McKinley and San Juan Counties), for a 56% yes vote. *See* State of New Mexico, Official 2002 General Election Results for San Juan County, http://www.sos.state.nm.us/Main/Elections/2002/02General/County%20Reports/conty015.htm (last visited Sep. 27, 2006); State of New Mexico, Official 2002 General Election Results for McKinley County, http://www.sos.state.nm.us/Main/Elections/2002/02General/County%20Reports/conty012.htm (last visited Sep. 27, 2006)

[162] State of New Mexico, Official 2002 General Election Results for Bernallilo County, http://www.sos.state.nm.us/Main/Elections/2002/02General/County%20Reports/conty001.htm (last visited Sep. 27, 2006).

[163] *See* Dann & Hansen, *supra* note 38, at 1435.

[164] The Tennessee Plan has had a somewhat controversial history. It was declared unconstitutional by a state trial court in 1998, on the grounds that the statute authorizing merit selection of appellate judges conflicted with a provision in the state constitution that called for election of judges. The opinion was reversed by the Tennessee Court of Appeals, which held that the statute was a permissible exercise of the legislature's authority. A Special Supreme Court (composed entirely of judges appointed for the case, because the regular Supreme Court has recused itself) later held that it was not necessary to consider the constitutionality of the Tennessee Plan because it was inapplicable to the facts of the case before it, thereby leaving the Plan in place. *See Delaney v. Thompson*, 982 S.W.2d 857, 858 (Tenn. 1998).

The Tennessee Judicial Evaluation Commission evaluates every appellate judge up for retention in each election cycle, prior to a scheduled August election.[165] The Commission consists of twelve members, and by law must represent gender, racial and geographic balance.[166] Judges are evaluated on six criteria: integrity; knowledge and understanding of the law; ability to communicate; preparation and attentiveness; service to the profession; and effectiveness in working with other judges and court personnel.[167]

As in other states, evaluations are initially based on survey results. Surveys are distributed to four groups of respondents who interact with the appellate bench: attorneys, court personnel, trial court judges, and appellate court judges. Survey participants are asked to rate judges in several areas on a scale of 1 to 10: 1-2 indicates levels of "poor" performance, 3-4 "fair," 5-6 "adequate," 7-8 "good" and 9-10 "excellent."[168] Areas of evaluation include oral argument, written opinions, administrative performance and general performance.[169]

In addition to survey data, the Commission considers information reported in each judge's self-evaluation, opinions written by the judge, caseload and workload statistics for each judge, and any public input that is received. The Commission also conducts a formal interview with each judge.[170] The Commission then issues a written recommendation, which summarizes the judge's biographical information, service to the profession, survey data and impressions of the interview.[171]

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[165] Tennessee conducts its general judicial elections in August of an election year, at the same time as the primary elections for executive and legislative offices.
[166] TENNESSEE JUDICIAL EVALUATION COMMISSION, TENNESSEE APPELLATE JUDGES EVALUATION REPORT 2006 at I (2006) (on file with author), *available at* http://www.tba.org/judicialcampaign/judeval_2006.pdf.
[167] *Id.*
[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] *See, e.g.*, *id*. at 1-3.

Tennessee's decision to implement a JPE program may have been instigated by the controversy surrounding the retention election for Supreme Court Justice Penny J. White in 1996.[172] Justice White was appointed to the court in 1994 and came up for retention two years later. She met with strong opposition from those who maintained she was "soft on crime" and would not vote for the death penalty, apparently stemming from a single case in which White concurred with the Court's decision to overturn a death sentence.[173] Without a neutral, independent performance evaluation to assist them, voters had to rely on politically and emotionally charged media advertising and print material for information on Justice White.[174] On election day, Justice White received only a 45% favorable vote, and was not retained. Whether the presence of a formal judicial evaluation would have changed the result of election is unclear, but there is no question it would have provided voters with an objective, independent review of Justice White's entire tenure on the bench, rather than one politically charged decision.

6. Utah

Utah formally adopted a merit plan similar to the Missouri Plan in 1984.[175] After appointment by the governor, a judicial nominee must be confirmed by the Utah Senate before taking the bench;[176] the judge is thereafter subject to periodic retention elections.[177] In conjunction with merit selection, Utah instituted a formal judicial evaluation process in 1986.[178] Evaluations are conducted by the Utah Judicial Council, which consists of fourteen members.[179]

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[172] *See, e.g.*, Dann & Hansen, *supra* note 38, at 1434-35.
[173] *Id*. at 1434.
[174] *Id*. at 1435.
[175] *See* ESTERLING & SAMPSON, *supra* note 39, at 106; *see also* UTAH CONST. art. VIII, § 8.
[176] UTAH CONST. art. VIII, § 8.
[177] *Id.*
[178] *See* American Judicature Society, Judicial Selection in the States: Utah, http://www.ajs.org/js/UT_methods.htm (last visited Sep. 28, 2006).
[179] *See, e.g.*, UTAH VOTER INFORMATION PAMPHLET (General Election November 5, 2002) at 59 (on file with author), *available at* http://elections.utah.gov/GOV_election_pamphletWEB.pdf.

Twelve members are judges selected by their peers,[180] and the two remaining members are the Chief Justice of the state Supreme Court and a member of the state bar.[181]

Like many other states, Utah measures its judges using the criteria of integrity; knowledge and understanding of the law; ability to communicate; preparation, attentiveness, dignity and control over proceedings; skills as a manager; punctuality; service to the profession and the public; and effectiveness in working with other judges, commissioners and court personnel.[182] To a far greater extent than any other state, however, Utah has bright-line performance standards which determine whether the judge will be recommended for retention. A judge must meet or surpass each of the following standards to receive a favorable recommendation:[183]

1) A favorable rating by at least 70% of the respondents on at least 75% of the attorney survey questions;

2) For trial judges, a favorable rating by at least 70% of the respondents on at least 75% of the juror survey questions;

3) Compliance with rigid timing requirements for disposition of cases. For Supreme Court justices, this means circulating no more than six principal opinions more than six months after submission. For Court of Appeals judges, the same requirement applies, in addition to achieving a final average time to circulation of a principal opinion of not more than 120 days after submission. For trial judges, no cases may be under advisement for more than six months and no more than six cases may be under advisement for more than two months;

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[180] *See* ESTERLING & SAMPSON, *supra* note 39, at 107.
[181] *See* UTAH CODE ANN. 78-3-21(1).
[182] *See* UTAH VOTER INFORMATION PAMPHLET, *supra* note 179, at 60.
[183] *See, e.g.*, *id*. Compliance with the listed standards creates a presumption that the judge will be certified for retention, rebuttable only by reliable information showing non-compliance with a performance standard, or "formal or informal sanctions by the Supreme Court of sufficient gravity or number or both to demonstrate lack of substantial compliance with the Code of Judicial Conduct." *Id*. Failure to meet all of the standards creates a presumption against certification, which "may be overcome by a showing of good cause to the contrary." *Id*.

4) At least thirty hours of judicial education a year;

5) Substantial compliance with the Code of Judicial Conduct; and

6) Physical and mental fitness for office.

Utah's dissemination of information about the judicial evaluation process is perhaps the most comprehensive of any jurisdiction. As part of the voter information pamphlets sent out prior to an election, voters receive a synopsis of the merit selection regime and retention elections, detailed information on the criteria for performance evaluation and the minimum standards of performance, a list of every survey question asked of attorneys and jurors, a biographical sketch of each judge seeking retention, and a statistical breakdown of each judge's results on each attorney survey question.[184]

Utah's more rigid evaluation system is a double-edged sword for judges. It creates predictability and avoids the prospect of a recommendation that is inconsistent with the evidence of the judge's performance, but it makes it quite difficult for a judge to account for unusual circumstances that might explain low performance. Of course, the ultimate retention decision still rests with Utah voters.

B. JPE Programs in Appointment States Without Retention Elections

States need not adhere to the Missouri Plan in order to benefit from formal, institutionalized judicial performance review. Indeed, several states that do not hold retention elections nevertheless have long-established JPE programs designed specifically to promote judicial self-improvement. These programs have proven valuable for that purpose.

States whose judges do not face elections have, as a general rule, declined to reveal the results of individual judges' evaluations to the public. Some states have compromised by issuing a summary report of the performance of the entire judiciary, so that the public at least has a

[184] *See id.* at 58-87.

general snapshot of how the court system is meeting performance goals. Other states, however, have refused to issue any information, citing confidentiality concerns. Ironically, however, states failing to disseminate official evaluation information have experienced an increase in less reliable surveys and rankings as a proxy for judicial performance review, heightening the risk that the public will be misinformed. A representative sample of approaches is discussed below.

1. New Jersey: No public release of information

New Jersey has one of the oldest JPE programs among states that do not hold judicial elections.[185] The state's judges are initially appointed for a term of seven years, and are evaluated during their second and fifth years on the bench.[186] If reappointed after that term, judges are granted tenure until mandatory retirement at age seventy.[187] Once tenured, judges are no longer required to face evaluation, although they may volunteer to be evaluated if they desire feedback on their performance.[188] One commentator has proposed adding at least one more performance evaluation during a judge's non-tenured service, as well as requiring tenured Superior Court judges to participate in performance evaluation every five years.[189]

The JPE program is run by New Jersey's Administrative Office of the Courts (AOC), and is driven by anonymous attorney surveys. Attorneys are asked to evaluate judges before whom they have appeared on over thirty performance standards in areas pertaining to legal ability, judicial management, and comportment.[190] Trial court judges whose rulings are appealed are

[185] The New Jersey Supreme Court formally adopted its Judicial Performance Program in 1986, and implemented the program in April 1987. *See* New Jersey Judiciary, Judicial Performance Program: A Brief Description, http://www.judiciary.state.nj.us/education/index.htm (last visited Sep. 27, 2006).
[186] Robert J. Martin, *Reinforcing New Jersey's Bench: Power Tools for Remodeling Senatorial Courtesy and Refinishing Judicial Selection and Retention*, 53 RUTGERS L. REV. 1, 80 (2000).
[187] *See* New Jersey Judiciary, A Walk Through the Judicial Process, http://www.judiciary.state.nj.us/process.htm (last visited Sep. 27, 2006).
[188] Martin, *supra* note 186, at 80.
[189] *See id.* at 81-82.
[190] *Id*.

also evaluated by appellate judges.[191] The program has four stated goals: (1) the improvement of judicial performance on an individual and institutional basis, (2) the enrichment of judicial educational programs, (3) the efficient assignment and use of judges within the judiciary, and (4) the enhancement of the reappointment process.[192]

Confidentiality is the hallmark of New Jersey's program. The AOC does not make the results of performance evaluations available to the public, either in individual or summary form.[193] As a consequence, other organizations have stepped in with their own evaluations of the state judiciary and/or recommendations with respect to awarding tenure. These unofficial evaluations have met with heavy resistance at times. For example, the *New Jersey Law Journal* has released four judicial surveys since 1989,[194] which rank each of the state's Superior Court judges by name based on attorney perceptions of judges in twelve categories. The 1999 survey in particular drew rapid and harsh criticism from both the state Supreme Court and the New Jersey State Bar Association. The Supreme Court charged that the survey's methodology – merely asking attorneys to respond, without any statistical controls – was severely flawed, and "provided no clear standards to assure the reliability of the responders or the information they were furnishing."[195] The state bar similarly asserted that the survey "does nothing more than encourage reckless judge-bashing and create unjustified suspicion about the integrity of those serving on the Superior Court bench."[196] These criticisms, however, lacked punch because the state would not release its own official performance evaluation data. The *New Jersey Law Journal* editors, while acknowledging that their survey was little more than a "non-scientific

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[191] *See id.*
[192] *See id.*; *see also* N.J. R. 1:35A-2 (Judicial Performance Program).
[193] Evaluation results are shared with the judge being evaluated, assignment judge, Supreme Court, Governor, Senate Judiciary Committee and Judicial Evaluation Commission. *See* New Jersey Judiciary, *supra* note 185.
[194] *See* Ronald J. Fleury, *New Jersey Superior Court Survey, 2005*, 179 N.J.L.J. 443 (Jan. 31, 2005).
[195] *Supreme Court Responds to Law Journal Judicial Survey*, 155 N.J.L.J. 425 (Jan. 25, 1999).
[196] *State Bar Questions Survey's Motives and Methods*, 155 N.J.L.J. 425 (Jan. 25, 1999).

sampling of the perceptions and opinions of the bar," justified their work as filling an information void:

> [W]hile the Supreme Court and the chief justice have plenary power over administration of the courts and discipline of judges, there is nothing in the Constitution of 1947 that gives them monopoly rights over information about the court system and the quality of performance of the judges who operate it. It thus seems to us that the continued existence of the survey is unlikely to undermine our judicial system. To the extent the survey encourages open discussion of the quality of judges' work and suggests where that performance might be improved, it can assist the bar and perhaps the bench as well.[197]

The point made by the *New Jersey Law Journal* editors was unmistakable: information on judicial performance is a valuable resource to the public, even in the absence of judicial elections, because it informs civic discussion on the quality of the judiciary. The *Journal's* conclusions that certain judges were the "best" or "worst" in the state may have been based on unreliable data, but these conclusions were no less informative than the Supreme Court's own broad and unsupported assertion that the state's "trial judges rank second to none."[198] The release of performance evaluation information by the AOC, even in summary form, would likely have done much to dampen the effect of unreliable surveys.

2. Virginia: No public release of information

Like New Jersey, Virginia runs a confidential JPE program. In late 2000, the state Supreme Court formed a Judicial Performance Evaluation Task Force to study the creation of a formal JPE program. The task force determined that the JPE program should provide both a self-improvement mechanism for judges and a source of information for the reelection process.[199] Since judges are retained by a vote of the legislature, not the voters, the task force determined

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[197] Editorial, *The Judicial Survey*, 155 N.J.L.J. 745 (Feb. 15, 1999).
[198] *Supreme Court Responds*, *supra* note 195, at 425.
[199] *See* REPORT OF THE JUDICIAL PERFORMANCE EVALUATION TASK FORCE SUBMITTED TO THE SUPREME COURT OF VIRGINIA, at v (2001) (on file with author), (hereinafter VIRGINIA REPORT) *available at* http://www.courts.state.va.us/publications/judicial_performance_eval_task_force_report.pdf.

that the results should have limited distribution and should remain confidential.[200] Specifically, the task force recommended that summaries of survey results be provided only to chairs of each of the state's Courts of Justice Committees and to the members of the local legislative delegation of the judge who was evaluated.[201]

The Virginia task force further proposed that all active judges be evaluated three times during their initial term on any level of court and twice during any additional terms on that court.[202] Evaluations would take into account in-court observations, self-evaluations, and survey data.[203] The proposal called for surveys to be distributed to attorneys "who have had the opportunity to observe a judge performing his or her duties."[204] In addition, circuit court judges would be subject to survey evaluation by jurors.[205] Both sets of surveys offered space for additional written comments. The task force considered, and rejected, sending surveys to other judges, litigants, and law enforcement personnel.[206]

The Virginia legislature provided funding for the pilot program in 2004,[207] and the program conducted its first round of evaluations in 2006.[208] The program has adopted the recommendations of the task force, attempting to balance the competing interests of maintaining confidentiality and providing information relevant to the retention of judges. Although confidentiality remains the paramount concern,[209] information is disseminated to legislators responsible for determining whether the judge will be retained. Accordingly, each judge is

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[200] *See id*. at 34-35.
[201] *Id*. at 35.
[202] *See id*. at vii.
[203] *See id*. at vi-vii.
[204] *Id*. at 19.
[205] *See id*.
[206] *See id*. at 22-23.
[207] *See* REQUEST FOR AMENDMENT TO HOUSE BILL 30 AS INTRODUCED 5 (on file with author).
[208] *See* Deborah Elkins, *Virginia Judges' Review to Stay Confidential*, VA. LAW. WKLY. (May 29, 2006) (page unavailable).
[209] Indeed, if confidentiality cannot be maintained, the entire program may be cancelled. *See id*.

evaluated three times during a six- or eight-year term, with the first two evaluations kept confidential and the final evaluation to be shared with the appropriate delegates to the General Assembly.[210]

Virginia's lack of transparency in judicial evaluation presents the risk that, as in New Jersey, less reliable polls and surveys will arise to meet the demand for information on judicial performance. The program's regular, confidential evaluations provide judges with ample opportunity to grow and improve in office, but the planned release of every third evaluation to lawmakers should be expanded to include the public, to give it a fair idea of each judge's performance.

3. New Hampshire: Public release of summary information

Judges in New Hampshire are appointed by the governor and may serve to the age of seventy without facing reelection or reappointment.[211] Nevertheless, trial court judges have been subject to judicial performance review since 1987, and all judges have been subject to review since 2001.[212] Furthermore, in contrast to the absolute confidentiality of New Jersey or the near-confidentiality of Virginia, New Hampshire makes summary results of each year's evaluations available to the public. The Chief Justice of the Supreme Court reports the summary results to the Governor and legislative branches and posts the report on the state's website.

New Hampshire's appellate evaluations are collective and unusually introspective. Supreme Court justices complete individual self-evaluation forms, then discuss their evaluations as a group to identify individual strengths and areas for improvement.[213] This peer-assisted self-

[210] *See Fulton to Head Virginia's Judicial Evaluation Program*, VA. LAW. WKLY. (Oct. 17, 2005) (page unavailable).
[211] *See* "Judicial Selection in the States," *supra* note 9.
[212] *See* David A. Brock, Report on Judicial Performance Evaluation Program (Jun. 28, 2002) at 1 (on file with author), *available at* http://www.courts.state.nh.us/press/judicialperfeval.htm.
[213] *See id*. at 2.

examination appears to be unique to New Hampshire. In addition, surveys are distributed to 10% of parties and attorneys who appear before the Supreme Court, asking participants to evaluate the Court as a whole on a five-point scale with respect to judicial management skills, temperament and demeanor, and bias and objectivity.[214] Finally, the Supreme Court itself adopted performance standards including time standards for the processing of cases.[215] Based on reasoning that the appellate court works as a group, appellate judges are not evaluated individually.[216]

Superior Court and District Court judges face individual evaluations at least once every three years, with approximately one-third of judges evaluated each year.[217] Up to sixty surveys per judge are distributed randomly to attorneys, parties, witnesses, jurors, and court staff, seeking evaluation and comment on the judge's overall performance, temperament and demeanor, management skills, legal knowledge, attentiveness, bias and objectivity, and degree of preparedness.[218] Survey results are then discussed with each individual judge, in addition to any outstanding complaints or known grievances. Remedial action is taken if appropriate.[219]

New Hampshire still lacks ideal transparency. Judges are not discussed individually in the annual summary reports, and Supreme Court justices are not even evaluated individually. There are also questions about public awareness of the summary reports. Nevertheless, the summary reports represent an important advance in public information over the confidentiality

[214] *See id*. at 1. While the Supreme Court originally intended to distribute surveys every year, in 2003 it amended Supreme Court Rule 56(III) to require distribution of surveys only every three years. The Court was concerned that since many attorneys routinely appear before it, sending out surveys too frequently may actually lower participation. *See* John T. Broderick, Jr., Report on Judicial Performance Evaluation Program (Jun. 30, 2005) at 3-4 (on file with author). Unfortunately, the new three-year time frame has not achieved the desired result: only 48 of 209 surveys distributed in 2005 were returned. *See* John T. Broderick, Jr., Report on Judicial Performance Evaluation Program (Jun. 30, 2006) at 3 (on file with author).
[215] *See id*. at 2.
[216] News Advisory, New Hampshire Judiciary, 2002 Judicial Performance Evaluations Released (Jul. 11, 2003) (on file with author).
[217] *Id*.
[218] Brock, *supra* note 212, at 4.
[219] *See id*.

approach of states like New Jersey and Virginia. At minimum, New Hampshire should increase public awareness of the annual reports and make them more generally available. The state should also explore conducting individual evaluations for appellate judges. Low response rates to appellate judge surveys may be caused in part by attorney frustration at being unable to comment on the performance of individual justices on the survey. No reasonable attorney or litigant would punish the entire court with a low rating in a category if she wanted to provide constructive criticism to a single justice. As a result, overall evaluations may be higher in some categories than they should be. A more individualized approach may lead to more, and better, feedback.

4. Hawaii: Dissemination Propelled by the State Bar

Retention decisions in Hawaii are made by the state's Judicial Selection Commission, not the voters. Accordingly, there has been debate as to the extent to which performance evaluation results should be disseminated to the public. The current process only reveals summary evaluation results, not the results for individual judges.[220] However, the Hawaii State Bar Association (HSBA) has pushed hard for public reporting of results. In fact, Hawaii is an excellent example of development of a JPE program (and transparency) being driven not by state government itself, but by the state bar.

The HSBA has pushed for judicial performance evaluation in Hawaii for over twenty years, and even developed plans for its own JPE program. In about 1986, members of the HSBA and the Hawaii state judiciary began formal joint work on the creation of a judicial performance evaluation program. However, no formal program was instituted until 1990, when the Hawaii Supreme Court promulgated Supreme Court Rule 19, establishing a Special Committee on

[220] *See id.*; *see also generally* JUDICIARY, STATE OF HAWAI'I, JUDICIAL PERFORMANCE PROGRAM REPORT (2005).

Judicial Performance.[221] In response to Rule 19, the HSBA dropped plans for its own JPE program.[222] However, implementation of the Rule 19 program was sporadic and disappointing. In the first eight years of the program, only seventeen judges were evaluated, followed by another seventeen judges in late 1998 and early 1999.[223]

In December 1999, the HSBA again pushed for a well-functioning, formal JPE program in Hawaii under its own auspices. In particular, the HSBA argued the need to disseminate the results of the evaluation process to the public, while assuring that the process is fair to the judges.[224] The proposal called for an independent expert to help craft a confidential survey similar to those used in Alaska, Arizona, Colorado and Utah. The final, verified survey results would be passed along to the HSBA oversight committee and each judge being evaluated; the judge would have the opportunity to respond to the results before the results are made public.[225] The HSBA proposed that its oversight committee "determine what action should be taken with respect to any judge's comments."[226]

The current system in Hawaii is a somewhat limited program similar to the 1999 HSBA proposal. Surveys are sent to attorneys (with no more than 150 surveys sent out per judge), asking them to evaluate the judge on a scale of one ("Poor") to five ("Excellent")[227] in areas of legal ability, management skills, comportment, and settlement and/or plea bargain ability.[228] Jurors are given their own questionnaire to evaluate a judge's patience, dignity, courtesy,

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[221] *See* Hawaii State Bar Association, Standing Committee on Judicial Administration, *Report: Regarding a Judicial Evaluation Program*, 3-DEC HAW. B.J. 9, 9 (1999).
[222] *See id.*
[223] *See id.*
[224] *See id.* at 10.
[225] *See id.* at 12.
[226] *Id.*
[227] *See* Hawaii State Judiciary, Judicial Performance Review, http://www.courts.state.hi.us/page_server/Courts/PerformanceReview/6E3630681ED48D2DEBD9421FB8.html (last visited Sep. 27, 2006).
[228] *See, e.g.*, JUDICIAL PERFORMANCE PROGRAM REPORT, *supra* note 220, at 1.

attentiveness, fairness, absence of prejudice or bias, clarity, and efficiency in jury trials.[229] Attorneys may also provide written comments. Results are furnished to the Chief Justice and the state's Judicial Education Review Panel to be discussed with individual judges.[230] Although Family and District Court judges are scheduled to be evaluated every three years,[231] there is no limit to the number of time a judge can and will be evaluated.[232]

The Hawaii judiciary makes a reasonably comprehensive judicial performance report available to the public.[233] While individual judges' scores are not made available, the report does give somewhat more information by showing how many evaluated judges received a particular rating for each category of review.[234] The report also includes blank copies of the distributed surveys.[235] While the overall process has lagged and transparency has not been fully achieved, the efforts of the HSBA and the state judiciary are moving along the right track.

C. JPE Programs in States Using Contested Elections

Judicial performance evaluation has been slow to gain acceptance in states that select judges through contested elections, in large part because of the perceived difficulty of properly evaluating candidates who have never held judicial office.[236] Detractors of JPE in these jurisdictions express concern that until a fair and equal means of assessing non-judge candidates can be developed, the asymmetry in evaluation biases the election.[237] Still other detractors complain that judicial performance evaluation programs are unnecessary, because a contested election, by its very nature, brings relevant information on judicial performance to light.

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[229] *See id*. at 42.
[230] *See* Hawaii State Judiciary, *supra* note 227.
[231] *See* JUDICIAL PERFORMANCE PROGRAM REPORT, *supra* note 220, at 1.
[232] *See* Hawaii State Judiciary, *supra* note 227.
[233] *See, e.g*., JUDICIAL PERFORMANCE PROGRAM REPORT, *supra* note 220.
[234] *See id*. at 6-9.
[235] *See id*. at 25-42.
[236] *See* David C. Brody, *The Relationship Between Judicial Performance Evaluations and Judicial Elections*, 87 JUDICATURE 168, 170 (2004).
[237] *See* Leonard Post, *ABA Offers New Way to Judge the Judges*, NAT'L L.J., May 5, 2005, at 4.

Despite these concerns, some states with contested elections are working to develop judicial performance evaluation programs, with results used both for public consumption and private self-improvement. Minnesota, for example, encourages each of its judicial districts to develop its own voluntary evaluation process and procedures,[238] and in 2006 reinstituted a statewide program of evaluation for its administrative and workers' compensation judges.[239] Another election state, Florida, has a voluntary JPE system which simply allows attorneys to send confidential assessments to a judge concerning the judge's strengths and weaknesses.[240] Other states have allowed non-governmental organizations to take the lead in developing state JPE programs. This report focuses in particular on the experiences in Washington and New York, which are extensive and offer significant insight for the future of JPE in contested election states.

1. Washington

The State of Washington has not adopted a formal program for judicial performance evaluation. In 2001, however, the Washington chapter of the American Judicature Society conducted a pilot program for Superior Court judges in the state, and published extensive findings from that study.[241] Ten Superior Court judges volunteered to participate in the pilot

[238] For an excellent summary report of the approach taken by Minnesota's Fourth Judicial District, *see* MARCY R. PODKOPACZ, REPORT ON THE JUDICIAL DEVELOPMENT SURVEY (2005) (on file with author), *available at* http://www.courts.state.mn.us/documents/4/Public/Research/Judicial_Development.doc.
[239] Telephone Interview with LeeAnn Shymanski, Assistant to the Chief Judge, Minnesota Office of Administrative Hearings (Sep. 14, 2006); *see also generally* OFFICE OF ADMINISTRATIVE HEARINGS, JUDICIAL DEVELOPMENT PROGRAM OFFICE-WIDE SUMMARY (2002) (on file with author).
[240] *See* U.S. DEPARTMENT OF JUSTICE BUREAU OF JUSTICE STATISTICS, STATE COURT ORGANIZATION 2004 at 53 (2004).
[241] *See* AMERICAN JUDICATURE SOCIETY – WASHINGTON CHAPTER, COMMITTEE ON JUDICIAL PERFORMANCE STANDARDS AND EVALUATION, FINAL REPORT OF THE WASHINGTON STATE JUDICIAL PERFORMANCE EVALUATION PILOT PROJECT (2002) (hereinafter "WASHINGTON FINAL REPORT"). For an excellent summary of the report's findings, *see* David C. Brody, A Report on the Washington State Judicial-Performance Evaluation Pilot Project, http://www.wsba.org/media/publications/barnews/archives/2002/sep-02-report.htm (last visited Sep. 27, 2006).

study.[242] The judges were selected to ensure diversity by geography, size of court, longevity on the bench, and gender.[243] The evaluations were kept anonymous.

The pilot program focused exclusively on obtaining feedback from surveys; it did not look at other sources of information about the judges, nor did it explore how and if information about the judges should be disseminated to the public.[244] Surveys were sent to attorneys, as well as to jurors and witnesses. Jurors and witnesses viewed judges significantly more favorably than did the attorneys, providing aggregate scores near the top range of the rating scale.[245] Among attorneys, approximately 75% of the comments were positive and laudatory, while about 25% of the comments provided "constructive criticism."[246] Interestingly, these critical comments were generally well-received by the judges. Each of the participating judges stated that the JPE process was beneficial to him or her, with the general sentiments that: (1) the information obtained was useful; (2) the procedure is a good vehicle to let litigants, witnesses and jurors "vent" and give feedback to the system; and (3) the information had not been previously available.[247] The judges also suggested that future performance evaluations provide more specific information about negative perceptions by a respondent (*i.e.*, the detailed reasons for a negative perception), and provide more space for comments to encourage more written feedback.[248]

The lessons of the Washington pilot program extend beyond the positive response of the judiciary. Unlike the judges in Missouri Plan states, Washington's judges are chosen initially by

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[242] *See* WASHINGTON FINAL REPORT, supra note 241, at 16.
[243] *See id.*
[244] *See id.* at 18.
[245] *See id.* at 23-27. There was a significantly smaller number of witness responses than juror or attorney responses. It was surmised that this was due to two factors: limited opportunity to observe the judge, and the manner in which the surveys were distributed (*i.e.*, by handing the surveys to witnesses immediately after their testimony). *See id.* at 25.
[246] *Id.* at 23.
[247] *Id.* at 29.
[248] *See id.*

nonpartisan election,[249] indicating that JPE is a useful tool regardless of the state's method of initially selecting its judiciary. At minimum, a JPE program provides valuable feedback to judges that they would not otherwise have received. Beyond that, a program similar to Washington's pilot program could be expanded to include other sources of information about a judge's performance, and disseminated to the public in advance of elections.

2. New York

New York holds partisan elections for most of its aspiring judges,[250] at least for the time being.[251] As in Washington, there is no official, state-sponsored program in New York for evaluating judges. However, since 1975, a private, nonprofit organization known as the Fund for Modern Courts has sponsored court monitoring programs throughout the state, through which ordinary citizens observe and evaluate their courts, report their findings, and issue recommendations for improvement.[252] Like the Alaska Judicial Observers, the Modern Courts observers sit in on a large number of proceedings: one judge, whose evaluation did not appear atypical, was observed by fifteen different monitors on thirty-seven different days.[253] Observers'

[249] Brody, *supra* note 236, at 170.
[250] Judges on the Court of Appeals – the state's court of last resort – as well as those on the court of claims, and criminal and family courts of New York City, are chosen through merit selection. *See* American Judicature Society, Judicial Selection in the States: New York, http://www.ajs.org/js/NY.htm (last visited Sep. 27, 2006).
[251] In September 2006, the Second Circuit Court of Appeals ruled unanimously in *Lopez Torres v. New York State Board of Elections*, No. 06-0635, that New York's arcane convention system for nominating candidates to the state Supreme Court violated the First Amendment rights of candidates and voters alike. *See* Daniel Wise, *2d Circuit Rejects N.Y. Judicial Conventions*, N.Y.L.J., Sep. 1, 2006. The decision may awaken new calls for reform in the system, including previous calls for a move away from elections altogether and toward a merit selection plan. *See, e.g.*, Michael Cardozo, *Selecting the Most Qualified Judges*, GOTHAM GAZETTE, May 26, 2006 (page unavailable) (arguing for the use of screening panels or a judicial qualification commission until merit selection can be fully implemented); Fund for Modern Courts, Why Merit Selection?, http://www.moderncourts.org/Advocacy/judicial_selection/why.html (last visited Sep; 27, 2006).
[252] *See, e.g.*, FUND FOR MODERN COURTS, REPORT OF THE SARATOGA COUNTY COURT 2004, at 3 (on file with author), *available at* http://www.moderncourts.org/Publications/pdf/cmr/saratoga_04.pdf.
[253] *See id*. at 7.

comments are broken down by performance criterion (*e.g.*, demeanor, professionalism, command of the courtroom, and audibility), and are extensively quoted in final reports.[254]

Unlike the Alaska Judicial Observers, however, the Modern Courts observers review performance of the entire court system, not just individual judges. Attorneys are reviewed for their courtesy, preparedness, and competence. Jurors are observed for alertness. Non-judicial personnel are rated on politeness and helpfulness. Even courthouse facilities are reviewed for cleanliness, structural damage, parking availability, and disabled access.[255] According to the Fund for Modern Courts, observer reports have been influential in creating a staggered court calendar to decrease waiting time and increase efficiency, promoting construction of new courthouses to replace those in disrepair, and introducing mandatory "civility training" for all non-judicial court personnel.[256]

The experience in Washington and New York strongly suggest that public dissemination of performance evaluation results would have a positive effect on judicial elections, by informing voters about the performance of their judges and their courts, and by motivating them to vote for good judges and against underperforming judges. However, broad implementation of JPE programs in contested election states must overcome resistance to the idea of evaluating a sitting judge one way, and evaluating the candidate(s) opposing him in a slightly different way. This resistance *can* be overcome, because the problem of asymmetric evaluation of judicial candidates itself can be overcome. Judicial candidates who are not incumbents still can be evaluated on the skills they would be expected to use on the bench. Presumably most candidates who are not already judges are attorneys, and would be expected to have skills and knowledge

[254] *See id*. at 7-9.
[255] *See id*. at 10-13.
[256] *Id*. at 3-4.

that are measurable in much the same way as a judge's skills and knowledge are. An attorney review might include:

1) Surveys of members of the bar, especially attorneys who have worked with and against the attorney in recent cases;

2) Surveys of non-attorneys who have interacted with the attorney in courtroom, mediation, or deposition settings, including judges, mediators, arbitrators, court staff, stenographers, and perhaps jurors and witnesses; and

3) Evaluation of selected submissions to the court, including a variety of motions and briefs.[257]

This form of evaluation, while not identical to judicial evaluation, would provide a fair and accurate basis for comparison between the candidates. More importantly, it would couch the comparison in terms of objective criteria expected of any judge, rather than the subjective, politically charged criteria that arise so frequently in the course of contested judicial elections. JPE focuses the voter on the candidate's ability to adjudicate fairly and efficiently, and away from the candidate's personal stance on controversial issues or admiration for a particular Justice on the United States Supreme Court (a favorite question of special interest groups).[258] Put another way, widespread use of JPE in contested elections would allow voters to evaluate candidates on legal competence rather than ideology.

Even if certain candidates cannot be, or refuse to be, evaluated, the candidate evaluations that have been conducted should be made publicly available. It turns out that even asymmetrical information is better than no information at all. One commentator has noted, "one must be

[257] *See id*. at 192.

[258] Asking judicial candidates to liken their philosophy to that of a particular Supreme Court justice is a particularly silly exercise. Voters know as little about the individual justices of the Supreme Court as they do about their local judges. A recent survey found that only 24% of Americans could name even two Supreme Court justices. *See New National Poll Finds: More Americans Know Snow White's Dwarfs Than Supreme Court Judges*, BUSINESS WIRE, Aug. 14, 2006. At best, a typical voter might recognize a Justice's name and connect it with a broad, vague assumption about expected outcomes (*e.g.*, "Justice Scalia is conservative."). Accordingly, even if a judicial candidate has a sophisticated, nuanced reason for wanting to emulate to style of, say, Justice David Souter, such a response is very unlikely to be appreciated by the voters he is trying to reach.

mindful that the purpose of JPE programs is to provide voters with information upon which to base their vote. If some information is better than no information, then the delivery of information on only one candidate, so long as such information is reliable, does provide assistance to the voter."[259] Similarly, another study of contested elections in Washington and Oregon concluded that

> The more knowledgeable voters are, the more tolerant of the competing demands of judicial independence and democratic accountability they become. … The task for those who wish to maintain balance between accountability and responsibility may well be to increase the amount of information available to the electorate.[260]

D. Efforts to Evaluate the Federal Judiciary

To date, federal judges have not been subject to comprehensive performance evaluation. Perhaps because Article III judges have already survived a confirmation process and enjoy life tenure, there has been little serious discussion about measuring their overall performance on the bench and drawing public attention to that performance. More puzzling is the fact that Article I judges (such as administrative law judges) have also avoided judicial performance evaluation, even though almost all other career federal employees in the executive branch are subject to annual performance appraisals.[261]

Congress has made efforts to introduce process-oriented accountability into the federal judiciary, albeit limited ones. Most significantly, the Civil Justice Reform Act of 1990 (CJRA) required each federal district court to develop a civil justice expense and delay reduction plan.[262] The legislation required each district court to assess annually the condition of its civil and

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[259] Brody, *supra* note 236, at 173.
[260] Charles H. Sheldon & Nicholas P. Lovrich, Jr., *Knowledge and Judicial Voting: The Oregon and Washington Experience*, 67 JUDICATURE 235, 244 (1983).
[261] *See* Jeffrey S. Lubbers, *The Federal Administrative Judiciary: Establishing an Appropriate System of Performance Evaluation for ALJs*, 7 ADMIN. L.J. AM. U 589, 590 (1994). Interestingly, proposals in the 1990s to institute periodic performance evaluations for ALJs were rejected by Congress as being too detrimental to the ALJs' decision independence. *See* James P. Timony, *Performance Evaluation of Federal Administrative Law Judges*, 7 ADMIN. L.J. AM. U 629, 631 (1994).
[262] 28 U.S.C. § 471.

criminal dockets, and implement additional measures to reduce cost and delay in civil litigation.[263] Most importantly for purposes of transparency, section 476 of the CJRA required the Administrative Office of the United States Courts to prepare a semiannual report, available to the public, that discloses for each federal district judge and magistrate judge: (1) the number of motions that have been pending for more than six months; (2) the number of bench trials that have been submitted for more than six months; and (3) the number and names of cases that have not been terminated within three years of filing.[264]

The impact of the CJRA, and section 476 in particular, on reducing delay was generally considered to be positive. Perhaps provoked by the fear of appearing behind the curve in comparison to their peers, federal judges and magistrates did in fact reduce the time needed to resolve motions and cases.[265] In the first two years the CJRA was in effect, the number of bench trials that had been submitted for more than six months declined dramatically, and declines were also seen in the number of cases more than three years old.[266] Nineteen of twenty chief judges expressing an opinion in a 1993 report characterized section 476 as a "very effective" or "somewhat effective" measure for remedying unjustified delays and judicial neglect.[267] Accordingly, Congress made the provisions of section 476 permanent in 1997, even as the rest of the statute expired.[268]

The CJRA reports have received little distribution, and their metrics are quite limited and thin. Perhaps in part because the CJRA's accountability measures are insufficient, the debate

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[263] *Id.* § 475.
[264] *Id.* § 476(a).
[265] *See generally* Charles Gardner Geyh, *Adverse Publicity As a Means of Reducing Judicial Decision-Making Delay: Periodic Disclosure of Pending Motions, Bench Trials and Cases Under the Civil Justice Reform Act*, 41 CLEV. ST. L. REV. 511 (1993).
[266] *See id.* at 533.
[267] *Id.*
[268] *See* Carl Tobias, *The Expiration of the Civil Justice Reform Act of 1990*, 59 WASH. & LEE L. REV. 541, 542 & n.7 (2002).

continues to rage over judicial independence and judicial accountability in the federal courts. In 1997, for example, the *National Review* demanded the impeachment of federal judge Thornton Henderson based purely on Judge Henderson's decision to enjoin enforcement of California's Proposition 209, which sought to prohibit racial preferences in certain programs.[269] The magazine's editorial staff left no doubt that its motivation was outcome-based:

> True, no federal judge has ever been impeached purely on the basis of his decision – yet. But, as Judge Henderson's philosophical soulmates are wont to remark, the Constitution must respond to the times.[270]

Similarly, conservative Congressional leaders called for the impeachment of Justice Anthony Kennedy in 2005 after Justice Kennedy authored an opinion forbidding capital punishment for juveniles.[271] Advocates of the independence of the federal judiciary have dismissed these calls for impeachment as purely political, and have expressed concern that society's preoccupation with controversial outcomes will reduce the overall effectiveness of the judiciary. As former Justice Sandra Day O'Connor recently commented, for judges, "[o]ur effectiveness relies on the knowledge that we won't be subject to retaliation for our judicial acts."[272]

The introduction of a comprehensive JPE program at the federal level can calm this debate by shifting the focus away from outcomes and toward the adjudicative process. Judges who perform well against process-oriented measures should engender greater public confidence in the judiciary at large, because of their ability to judge fairly and knowledgeably. Judges who do not perform as well in evaluations will nevertheless benefit from the opportunity to improve their performance on the bench. At some point, the public has to trust that judges will

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[269] *See Editorial, Unimpeachable Sources – Impeaching Federal Judge Thornton Henderson*, NAT. REV., Feb. 10, 1997.
[270] *Id.*
[271] *See, e.g.*, Dana Milbank, *And the Verdict on Justice Kennedy Is: Guilty*, WASH. POST, Apr. 9, 2005, at A3.
[272] O'Connor, *supra* note 2, at 1-2.

themselves care about improving their performance, if that performance is measured against legitimate criteria – and if the results of that measurement are widely disseminated.

Most federal judges are selected because of they rate highly in areas of legal knowledge, experience and moral character. Putting aside the natural aversion that any person has to being evaluated, federal judges should welcome JPE as an opportunity to demonstrate the quality of their skill on the bench and refocus the debate away from emphasis on case outcomes. As one federal judge recently noted, "judges themselves have a certain responsibility for maintaining judicial autonomy."[273] Enhancing judicial performance evaluation is part of that responsibility.

E. ABA Proposals

In addition to the programs enacted in a number of states, the American Bar Association (ABA) has promoted its own vision of judicial performance evaluation. In 1985, the ABA promulgated guidelines for evaluating state court judges.[274] These guidelines were intended primarily to promote judicial self-improvement.[275] To the extent any information gleaned from performance evaluations was disseminated to the public, the guidelines advised that that information "should not identify or give comparative rankings of individual judges."[276] While the ABA recognized that each jurisdiction would have to tailor a JPE program to its own specific needs,[277] it generally recommended evaluating judges on their integrity, knowledge and understanding of the law, communication skills, preparation, attentiveness and control over the proceedings, managerial skills, punctuality, service to the profession, and effectiveness in

[273] Richard A. Posner, *Judicial Autonomy in a Political Environment*, 38 ARIZ. ST. L.J. 1, 1-2 (2006).
[274] *See generally* AMERICAN BAR ASSOCIATION SPECIAL COMMITTEE ON EVALUATION OF JUDICIAL PERFORMANCE, GUIDELINES FOR THE EVALUATION OF JUDICIAL PERFORMANCE (1985).
[275] *See id*. at 1, Guideline 1-1.1.
[276] *Id*. at 33, Guideline 5-3.
[277] *See id*. at iv. *See also id*. at 22, Guideline 4-2 (noting that "criteria should be developed reflective of unique jurisdictional characteristics and should be as specific as is feasible").

working with other judges.[278] Furthermore, the guidelines suggested seeking information from multiple, reliable sources, including "lawyers, other judges, public records, court personnel, litigants, and other appropriate sources."[279]

The 1985 guidelines stood as a model until the ABA revised them in February 2005.[280] While the revised guidelines continue to promote adoption of judicial performance evaluations by every court system for self-improvement purposes, they also reflect a new emphasis on providing more information to the public about a judge's performance, in order to educate the public about the proper role of the judge and preserve judicial independence. New Guideline 2-1 elevates "providing relevant information to those responsible for continuing judges in office" to a "primary use" of judicial performance evaluations.[281] New Guideline 5-2.7 recommends that one criterion for evaluation should be the judge's "ability to make difficult or unpopular decisions,"[282] and its related commentary stresses that "Good judges are also willing to rule on issues without regard for the popularity of their rulings and without concern for or fear of criticism."[283] New Guideline 4-4 echoes old Guideline 1-2, and continues to emphasize that "Judicial evaluation programs should be structured and implemented so as not to impair judicial independence."[284] The commentary to new Guideline 4-4 explains that

> The preservation of judicial independence must be recognized in the development and administration of any judicial evaluation effort. From the wording of the questionnaire to the identification of respondents to the dissemination of results,

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[278] *See generally id*. at 9-20, Guidelines 3-0 to 3-8 and commentary.
[279] *Id*. at 26, Guideline 4-6. Interestingly, the 1985 guidelines were cool to the inclusion of jurors as sources of information, citing the "halo effect" in which jurors give judges uniformly high evaluations. *See id.* at 27. The ABA also stopped short of recommending surveys of witnesses, noting that reliability may be compromised where a witness had the chance to observe only a small part of the Court proceedings. *See id*.
[280] *See* AMERICAN BAR ASSOCIATION, GUIDELINES FOR THE EVALUATION OF JUDICIAL PERFORMANCE WITH COMMENTARY (Feb. 2005), http://www.abanet.org/jd/lawyersconf/pdf/jpec_final_commentary.pdf (last visited Sep. 27, 2006) (hereinafter "ABA 2005 GUIDELINES").
[281] *Id*. at 1.
[282] *Id*. at 7.
[283] *Id*. at 8.
[284] *Id*. at 6.

> performance evaluation programs should be conducted so that judicial evaluations are not based on agreement or disagreement with a particular judicial philosophy or outcome.[285]

The 2005 ABA Guidelines reflect the growing need for evaluation programs to emphasize that judicial performance must be measured by process, not outcome. That is, judicial independence and accountability are both promoted only when judges are evaluated according to principles of fairness, efficiency, and adherence to the law and facts of the case, not according to a specific result desired by one or more parties. They also reflect a growing demand for public information about judicial performance. While falling short of demanding transparency in all situations, the new ABA Guidelines reinforce the importance of providing accurate information to those who place and maintain judges in office.

F. What About Bar Polls?

In the absence of comprehensive, transparent JPE programs, several states and jurisdictions have relied upon bar polls for information about judges at election time. Bar polls typically work like the survey portion of a full-fledged JPE program: attorneys rate judges on their legal knowledge, courtroom demeanor, administrative capacity, and the like, and publish the results prior to elections. Such polls do increase the amount of information available to voters when they go to the polls. They may also contribute to determining areas of judicial education.[286] However, bar polls lack the key trappings of comprehensive JPE programs. Bar surveys alone cannot account properly, if at all, for the reaction of jurors, litigants, witnesses, and court staff; the judge's ability as a case manager; or impartial courtroom observation. And because they are limited to the opinions of attorneys, they may not be treated with the same gravity as more inclusive studies.

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[285] *Id.*

[286] *See* Hennepin County Bar Association, About the Judicial Performance and Retention Survey (on file with author), *available at* http://www.hcba.org/District-Court/DistrictCourt-JudicialEvaluations.htm.

The judge's case management ability deserves special consideration that bar polls alone cannot capture. Traditionally, attorneys were responsible for managing the timeline of events of an individual case. As both the number of the cases and the number of parties without attorney representation increased, so did the demands for early intervention and active case management by the judge. The goal of case management is to create a predictable system that sets reasonable time frames to move a case forward; *i.e.*, to create certainty that court events will take place as scheduled, and that the judge will enforce set deadlines. This sort of certainty is a central concern for litigants, and efficient management of cases from filing through disposition is critical to the timely, cost-effective, and fair resolution of disputes in the courts.[287] Further, it has become evident that a court's case management ability and decision-making process is at least as important as case outcomes in shaping the public's perception of fairness. Performance measurement of individual judges must include both a review of the judge's case management skills and an evaluation of the judge's docket statistics, which bar polls do not adequately consider.

Bar polls fall also short because they usually are not designed to foster individual judicial self-improvement. Rather, they merely provide a snapshot of the judge's performance shortly before the election, giving the judge little or no opportunity to develop better practices before facing the voters. Recognizing this limitation, some in Missouri are now seeking to replace bar polls with a robust JPE program. One such advocate, Dr. Gregory Casey, has recommended that Missouri adopt an ongoing assessment program complete with a judicial performance evaluation commission, based on the Colorado model.[288] Noting the strength of Colorado's program in

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[287] *See* Holly Bakke & Maureen Solomon, *Case Differentiation: An Approach to Individualized Case Management*, 73 JUDICATURE 17, 17 (1989)

[288] *See* Allison Retka, *Missouri Lawyers, Jurors Pass Judgment on Area Judges*, DAILY RECORD (St. Louis, Mo.), Aug. 30, 2006 (page unavailable).

comparison to the Missouri bar polls, Casey stated, "They [Colorado] have everybody rating the judges…. Judges rate themselves, judges are rated by lawyers, by trial participants, clerks, the courtroom personnel, people who are litigants, jurors. It's unbelievable what they have. We don't have anything like this."[289]

V. Current Challenges to a Well-Functioning JPE Program

No JPE program that has been implemented to date has worked perfectly. There have been – and still are – concerns about cost, undue political influence, reliability of data, and proper modes of dissemination of information to the public. Still, the crucible of existing JPE programs provides many valuable lessons about the efficient use of performance evaluation programs going forward. This section discusses some of the challenges JPE programs have faced, and offers recommendations for overcoming these obstacles.

A. Cost of Implementation

Cost is always a concern when implementing a new program, or substantially improving an existing one. Budget crises in some state courts do not help. Still, states should not delay implementing JPE programs because of perceived cost constraints. Indeed, the overall cost has proven to be quite reasonable. In most cases, a comprehensive judicial performance evaluation (including compilation and analysis of survey data by an independent entity, production and dissemination of reports, staffing, travel, courtroom observation and administrative overhead) can be achieved for about $3000-4000 per judge.[290] The costs per judge may be considerably

[289] *Id.*

[290] Virginia calculated the "average" cost of evaluating each judge to be approximately $3400, a figure that included travel and meeting expenses; copying and printing costs for surveys; mailing costs for distribution and return of surveys; independent consulting to tabulate survey results; staffing; training and travel expenses for facilitator judges and courtroom observers, and compiling attorney and juror lists. *See* VIRGINIA REPORT, *supra* note 199, at 36-39. Colorado currently pays approximately $2400 per judge to an independent consulting firm to handle all issues relating to compiling and analyzing survey data. Telephone Interview with Jane Howell, Director, Colorado Commission on Judicial Performance (Sep. 14, 2006). *See also* Norman L. Greene, *Perspectives on Judicial*

less for programs that are narrower in scope[291] or for off-year evaluations (conducted when the judge does not face an election).[292]

Furthermore, there are many creative ways to generate the necessary financing. Colorado uses fee-generated financing, allocating a portion of every traffic fine collected in the state to the performance evaluation program.[293] Colorado also uses the resources of its existing State Court Administrative Office to provide technical and administrative assistance to its JPE program, obviating the need for separate administrative costs.[294] States holding contested judicial elections may wish to explore funding the program in connection with a public election financing scheme.[295] Of course, states may also turn to private funding from non-partisan, civic-minded groups. Whatever the funding mechanism, jurisdictions that have instituted JPE programs have largely found them to be worth the expense.

B. Composition of the Evaluation Committee

Just as we expect judges to be fair, impartial, and careful in their decisions, we must expect the same of those who judge the judges. To this end, evaluation committees must be constructed to be as free as possible from bias. Furthermore, safeguards should be taken to

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Selection, 56 MERCER L. REV. 949, 958 n.39 (2005) (noting same costs for Colorado during 2004 evaluation process).

[291] Washington's pilot program in 2001, for example, was able to compile scientifically reliable survey data from attorneys and jurors for ten judges at a total cost of about $3000, or only $300 per judge. *See* WASHINGTON FINAL REPORT, *supra* note 241, at 8 n.7 Similarly, Minnesota's evaluation of administrative law judges and workers' compensation judges costs approximately $1000 per judge. Telephone Interview with LeeAnn Shymanski, *supra* note 239.

[292] For example, Colorado is exploring conducting mid-term or off-year surveys of judges, where the cost of collecting information may be as little as $1200 per judge, or half of the cost of election-year surveys. Telephone Interview with Jane Howell, *supra* note 290.

[293] *Id.*

[294] *Id.*

[295] In its 2005 Guidelines, the ABA cautioned against public financing of evaluations in contested elections, noting that "it may be inappropriate for the judicial branch other any other entity using public funds to disseminate performance evaluations of incumbent judges running for reelection." ABA 2005 GUIDELINES, Guideline 4-1-1.2. Of course, conducting performance evaluations for all judicial candidates, not just incumbent judges, would greatly reduce this concern.

assure that each committee provides the public with clear, objective information as to whether the judge has met predetermined performance benchmarks.

Concerns about the composition of the evaluation committee have been a significant roadblock toward broad judicial acceptance of performance evaluations. Jacqueline Griffin, a judge on Florida's District Court of Appeals, has openly questioned how judges can get a fair evaluation if the committees themselves are composed of people with little or no knowledge of the judicial system, and with no formal accountability for their actions.[296] Another commentator has argued that:

> A judge should never have to be concerned that a decision or ruling will result is his or her being cast out of the judiciary for acting contrary to the prevailing mood of public opinion, whether expressed by the electorate at the polls or by the more limited public opinion of a politically-appointed retention commission of six nonlawyers and five lawyers. … The retention commission process, like its big brother the elective process, is inextricably intertwined with interest groups and politics. It is, as a consequence, inherently flawed. A judicial retention system which is dependent on the political process and the multitude of influence groups which make up society will not in fact always be fair and unbiased and will frequently carry with it the perception of being unfair and biased.[297]

Concerns about uninformed or agenda-driven citizen committee members are understandable, but in practice public involvement in evaluation committees has worked well. Reviews of citizen involvement in Colorado's JPE pilot programs in 1984 and 1986, for example, revealed that public participation in evaluation committees resulted in a better informed and more engaged citizenry. Citizen participants "stressed how much they had learned about the complexities of judging and the legal system"[298] and became less inclined to make "no retention" decisions as they became more knowledgeable about the complexities of judging.[299] While there is a proper role for lawyers and judges on evaluation committees as relative experts

[296] *See* Griffin, *supra* note 47, at 61.
[297] McGowen, *supra* note 11, at 622.
[298] Mahoney, *supra* note 48, at 213.
[299] *Id*. at 215.

in the legal system, there is no reason to believe that even extensive public participation will necessarily lead to an unfair outcome. Indeed, at least one commentator has noted that the committee is more likely to be viewed as "fair, impartial, and independent from the judiciary" if a majority of committee members are not lawyers or judges.[300]

Moreover, relatively simple safeguards may be implemented to protect against undue political influence on the committee. The state may require each committee to have partisan balance, to protect against the risk of a dominant political philosophy acting to the detriment of certain judges. Committee members may be required to undergo formal training on the judicial process and the legal system before commencing their service. Candidates for evaluation committees should perhaps be formally approved by the legislature or another body before joining the committee. As a final check, jurisdictions may choose to implement an appeals process for judges who are not recommended for retention.[301]

The composition of the evaluation committee is less problematic in jurisdictions that currently use performance evaluation solely for judicial self-improvement, since the results of an evaluation carry fewer political consequences. However, the composition of the committee should still be as unbiased as possible. Judges need to feel confident that the feedback they receive is the result of a good faith effort to identify their strengths and weaknesses, not an act of political gamesmanship.

A final challenge to the composition of the evaluation committee is attracting volunteers who are dedicated and willing to work for little or no pay. During Colorado's pilot project in the mid-1980s, committees had some difficulty retaining volunteer members who were not prepared

[300] David C. Brody, *Judicial Performance Evaluations by State Governments: Informing the Public While Avoiding the Pitfalls*, 21 JUST. SYS. J. 333, 335 (2000).
[301] *See* Griffin, *supra* note 47, at 61. *See also* ESTERLING & SAMPSON, *supra* note 39, at 93 (describing the Arizona appeals process).

for the significant time commitment associated with conducting frequent judicial evaluations.[302] This challenge might be met by raising the visibility and importance of judicial performance evaluations, thereby raising the prestige of the committee. As a matter of human psychology, high-visibility and high-prestige positions are likely to attract more volunteers, and increased competition for membership yields a higher quality and more dedicated committee.

C. Clearly Distinguishing Between Good and Bad Judges

Whatever their composition, evaluation committees rarely determine that a sitting judge is unworthy of remaining in office.[303] This has led critics of JPE to argue that the process does not help the public in a meaningful way at election time, and instead helps perpetuate a system which results in *de facto* lifetime appointments.[304] Failure to clearly identify "bad" judges in every instance also poses a credibility challenge in retention states, where some segment of the public is anxious to see one or more judges defeated to show that the merit system works.[305] Shortly after Colorado released its 2006 judicial performance reviews and retention recommendations, for example, Denver's *Rocky Mountain News* bemoaned in an editorial, "Only three [of the 108 judges reviewed] drew any negative votes [for retention]. Surely there ought to be more."[306] Public sentiment that some (undefined) percentage of judges are surely not worthy of holding their jobs may pressure evaluation committees to recommend against retention of judges whose performance is otherwise acceptable.

The public needs to be better informed that a high number of judges being recommended for retention is not a sign that the merit system is broken. There do not need to be judges who

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[302] Mahoney, *supra* note 48, at 213.
[303] *See* Pelander, *supra* note 80, at 718 (pulling data from Alaska, Colorado and Arizona to show that the vast majority of judges who are evaluated are recommended for retention).
[304] *See id.*
[305] *See, e.g., id.*
[306] Editorial, *Judicial Evaluations Appear Too Lenient*, ROCKY MTN. NEWS, Aug. 21, 2006, at 30A.

fail in order for there to be judges who succeed. Indeed, given the rigors of the selection process, voters have a right to expect that most judges will succeed. What we worry about is those that do not. At the same time, evaluation committees must understand the disproportionate weight that the public assigns to their recommendations. Although the committee may intend the recommendation to be a mere summary of the underlying information on the judge, voters may simply view the recommendation as a signal of how to vote and eschew the underlying information entirely.

One solution to this problem is to relieve evaluation committees of the responsibility to make formal recommendations on retention. Arizona has adopted this approach. Arizona's Commission on Judicial Performance votes only on whether a sitting judge meets judicial performance standards; judges are not ranked and the Commission issues no retention recommendations.[307] The Commission has the latitude to conclude (for example) that a judge meets performance standards notwithstanding a poor survey response on administrative skill, if the evidence shows the judge had an unusually heavy or complex docket during the evaluation period. Voters receive information on the specific totals of the Commission's vote, as well as a summary of the survey results and supporting information. Because voters cannot use a formal retention recommendation as a shortcut, they may be more likely to review the underlying information more closely.

Finally, voters need to better understand that an "important, residual effect" of judicial performance evaluation "is its implicit tendency to dissuade certain judges from running for retention and to instead encourage them to retire from the bench."[308] While there are no official statistics concerning judges who decide to retire as a direct or indirect result of judicial

[307] *See* Pelander, *supra* note 90, at 703-04.
[308] *Id*. at 721.

performance review, the effect has been observed, at least anecdotally, in Alaska and Utah, and probably Arizona and Colorado.[309]

D. Data Quality

The collective experience of existing judicial performance evaluation programs suggests a number of steps that can be taken to increase the quality of the data collected. First, the survey questions must be clear and rating scales uniform. Several states have developed rating scales to bring uniformity to responses, but relative terms such as "poor" and "excellent" may be appropriate only for those who interact with judges on a regular basis, such as attorneys or court staff. A better approach for those with isolated experiences in court (such as jurors or litigants) is to give concrete examples of judicial behavior for each category. For instance, the Alaska Judicial Observers ask their volunteers to consider specific observable behavior. With respect to the judge's control over the courtroom, for example, observers are asked, 1) Was the jury attentive? 2) Was the gallery quiet? 3) Did the judge make sure attorneys behaved properly? 4) Were disruptions or out bursts of emotion controlled? and 5) Did a "short" break turn into a long break with no explanation?[310]

Second, survey participation must be increased across all demographics. To the greatest extent possible, evaluation committees should survey lawyers, jurors, witnesses, litigants, court staff, law clerks, law enforcement officials, and any others who interact professionally with the judge. Surveys should be tailored as closely as possible to the type of interaction the respondent had with the judge. For example, non-party lay witnesses, law enforcement officers, psychologists, and others who testify at trial should evaluate the judge on somewhat different

[309] *See, e.g., id*.
[310] ALASKA JUDICIAL OBSERVERS 2006 BIENNIAL REPORT, *supra* note 77, at 5.

criteria than attorneys or litigants. Caution must also be taken not to skew survey data by placing too much weight on the opinions of attorneys who appear frequently before the judge.[311]

Litigants are not surveyed as frequently as attorneys, jurors, or court staff, but their opinions bear special emphasis. Research has shown that litigant satisfaction with the courts is more closely correlated to the perception of how they are treated in the courtroom than the actual outcome of the case. Furthermore, the court's own legitimacy in the eyes of the public is derived in significant part from individual experience with the court system. Based on a review of court user studies in the 1980s, New York University's Tom R. Tyler noted that

> Personal experience does have political impact. The judgment of adults about their obligation to follow legal authorities respond to their experiences with particular police officers and judges…. [L]egitimacy will be eroded if the legal system consistently fails to meet citizens' standards. On the other hand, the existing reserve of legitimacy can be increased over time by positive personal experiences with police officers and judges.[312]

Tyler concluded that "The important role of procedural justice in mediating the political effects of experience means that fair procedures can act as a cushion of support when authorities are delivering unfavorable outcomes."[313] Simply put, if litigants feel the legal process was fair, they are more likely to accept the legitimacy of the result, whatever it may be.

Internalizing these conclusions, Minnesota's Fourth Judicial District has surveyed litigants to gather their perceptions on the fairness of the judicial process, focusing on four major topics: (1) is the court perceived as fair to litigants? (2) do litigants perceive they are being

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[311] In 1994, Arizona sent attorneys survey forms every time they appeared before a Superior Court judge, even though some attorneys appeared before the judge several times a week. As a result, some lawyers were overburdened with surveys and there was increased risk of sample bias by giving undue weight to multiple responses from the same few attorneys. Over the next two JPE review cycles, Arizona gradually reduced survey distribution so that no attorney was sent more than one survey form for any judge. *See* Pelander, *supra* note 90, at 675-76.

[312] TOM R. TYLER, WHY PEOPLE OBEY THE LAW 106 (1990).

[313] *Id*. at 107.

listened to? (3) do litigants understand the orders given by the court? (4) do litigants perceive that cases are resolved in a timely manner?[314]

E. Public Input into the Evaluation Process

Particularly in states where JPE is used to inform and educate voters prior to an election, there has been frequent demand for public input into the evaluation process.[315] This demand has resulted in public hearings and the opportunity for the public to submit written comments. There is near universal agreement that in theory, the public should be able to provide insight into judges' performances; judges are, after all, public servants. In practice, however, the effort to increase public input has been a questionable enterprise.

No one comes to public hearings. In the early years of Arizona's JPE program, for example, hearings were sparsely attended and unconstructive despite extensive advance publicity. As one commentator described:

> To say attendance at the 1994 public hearings was sparse would be a major understatement. The hearings attracted very few participants and virtually no relevant public comment. Consequently, the Commission considered the public hearings a colossal waste of time and effort. The few people who did appear for hearings primarily vented irrelevant, vitriolic messages which had little, if anything, to do with judicial performance.[316]

In 1996 and 1998, Arizona held only two public hearings during each performance review cycle in the hope of attracting more people to the same meeting. Despite good advance publicity, the hearings again generated little public interest and small attendance.[317]

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[314] *See* Fourth Judicial District of Minnesota, Fairness Studies Summary, http://www.mncourts.gov/documents/4/Public/Research/Fair_Summary.doc (last visited Sep. 26, 2006). *See also* Kevin S. Burke, *A Court and a Judiciary That Is as Good as Its Promise*, 40 CT. REV. 4, 6 (2003) (noting that courts must be known for "fairness and respect, attention to human equality, a focus on careful listening, and a demand that people leave our courts understanding our orders."). Judge Burke is one of the driving forces behind litigant surveys in Minnesota's Fourth Judicial District.

[315] *See, e.g.*, Pelander, *supra* note *90*, at 678-79.

[316] *Id*. at 679.

[317] *See id*. at 679-80.

Similarly, written comments have frequently proven to be unhelpful. While written comments have the potential to inform the committee about public perceptions of the judge they might not otherwise receive, such comments also have the potential to waste the committee's time if they contain nothing more than unsubstantiated vitriol. Accordingly, the public must be made aware that any unsolicited written comments must be accompanied by the name and address of the author, so that comments can be investigated and verified. Furthermore, the committee should assign less weight to written comments from the general public, unless and until the substance of the comments can be properly scrutinized.

F. Proper Dissemination of Information

Even high-quality, multi-source data on judicial performance is not useful in states with judicial elections unless the data is widely disseminated to the public in an easy-to-understand format. Rational voters "have almost no incentive to invest heavily in acquiring sufficient knowledge to make an informed choice."[318] Evaluation committees should assume that most voters will review just enough information about a judge (or judicial candidate) to be comfortable making a decision, and will not independently seek out all details of the judge's performance evaluation. Accordingly, the material presented in voter information pamphlets (for example) must be comprehensive enough to allow the voter to make an informed decision, but not so detailed that the voter is overwhelmed and will not pay attention. The first hurdle is convincing voters that the information will be useful to them.

Striking this balance is particularly important in states where the evaluation committee makes a recommendation on retention. If a voter receives too little information, or so much information that she is unable or unwilling to absorb it, she is more likely simply to adopt the

[318] Ilya Somin, *When Ignorance Isn't Bliss: How Political Ignorance Threatens Democracy*, POL'Y ANALYSIS No. 525 at 15 (2004).

committee's recommendation without understanding the basis for its conclusion. Alternatively, the voter may consider herself inadequately informed, and forgo voting in a judicial election altogether.

To reach the right balance of information, states employing JPE programs have frequently adjusted their methods of disseminating results. Arizona's experience is instructive. For the 1994 election cycle, Arizona's Commission on Judicial Performance Review produced 11 by 17-inch, twelve-page pamphlets entitled "You Be The Judge," which included detailed information on the judicial selection and retention process, performance standards for trial and appellate court judges, the composition and mission of the Commission, the evaluation process, and instructions on how to obtain additional information.[319] The pamphlet dedicated eight pages to full factual reports on each of the judges seeking retention.[320] Despite the obvious attention and effort that had gone into making the pamphlets, they were generally regarded as a failure. The nearly uniform response from the public was, "it was too much; I didn't read it."[321] For the 1996 election cycle, the Commission drastically scaled down the pamphlet to a one-page, 8½ by 11-inch flyer, which set forth JPR standards and the Commission's votes on the judges standing for retention, but not full factual reports.[322] This time, the Commission was criticized for not providing enough information.[323] For 1998, the Commission tried to reach a middle ground, developing a 30-page, 5 by 8-inch pamphlet, that generally described the Commission's membership and role, set out the JPR standards, and provided a brief profile, summary survey results, and the Commission's vote for each judge standing for retention.[324] For the last two

[319] *See* Pelander, *supra* note 90, at 686-87.
[320] *See id*. at 687.
[321] *Id*. (quoting Dorothy Y. Joseph et al., *Evaluating the Performance of the Judges Standing for Retention*, 79 JUDICATURE 190, 196 (1996)).
[322] *See id*. at 688.
[323] *See id*.
[324] *See id*. at 689.

election cycles (2004 and 2006), the Commission has settled on a 25 to 30-page report that emphasizes the results of its vote on each judge up front. The Commission also provides a text box for each judge (about three to a page), which reiterate's the Commission's vote and provides the percentage of survey respondents who gave the judge a score of "satisfactory" (2.0 on the 0-4 rating scale) or higher in each category of evaluation.[325]

Similarly, Colorado has adjusted its format several times to provide more specific information on the judges facing retention. In 1998, for example, the information circulated in the voter information guide focused primarily on the judge's biography and service to the legal profession, with only a small amount of information on the judge's strengths and weaknesses.[326] By 2002, the voter information guide provided much more detail about trends in the surveys, giving the public a stronger sense of the judge's strengths and weaknesses on the bench.[327] For 2006, the appellate judge narratives included an explicit section on each judge's strengths and weaknesses and reasons for the committee's vote.[328] These changes have managed to provide additional, valuable information to the electorate without appreciably lengthening the voter information guide.

Evaluation information must also be made as widely available to the public as possible. This is particularly true in states with retention elections, where it is hoped that the electorate will educate itself sufficiently to cast informed votes on every judge standing for retention. For these reasons, Illinois's approach to JPE and retention elections stands out as particularly

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[325] *See* ARIZONA COMMISSION ON JUDICIAL PERFORMANCE REVIEW, 2006 REVIEW OF JUDGES' PERFORMANCES (2006) (on file with author), *available at* http://www.azsos.gov/election/2006/Info/PubPamphlet/english/jpr.pdf; REPORT OF THE ARIZONA COMMISSION ON JUDICIAL PERFORMANCE REVIEW (2004) (on file with author), *available at* http://www.azsos.gov/election/2004/Info/PubPamphlet/english/jpr.pdf.

[326] *See generally* Recommendations for Judicial Retention – November 3, 1998 Election, http://www.cobar.org/static/judges/ (last visited Sep. 27, 2006).

[327] *See generally* Judicial Retention, http://www.cobar.org/group/index.cfm?category=309&EntityID=dpwmr (last visited Sep. 28, 2006).

[328] *See generally* 2006 Recommendations for Judicial Retention, http://cojudicialperformance.com/main.cfm?webdiv=426&top=182 (last visited Sep. 27, 2006).

puzzling. In Illinois, initial selection of all levels of the judiciary occurs through partisan elections.[329] At the end of the initial term, judges seeking to remain in office may opt between another partisan election, in which case a bare majority of votes is sufficient to secure another term, or a retention election, which requires a 60% supermajority vote for retention.[330] Despite having the most stringent retention requirements in the country, however, Illinois does not disclose any information from its long-running judicial performance evaluation program. Indeed, Illinois has concluded that "[t]he disclosure of evaluation information would be counterproductive to the goals of the evaluation program, reduce the free flow of comment, and result in the termination of the program."[331] With due respect to Illinois's concerns about the well-being of its judiciary, keeping results away from the public in fact strongly undermines the value of the program. Confidentiality forces the public to rely on imperfect proxies such as bar polls for information on judges during retention elections,[332] whereas dissemination of evaluation results would benefit the public in making its retention decisions. It would also benefit sitting judges, since they would enjoy a more comprehensive evaluation at retention time than bar polls can offer.

New Jersey provides another example of how failure to disseminate information may backfire. The *New Jersey Law Journal*'s periodic judicial surveys have been criticized by bench and bar alike as being unreliable,[333] but the surveys nevertheless provided more information on the demeanor, behavior and reputation of the state judiciary than had ever been released by the state AOC. Furthermore, while the state bar as a whole has derided the *Law Journal* survey as

[329] *See* Illinois Voters' Guide 2006, http://illinoisvotersguide.org/2006/elections.php (last visited Sep. 27, 2006).
[330] *See* Saucedo, *supra* note 141, at 178; *see also* ILL. CONST. art. VI, § 12(d).
[331] ILL. SUP. CT. R. 58.
[332] *See, e.g.*, Chicago Bar Association Judicial Evaluation Committee, Findings for November 2, 2004 Judicial Election, http://www.chicagobar.org/public/judicial/2004generaljudicial_findings.htm (last visited Sep. 28, 2006).
[333] *See supra* Part IV.B.1

"inconsistent and inaccurate,"[334] individual attorneys applauded the *Journal* "for its efforts to ensure that judicial performance continues to be brought to the attention of the public."[335] Dissemination of official performance evaluation results by the AOC in at least some form would likely satisfy some of the public hunger for information about the state judiciary, and make independent surveys (and their questionable methodologies) less common.

G. Judicial Resistance

Another obstacle to healthy judicial performance review is resistance from the judges themselves. Sitting judges have expressed concern that judicial performance evaluation and public dissemination of results risks politicizing the judicial sphere and will contribute to a decline in judicial independence.[336] More specifically, some judges have expressed concerns that the evaluation committee itself will be politicized, and that judges will be evaluated on the outcomes of their cases, even if the committee purports to base its decision on neutral criteria. As discussed above, however, numerous safeguards are available to prevent politicization of the evaluation committee, not the least of which is the advance setting of neutral standards that must serve as the primary bases for the committee's recommendation.

Moreover, in reality judicial elections (contested or otherwise) have more frequently been politicized in the ***absence*** of judicial performance reviews. The most notorious examples of special interest groups waging campaigns to remove specific judges from the bench – Rose Bird, Joseph Grodin and Cruz Reynoso in California;[337] David Lanphier in Nebraska;[338] and Penny

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[334] *State Bar Questions Survey's Motives and Methods*, *supra* note 196, at 425 (Jan. 25, 1999).
[335] *More Reaction to the Judicial Survey*, 155 N.J.L.J. 841 (Feb. 22, 1999).
[336] *See generally* Griffin, *supra* note 47. *See also* Pelander, *supra* note 90, at 717.
[337] *See generally* John T. Wold & John H. Culver, *The Defeat of the California Justices: The Campaign, the Electorate, and the Issue of Judicial Accountability*, 70 JUDICATURE 348 (1987).
[338] *See* Traceil V. Reid, *The Politicization of Retention Elections: Lessons From the Defeat of Justices Lanphier and White*, 83 JUDICATURE 68, 76-77 (1999).

White in Tennessee[339] – occurred in states where official, formal evaluations of each judge's performance were not available to the voters at the time of the election. As a result, campaign advertisements, limited to one or two controversial issues, became the focus of the campaign. Voters were not provided with neutral information with which to evaluate the judges, and consequently could not make an informed decision on the judge's overall performance.[340]

Furthermore, without objective evaluations to point to, judges have been unable to find resonant election themes to defend their performance. Justice White aggressively fought for her seat in 1996 on a platform of the need for judicial independence, which rang hollow with the electorate.[341] Justice Bird took the same approach in California, and encountered the same deaf ear.[342] Justice Lanphier engaged in very little active campaigning in Nebraska in order "to maintain the dignity of the office," which also fell flat as an election strategy.[343]

This sort of overt politicization of retention elections has had a transformative effect on judges' views about performance evaluation. Former Justice White is now a staunch advocate of judicial performance evaluation as a means of securing judicial independence.[344] Virginia's program was spearheaded by state Supreme Court Justice Barbara Milano Keenan, who faced opposition to her reappointment by the state legislature in 2003 because of a dissent she wrote in 1995 case involving the custody of a child by a homosexual parent.[345] Elsewhere, judges are

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[339] *See id.*
[340] *See* Seth S. Andersen, *Judicial Retention Evaluation Programs*, 34 LOYOLA L.A. L. REV. 1375, 1379 (2001).
[341] *See* Reid, *supra* note 338, at 72.
[342] Justice Bird's first election consultant, Bill Zimmerman, later commented, "although polling indicated that judicial independence was the one message that would not work, [Bird] adopted it as the sole basis for her campaign." Wold & Culver, *supra* note 337, at 350; *see also* Bill Zimmerman, *The Campaign That Couldn't Win: When Rose Bird Ran Her Own Defeat*, L. A. TIMES, Nov. 9, 1986, at V:1 (arguing that "[t]o base a political campaign on the independence of the judiciary was to commit electoral suicide.").
[343] *See* Reid, *supra* note 338, at 72.
[344] *See* Penny J. White, *Judging Judges*: *Securing Judicial Independence by Use of Judicial Performance Evaluations*, 29 FORDHAM URB. L.J. 1053, 1076 (2002) (advocating for robust performance evaluations and noting that "Undoubtedly, much of the success of those who seek to destroy judicial independence results from the lack of available information upon which to base one's decision in judicial elections.").
[345] *See* Post, *supra* note 237.

seeking development of their own performance evaluations to counter unofficial bar and media polls, which they do not consider to be complete or representative of their overall performance.[346]

Furthermore, judges who have actually participated in the performance evaluation process have generally praised the system. Esterling & Sampson's survey of judges in the four most developed JPE states (Alaska, Arizona, Colorado and Utah) found that:

- A very high percentage of judges in all four states felt that the evaluations provided useful feedback on their performance;
- A significant majority of judges in each state agreed that appropriate criteria are used to evaluate their performance;
- Nearly all judges in each state felt that evaluation commissioners are fair;
- Large percentages in each state say commissioners understand their role as judges;
- Majorities in each state agree that the commissioners understand the importance of judicial independence; and
- Majorities of judges in each state say that the evaluation process makes them appropriately accountable for their job performance.[347]

This positive feedback is similar to comments made by the judiciary in several other evaluation programs.[348] For example, participating judges in the 2001 Washington pilot program had "predominantly positive" comments about the experience, noted that the information was useful and had not previously been available, and in fact requested additional

[346] Judges in Utah leveled similar criticisms against that state's JPE program in 1996, arguing that the Judicial Council relied too heavily on attorney surveys, which pressured judges to become more "popular" with active attorneys in order to assure good ratings. The Judicial Council responded to these critiques by including a juror survey in subsequent evaluation cycles. Importantly, judges in Alaska, Arizona, and Colorado, which use a more comprehensive collection of information in their evaluations, reported far stronger agreement that the reports accurately reflected their job performance. *See* ESTERLING & SAMPSON, *supra* note 39, at 44-46.
[347] *Id*. at xvii.
[348] *See, e.g*., Esterling, *supra* note 38, at 211.

comments and feedback from survey participants in the future.[349] As a self-improvement tool, judges report that the feedback they receive is constructive and could not have been transmitted through a means other than anonymous evaluations.[350] As an election tool, judges have voiced appreciation for a more comprehensive process and report than what might otherwise be offered by bar polls and special interest groups.[351]

VI. Toward a Model of Measurement

Judicial performance evaluation has now been adopted – or at least attempted – in a critical mass of states. Despite efforts by various commentators to offer recommendations on improvement and development of JPE programs, however, the spread of robust, official evaluation programs remains slow. More than twenty years after the ABA issued its first set of guidelines, the majority of states, as well as the federal courts, still lack a viable system of performance evaluation. This need not – and should not – be the case. The experiences of the several states that have instituted JPE provide fertile ground for a model system of performance evaluation.

Of course, no one model is perfect for every jurisdiction. Judges with life tenure need to be evaluated somewhat differently than judges who must seek reelection periodically. Still, the main principles of performance evaluation cut across all judicial selection and retention styles, and a model system based on those principles can be widely applicable. These principles are listed below, in the form of recommendations. In addition, the Appendix to this paper contains model surveys, reports, and standards that implement these recommendations.

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[349] WASHINGTON FINAL REPORT, *supra* note 241, at 29.
[350] *See, e.g.*, *id*. at 31.
[351] In one Colorado survey, "Almost without exception, judges recommended that a combination of evaluation methods be used so that a variety of views could be presented to the public. In fact, it was the respondents' most unequivocal recommendation." Joyce Sterling et al., *What Judges Think of Performance Evaluation: A Report on the Colorado Survey*, 64 JUDICATURE 414, 424 (1981).

A. Scope and Purpose of Evaluations

RECOMMENDATIONS:

- **Each judge should be evaluated on a regular schedule, at least twice a term or, if there is no set term, once every three years.**
- **Each individual performance evaluation should clearly identify the judge's areas of strength and weakness, and present strategies for professional improvement.**
- **Evaluations should be designed in a manner that emphasizes appropriate, apolitical metrics of judicial performance, and any results disseminated to the public should include these metrics.**
- **Evaluation results should be made publicly available as a general rule.**

All judicial evaluation programs must be designed, at minimum, to identify areas of strength and weakness in a judge's performance and assist the judge in developing a plan of professional self-improvement. To this end, each judge should be evaluated on a regular basis. If the judge must prevail in a contested or retention election to remain in office, the judge and the evaluation committee should have the benefit of at least one mid-term evaluation and one election-year evaluation each term. If the judge enjoys tenure or is otherwise not subject to a retention decision, judicial evaluations should still be conducted at regular intervals of no more than three years. In addition, judges should be able to request additional evaluations during off years if they so desire. A history of the judge's performance is valuable to the judge and the performance evaluators. Furthermore, the possible effects of political appointments to the performance commissions can be somewhat neutralized if the commission as a whole has a history of information about the judge. Historical reference points reduce subjectivity in the analysis of the judge's data.

Evaluations should also serve to inform the public about the ongoing performance of the judiciary. This means, first and foremost, that evaluations should be made public unless unusual

circumstances (such as, perhaps, a judge's first evaluation shortly into his tenure) dictate otherwise. In addition, evaluations should be designed and administered in a manner that emphasizes appropriate, neutral metrics of judicial performance and conveys those metrics to the electorate. In other words, performance evaluation should be seen as an active opportunity to educate the public about the role of the judge. During evaluation cycles where elections are not being held, JPE programs should still reinforce the appropriate measures of judicial performance with the public by issuing either individual reports, or summary reports discussing general performance of the entire judiciary against preset benchmarks. The reports developed by New Hampshire and Hawaii are useful guides for this sort of summary.

B. Composition and Mission of Evaluation Committee

RECOMMENDATIONS

- **The evaluation committee should include a balance of attorneys and non-attorneys, and the committee as a whole should reflect partisan balance.**
- **Committee members should receive adequate training concerning the specific court system they are evaluating.**
- **The committee should set benchmarks or minimum standards for judicial performance before commencing individual evaluations.**
- **The committee should set presumptions about a judge's fitness to remain in office based on his performance against the preset benchmarks, and should vary from the presumptions only if extraordinary conditions warrant.**
- **The committee should maintain an open dialogue with the judge being evaluated, and should discuss its conclusions with the judge before making them publicly available.**
- **The importance of the committee's mission should be frequently and publicly emphasized.**

The evaluation committee has a challenging task. It must be a trustworthy partner to individual judges, helping them improve by identifying areas of weakness in their job performance. At the same time, it must be a public advocate, informing the electorate about the

quality of their judges by publicly announcing those same areas of weakness. To gain the trust of both constituencies, evaluation committees must always remain objective and straightforward in their analyses.

Experience suggests that the size of the committee does not matter, although the composition of the committee does. Both attorneys and non-attorneys should be included, in roughly equal proportion. Attorneys and judges provide necessary experience and expertise on the court system, the role of the judge, and neutral measures for evaluation. Non-attorneys provide insight into the concerns of the general public; beyond the individual contributions non-attorneys make, their mere presence on the committee may cause the public to see JPE as more than legal insiders evaluating each other, and may create greater public confidence in the program.

Similarly, the committee should reflect partisan balance. An equal (or roughly equal) mix of political philosophies makes it less likely that the committee will allow partisan concerns to influence judicial evaluations. Put another way, the committee is more apt to focus on the relevant, neutral measures of judicial performance if the opportunity for partisan mischief is minimized.

Committee members must be well-versed in the courts and judges they evaluate. This may require training before the evaluation process begins. Each committee should design its training to fit the pre-existing knowledge of its members, but should include information on the types of cases assigned to each judge, principles of case management, judicial ethics, and general court management statistics. Judges deserve to be evaluated by a knowledgeable committee.

When training is complete, the committee should establish clear thresholds for acceptable job performance. Predetermined standards serve as guideposts for the committee, and reduce the

chance that the committee will reach a conclusion about the judge's performance that is inconsistent with the information collected. Closely tying the committee's conclusion to threshold standards also adds credibility. Furthermore, evaluation against threshold standards applies equally well to retention and partisan elections, since the committee's conclusion that a judge meets or does not meet the predetermined threshold need not be read as a political endorsement.

Proposed benchmarks for acceptable job performance include:

1) At minimum, an average performance on at least 90% of all survey questions ("average performance" meaning, for example, a score of 3.0 on a 1-5 scale, or at least 75 percent of respondents answering "yes" to a yes/no question);

2) No cases with issues under advisement more than 90 days, unless the judge's particular docket assignment justifies exceptions.

3) All or nearly all written opinions clearly and accurately describe the relevant facts and applicable law, and clearly state the court's order; and

4) No findings by a body charged with judicial discipline that the judge has violated the applicable code of judicial conduct.

Judges who meet these benchmarks would be presumed to be qualified to remain in office, whereas judges who fail to meet one or more of these benchmarks would be presumed not to be qualified. Committee members should have the discretion to reach a conclusion contrary to the threshold presumption if additional information so warrants. However, if a committee reaches a contrary conclusion, it should explain its decision in detail.

The committee should also keep an open dialogue with the judiciary at all times. The committee should inform each judge being evaluated of its findings early in the evaluation

process. Judges should have the opportunity to seek additional interviews with committee members, comment on narratives to be submitted to the public, and offer their own additions to the narrative if the committee stands by its written comments. An appeals process should also be instituted in the specific circumstance where the committee provides a negative evaluation at variance with the judge's performance against threshold standards.

Finally, state and local government, including the judiciary itself, should publicly emphasize the importance of the committee's mission on a regular basis. A robust, ongoing JPE program requires a significant commitment of committee members. The time necessary to compile and review data, interview judges, and draft reports on judicial performance can be substantial, especially if pre-election deadlines must be met. In order to attract highly qualified, dedicated volunteers for committee membership, participation in the committee itself must be held out as a high form of public service. The higher esteem in which the committee and its mission are held, the more likely there will be strong competition to fill empty membership slots.

C. Collecting Information

RECOMMENDATIONS

- **The committee should collect reliable survey data from a wide variety of sources, including attorneys who have appeared before the judge, jurors, litigants, witnesses, court staff, law enforcement personnel, social workers and law clerks.**
- **The committee should take special care to consider evaluations from litigants concerning their perceptions of fairness, clarity of the judge's rulings and attention to the case.**
- **Survey responses should be anonymous and compiled by an organization independent of the evaluation committee.**
- **The committee should directly observe each judge being evaluated, or collect information from trained courtroom observers.**
- **The committee should review representative writing samples from each judge for clarity and adherence to the law and facts presented.**

- **The committee should review docket statistics and other information concerning each judge's skill as a case manager.**

- **The committee should allow for public comment on each judge being evaluated, but should scrutinize such comments carefully.**

The information relevant to judicial performance evaluation will naturally vary to some degree based on the court on which the judge sits. Nevertheless, survey data is likely to be the most insightful and extensive information available on any judge. To the extent possible, surveys should be sent to everyone who has interacted with the judge in a professional capacity during the period of evaluation. This includes attorneys who have appeared before the judge, jurors, litigants, witnesses, law enforcement personnel, social workers, court-appointed special advocates, guardians ad litem, court staff, and law clerks. Furthermore, law professors and other judges may be surveyed with respect to the quality of the judge's written opinions. The committee should develop and closely consider litigant surveys that address each litigant's perception of the fairness of the legal process. If surveying all individuals who have observed the judge at work is too burdensome or costly, as large a representative sample as possible should be surveyed.

To assure maximum familiarity with the judge's current performance, survey responses should not be based on professional reputation, social contacts, or other interaction with the judge outside the courtroom setting. Surveys themselves should establish clear rating scales. Surveys should be anonymous, and survey data should be compiled by an independent entity such as a university or consulting firm. Individuals should receive only one survey, and the responses should be based only on experience in a professional setting.

The committee should also observe the judge directly in the courtroom. If it is not practical for committee members to observe the judges themselves, they should rely on trained courtroom observers, or even videotapes of selected proceedings. A well-run courtroom

observer program has the benefit of attracting public attention, and may well serve as a training ground for future evaluation committee members.

Selected written opinions and orders should be reviewed for overall clarity, a plain explanation of the relevant facts and governing law, adherence to precedent, and understandable directions to the parties. If the judge did not address specific facts or law in the opinion, it should be obvious why.

Review of the judge's case management skills is also important. Several states have attempted to capture this information, with varying degrees of detail. Alaska's survey to court staff asks them to evaluate whether the judge "manages caseload and staff capably and effectively."[352] Separate from the formal evaluation process, Arizona conducts ongoing evaluations of a judge's case management skills.[353] Colorado performance commissions may consider caseload statistics, and as of 2006 may review open case reports and case aging reports.[354] Evaluations in Tennessee consider caseload and workload statistics for each judge.[355] The JPE criteria in Utah include evaluation of the judge's skills as a manager, and review of rigid timelines for disposition of cases.[356]

In conducting its evaluation, the committee should review each judge's docket with an eye to movement of each case, and the reasons behind any cases that have lingered beyond a time period reasonable for the type of court and case. CourTools, a trial court measurement instrument developed by the National Center for State Courts includes as core measures clearance rates, time to disposition, age of active pending caseload, and trial date certainty.[357]

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[352] Alaska Court Staff Survey Report, *supra* note 65, at 3.
[353] *See supra* Part IV.A.2.
[354] *See* Colorado Commission Rules, *supra* note 119, Rule 2(c).
[355] *See* TENNESSEE JUDICIAL EVALUATION COMMISSION, *supra* note 166, at I.
[356] *See* UTAH VOTER INFORMATION PAMPHLET, *supra* note 179, at 60.
[357] *See* National Center for State Courts, *supra* note 7.

Measurement of clearance rates will reflect whether an individual judge is moving incoming cases to disposition. Time to disposition is another typical measure, where an individual judge may be compared to local, state or national standards, or compared to other judges in the same courthouse with a similar docket. The age of the active pending caseload of a particular judge also provide information about performance as a case manager. Trial date certainty is also an important measure. Continuances add substantial cost and delay to proceedings.

The committee should always review statistics in the context of the judge's overall workload and docket, as statistics can fluctuate significantly if the judge is assigned one or two particularly complex cases. If a backlog of cases appears, it is important to determine whether the procedures and practices of the individual judge are the direct cause of the backlog, or whether special factors such as assignment of an unequal number of complex, time intensive cases to one judge contribute to the backlog. In the latter situation it may be appropriate to look at the assignment of cases, and the courthouse culture of judges providing backup for other judges. Of course, fair evaluation of judges should compare case management data across time periods to determine improvement in performance. One-time snapshots of any of these data categories as a determinative performance factor does not contribute to improved performance. Specific questions on the judge's written self-evaluation or during the judge's interview should address the judge's knowledge and utilization of these performance measurements.[358]

Finally, the public should remain invited to comment on any judge's performance, either through hearings or in written form. However, the committee should be careful to investigate

[358] To date, there has been little effort to ask judges about their own case management skills. The judge's interview and/or self-evaluation might include a section for the judge to describe the process for moving paper through his courtroom. Does the judge personally know what happens to a motion filed in his division, or does a court clerk take responsibility? Is the judge available for telephone conferences with counsel and the parties if there is a sticking point in the case? Does the judge work with his staff to review case aging reports, to monitor cases with to activity or scheduled events?

any charges or compliments coming from members of the public, to confirm their validity. The experience in Arizona, Colorado and elsewhere suggests that those who attend public hearings more often have come to bury a judge than praise him. While truthful comments are informative, the committee should consider whether they are really representative of the judge's performance.

D. Using and Disseminating Evaluation Results

RECOMMENDATIONS

- **The committee should provide each evaluated judge with a comprehensive report, which should clearly identify areas of strength and areas needing improvement.**
- **After being evaluated, judges should be teamed with one or more mentors to develop strategies for professional improvement.**
- **The committee should disseminate evaluation results to the public in the most transparent form possible, recognizing that there may be differences based on a state's method of judicial selection.**

Every jurisdiction can and should use judicial performance evaluation to foster judicial self-improvement. To this end, evaluation committees should provide concrete feedback and suggestions to each judge being evaluated. To the extent possible, feedback should include comments drawn from the surveys. It is much easier to address a perceived weakness if that weakness is plainly identified and supported by examples. Furthermore, the committee should take an active role in the judge's self-improvement program by assigning the judge one or more mentors to help develop strategies for professional growth. Conference teams like those in Arizona, or peer-assisted self-examination like that in New Hampshire, have proven to be useful supplements to a written evaluation, and are likely more useful to a judge in creating improvement strategies than just handing him a copy of the committee's report.

With respect to dissemination of information on performance evaluation, two lessons can be drawn. First, transparency about the evaluation process and specific evaluation results benefits both the public and the judiciary. The public benefits because it is able to develop an appreciation for the role of the courts beyond the outcome-based information it is likely to receive from the mainstream media or special interest groups, and can make more informed votes in judicial elections. The courts benefit because increased public awareness of the proper modes of judicial measurement fosters an appreciation for the challenges judges face, as well as the high caliber of judges in the community. It also makes judicial elections less likely to be decided by specific issues or case outcomes, and ultimately creates a public atmosphere more accepting of judicial independence.

The second lesson is that broad dissemination is almost always preferable to limited dissemination. Making information about individual judges available to the public allows ordinary citizens to become more familiar with the judges who serve them, and to appreciate the individual strengths and weaknesses of each judge. Good judges rightly will be praised, and weaker judges will feel appropriate pressure to improve their performance. More importantly, broad dissemination allows the public to evaluate judges on neutral, relevant criteria, rather than having to rely on reports about specific case outcomes. Even summary information about the state of the judiciary as a whole assists the public in understanding the relevant metrics for measuring judicial performance. By contrast, maintaining the confidentiality of performance evaluations fails to educate the public about appropriate measurements, allows less reliable or less comprehensive surveys to fill the void (with potentially unwelcome results), and arouses public suspicion about the real quality of the judiciary.

There is some question as to whether transparency can hinder the self-improvement function of JPE. Some judges, particularly those new to the bench, may benefit from a confidential evaluation early in their service, to allow them privately to improve upon areas of weakness. There may be other occasions in which a judge's improvement on the bench may be promoted by keeping his individual evaluation confidential. Too much confidentiality, however, may provide less incentive for judges to improve; release of information to the public is a great motivator. Therefore, even if evaluations are occasionally kept confidential, more often than not they should be made publicly available. All states should develop a dissemination strategy that maximizes transparency without sabotaging self-improvement.

1. *Strategies for Missouri Plan States*. States employing the Missouri Plan or a variant thereof should aim for broad, widespread dissemination of evaluation information prior to retention elections. Voters should be informed of the methodology adopted for evaluation, the threshold criteria used to evaluate each judge, and for each judge, whether each such criterion has been met. Comprehensive public information campaigns should be developed to urge voters to learn about their judges prior to election day, and inform voters that evaluation results will be made available through voter guides, print and electronic media, and on the internet.

The committee should develop short-form evaluations for inclusion in voter guides and newspapers. Short-form evaluations should include a digest of the survey data, as well as a short narrative containing the judge's biography and a summary of the judge's strengths and weaknesses. The committee should also make full-length reports, with complete survey data and other relevant information, available to the public in hard copy and electronically.

The committee need not issue a formal recommendation on retention. Instead, the committee should vote on whether each judge meets performance standards. Committee

members should be instructed to use the judge's performance against the predetermined thresholds as a presumptive guide for their vote, to be changed only if specific additional evidence requires a different decision. Both the short-form and full-length reports should state the presumption granted to the judge based on her performance against the threshold standards, the results of the committee's vote, and a detailed explanation of any votes contradicting the threshold presumption. A model short-form report is included in the Appendix.

Finally, if a Missouri Plan state chooses to treat mid-term evaluations as confidential, it should nevertheless issue a summary report of collective judicial performance during each evaluation cycle. If retention elections are staggered (as is the case in most states) and some judges being evaluated are not facing retention, it is appropriate to issue a summary report for all judges being evaluated in addition to individual reports for the judges facing retention. In no circumstance, however, should a summary report be issued in place of individual reports for judges seeking retention.

2. *Strategies for states with contested elections*. States holding contested elections for judicial positions face the significant challenge of avoiding informational asymmetry when there is more than one candidate for office. Candidates who are not sitting judges cannot be subject to the identical evaluation as those currently on the bench. Still, it is possible to develop evaluations for candidates not currently on the bench that measure the same skills and performance capacity that would be expected from a sitting judge. For example, candidates who are currently attorneys can be evaluated on their temperament in court, at settlement conferences, and at depositions; on the timeliness and clarity of their written submissions to the court; on client satisfaction; on service to the profession; and on ability to communicate effectively and harmoniously with other attorneys. Evaluations can also confirm that an attorney candidate has

not been found to have violated the applicable rules of professional conduct. While the specific criteria may differ somewhat from a judicial evaluation, the relevant categories of information are the same. The results of all candidate evaluations should be broadly disseminated in advance of the election, in the same manner as described for the Missouri Plan states above. To avoid the appearance of endorsing one candidate over another, evaluation committees in contested election states should refrain from issuing ultimate "recommendations," and instead should simply indicate whether the candidate meets or does not meet the predetermined thresholds for adequate judicial performance.

Even if the balance of information about the candidates is not perfect, sharing evaluation results with the public is far preferable to the alternative of providing no information. With or without JPE, contested judicial elections will continue to feature the common characteristics of any political campaign, including literature and advertising propagated by each candidate, and (all too frequently) efforts to paint the opposing candidate in an unfavorable light. Dissemination of performance evaluation criteria and results provides a common baseline to inform the public about expectations for judicial performance, beyond the vague assertions that a particular candidate is "tough on crime" or "fights for the little guy."

3. *Strategies for states with an appointed judiciary*. States and jurisdictions in which the judiciary is tenured or subject to reappointment by a governing body need not be concerned with elections, but would still benefit significantly from disseminating information to the public at regular intervals. At minimum, summary reports of judicial evaluations should be made publicly available for each evaluation cycle. The reports should describe the evaluation process, identify the judges who were evaluated (even if individual evaluation results are not included), note overall strengths and weaknesses of the judiciary, and describe any areas of

improvement from the time of the previous summary report. Frequent use of summary reports allows the public to observe growth in judicial performance, and again reinforces that the appropriate criteria for judicial evaluation are process-driven, not outcome-driven. Appointment jurisdictions may, of course, issue results for individual judges as well. The strategies relating to an appointed judiciary at the state level are equally applicable to the federal judiciary, and should be instituted in the same way.

VII. Conclusion

Judicial performance evaluation is, most fundamentally, an educational tool. Used properly, it provides constructive criticism to judges, and helps them identify areas of strength and areas needing improvement. Just as importantly, it educates legislators, policy makers, and the public as to the current performance of the judiciary and the proper metrics for evaluating that performance. Put another way, JPE puts everyone on the same page with respect to evaluation. A judge's effectiveness becomes a function of her ability to meet politically neutral standards, not her stance on controversial issues, the harshness or leniency of sentencing in a high-profile case, or her vote in one case.

The ability of well-constructed JPE programs to shift the conversation away from political opinion and toward professional standards only promotes judicial independence, and can help reduce the pressure that surrounds a legally correct, but politically unpopular, conclusion. At the same time, it increases judicial accountability by holding judges to certain professional expectations attendant upon judicial office.

JPE is not a perfect solution to the inevitable political friction among the three branches of government, and between government, the media, and the public. There will always be calls for more accountability from the courts, just as there will always be calls for enhanced judicial

independence. Few programs, however, have the potential to increase both accountability and independence simultaneously. Judicial performance evaluation does have that potential. It is an idea whose time has come.

APPENDIX A
OVERVIEW OF OFFICIAL JUDICIAL PERFORMANCE EVALUATION PROGRAMS

STATE OR JURISDICTION	OPERATION AND AUTHORIZATION	GOALS	COMMITTEE COMPOSITION	PARTICIPATING JUDGES	FREQUENCY	PUBLIC DISSEMINATION?
Alaska	Alaska Judicial Council (Alaska Stat. §§22.05.100, 22.07.060, 22.10.150, 22.15.155)	To provide information to voters for retention elections; to provide useful feedback to judges for self-improvement	7 members: Chief Justice (ex officio chair), 3 non-attorneys, 3 attorneys appointed by state bar	All judges	Prior to retention election	Yes -- Included in election pamphlet mailed to every voter; detailed evaluations posted on website; evaluations printed in newspapers and aired on radio
Arizona	Commission on Judicial Performance Review (Ariz.. Const. art. VI, §42)	To provide information to voters for retention elections; to identify needed education and training programs; to promote appropriate judicial assignments	30 members: six attorneys, six judges, and eighteen members of the public.	All appellate judges; Superior Court judges in Pima and Maricopa Counties	Every two years (mid-term and prior to retention election)	Yes -- Pre-election reviews are mailed to voters and made available at public centers such as libraries, banks and grocery stores, and are posted on Arizona courts webpage. Mid-term performance reviews are confidential.
Colorado	State Commission (for appellate judges) and 22 local commissions (for trial judges) (C.R.S. §13-5.5-101 et seq.)	To provide information to voters for retention elections; to provide useful feedback to judges for self-improvement	Each commission has 10 members: 4 attorneys and 6 non-attorneys.	All judges	Prior to retention election	Yes – Blue Book of Ballot Issues (election information) sent to all voters prior to election; also available on judicial branch website and published in newspapers
Connecticut	Judicial Selection Commission, authorized by (Conn. Gen. Stat. § 51-44a *et seq*.)	To provide recommendations to the governor on new judicial candidates and candidates seeking reappointment	12 members, two from each Congressional district. No more than six members may belong to the same political party. 3-year terms.	New judicial nominees and incumbent judges seeking reappointment	Upon seeking reappointment	Only evaluation criteria and procedural rules are made public. Judge may request that hearings concerning his reappointment be open to the public.
D.C.	D.C. Commission on Judicial Disabilities and Tenure (Title 11, Appx. IV433)	To evaluate judges' performance and fitness for reappointment or senior status	7 members, all of whom must be D.C. residents and not employees of legislative or executive branches	Those seeking reappointment or senior status	Upon seeking reappointment or senior status	No
Florida	Joint project of state judiciary and Florida Bar (authorized by Supreme Court)	To promote self-improvement through awareness of professional strengths and weaknesses	No committee	Voluntary, informal program,; appears to vary from circuit to circuit	No evaluations	No – evaluation forms go directly to judge with committee reviews

STATE OR JURISDICTION	OPERATION AND AUTHORIZATION	GOALS	COMMITTEE COMPOSITION	PARTICIPATING JUDGES	FREQUENCY	PUBLIC DISSEMINATION?
Hawaii	Judicial Performance Committee (Supreme court Rule 19)	To improve judicial performance; increase the efficiency of judicial management; provide the Judicial selection Commission with information for retention and promotion decisions; improve judicial education programs; and public trust and confidence in the courts	13 members, appointed by Chief Justice	All full-time judges	As retention and appointment decisions warrant	Summary reports are disseminated; individual results are kept confidential.
Idaho	Magistrates Commission	To provide information for retention of a magistrate in office after 18-month probationary period	Chair of Board of County Commissioners, mayors of three municipalities within the district, two non-attorneys citizens, two attorneys, non-voting magistrate judge, administrative district judge	District magistrates only	After initial 18-month term of office	No
Illinois	Planning and Oversight Committee for a Judicial Performance Evaluation Program (SCR 58)	To promote judicial self-improvement	No committee	Voluntary	N/A	No – evaluation data is kept strictly confidential
Kansas	Commission on Judicial Performance (in development)	To provide information to voters for retention elections; to promote judicial self-improvement	13 members, including six non-lawyers and six lawyers or judges. At least one lawyer and one non-lawyer shall reside in each Congressional district	All judges	N/A	Yes and no – for judges in retention elections, evaluations publicly available; for judges running in contested elections, evaluations kept confidential
Massachusetts	Supreme Judicial Court Judicial Performance Evaluation Committee (M.G.L. ch. 211, §26-26b)	To promote judicial self-improvement	12 members, all attorneys, judges, or legal services representatives	All judges	Judges with four years of experience are evaluated every 12-18 months; judges with more than four years of experience are evaluated once every 18-36 months.	Annual summary report available to bar members; no information provided on individual judges

STATE OR JURISDICTION	OPERATION AND AUTHORIZATION	GOALS	COMMITTEE COMPOSITION	PARTICIPATING JUDGES	FREQUENCY	PUBLIC DISSEMINATION?
Minnesota	Joint project of Supreme Court, Conference of Chief Justices, and Minnesota District Judges Association Committee	Varies by judicial district	Varies by judicial district	Voluntary	Varies by judicial district	Varies; some districts issue reports or summary information
New Hampshire	New Hampshire Supreme Court	To promote judicial self-improvement; to provide information to the public about the overall performance of the judiciary	N/A	All Superior Court and District Court judges (appellate judges are evaluated collectively)	Every three years, with one-third of judges evaluated each calendar year	Annual summary report for entire judiciary is presented to Governor and other top state officials
New Jersey	Judicial Performance Committee (RGA 1:35A-1)	To provide feedback useful for self-improvement; to assist with tenure decisions	At least 6 judges, 3 attorneys, 2 members of the public with additional members fixed by Supreme Court. 3-year terms.	All judges	Second and fifth year after appointment	No – strictly confidential.
New Mexico	Judicial Performance Evaluation Commission	To provide information to voters for retention elections	15 members – 7 lawyers and 8 non-lawyers. Terms are staggered.	All sitting judges except those running in a partisan election	Midterm and prior to retention election	Yes – Retention evaluations are posted on commission's website, published in newspapers, and made available at county clerk offices. Midterm evaluations are confidential.
Puerto Rico	Judicial Evaluation Commission	To promote self-improvement	9 members, including one supreme court justice, one member experienced in managerial and administrative affairs, and at least one non-attorney. 3-year terms.	N/A	Every 3 years	N/A
Rhode Island	Judicial Performance Evaluation Committee	To promote judicial self-improvement; to improve the design and content of continuing judicial education classes	11 members – 6 judges, 3 members of the state bar, 2 members of the public familiar with the judicial system	All judges	Every 2 years	No – sent to Chief Justice of Supreme Court and Chief Judge of each district court only.
Tennessee	Judicial Evaluation Commission	To provide information to voters for retention elections	12 members – 4 state court judges, 2 non-lawyers, 3 members each appointed by speaker of the house and speaker of the senate	Appellate judges seeking retention	Every 8 years, prior to retention election	Yes – final report of less than 600 words per judge is published at least 180 days before qualifying deadline in general circulation daily newspaper

STATE OR JURISDICTION	OPERATION AND AUTHORIZATION	GOALS	COMMITTEE COMPOSITION	PARTICIPATING JUDGES	FREQUENCY	PUBLIC DISSEMINATION?
Utah	Utah Judicial Council Standing Committee on Judicial Performance Evaluation	To provide information to voters for retention; to provide information to judges for self-improvement	14 members – Chief Justice, 1 member of the Board of Commissioners, 12 judges elected by their peers. 3-year terms	All judges	Every 2 years	Yes – published inn voter information pamphlet and posted on governor's website.
Vermont	Joint Committee on Judicial Retention (4 V.S.A. § 608)	To make recommendations to the state legislature on judicial retention	8 members – four from the House of Representatives and four from the Senate	Judges seeking retention	Prior to retention elections	Report for each judge seeking retention presented to the General Assembly for consideration
Virginia	Judicial Performance Evaluation Commission	To provide information to legislators for retention; to provide information to judges for self-improvement	8 members appointed by Chief Justice	All judges	Three times per term	No – first two evaluations of each term are confidential; third sent only to relevant members of state legislature

Note: This chart reflects official judicial performance evaluation programs only. State and/or local bars conduct independent judicial evaluations in Georgia, Illinois, Kentucky, Maine, Missouri, Nebraska, Ohio, Pennsylvania, South Carolina, Texas, Washington, West Virginia and Wyoming. In Nevada, performance evaluations are conducted by a newspaper, the *Las Vegas Review-Journal*.

APPENDIX B

JUDICIAL QUALIFICATION REQUIREMENTS BY STATE

STATE	COURT	RESIDENCY	AGE RESTRICTIONS	EXPERIENCE
Alabama	Supreme Court	1 year in state	Maximum 70	Licensed in state
	Court Crim. App.	1 year in state	Maximum 70	Licensed in state
	Court Civ. App.	1 year in circuit	Maximum 70	Licensed in state
	County Court	1 year in county	Maximum 70	Licensed in state
Alaska	Supreme Court	U.S. citizen, 5 years in state	None	8 years active practice; licensed in state
	Court of Appeals	U.S. citizen, 5 years in state	None	8 years active practice; licensed in state
	Superior Court	U.S. citizen, 5 years in state	None	5 years active practice; licensed in state
Arizona	Supreme Court	10 years in state	Mandatory retirement at 70	Licensed in state
	Court of Appeals	10 years in state, 1 year in locality	At least 30; mandatory retirement at 70	Licensed in state
	Superior Court	5 years in state, 1 year in locality	At least 30; mandatory retirement at 70	Licensed in state
Arkansas	Supreme Court	U.S. citizen, 2+ years state resident	At least 30	8 years practice, learned in the law, good moral character
	Court of Appeals	U.S. citizen, 2+ years state resident	At least 30	8 years practice, learned in the law, good moral character
	Circuit Court	U.S. citizen, 2+ years state resident	At least 28	6 years practice, learned in the law, good moral character
California	Supreme Court	None	None	10 years practice in state or service as judge of court of record
	Court of Appeals	None	None	10 years practice in state or service as judge of court of record
	Superior Court	None	None	10 years practice in state or service as judge of court of record

Colorado	Supreme Court	Qualified elector in state	Mandatory retirement at 72	Licensed to practice 5 years
	Court of Appeals	Qualified elector in state	Mandatory retirement at 72	Licensed to practice 5 years
	District Court	Qualified elector in district	Mandatory retirement at 72	Licensed to practice 5 years
Connecticut	Supreme Court	State resident	Mandatory retirement at 70	State bar member 10 years
	Appellate Court	State resident	Mandatory retirement at 70	State bar member 10 years
	Superior Court	State resident	Mandatory retirement at 70	Bar member
Delaware	Supreme Court	State resident	None	"Learned in the law," state bar member
	Court of Chancery	State resident	None	Law degree, "learned in the law," state bar member
	Superior Court	State and local resident	None	Law degree, "learned in the law," state bar member
D.C.	Court of Appeals	U.S. citizen, D.C. resident 90+ days before appointment	Mandatory retirement at 74	5 years as active member of D.C. bar, professor at D.C. law school, or attorney with U.S. or D.C. government
	Superior Court	U.S. citizen, D.C. resident 90+ days before appointment	Mandatory retirement at 74	5 years as active member of D.C. bar, professor at D.C. law school, or attorney with U.S. or D.C. government
Florida	Supreme Court	Qualified elector, state resident	Mandatory retirement at 70	Admitted to practice in state 10 years
	District Court of Appeal	Qualified elector, district resident	Mandatory retirement at 70	Admitted to practice in state 10 years
	Circuit Court	Qualified elector, circuit resident	Mandatory retirement at 70	Admitted to practice in state 5 years
Georgia	Supreme Court	State resident	None	Admitted to practice law 7 years
	Court of Appeals	State resident	None	Admitted to practice law 7 years
	Superior Court	State resident 3 years, circuit resident	At least 30	Admitted to practice law 7 years

Hawaii	Supreme Court	U.S. citizen, state resident	Mandatory retirement at 70	10 years state practice
	Intermediate Court of Appeals	U.S. citizen, state resident	Mandatory retirement at 70	10 years state practice
	Circuit Court	U.S. citizen, state resident	Mandatory retirement at 70	10 years state practice
Idaho	Supreme Court	U.S. citizen, state resident 2+ years	At least 30	10 years state practice
	Court of Appeals	U.S. citizen, state resident 2+ years	At least 30	10 years state practice
	District Court	U.S. citizen, state resident 2+ years, district resident 1+ years	At least 30	10 years practice of law
Illinois	Supreme Court	U.S. citizen, district resident	Mandatory retirement at 75	Licensed to practice in state
	Appellate Court	U.S. citizen, district resident	Mandatory retirement at 75	Licensed to practice in state
	District Court	U.S. citizen, circuit/county resident	Mandatory retirement at 75	Licensed to practice in state
Indiana	Supreme Court	U.S. citizen, state resident	Mandatory retirement at 75	Admitted to practice 10 years or served as trial judge 5 years
	Court of Appeals	U.S. citizen, state resident	Mandatory retirement at 75	Admitted to practice 10 years or trial judge 5 years
	Circuit Court	Circuit resident	None	Admitted to practice law in state
	Superior Court	Circuit resident	None	Admitted to practice law in state
Iowa	Supreme Court	State resident	Maximum age of 72	Licensed in state and member of Iowa bar
	Court of Appeals	State resident	Maximum age of 72	Licensed in state and member of Iowa bar
	District Court	State and district resident	Maximum age of 72	Licensed in state and member of Iowa bar
Kansas	Supreme Court	None	At least 30; maximum 70	10 years active and continuous practice in state
	Court of Appeals	None	At least 30; maximum 70	10 years active and continuous practice in state
	District Court	State resident	Maximum 70	Member in good standing of state bar 5+ years
Kentucky	Supreme Court	U.S. citizen; district resident 2 years	None	Licensed to practice law 8 years
	Court of Appeals	U.S. citizen; district resident 2 years	None	Licensed to practice law 8 years
	Circuit Court	U.S. citizen; circuit resident 2 years	None	Licensed to practice law 8 years

Louisiana	Supreme Court	District resident 2 years	Maximum 70	5 years state practice
	Court of Appeals	District/circuit resident 2 years	Maximum 70	5 years state practice
	District Court	District resident 2 years	Maximum 70	5 years state practice
Maine	Supreme Judicial Court	None	None	"Learned in the law"
	Superior Court	None	None	"Learned in the law"
Maryland	Court of Appeals	U.S. and state citizen; registered to vote in state elections, state resident 5 years, circuit resident 6 months	At least 30; mandatory retirement at 70	State bar member
	Court of Special Appeals	U.S. and state citizen; registered to vote in state elections, state resident 5 years, circuit resident 6 months	At least 30; mandatory retirement at 70	State bar member
	Circuit Court	U.S. and state citizen; registered to vote in state elections, state resident 5 years, circuit resident 6 months	At least 30; mandatory retirement at 70	State bar member
Massachusetts	Supreme Judicial Court		Mandatory retirement at 70	
	Appeals Court	U.S. citizen, state resident	Mandatory retirement at 70	State bar member in good standing, 15 years legal experience and training
	Superior Court	U.S. citizen, state resident	Mandatory retirement at 70	State bar member in good standing, 10 years legal experience and training
Michigan	Supreme Court	Qualified elector	Maximum 70	Licensed to practice in state, 5 years practice of law
	Court of Appeals	Qualified elector of district	Maximum 70	Licensed to practice in state, 5 years practice
	Circuit Court	Qualified elector of circuit	Maximum 70	Licensed to practice in state, 5 years practice
Minnesota	Supreme Court	None	Mandatory retirement at 70	"Learned in the law"
	Court of Appeals	None	Mandatory retirement at 70	"Learned in the law"
	District Court	None	Mandatory retirement at 70	"Learned in the law"

Mississippi	Supreme Court	State citizen 5 years	At least 30	Practicing attorney
	Court of Appeals	State citizen 5 years	At least 30	Practicing attorney
	Chancery Court	State citizen 5 years, district resident	At least 26	Practicing attorney 5 years
	Circuit Court	State citizen 5 years, district resident	At least 26	Practicing attorney 5 years
Missouri	Supreme Court	U.S. citizen 15 years, qualified state voter 9 years	At least 30, mandatory retirement at 70	Licensed to practice in state
	Court of Appeals	U.S. citizen 15 years, qualified state voter 9 years, district resident	At least 30, mandatory retirement at 70	Licensed to practice in state
	Circuit Court	U.S. citizen 10 years, qualified state voter 3 years, circuit resident 1 year	At least 30, mandatory retirement at 70	Licensed to practice in state
Montana	Supreme Court	U.S. citizen, state resident 2 years	None	5 years state practice
	District Court	U.S. citizen, state resident 2 years, district resident	None	5 years state practice
Nebraska	Supreme Court	U.S. citizen, state resident 3+ years, district resident	At least 30	5+ years state practice, state bar member
	Court of Appeals	U.S. citizen, state resident	At least 30	5+ years state practice, state bar member
	District Court	U.S. citizen, district resident	At least 30	5+ years state practice, state bar member
Nevada	Supreme Court	Qualified elector, state resident 2 years	At least 25	Licensed and admitted to practice law in state, may not have been removed or retied from judicial office
	District Court	Qualified elector, state resident 2 years, district resident	At least 25	Licensed and admitted to practice law in state, may not have been removed or retied from judicial office
New Hampshire	Supreme Court	None	Mandatory retirement at 70	None
	Superior Court	None	Mandatory retirement at 70	None
New Jersey	Supreme Court	None	Mandatory retirement at 70	Admitted to practice 10 years
	Appellate Div. of Superior Court	None	Mandatory retirement at 70	Admitted to practice 10 years
	Superior Court Law and Chancery Div.	None	Mandatory retirement at 70	Admitted to practice 10 years
New Mexico	Supreme Court	State resident 3 years	At least 35	10 years legal practice
	Court of Appeals	State resident 3 years	At least 35	10 years legal practice
	District Court	State resident 3 years, district resident	At least 35	6 years legal practice

New York	Court of Appeals	State	At least 18	10+ years state practice
	Supreme Court	State	At least 18; Retirement at 70	10+ years state practice
	County Court	State and County	At least 18; Retirement at 70	5+ years state practice
North Carolina	Supreme Court	None	Mandatory retirement at 72	Licensed to practice in state
	Court of Appeals	None	Mandatory retirement at 72	Licensed to practice in state
	Superior Court	None	Mandatory retirement at 72	Licensed to practice in state
North Dakota	Supreme Court	U.S. and state citizen	None	Licensed attorney
	Court of Appeals	U.S. and state citizen	None	Licensed attorney
	District Court	U.S. and state citizen	None	Licensed attorney
Ohio	Supreme Court		Maximum 70	6 years practice of law
	Court of Appeals	District resident	Maximum 70	6 years practice of law
	Court of Common Pleas	County resident	Maximum 70	6 years practice of law
Oklahoma	Supreme Court	Qualified elector in district 1+ years	At least 30	Licensed to practice or judge 5+ years
	Court of Criminal Appeals	Qualified elector in district 1+ years	At least 30	Licensed to practice or judge 5+ years
	Court of Civil Appeals	Qualified elector in district 1+ years	None	Licensed to practice or judge 4+ years
	District Court	Qualified elector in district 1+ years	None	Licensed to practice or judge 4+ years
Pennsylvania	Supreme Court	State resident 1 year	At least 21; maximum 70	State bar member
	Superior Court	State resident 1 year	At least 21; maximum 70	State bar member
	Commonwealth Court	State resident 1 year	At least 21; maximum 70	State bar member
	Court of Common Pleas	State and district resident 1 year	At least 21; maximum 70	State bar member
Rhode Island	Supreme Court	None	None	Attorney; licensed in state; state bar member in good standing
	Superior Court	None	None	Attorney; licensed in state; state bar member in good standing

South Carolina	Supreme Court	U.S. citizen, state resident 5 years	At least 32; maximum 72	Licensed attorney 8 years
	Court of Appeals	U.S. citizen, state resident 5 years	At least 32; maximum 72	Licensed attorney 8 years
	Circuit Court	U.S. citizen, state resident 5 years	At least 32; maximum 72	Licensed attorney 8 years
South Dakota	Supreme Court	U.S. citizen, state resident, voting resident within district	Mandatory retirement at 70	Licensed to practice law in state
	Circuit Court	U.S. citizen, state resident, voting resident within circuit	Mandatory retirement at 70	Licensed to practice law in state
Tennessee	Supreme Court	State resident 5 years	At least 35	Authorized to practice law in state
	Court of Appeals	State resident 5 years, district resident 1 year	At least 30	Authorized to practice law in state
	Court of Criminal Appeals	State resident 5 years, district resident 1 year	At least 30	Authorized to practice law in state
	All trial courts	State resident 5 years, district resident 1 year	At least 30	Authorized to practice law in state
Texas	Supreme Court	U.S. citizen, state resident	At least 35	10+ years practicing lawyer or judge
	Court of Appeals	U.S. citizen, state resident	At least 35	10+ years practicing lawyer or judge
	Court of Criminal Appeals	U.S. citizen, state resident	At least 35	10+ years practicing lawyer or judge
	District Court	U.S. citizen, state resident, district resident 2 years	At least 25	4+ years practicing lawyer or judge
Utah	Supreme Court	U.S. citizen, state resident 5 years	At least 30	Admitted to practice law in state
	Court of Appeals	U.S. citizen, state resident 3 years	At least 25	Admitted to practice law in state
	District Court	U.S. citizen, state resident 3 years	At least 25	Admitted to practice law in state
Vermont	Supreme Court	None	Mandatory retirement at 70	Attorney who has practiced law or served as judge in state 5 or more of the last ten years
	Superior Court	None	Mandatory retirement at 70	Attorney who has practiced law or served as judge in state 5 or more of the last ten years
	District Court	None	Mandatory retirement at 70	Attorney who has practiced law or served as judge in state 5 or more of the last ten years
Virginia	Supreme Court	State resident	Maximum 70	State bar member 5 years
	Court of Appeals	State resident	Maximum 70	State bar member 5 years
	Circuit Court	State and circuit resident	Maximum 70	State bar member 5 years

Washington	Supreme Court	None	Mandatory retirement at 75	Licensed to practice in state
	Court of Appeals	None	None	5 years practicing in state
	Superior Court	None	Mandatory retirement at 75	Licensed to practice in state
West Virginia	Supreme Court of Appeals	State citizen 5 years	At least 30	10 years practice of law
	Circuit Court	State citizen 5 years, circuit resident	At least 30	5 years practice of law
Wisconsin	Supreme Court	Qualified elector of state	Mandatory retirement at 70	Licensed to practice law in state 5 years
	Court of Appeals	Qualified elector of district	Mandatory retirement at 70	Licensed to practice law in state 5 years
	Circuit Court	Qualified elector of circuit	Mandatory retirement at 70	Licensed to practice law in state 5 years
Wyoming	Supreme Court	U.S. citizen, state resident 3 years	At least 30; mandatory retirement at 70	9 years legal experience
	District Court	U.S. citizen, state resident 2 years	At least 28; mandatory retirement at 70	

APPENDIX C

MODEL ATTORNEY SURVEY FOR APPELLATE JUDGE EVALUATIONS

This questionnaire seeks your input on the quality of Judge X's performance on the appellate bench. Your responses will remain anonymous. Please fill out and return this survey if you have appealed a case and Judge X participated in the decision. If you have not had experience with Judge X, please so indicate immediately below, leave the remaining questions blank and return the survey. Your participation is appreciated.

Judge X has not heard the appeal of any of my cases for the survey period. _____

1. Which of the following types of cases have you appealed in which Judge X participated in the decision? Select all that apply.

a. Civil
b. Criminal
c. Domestic
d. Juvenile
e. Other

2. Please evaluate Judge X's job performance on the issues below, using the following scale:

5 Excellent
4 More Than Adequate
3 Adequate
2 Less than Adequate
1 Inadequate
0 Cannot Evaluate

If you do not feel you have adequate information to evaluate Judge X on a specific question, select 0 ("Cannot Evaluate").

a.	Behaves in a manner that is free from impropriety or the appearance of impropriety	5	4	3	2	1	0
b.	Displays fairness and impartiality toward each side of the case	5	4	3	2	1	0
c.	Avoids ex parte communications	5	4	3	2	1	0
d.	Is prepared for oral argument	5	4	3	2	1	0

e.	Allows parties to present their arguments and answer questions	5	4	3	2	1	0
f.	Maintains the quality of questions and comments during oral argument	5	4	3	2	1	0
g.	Is courteous toward attorneys	5	4	3	2	1	0
h.	Is courteous toward court staff	5	4	3	2	1	0
i.	Demonstrates appropriate demeanor on the bench	5	4	3	2	1	0

3. Did Judge X author or co-author one or more opinions in your case(s)?

4. If you answered Question 3 in the affirmative, please evaluate the judge on the topics below, using the same 1-5 scale as in Question 2:

a.	Opinions are clearly written	5	4	3	2	1	0
b.	Opinions are issued without unnecessary delay	5	4	3	2	1	0
c.	Opinions clearly explain the basis of the Court's decision	5	4	3	2	1	0
d.	Opinions demonstrate scholarly legal analysis	5	4	3	2	1	0
e.	Opinions demonstrate knowledge of the substantive law	5	4	3	2	1	0
f.	Opinions reflect sufficient familiarity with relevant facts of the case	5	4	3	2	1	0
g.	Opinions demonstrate knowledge of the rules of evidence and procedure	5	4	3	2	1	0
h.	Opinions are rendered without regard for possible public criticism	5	4	3	2	1	0
I	Opinions refrain from reaching issues that need not be decided	5	4	3	2	1	0

5. Please add any comments about Judge X relating to any of your responses above. Please use additional pages as necessary.

6. Your years in practice: 0-5 _____ 6-10_____ 11 or more _____

APPENDIX D

MODEL ATTORNEY SURVEY FOR TRIAL JUDGE EVALUATIONS

This questionnaire seeks your input on the quality of Judge X's performance on the bench. Your responses will remain anonymous. Please fill out and return this survey if you have had courtroom interaction of any sort with Judge X during the survey period, including but not limited to jury trials, bench trials, and motion hearings. If you have not had experience with Judge X during the survey period, please so indicate immediately below, leave the remaining questions blank and return the survey. Your participation is appreciated.

Judge X has not heard the appeal of any of my cases for the survey period. _____

1. Which of the following types of cases have you appealed in which Judge X participated in the decision? Select all that apply.

a. Civil
b. Criminal
c. Domestic
d. Juvenile
e. Other

2. Please evaluate Judge X's job performance on the issues below, using the following scale:

5 Excellent
4 More Than Adequate
3 Adequate
2 Less than Adequate
1 Inadequate
0 Cannot Evaluate

If you do not feel you have adequate information to evaluate Judge X on a specific question, select 0 ("Cannot Evaluate").

a.	Behaves in a manner that is free from impropriety or the appearance of impropriety	5	4	3	2	1	0
b.	Displays fairness and impartiality toward each side of the case	5	4	3	2	1	0
c.	Avoids ex parte communications	5	4	3	2	1	0
d.	Is prepared for hearings and trials	5	4	3	2	1	0
e.	Allows parties latitude to present their arguments	5	4	3	2	1	0

f.	Allows parties sufficient time to present case	5	4	3	2	1	0
g.	Is courteous toward attorneys	5	4	3	2	1	0
h.	Is courteous toward court staff	5	4	3	2	1	0
i.	Maintains and requires proper order and decorum in the courtroom	5	4	3	2	1	0
j.	Shows and expects professionalism from everyone in the courtroom	5	4	3	2	1	0
k.	Demonstrates appropriate demeanor on the bench	5	4	3	2	1	0
l.	Understands substantive law	5	4	3	2	1	0
m.	Understands rules of procedure and evidence	5	4	3	2	1	0
n.	Weighs all evidence fairly and impartially before rendering a decision	5	4	3	2	1	0
o.	Clearly explains all oral decisions	5	4	3	2	1	0
p.	Written opinions and orders are clear	5	4	3	2	1	0
q.	Issue opinions and orders without unnecessary delay	5	4	3	2	1	0
r.	Starts court on time	5	4	3	2	1	0
s.	Uses court time efficiently	5	4	3	2	1	0
t.	Effective as an administrator	5	4	3	2	1	0
u.	Effectively uses pretrial procedures to narrow and define the issues	5	4	3	2	1	0
v.	Overall performance	5	4	3	2	1	0

3. Please add any comments about Judge X relating to any of your responses above. Please use additional pages as necessary.

4. Your years in practice: 0-5 _____ 6-10_____ 11 or more _____

APPENDIX E

MODEL ATTORNEY SURVEY FOR TRIAL JUDGE CANDIDATE EVALUATIONS IN CONTESTED ELECTIONS

Candidate X has declared his intent to run for judicial office. This questionnaire seeks your input on the quality of Candidate X's performance as an attorney related to skills he will be expected to use on the bench. Your responses will remain anonymous. Please fill out and return this survey if you have had professional interaction in a litigation setting with Candidate X during the survey period, including but not limited to trials, court hearings, depositions, discovery conferences, settlement conferences, or alternative dispute resolution. If you have not had experience with Candidate X during the last ten years, please so indicate immediately below, leave the remaining questions blank and return the survey. Your participation is appreciated.

I have not interacted professionally with Candidate X on any litigation matters in the last ten years. _____

1. In which of the following types of cases have you interacted with Candidate X? Select all that apply.

a. Civil
b. Criminal
c. Domestic
d. Juvenile
e. Other

2. In which types of settings you have interacted with Candidate X? Select all that apply.

a. Jury trial
b. Bench trial
c. Motion hearing
d. Evidentiary hearing
e. Other hearing
f. Deposition
g. Discovery conference
h. Settlement conference
i. Mediation
j. Arbitration
k. Contact by telephone only
l. Contact by letter or e-mail only
m. Other contact

3. Did you work on the same litigation team as Candidate X in any of the litigation matters listed above? If so, identify which matters:

_____

3. Please evaluate Candidate X on the issues below, using the following scale:

5 Excellent
4 More Than Adequate
3 Adequate
2 Less than Adequate
1 Inadequate

If you do not feel you have adequate information to evaluate Candidate X on a specific question, select 0 ("Cannot Evaluate").

a.	Behaves in a manner that is free from impropriety or the appearance of impropriety	5	4	3	2	1	0
b.	Avoids ex parte communications	5	4	3	2	1	0
c.	Is prepared for hearings, trials, and the like	5	4	3	2	1	0
d.	Is courteous toward other attorneys	5	4	3	2	1	0
e.	Is courteous toward court staff	5	4	3	2	1	0
f.	Maintains and requires proper order and decorum in the courtroom	5	4	3	2	1	0
g.	Shows and expects professionalism from everyone in the courtroom	5	4	3	2	1	0
h.	Demonstrates appropriate demeanor	5	4	3	2	1	0
i.	Understands substantive law	5	4	3	2	1	0
j.	Understands rules of procedure and evidence	5	4	3	2	1	0
k.	Acknowledges weaknesses in argument where appropriate	5	4	3	2	1	0
l.	Briefs and motions are clearly written	5	4	3	2	1	0
m.	Meets court and discovery deadlines without unnecessary delay	5	4	3	2	1	0
n.	Ready for court and depositions on time	5	4	3	2	1	0
o.	Uses court time efficiently	5	4	3	2	1	0
p.	Effectively uses pretrial procedures to narrow and define the issues	5	4	3	2	1	0
q.	Overall performance	5	4	3	2	1	0

4. Please add any comments about Candidate X relating to any of your responses above. Please use additional pages as necessary.

6. Your years in practice: 0-5 _____ 6-10_____ 11 or more _____

APPENDIX F

MODEL JUROR SURVEY FOR TRIAL JUDGE EVALUATIONS

As a juror, you have been in a position to observe the functions of the court system. Your opinion of the system is important to us. Please take a few minutes to complete this survey regarding your observations of Judge X. Your responses will be kept anonymous, and will help maintain a system than runs efficiently and effectively. Thank you for your service.

Please answer the following questions:

1.	Did the judge treat people equally regardless of race, gender, ethnicity, economic status, or any other factor?	Yes	No
2.	Did the judge's behavior appear to be free from bias or prejudice?	Yes	No
3.	Did the judge conduct proceedings in a fair and impartial manner?	Yes	No
4.	Did the judge act in a dignified manner?	Yes	No
5.	Did the judge treat people with courtesy?	Yes	No
6.	Did the judge act with patience and self-control?	Yes	No
7.	Did the judge act with humility and avoid arrogance?	Yes	No
8.	Did the judge pay attention to the proceedings throughout?	Yes	No
9.	Did the judge display an appropriate level of compassion?	Yes	No
10.	Did the judge promote public confidence in the courts?	Yes	No
11.	Did the judge clearly explain court procedure?	Yes	No
12.	Did the judge clearly explain the responsibility of the jury?	Yes	No
13.	Did the judge clearly explain reasons for any delay?	Yes	No
14.	Did the judge start court on time?	Yes	No
15.	Did the judge maintain control over the courtroom?	Yes	No
16.	Did you have frequent enough and long enough breaks to attend to your personal needs?	Yes	No
17.	Would you be comfortable having your case tried before this judge?	Yes	No
18.	What is your gender? _____		
19.	What is your race or ethnicity? _____		
20.	In what year were you born? _____		

APPENDIX G

MODEL LITIGANT SURVEY FOR TRIAL JUDGE EVALUATIONS

We are interested in learning about your recent experience with our court system. Please take a few minutes to complete this survey regarding your perceptions of Judge X and the court's handling of your case. Your responses will be kept anonymous, and will help us maintain a system that it efficient, effective, and fair.

Please answer the following questions about your case:

1.	What kind of case were you involved in?	Criminal	Civil
2.	Were you the plaintiff or defendant?	Plaintiff	Defendant
3.	How long did the trial last? _____		

Please answer the following questions about the judge:

1.	Did the judge appear well-prepared for your case?	Yes	No
2.	Did the court deal with your case promptly?	Yes	No
3.	Was the judge respectful to you?	Yes	No
4.	Was the judge respectful to the other parties?	Yes	No
5.	Did the judge manage the trial efficiently?	Yes	No
6.	Did the judge manage the entire case efficiently?	Yes	No
7.	Do you feel that the judge listened to your side of the case?	Yes	No
8.	Were the judge's rulings clear?	Yes	No
9.	Do you understand why the judge ruled the way he/she did?	Yes	No

Please add any other comments you would like to make about the judge or the way your case was handled in court:

APPENDIX H

MODEL SELF-EVALUATION – APPELLATE JUDGE

Please complete the following evaluation based on your perception of your performance. Information on this self-evaluation will be used for professional self-improvement purposes only, and will not be publicly released.

Name _____ Date _____

Date appointed to current judicial position _____

Previous judicial position(s) before taking the bench _____

Judicial administration assignments _____

_____

_____

_____

Please evaluate your performance on the following issues. The rating scale is as follows:

5 Excellent
4 More Than Adequate
3 Adequate
2 Less Than Adequate
1 Inadequate

a.	Patience, dignity and courtesy	5	4	3	2	1
b.	Conscientiousness and diligence	5	4	3	2	1
c.	Demonstrating respect for all persons	5	4	3	2	1
d.	Attentiveness at oral argument	5	4	3	2	1
e.	Appropriate interaction with counsel during oral argument	5	4	3	2	1
f.	Relevant questions during oral argument	5	4	3	2	1
g.	Courtesy and dignity on the bench	5	4	3	2	1
h.	Conduct that promotes public confidence in the court	5	4	3	2	1
i.	Fairness, equality, and consistency of treatment	5	4	3	2	1
j.	Freedom from bias or prejudice against any person or group	5	4	3	2	1

k.	Conduct free from impropriety or the appearance of impropriety	5	4	3	2	1
l.	Refraining from inappropriate ex parte communications	5	4	3	2	1
m.	Showing and expecting professionalism from everyone	5	4	3	2	1
n.	Legal reasoning ability	5	4	3	2	1
o.	Knowledge of substantive law	5	4	3	2	1
p.	Knowledge of rules of evidence and procedure	5	4	3	2	1
q.	Knowledge of rules pertaining to sentencing	5	4	3	2	1
r.	Abreast of current legal developments	5	4	3	2	1
s.	Clearly written opinions	5	4	3	2	1
t.	Legally supported opinions	5	4	3	2	1
u.	Decisions are based on a review of the record	5	4	3	2	1
v.	Decisions are based on the law and the facts	5	4	3	2	1
w.	Opinions are issued without unnecessary delay	5	4	3	2	1
x.	Working efficiently with other judges and court personnel	5	4	3	2	1
y.	Handling ongoing workload	5	4	3	2	1
z.	Overall performance	5	4	3	2	1

What are your greatest strengths as a judge?

What are your greatest weaknesses as a judge?

What do you believe your reputation is within the community?

What are your professional goals for the coming term?

Additional comments:

APPENDIX I

MODEL SELF-EVALUATION – TRIAL JUDGE

Please complete the following evaluation based on your perception of your performance. Information on this self-evaluation will be used for professional self-improvement purposes only, and will not be publicly released.

Name _____ Date _____

Date appointed to current judicial position _____

Previous judicial position(s) before taking the bench _____

Judicial assignments during evaluation period _____

_____

_____

_____

Please evaluate your performance on the following issues. The rating scale is as follows:

5 Excellent
4 More Than Adequate
3 Adequate
2 Less Than Adequate
1 Inadequate

a.	Patience, dignity and courtesy	5	4	3	2	1
b.	Conscientiousness and diligence	5	4	3	2	1
c.	Demonstrating respect for all persons	5	4	3	2	1
d.	Attentiveness at oral argument	5	4	3	2	1
e.	Appropriate interaction with counsel during oral argument	5	4	3	2	1
f.	Relevant questions during oral argument	5	4	3	2	1
g.	Courtesy and dignity on the bench	5	4	3	2	1
h.	Conduct that promotes public confidence in the court	5	4	3	2	1
i.	Fairness, equality, and consistency of treatment	5	4	3	2	1
j.	Freedom from bias or prejudice against any person or group	5	4	3	2	1

k.	Conduct free from impropriety or the appearance of impropriety	5	4	3	2	1
l.	Refraining from inappropriate ex parte communications	5	4	3	2	1
m.	Showing and expecting professionalism from everyone	5	4	3	2	1
n.	Legal reasoning ability	5	4	3	2	1
o.	Knowledge of substantive law	5	4	3	2	1
p.	Knowledge of rules of evidence and procedure	5	4	3	2	1
q.	Knowledge of rules pertaining to sentencing	5	4	3	2	1
r.	Abreast of current legal developments	5	4	3	2	1
s.	Clearly written opinions	5	4	3	2	1
t.	Legally supported opinions	5	4	3	2	1
u.	Decisions are based on a review of the record	5	4	3	2	1
v.	Decisions are based on the law and the facts	5	4	3	2	1
w.	Opinions are issued without unnecessary delay	5	4	3	2	1
x.	Working efficiently with other judges and court personnel	5	4	3	2	1
y.	Handling ongoing workload	5	4	3	2	1
z.	Overall performance	5	4	3	2	1

Please describe your approach to case management. In doing so, please answer the following questions:

(1) What happens when a motion is filed in your division?
(2) When and under what circumstances are you available for telephone conferences with counsel and the parties?
(3) What steps do you take to monitor open case reports and case aging reports?
(4) What is your approach to granting continuances?

What are your greatest strengths as a judge?

What are your greatest weaknesses as a judge?

What do you believe your reputation is within the community?

What are your professional goals for the coming term?

Additional comments:

APPENDIX J

MODEL EXPLANATION OF RATINGS AND SHORT-FORM REPORT

Our state has adopted a judicial performance evaluation program, which is overseen by the State Judicial Performance Commission. The program has two purposes:

To provide each judge with information to promote professional self-improvement; and

To provide voters with information upon which to make informed and knowledgeable decisions regarding judicial elections.

Each state judge is evaluated every two years by the State Judicial Performance Commission. The Commission examines the judge's caseload, reviews written opinions for clarity and faithfulness to the law, conducts unscheduled visits to the judge's courtroom to observe the proceedings, and collects public comments on the judge's performance. The Commission also conducts an interview with the judge. Finally, the Commission considers survey responses about the judge's performance.

How surveys are conducted

An independent organization surveys attorneys, jurors, witnesses, and court staff, and others who interact professionally with the judge, and reports the results of those surveys to the Commission. All survey participants except jurors are asked to rate the judge by responding to questions in five categories:

Legal knowledge – (1) understanding the substantive law and relevant rules of procedure and evidence; (2) awareness and attentiveness to the factual and legal issues before the court; (3) proper application of statutes, judicial precedents, and other appropriate sources of legal authority.

Integrity – (1) avoiding impropriety or the appearance of impropriety; (2) displaying fairness and impartiality toward all parties; (3) avoiding ex parte communications.

Communication skills – (1) clearly explains all oral decisions; (2) issues clear written orders and/or opinions; (3) for trial judges, clearly explains relevant information to the jury.

Judicial temperament – (1) courtesy toward attorneys, court staff, and others in the courtroom; (2) maintains and requires order and decorum in the courtroom; (3) shows and expects professionalism from everyone in the courtroom; (4) demonstrates appropriate demeanor on the bench.

Administrative performance – (1) being prepared for all hearings and/or trials; (2) using court time efficiently; (3) issuing opinions or orders without unnecessary delay; (4) effective overall case management.

For each survey question, the judge is rated from 5 (Excellent) to 1 (Poor). An overall rating of 3.0 is therefore considered average, and a rating of 4.0 or higher is considered outstanding. Survey participants can also provide written comments on the judge in any category, which are considered by the Commission.

Juror and litigant surveys

Jurors and litigants usually only observe the judge for one case, so their surveys are somewhat different from surveys for attorneys or others who observe the judge more regularly. At the end of their service, jurors are asked to provide "yes" or "no" answers to several questions concerning the judge's integrity, communication skills, and judicial temperament. Jurors do not give numerical ratings to the judge. Because appeals do not involve juries, no juror surveys are given for appellate judges.

Litigants are also asked to complete a survey at the end of their case, and to answer "yes" or "no" questions concerning the judge's integrity, temperament, and communication skills during the course of their case.

The Commission's vote

Once the Commission has collected and reviewed all available information on each judge, it votes on whether the judge has met the state's judicial performance standards. The current standards are as follows:

1) A rating of at least 3.0 on 90% of total non-juror survey questions;
2) A favorable answer at least 75% of the time on all juror and litigant survey questions;
3) No cases with issues under advisement more than 90 days, unless the judge's particular docket justifies exceptions;
4) All or nearly all written opinions clearly and accurately describe the relevant facts and applicable law, and clearly state the court's order; and
5) No findings by a body charged with judicial discipline that the judge has violated the applicable code of judicial conduct.

Any judge who meets these standards is presumed to be qualified to continue to serve on the state judiciary. If a judge does not meet one or more of these standards, the judge is presumed not to be qualified. However, each member of the Commission may vote against the presumption if he or she feels that other information about the judge makes the presumption inaccurate.

The Commission's vote only relates to whether a judge is qualified to serve. It is not a recommendation as to whether that judge should continue to serve. **Whether a judge remains in office rests with you, the voter.**

How to read each judge's report

The reports in your voter guide summarize the information available to the Commission and state the results of the Commission's vote on each judge.

The two boxes in the top left of each report identify the court in which the judge sits, and the Commission's vote on whether the judge is qualified.

The large box in the top right provides biographical information about the judge. It also identifies the judge's major strengths and weaknesses, as determined from survey responses and public comments.

The bottom series of boxes provides the survey data for each judge. The data is broken down by attorneys, jurors, and all other survey participants. For attorneys and other participants, the box provides the judge's average score in each of the five categories. The box also provides an "approval percent," which indicates the percentage of survey questions in each category in which the judge received a score of 3 or higher. For juror surveys, the "approval percent" reflects the percentage of survey questions in each category for which the judge received a positive response.

The full report on each judge is available to the public at the State Commission's website, www.statejudicialperformance.com, or by contacting the Commission directly.

Judge
Armistead O. Hull

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

By a Vote of 10-2, the Committee Concludes that Judge Hull is
QUALIFIED
to Serve on the District Court

Judge Armistead O. Hull was appointed to the Fourth District Court in November 1999 by Governor Philip K. Buchanan. He received his law degree from the University of Chicago in 1978. Before he was appointed to the bench, Judge Hull served as an Assistant District Attorney, and also practiced law privately. Judge Hull is married and has three children. He is active in several civic organizations.

STRENGTHS OF JUDGE HULL'S PERFORMANCE

*** *Legal knowledge***. Judge Hull received high marks for his strong command of the law, as well as his understanding of the rules of evidence and procedure.

* ***Efficiency***. Judge Hull was praised for managing cases efficiently and with minimal delay. He issues written orders promptly.

* ***Clarity***. Jurors and attorneys rated Judge Hull highly on the clarity of his orders and instructions.

WEAKNESSES OF JUDGE HULL'S PERFORMANCE

* ***Temperament on the bench***. Several survey respondents commented that Judge Hull too frequently treats attorneys with condescension and has a short temper.

Judicial Performance Standards Evaluation Categories	Attorney Responses Surveys Distributed: 204 Surveys Returned: 88		Juror Responses Distributed: 86 Returned: 76	Litigant Responses Distributed: 31 Returned: 13	Other Responses Surveys Distributed: 103 Surveys Returned: 26	
	Avg. Score	Approval%	Approval %	Approval %	Avg. score	Approval%
Legal Ability	4.8	98%	---	---	4.7	91%
Integrity	4.6	95%	95%	77%	4.4	85%
Communication Skills	4.1	88%	94%	92%	4.5	93%
Judicial Temperament	3.1	71%	87%	77%	3.8	82%
Administrative Perf.	4.3	92%	---	---	4.2	88%

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