Chapter 19

Improving the Judiciary through Performance Evaluations

Marla N. Greenstein, Dan Hall, and Jane Howell

Marla N. Greenstein has been the Executive Director for the Alaska Commission on Judicial Conduct since 1989. Before this, she was Senior Staff Attorney for the Alaska Judicial Council and before that was Senior Staff Attorney for the American Judicature Society, where her work focused on judicial selection, judicial performance evaluation, and judicial ethics issues. Daniel J. Hall has been the Director of Planning and Analysis for the Colorado Judicial Department for twenty years. In that capacity he has performed a variety of duties, including serving as the initial Executive Director to the Colorado State Commission on Judicial Performance. He is an adjunct professor at the University of Denver College of Law and is the incoming Vice-President of Court Services for the National Center for State Courts. Jane B. Howell is the Chief Deputy Clerk at the United States Court of Appeals for the Tenth Circuit. She is the former Judicial Performance Program Director at the Colorado Office of the State Court Administrator.

Evaluating judicial performance means different things to different people. In the area of court administration, it refers to a disciplined method for assessing various judicial qualities with objective criteria and methodology. The earliest forms of performance evaluation were often bar association surveys of members as to their views on the qualities judges possess for reelection or retention election purposes. As evaluations have evolved, the more sophisticated systems survey a variety of views, not

1 From the upcoming Judicial Division, American Bar Association, The Improvement of the Administration of Justice (Gordon Griller & Keith Stott, Jr. eds., 7th ed., 2002).
only those of lawyers, and use that information not only for assisting informed voting, but to improve the quality of the judiciary.

Part of the enterprise includes defining what constitutes a well-qualified judge and how best to ensure a well-qualified judiciary. Identifying judicial qualities and creating measures that provide objective representations of those qualities are key. Equally important are the subjective views of those who have interactions with judges in their official capacity.

All official judicial performance evaluation programs recognize the importance of preserving the ability of judges to decide cases impartially and without outside influence. Performance evaluation programs are therefore designed not to address the substance of judicial decision making but to focus on the judge’s competence and freedom from bias.

**Historical Background**

Initially, in both England and our first states, judges were appointed to their positions. After appointment there was little if any evaluation of the quality of the judges’ service that was not based on the substance of their decisions in cases. In the mid-1800s, as a part of the general democratization of various governmental institutions, judicial selection by popular election became the new standard. Originally designed to take judicial selection and evaluation out of the hands of the few and place them in the hands of the people, the real impact was to shift judicial selection from the few elected officials to the hands of the few political party leaders. Party slates soon determined who would become judges and whether they would remain in office by controlling which names made it onto the judicial ballot. It was in response to these election abuses that the first bar associations formed, with a goal of reforming judicial elections.
Most judicial election reforms centered on legal changes to the ballots. Judges began appearing on nonpartisan ballots and judicial nominations were separated from those for other political offices. The organized bar also sought to extend its influence in the judicial selection process by instituting bar recommendations for judges. Bar surveys to evaluate sitting judges and candidates for judgeships were a natural evolution from these beginnings.

When even these efforts proved limited in their effectiveness, reform efforts were made to initiate a new form of judicial selection that sought to preserve a popular voice in judicial retention while providing a nonpolitical nominating process for a judge’s initial selection. Commonly known as “merit selection” or the “Missouri plan,” this method has several common components: nomination to an appointing authority after screening by an independent, nonpartisan, citizen-based body; the appointing authority is bound to pick from the list of nominees; and there is a subsequent nonpartisan, noncompetitive election in which judges run on their records. While it has often been observed that these selection plans still maintain some political elements, the emphasis of this system is to distance partisan politics from judicial selection. There is no guarantee that an individual selected under a merit selection system is more “meritorious” than another individual selected under strict appointive or elective systems, but the procedures employed are designed to remove partisan political concerns from directing less-than-qualified individuals to the bench.

Most recently election reforms for all judicial selection and retention systems have focused on campaign finance issues. Judges, even more than other public officials, must be independent from the influence of special interest groups. Whether at the selection phase, or when challenged at the time of facing retention in office, separating
campaign fundraising from the judicial candidate is a concern. While lawyers are natural constituents of judges, some judicial ethics codes have sought to disqualify judges from hearing cases where lawyers appear who have contributed more than a specified amount to their campaigns. Various campaign finance reforms are currently under consideration and are being addressed through limits on contributions, greater disclosure and reporting requirements, and limiting the time period for campaign fundraising and spending.

Judicial performance evaluation programs are often directed at providing unbiased objective information to the public to assist in assessing judges’ qualifications when deciding whether to support the judges’ retention in office. While the very first programs did evolve from this need on the part of the voters, they also evolved into programs that serve various other purposes. Judicial performance evaluation programs today also attempt to facilitate judges’ self-improvement, tailor judicial education programs, and, in some jurisdictions, determine appropriate case assignments.

Judicial Performance Evaluation Programs

As previously discussed, performance evaluation programs grew out of a need from the public to inform their judicial voting decisions. Bar associations—whether private or integrated, specialized or general—have historically done their own evaluations with accompanying recommendations to the electorate. Voters, however, have received those evaluations with some degree of skepticism, viewing bar associations as trade unions with specialized concerns that would influence their recommendations. The information provided to voters by bar associations was often limited as well. The recommendation could be simply a “yes” or “no,” with little or no supporting information. An objective credible assessment of judicial performance was lacking and
needed. One of the first of these programs was established by statute in Alaska. Alaska had created an independent judicial branch agency in its state constitution that was charged with nominating qualified applicants for judicial vacancies and conducting research to improve the courts. The Alaska Judicial Council thereby became the likely host for a program that would inform the public about the quality of the state’s judges at time of retention elections.

In 1985, the American Bar Association (ABA) published Guidelines for the Evaluation of Judicial Performance that initiated the idea of judicial performance evaluation with the primary purpose of improving the individual judge’s performance as a judge. The ABA’s goal was to encourage all jurisdictions to develop a formal judicial performance program that would “improve the performance of individual judges and the judiciary as a whole.” Self-improvement was identified as the primary goal, with secondary goals and uses that would include more effective assignment of judges, improved design of continuing judicial education programs, and, lastly, the retention or continuation of judges in office. Under the ABA guidelines, programs should be under the highest court for the jurisdiction and receive adequate funding to staff the various functions.

Perhaps the greatest achievement of the ABA guidelines was the articulation of qualities of judges and suggested measures for assessing how close judges are to achieving the highest manifestation of the qualities. While other evaluation programs—whether by bar associations, media organizations, or civic groups—have used disparate criteria, the ABA guidelines synthesize those historically used with additional desirable qualities and integrate them with the requirements of the ethical standards set out in the Code of Judicial Conduct. Criteria set out by the guidelines include integrity
(emphasizing freedom from bias), legal knowledge, effective communication, courtroom effectiveness, management skills, punctuality, service to the community and the profession, and working well with colleagues.

Logically, the next step is to determine how to acquire the information that will lead to an effective and accurate evaluation of the criteria. While the ABA guidelines do not suggest methodologies, the guidelines emphasize the need for scientifically valid mechanisms. Traditionally, and continuing today, surveys of various court users and employees are the most widely used and the most effective. In addition, several programs use personal interviews, random court file reviews, focus groups, and solicited and unsolicited comments. Sources for the information are most often the lawyers who appear before the judges, parties, witnesses, jurors, fellow judges, other court employees, and court-watching groups.

The varying uses of judicial performance evaluation data will affect the dissemination of the results. For example, programs that follow the ABA guidelines’ emphasis on self-improvement will emphasize confidentiality and the importance of confining the results to those who need to know them: the judge and those who will facilitate the judge’s improved performance. If developing training programs were a high-level purpose, at least the aggregate results would need to be conveyed to the judicial educators responsible for those programs. However, if the emphasis is on enhancing voter information to be used in judicial retention elections, the results need to be broadly distributed in a form useful to the electorate.

For a variety of reasons, largely political and practical, judicial performance evaluations for retention purposes have proved the most successful. While these programs also serve to inform the judges being evaluated of ways to improve their
performance, their chief aim is to inform the voting public. Promoters of these programs, while lauding the obvious attributes of providing useful information, also assert that by informing the public they are also enhancing the public’s confidence in the judiciary. Those programs that integrate court users’ views into their evaluations can assert that they are attentive to the public’s views of the courts and are responsive to them. With these purposes in mind, it will be helpful to look at four state judicial evaluation programs that have been held out as models in this arena.

Model Programs

Recent official state programs have been established to inform the public, giving the voters the information that they need to make informed decisions concerning those judges who are on the ballot for retention in office. Our four model programs all use some form of official state commission, composed, at least in part, by citizen members who contribute the viewpoint of the nonlegal observer. While emphasizing the public’s use of the information, all of the programs also do some interim evaluation of judges to address any concerns with the individual judges prior to their election review. In this way, the official retention evaluation programs can also incorporate a self-evaluation component.

Alaska’s Judicial Evaluation Program

Judicial performance evaluation in Alaska is administered by the same independent state agency that serves as that state’s judicial nominating commission and court research agency, the Alaska Judicial Council. Created by the state constitution to conduct research and assist in the judicial selection process, state statutes soon added the
requirement to evaluate judges who will be on the ballot for retention election and make its recommendations available to the voters. There are six members of the Alaska Judicial Council: three attorneys and three nonattorneys. The Chief Justice of the Alaska Supreme Court serves as ex officio chair.

Alaska’s judicial evaluation procedures have been noted to be among the most comprehensive in the country. In 2000, for example, the council sent written surveys to just under ten thousand Alaskans. The surveys were directed to a variety of sources, including attorneys, peace and probation officers, social workers, guardians ad litem, and court-appointed special advocate (CASA) volunteers, as well as jurors and court employees. In addition to the surveys, counsel questionnaires were sent to all attorneys of record for six separate cases before the judge, and at least half the cases must have been a case that went to trial before the judge. The questionnaires and the surveys seek to evaluate factors relating to the judge’s fairness, integrity, legal abilities, temperament, and administrative handling of the case.

The council also reviews other available records, including data relating to filed peremptory challenges (challenges for change of judge that do not require supporting reasons) and a review of any appellate reversals of the judge’s decisions. Public hearings are held in the months before the council recommendations are mandated to be published. Occasionally, judges may be invited to be interviewed by the council to explore problem areas.

Dissemination of the information to the public is quite extensive. The survey results and accompanying recommendations are included in the official voters’ pamphlet that is mailed to every registered voter in the state. In addition, the council recently expanded its Web site to include extensive public information about each of the judges.
The council also advertised its evaluations in most state newspapers, sent out press releases and public service announcements, paid for radio advertising, and made numerous appearances in the media and the community.

While focused largely on retention evaluation, the judicial performance evaluation efforts also assisted the judges by highlighting areas in which they should seek future training. If problem areas are noted, judges can make individual effort to improve temperament and avoid creating the appearance of bias. The results, as a group, also are used to highlight areas of needed judicial training.

Arizona’s Judicial Performance Review Program

The Commission on Judicial Performance Review administers the Judicial Performance Review Program in Arizona. Created by the Arizona Supreme Court in 1993, the commission is responsible for developing standards and rules of procedure for evaluation. The commission consists of thirty members (eighteen public, six attorneys, and six judges) and is charged with evaluating all appellate judges and the superior court judges in counties with populations over 250,000—currently, Maricopa and Pima counties.

The purpose of judicial performance review in Arizona is fourfold:

- to assist voters in evaluating the performance of judges standing for retention election,
- to facilitate the self-improvement of all judges subject to retention election,
- to promote appropriate judicial assignments, and
- to identify needed judicial education and training programs.
Judges are reviewed at mid-term and at the end of the term just before the general election. In 2000, 108 judges were evaluated. Over a six-month period ending March 21, 2000, court staff distributed 31,999 survey forms to jurors, litigants, witnesses, attorneys, and court staff. Respondents answered questions about legal ability, integrity, communications skills, judicial temperament, administrative performance, and settlement activities. The surveys were returned to an independent data center that compiled the data and generated a report on each judge. In addition, judges completed a self-evaluation to rate their own performance. The commission also held public hearings and received written comments from the public.

Unique to the Arizona program, the commission appoints a “conference team” to meet with the judge to discuss the judge’s strengths, identify areas needing improvement, set goals for the judge, and prepare a self-improvement plan. The conference team consists of one public, one attorney, and one judge member.

Results of the evaluations were published in the voter information pamphlet and on the Arizona Courts homepage.

*Colorado’s Judicial Performance Program*

By constitutional amendment in 1966, Colorado was among the first states to adopt a merit selection system for nomination, appointment, and retention of judges in the state court system. To advance the ideal of the best possible judiciary, commissions on judicial performance were created in 1988 by the Colorado General Assembly for the purpose of providing voters with fair, responsible, and constructive evaluations of trial and appellate justices and judges seeking retention. The results of the evaluations also
provide the judges with information that can be used to improve their professional skills as judicial officers.

The State Commission on Judicial Performance promulgates rules for the review of judges and sets policy for the twenty-two district commissions throughout the state. In addition, the state commission evaluates the appellate judges. The district commissions evaluate the performance of judges within the judicial district. The commissions are composed of ten volunteer members, four attorneys, and six nonattorneys who are appointed by the chief justice, governor, president of the senate and speaker of the house. Justices and judges actively performing judicial duties may not be appointed to serve on the state or district commissions.

Judges stand for retention at the end of their term. To improve the quality of the information disseminated to the public, commission members, and the judiciary, extensive enhancements were made to the evaluation process in 2000. The state commission contracted with an independent market research firm to survey the ninety-three justices and judges standing for retention. The independent firm

- randomly selected two hundred cases heard by each judge;
- verified the addresses of the respondents (37,000 names and addresses extracted from court files);
- designed and produced questionnaires;
- mailed questionnaires to over 32,000 verified addresses;
- sent up to three follow-up mailings;
- performed data input from returned questionnaires;
- performed statistical analysis; and
- drafted, produced, and distributed a report to commissions and judges, which included comparing the judge’s performance against the performance of other judges evaluated in the district and statewide.

The Colorado program includes some of the most extensive data gathering in the country. Questionnaires were mailed to attorneys (including district attorneys and public
defenders), jurors, litigants, guardians ad litem, CASA volunteers, court personnel, probation officers, social services caseworkers, crime victims, law enforcement personnel, and professional sureties.

Respondents assessed judges on integrity, impartiality, communication skills, judicial temperament, diligence and knowledge of the law.

The trial judges’ evaluations are the result of a report generated from survey questionnaires, a self-evaluation, an interview with the judge, and caseload information. The evaluation may also include oral interviews with other persons who have appeared before the judge on a regular basis, written documentation from interested parties, public hearings, and onsite visits. The evaluations of the appellate judges are the product of survey results from attorneys and court employees, a self-evaluation, an interview with the state commission, and a review by the state commission of two opinions authored by the justice or judge. In addition, the trial judges completed a survey of appellate judges.

Evaluations for judges include a narrative profile with a recommendation of “retain, “do not retain,” or “no opinion.” A “no opinion” recommendation can only be made when the commission concludes that results are not sufficiently clear to make a firm recommendation, and it must be accompanied by a detailed explanation.

Public awareness and distribution of information is critical to the program’s success. Each commission selected a public information liaison who contacted local newspapers and radio stations, spoke to local public interest groups, and responded to local media inquiries. The narrative profiles and recommendations were published in the legislative ballot analysis booklet as well as newspapers throughout the state. In addition, the narrative profiles and recommendations (and photographs, if provided) were available at the Colorado Courts homepage and the Colorado Bar Association homepage. Links
By providing judges with an opportunity to reflect on their performance and improve their judicial skills as judicial officers, the information learned through this evaluation process provides a valuable feedback mechanism to the judges and the public they serve.

*Utah’s Judicial Performance Evaluation Program*

The Judicial Council governs the Judicial Performance Program in Utah. Under the Utah Constitution, the council establishes policy for the judicial branch of government and is responsible for promulgating rules and standards for the judicial performance evaluation program. The fourteen-member council is composed of thirteen justices and judges and a member of the Utah State Bar. Pursuant to rule, the Standing Committee on Judicial Performance Evaluation supervises the day-to-day management of the program.

The purpose of the program is to provide each judge with information for his or her self-improvement and to provide the public with information upon which to make knowledgeable decisions about retention elections.

Judges stand for retention at the end of their term. However, all judges in Utah are evaluated every two years. In 2000, the council evaluated fifty-three judicial officers. An independent surveyor mailed 7,193 surveys to attorneys asking input on the judge’s integrity, knowledge and understanding of the law, ability to communicate, preparation, attentiveness, dignity and control over the proceedings, skills as a manager, and punctuality. Jurors were polled separately through exit surveys. The evaluation process
may also include onsite visits, caseload management data analysis, and personal interviews with the judge. As a result of the evaluations, judges are “certified” by the council whether they are qualified to stand for retention election.

Unique to the Utah program, a judge may exclude an attorney respondent by certifying that one or more of the following conditions exist: the judge has referred the lawyer to the Utah bar for discipline, has found the lawyer in contempt of court, has sanctioned the lawyer pursuant to rules of procedure, has presided in a civil or criminal proceeding to which the lawyer is a party, or has been the subject of an affidavit of bias or prejudice under the Rules of Civil or Criminal Procedure filed by the attorney.

Results of the individual evaluations were published in the voter information pamphlet and on the governor’s Web site.

Success of the Model Programs

A recent study of these programs by the American Judicature Society showed that voters who received and were aware of the evaluations were more likely to vote in the judicial races and make the judiciary more accountable to the voters. Judges in these states also viewed the evaluative reports as providing useful feedback but do not influence the judges’ substantive decision making or lead to follow-up educational efforts. This 1998 study, Judicial Retention Evaluation Programs in Four States: A Report with Recommendations, also included concrete recommendations for improving these models and for those seeking to emulate the programs in other states. The recommendations advise states to establish clear rules, provide adequate funding, develop clear and measurable standards, ensure confidentiality to promote candid responses, incorporate self-improvement components, require judges to review results before they
are public, effectively disseminate results to the public, incorporate results in designing
judicial education programs, and include the public in the process.

Part of the difficulty in assessing the success of the programs lies in the difficulty
of assessing components such as voter confidence in the judiciary, improvement in the
quality of judicial activities after evaluation, or increasing the effectiveness of judicial
training programs. The most obvious success is in the acquisition and dissemination of
information. Participants in those states without official programs may often question the
objectivity of the information or doubt its value. By institutionalizing the evaluation
process and incorporating more than the legal community in it, the public and the judges
can evaluate the evaluative information without any presumptions of bias.

The Future of Judicial Evaluation

As special interest groups increase political pressure on the judiciary for
substantive court decisions, the need for objective credible evaluation of judges also
increases. Some special interest groups are well funded and target individual judges not
on the basis of any accepted criteria but because, in a given case or set of cases, the
judges have decided outcomes according to the law as they understand it but which do
not correspond to the interests of a special group. At times these groups are industry
based, at others ideological or religious. Fundamental concepts of the importance of
separate balanced branches of government demand that judges exhibit courage in their
decision making when faced with outside pressures. While accountability of judges to the
public through retention elections is a fundamental element of most of our judicial
selection systems, accountability does not equate with responsiveness. The judiciary, in
fact, is the one branch of government that frequently is called upon to determine whether
the rule of law overrides majority desires. Ideally, effective judicial performance mechanisms can address these concerns.

If the judicial performance evaluation is credible and respected, that credibility may effectively counter attacks on judges that are not founded on established judicial qualities. One component of this credibility is a valid measure of the programs’ accuracy and effectiveness. Judges are also increasingly being asked to take on social service roles through specialized courts and outside community activities. These activities, while necessary, may also confuse the public’s perception of judges as impartial arbiters without policymaking roles. So too, as judges are younger and more reflective of the general population by including more women and minorities, public biases and prejudices may enter into the voting process. These changes in the judiciary require a countervailing credible evaluation that emphasizes the legitimate criteria for evaluating judicial performance and accentuate the goal for every evaluation program: an impartial qualified judiciary.

Future programs may also reflect the new roles and makeup of the judiciary. Evaluation programs to enhance their effectiveness will need to consider the role of the judge in the community, include minorities and women in the evaluation process, and address directly the attacks by special interests. A strong and responsive judicial performance evaluation program could help ensure what some have referred to as “judicial independence” but what is more accurately described as the freedom of judges to decide cases correctly—according to the law—without fear of public reprisal.

Selected Bibliography


