JUDICIAL RETENTION EVALUATION PROGRAMS IN FOUR STATES
A Report with Recommendations

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American Judicature Society

SJII State Justice Institute
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Founded in 1913, the American Judicature Society is an independent, nonprofit organization supported by a national membership of judges, lawyers and other members of the public. Through research, educational programs, and publications, AJS addresses concerns related to ethics in the courts, judicial selection, the jury, court administration, and public understanding of the justice system.
With financial support from the State Justice Institute (Award #SJI-96-12A-C-149), the American Judicature Society undertook a project to assess the impact of court-sponsored judicial performance evaluation programs that serve two purposes: improving judicial performance and informing voters in retention elections. Only four states, Alaska, Arizona, Colorado and Utah, had such programs in place for the 1996 judicial retention elections, the period we studied. Experience with retention evaluations varies from two to twenty years. Alaska first evaluated judges standing for retention in 1976, Arizona in 1994, Colorado in 1990, and Utah in 1990.

Performance evaluations as a response to the absence of information in judicial retention elections

All four states initially select their judges under a merit plan, whereby a nominating commission recruits, investigates, interviews and evaluates applicants for judgeships, and recommends a short list of the best-qualified candidates to the appointing authority. In each of the four states we studied the governor is the appointing authority. A traditional component of merit plans is retention elections, in which appointed judges seeking subsequent terms stand in uncontested, nonpartisan elections. In a retention election, voters are asked to respond yes or no to the question, “Shall Judge X be retained in office?” A judge who receives a simple majority of votes cast is retained. One rationale for the retention-election component of merit plans is to provide some measure of public accountability.

However, retention elections share with all judicial elections the problems of low visibility and lack of voter knowledge about candidates. To address these problems, some merit-plan states have adopted judicial retention evaluation programs. These programs are designed to collect systematic information about judges’ on-the-bench performance, using such criteria as legal, administrative and communication skills, integrity, impartiality, temperament/demeanor, punctuality, and compliance with continuing judicial education requirements. The evaluation commissions analyze this information, and then publicly disseminate the evaluation results and recommendations to voters as widely as resources permit.

In addition, as part of the performance-improvement component of the process, the evaluations are intended to provide feedback to judges about their relative strengths and areas in need of improvement.

How performance evaluation programs operate

All four programs are based on a common model. Each commission conducts surveys of court users (attorneys, and typically police officers, jurors, litigants, social workers, etc.) to measure each judge’s performance on a list of criteria or performance standards. Each commission also may meet with the judge under review, collect nonsurvey information such as a self-evaluation by the reviewed judge, caseload statistics, disciplinary sanctions, credit records, etc. Two states, Alaska and Arizona, invite public comment and hold public hearings. After analyzing information from survey and nonsurvey sources, the commission members author a summary of the evaluation findings and issue either a prescriptive or descriptive finding on each evaluated judges’ performance in office. For example, the Alaska and Colorado com-
missions issue a recommendation to retain or not retain each reviewed judge; Utah reports whether or not the judge is certified for retention; and Arizona informs the voters that the judge meets or exceeds or fails to meet performance standards. Commissions disseminate the information to voters in a variety of ways, including, for example, mailing the evaluation results to each household (Alaska), inserting the voter information pamphlet in newspapers (Utah); distributing pamphlets at libraries, banks, shopping centers, etc. (Arizona and Colorado), purchasing newspaper ads and posting evaluation results on Web pages.

All four states conduct midterm evaluations; these results are confidential and strictly for the judge’s guidance in improving his or her performance.

**Summary of the assessment of judicial performance evaluation programs**

The American Judicature Society (AJS) assessed the extent to which the Alaska, Arizona, Colorado and Utah retention evaluation programs are reaching their stated goals of informing voters and providing feedback to judges. The focus of our analysis is in making comparisons between programs. While these programs are based on a similar model, they also differ in some respects, and this permits us to isolate the strengths and weaknesses of specific programs. Finally, based on our assessment and suggestions from members of the project advisory committee, we conclude with recommendations for a successful performance evaluation program.

*Data Collection.* The data we use come primarily from three surveys that AJS commissioned or conducted as part of this study.

AJS commissioned an exit survey of nonrandomly selected voters in the largest locality in Alaska, Arizona, Colorado and Utah, measuring respondents’ attitudes toward the court system, their participation in judicial retention elections, and the extent of their use of performance evaluation reports. This nonrandom poll netted 1554 respondents, of whom about one-third reported receiving the evaluation reports or information based on the reports.

By design the voter exit survey sampling was not random. Therefore, our voter respondents are not representative of voters in each locality, and our analysis of the exit survey is strictly exploratory. These voters’ statements are valuable to this assessment, however, if only because they are the views of some citizens who are neither the evaluation commissioners nor evaluated judges, but they are not representative of all voters in each locality. We partly remedy this shortcoming through a study of election outcomes data in Alaska retention elections, data that reflect the behavior of the population of voters in Alaska judicial retention elections.

AJS mailed survey questionnaires to all judges in the four states who were evaluated for retention in 1996; 70 percent of the judges responded. AJS also surveyed all commissioners who evaluated the judges standing for retention in 1996; 62 percent of them responded. We asked judges their attitudes toward, and satisfaction with, the evaluation process, and the extent to which they used the evaluation information to improve their own performance on the bench. We solicited similar information from commissioners so that we could make comparisons in the perceptions of both judges and commissioners. We also asked commis-
sioners questions about, among other things, internal relationships between commissioners, the most useful evaluative criteria, and which respondent groups provide the most helpful information.

In addition, we asked each commission to provide a large quantity of qualitative material in the form of internal memoranda and public documents and reports that, among other things, gives us details about each commission’s structure and procedures. We use this qualitative information to interpret the patterns of responses in our three surveys.

**Voter exit survey**

In order for these commissions to reach their goal of informing voters, voters must have access to the evaluation information, and they must find the information interpretable and persuasive.

*Commission visibility and respondents’ access to reports.* While our sampling procedure does not permit us to say how visible these commissions are to all voters, we can report that the Phoenix-area respondents were least familiar with their state evaluation commission (30.7 percent report familiarity with the commission), and Anchorage respondents were most familiar (58 percent). This difference in responses is not surprising since the Arizona Commission on Judicial Performance Review has only been in operation since the 1994 retention-election cycle, while the Alaska Judicial Council has been conducting evaluations of judges for voters since 1976. In the two other localities, 54.6 percent of Denver respondents and 49.6 percent of Salt Lake City respondents report familiarity with the commission.

Roughly 40 percent of Anchorage and Salt Lake City respondents say they obtained a copy of the evaluation report. Fewer voter respondents in the Phoenix area (15.2 percent) and Denver (24.4 percent) report acquiring the report. In a related finding, Arizona and Colorado judges and commissioners also believe that voters in their states do not get the evaluation information. The most salient difference among the commissions is that only Alaska and Utah disseminated the voter pamphlets directly to households in 1996.

*Respondents’ use of reports.* Among those respondents who were familiar with the evaluation reports, most report that the evaluation information either determined or assisted their vote choice in retention elections. The most frequent response was that the evaluation information assisted but did not determine their vote choice (from a low of 39.3 percent of Phoenix-area respondents to a high of 62.5 percent of Denver respondents). A modest proportion of those respondents who received a report say that their choices were based solely on the evaluation information, with the highest percentage among the Phoenix-area respondents (26.8 percent) and the lowest in Denver (13.8 percent).

Of the respondents who said they received the evaluation information, 59.8 percent in Anchorage, 60.0 percent in Phoenix, 81.6 percent in Denver, and 72.7 percent in Salt Lake City say the information influenced their vote choices in judicial retention elections. These percentages are very likely to overstate the true influence of the reports on voters’ decision making. While the Denver respondents are the most likely of the four groups to find the information influential, they also are the most likely to find the evaluation report difficult to
use. This may be a result of the format of the Colorado report to voters, which provides rich information about each judge but does so in a newspaper format with small type.

Many of the respondents who said they were familiar with the report say that the evaluation reports make them more likely to vote in judicial elections (64.6 percent in Anchorage; 66.1 percent in the Phoenix area; 72.0 percent in Denver and 68.1 percent in Salt Lake City), and that the evaluation reports make judges more accountable to voters (78.0 percent in Anchorage, 64.3 percent in Phoenix, 76.0 percent in Denver and 74.2 percent in Salt Lake City). These results are quite high, but they should be viewed with considerable caution. These respondents include only those who are familiar with the retention evaluation reports, and they are not representative of voters in each locality. It is likely that these results overstate the true feelings of the voting population. These findings would be quite strong, though, if they were replicated using a random selection design.

Statistical analysis of Alaska election outcomes. The sampling procedure in our exit survey of voters does not permit us to assess whether the general population of voters in each locality uses the evaluation information to differentiate between judges in their voting decisions. To partly remedy this shortcoming in our exit survey, we use Alaska election outcome data over judicial retention elections from 1976-96 to see if there is any statistical evidence that Alaska voters find the commission evaluations persuasive. Alaska is unique among the four states studied in that the retention recommendation is accompanied by a numeric rating. Each judge is rated on a 0-5 scale, where a rating of 3 is labeled acceptable in the voter information pamphlet.

Our analysis shows that Alaska voters take the ratings information into account. The higher the judge's rating, the higher his or her percent affirmative vote, on average. In addition, supplemental analysis of these data shows that Alaska voters (1) appear to find the bar ratings most persuasive, (2) tend to rely more heavily on the evaluation information for district court judges (limited jurisdiction) than for superior court judges (general jurisdiction), and (3) tend to give greater weight to negative evaluations than to positive evaluations. These results cannot be generalized to the other states in our study, however.

Judges' survey

In addition to informing voters, a primary goal of performance evaluation commissions is to provide judges with useful feedback. As noted above, we asked judges about the value of the evaluation findings and their attitudes toward the process. Our very high response rate from judges (70 percent) gives us confidence in the results. Their responses are summarized below.

Evaluations as feedback. A very high percentage of judges in all four states feel that the reports provide useful feedback on their performance, from a low of 73.5 percent in Utah to a high of 85.4 percent in Arizona. We have little evidence, however, for the specific ways the evaluation information influences judicial performance, since few judges report that the evaluations make them change their sentencing practices, affect the frequency of their public appearances, change their behavior toward the surveyed groups, or prompt them to take additional continuing judicial education courses. We conducted a follow-up survey of state judi-
cial educators that found that few continuing judicial education courses are based on the performance results.

Other highlights of the judges’ responses are:

- A majority of judges in Alaska, Arizona, and Colorado agree that the evaluation reports accurately reflect their job performance, and in Utah a near majority agrees;
- A significant majority in each state agree that appropriate criteria are used to evaluate their performance;
- Nearly all judges in each state feel 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;
- Majorities of judges in each state say that the evaluation process makes them appropriately accountable for their job performance.

*Fairness of the process.* Outside of Arizona, judges express dissatisfaction with the fairness of the available appeals process if they disagree with the commission’s ultimate findings; a majority (but only a bare majority) of Arizona judges are comfortable with their available appeals process. It may be that Arizona’s emphasis on involving the judge in the evaluation process makes appeals less important. The Arizona and Colorado commissions are required to interview all evaluated judges as part of the evaluation process. Consequently, judges in Arizona (60%) and Colorado (61%) are more likely than those in Alaska (42.9 percent) and Utah (34.4 percent) to feel that they have an adequate opportunity to respond to the commission findings before they are made public than judges in the other states.

With the exception of Utah judges, judges feel that the evaluations accurately reflect their performance and that the process is fair and preserves judicial independence. A follow-up survey of some Utah judges found that their expressed dissatisfaction is partly from the Utah Judicial Council’s (UJC) apparent use of case processing as a standard to meet rather than as contextual information to help interpret the court user survey results. Furthermore, interviewed judges were particularly uncomfortable with the UJC’s exclusive reliance on the attorney survey for its evaluation. The Utah commission is clearly aware of this problem; a majority of Utah commissioners in our survey state that the UJC does not have sufficient data to make an informed judgement about judges’ performance, and the UJC is implementing a juror survey for the 1998 evaluation cycle.

*Responding to interest group attacks.* Most judges in Alaska (77.8 percent) and Colorado (59.4 percent) feel that the evaluation information helps to counterbalance narrow political attacks on the judiciary; smaller percentages of judges in Arizona and Utah agree (45.0 and 41.2 percent respectively). Nearly half of the 22 judges who reported experiencing such a campaign used the report in responding.
Commissioners’ survey

We asked the commissioners questions that paralleled the questions on the judges’ survey so that we could compare judge and commissioner perspectives on the evaluation process. We also asked commissioners some questions on internal commission interactions. Here, too, a high response rate (62 percent) gives us confidence in the results.

Commissioners appear overly optimistic on whether the performance evaluations prompt judges to take additional continuing judicial education courses; this is contradicted by judges, who report that their own professional development needs are the determining factor. A very large majority of commissioners in all states feel that judges have an adequate opportunity to respond to evaluation findings before they are made public and that judges have access to a fair appeals process. Judges in all states except Arizona disagree. The Arizona commission places particular emphasis on involving all evaluated judges in the review process, and this may make appeals less important or necessary. Many of the Utah commissioners report that their commission does not have sufficient independence to objectively evaluate judges, and this may reflect the persistent introduction of legislation in the Utah legislature to change or abolish the evaluation program.

As a group, commissioner respondents identified the following groups of court users as suppliers of useful information (in descending order): Lawyers, court personnel and law enforcement officers. The least useful sources are, again in descending order, jurors, litigants and witnesses.

Criteria commissioners identify as most helpful in assessing judicial performance are impartiality, integrity, knowledge of the law and procedures, and appropriate judicial temperament and demeanor. Least useful criteria are administrative skills, service to the legal profession and to the community, punctuality, effectiveness in working with other judges and court personnel and compliance with continuing education requirements.

Judges’ and commissioners’ views about performance evaluations

We asked judges and commissioners open-ended questions about the benefits of and problems with the evaluation process. For the most part, judges’ comments fall under two main headings—the benefits to them and the benefits to the public. A main benefit to them is receiving feedback about their performance, “...the only way we get to see ourselves as others see us,” as one judge said. Some judges listed political benefits, such as preventing the legislature from “enacting a worse process,” and keeping them out of politics. Nearly as many judges listed informing the public as a main benefit.

Commissioners’ responses on the benefits of the process mirror judges’ in some respects. For example, commissioners agree that feedback on judicial performance, informing voters and minimizing the influence of partisan politics on the process are clear benefits. A few commissioners added increasing citizen confidence in the judicial process and providing a foundation for improving the judicial system as additional benefits.
Judges identified the following as problems with the evaluation process: concerns about evaluation methodology, inadequate funding of the evaluation program and inadequate dissemination of evaluation results to the public.

Commissioners cited methodological problems, inadequate funding, poor dissemination of the evaluation findings, and an apathetic and/or uninformed public.

Based on the results of this study and suggestions of members of the project advisory committee, the following recommendations were developed:

**Recommendations**

1. **Establish clear rules and procedures for the performance evaluation process.** Important decisions need to be made before the process begins. They include:
   - Identifying program goals (i.e., improve judicial performance, inform voters, help design continuing judicial education programs, improve public trust and confidence in the courts, etc.);
   - Selecting appropriate groups of survey respondents; in addition to lawyers, others with first-hand knowledge of the judges’ performance also should be surveyed;
   - Choosing a format for reporting results to judges and the public (e.g., standardized format? statistical survey results only? narrative summary only? narrative and statistical results? give a prescriptive recommendation such as retain or do not retain as Alaska and Colorado do? present descriptive findings such as meets or fails to meet performance standards as Arizona does?);
   - Developing a dissemination plan to ensure that as many members of the public as possible receive the final report and recommendations (see Recommendation 8 below);
   - Identifying measurable criteria (see Recommendation 3 below);
   - Drafting detailed procedural rules to cover, for example, a process whereby judges can discuss evaluation results before they are made public (see Recommendation 7 below), how anonymous comments will be handled (i.e., accepted, used or not used by commissioners in formulating a retention finding, relayed to the judge, etc.), establishing confidentiality safeguards (see Recommendation 5 below); defining circumstances under which commissioners must recuse themselves, etc.

2. **Provide adequate funding.** The lack of adequate funding is a recurrent theme in both judge and commissioner respondents’ comments, and improved funding would address many of their concerns. For example, adequate funding would permit the following improvements in the process:
   - Allow for more valid and reliable surveying techniques; this could include, for example, surveying a sufficient number of groups of people (and a significant number of individuals within those groups) with first-hand knowledge of the reviewed judges (e.g., lawyers, litigants, court employees, peace and probation officers, jurors, court employees, etc.). A number of commissioners noted that, in their opinion, not enough laypeople are surveyed (see also Recommendation 4 below);
   - Permit surveying sufficient numbers of individuals within those groups and allow follow-up mailings to improve the response rate; the goal is to give evaluation commissioners as much information as possible on which to base their evaluation reports;
 Permit the evaluation commission members and staff to explore and implement improvements to the process;
 Reimburse evaluation commissioners for per diem expenses such as meals and mileage;
 Publicize the performance standards and commission operating rules for the benefit of judges and the public.

3. **Develop clear, measurable performance standards.** This is critical, because the survey questions must be valid measures of the standards. An observable, behaviorally based criterion such as “Treats attorneys, witnesses and litigants courteously,” is easier to measure than a general standard of “appropriate judicial demeanor.” It also is important to review the “whole judge” in the context of his or her work environment. A criterion of “Meets case processing time standards,” for example, does not take into account the volume and nature of the cases a judge is handling. Professor James Lynch, who assessed the survey procedures of the Arizona Commission on Judicial Performance Review, recommends that evaluators analyze survey responses to eliminate any questions that yield redundant information about a judge’s performance, and provide a sufficient range of response options to elicit more differentiated responses. Differentiated responses help overcome, for example, the “halo effect” in jury surveys, where jurors almost always rate a judge highly.

4. **When there is a sufficiently large pool of respondents, adopt standard random sampling and appropriate follow-up procedures when surveying court user groups.** This is closely related to Recommendations 2 and 3 above. It is important to seek the advice of an expert in survey research and data analysis when designing sampling techniques, defining evaluation criteria and developing survey questions. Random sampling permits use of statistical tests of a judge’s relative performance. Rigorous follow up increases the response rate for each judge and helps ensure that survey results are not biased. A properly designed sampling procedure will identify the minimum number of responses necessary to provide a high level of confidence in the results. If circumstances do not allow for random sampling, for example when there is a small respondent pool, commissions should use a data center and statistician experienced in the use of nonrandom surveys. With smaller respondent pools, it is critical to follow up to get the highest possible response rate.

5. **Ensure confidentiality in surveys and in commission deliberations to promote candid responses by surveyed individuals and frank discussion among commissioners.** According to some respondents’ comments, this is especially important for attorney respondents in small jurisdictions and for court personnel. Since all respondents can be sources of specific comments that will help facilitate a judge’s self-improvement efforts, safeguarding confidentiality is critical. Those who design the performance evaluation must make every effort to safeguard respondents’ confidentiality by, for example, setting up a survey response-monitoring that effectively separates the respondent’s questionnaire from the mailing list.

Every effort also must be made to ensure confidentiality of commission deliberations so that commissioners can frankly discuss evaluation results and their proposed retention recommendation. This will enhance judges’ confidence in the process.
6. **Establish strong self-improvement components of the performance evaluation process.** This can be accomplished by, for example, conducting midterm evaluations to give judges early notice of any areas in need of improvement before the retention evaluation; permitting judges to evaluate themselves for self-improvement purposes; using conference teams to discuss evaluation results with judges; and provide judges with narrative comments from survey respondents if it will not impinge on respondents' anonymity. The ultimate goal is to provide very specific feedback to judges about their strengths and weaknesses.

7. **Mandate a procedure for judges to receive and respond to evaluation results before they are made public.** This is a sensitive and important aspect of due process for reviewed judges. Even though each of the four states studied permits it, only Colorado mandates interviews with reviewed judges to discuss evaluation results, and in Arizona conference teams meet with all reviewed judges. The performance evaluation programs should require that reviewed judges have an opportunity to meet with the full evaluation commission, or a subcommittee representing the commission's composition (i.e., lawyer, layperson, judge), to respond to the findings, even if the results are positive, and especially if the results are negative.

8. **Establish an effective mechanism for disseminating evaluation reports to the public.** This also has funding implications, but deserves a separate recommendation. Since many voter respondents who reported getting the evaluation report received it at home, the most effective dissemination method may be direct mailing of the reports to households of registered voters. (Of course, there are other ways for someone to receive a report “at home,” e.g., delivered as an insert with a daily newspaper). Some states have put evaluation results on their website as a channel to reach the public, and other innovations should be explored.

9. **Establish a mechanism to incorporate evaluation results in designing judicial education programs.** This is closely related to Recommendation 6. If areas of weakness appear in the evaluation results, it will be helpful for the judge to have access to educational programs or special training to improve his or her performance. One mechanism might be a committee composed of judicial education staff and advisory board members and performance evaluation staff and several commissioners to develop a way to convey useful information about continuing education needs. The form in which evaluation results are conveyed to judicial education staff also needs to be defined. In Utah, for example, evaluation commission staff provide “group data” that gives the percentage of judges who score less than satisfactorily in a given area. Judicial educators said they need more specificity about educational needs identified by evaluation committees, but many also noted they draw on other sources for judicial education needs.

10. **Establish linkages with print media.** A significant number of respondent voters reported they received information about performance evaluation results from newspaper stories. In addition to being used as an alternative to direct mailing of reports to registered voters, media coverage is a supplementary medium to convey the information. However, unless editorial boards and reporters understand the purpose and goals of the process, the performance standards used and commission procedures, articles and editorials may focus on “report card” stories about individual judges. (See Recommendation 8
above.) Therefore, it is important that ongoing relationships with the print media in particular be established and maintained.

11. **Leave the process open to amendment.** Judicial retention evaluation programs are evolving entities. Evaluation programs have a history of change—in groups surveyed, in procedural rules, in the form of the final report that goes to the public, in their dissemination plan, etc. It is important that the state supreme court, judicial council or other supervising body be able to make changes expeditiously as experience indicates.

12. **Establish training programs for all evaluation commissioners.** Such training should include information about the purpose and goals of the evaluation process; explanation of the evaluative criteria; a thorough review and explanation of the commission’s operating rules, including confidentiality requirements, conflicts of interest, voting, etc.; and courtroom observations (by lawyers, too; a lawyer may be a commercial litigator or a prosecutor, and not be aware of the working environment of judges in, for example, domestic relations, traffic or other high-volume courts). The value of all commissioners’ participation—lawyer, layperson and judge—should be explained and emphasized.

13. **Involve the public in and educate them about the process.** Most retention evaluation programs involve laypeople as commissioners; most of them involve laypersons as survey respondents. Some states, such as Alaska and Arizona, also hold hearings to allow members of the public to comment on judges who will stand for retention. The print media in particular can help educate the public about the process itself and the results of performance evaluations (see Recommendation 10). While judicial performance evaluation commissions probably cannot undertake general education programs for the public given their constraints on time and funding, an effort should be made to somehow explain the role of the judge, the personal and professional qualifications judges should possess, and the need for them to be independent decision makers.