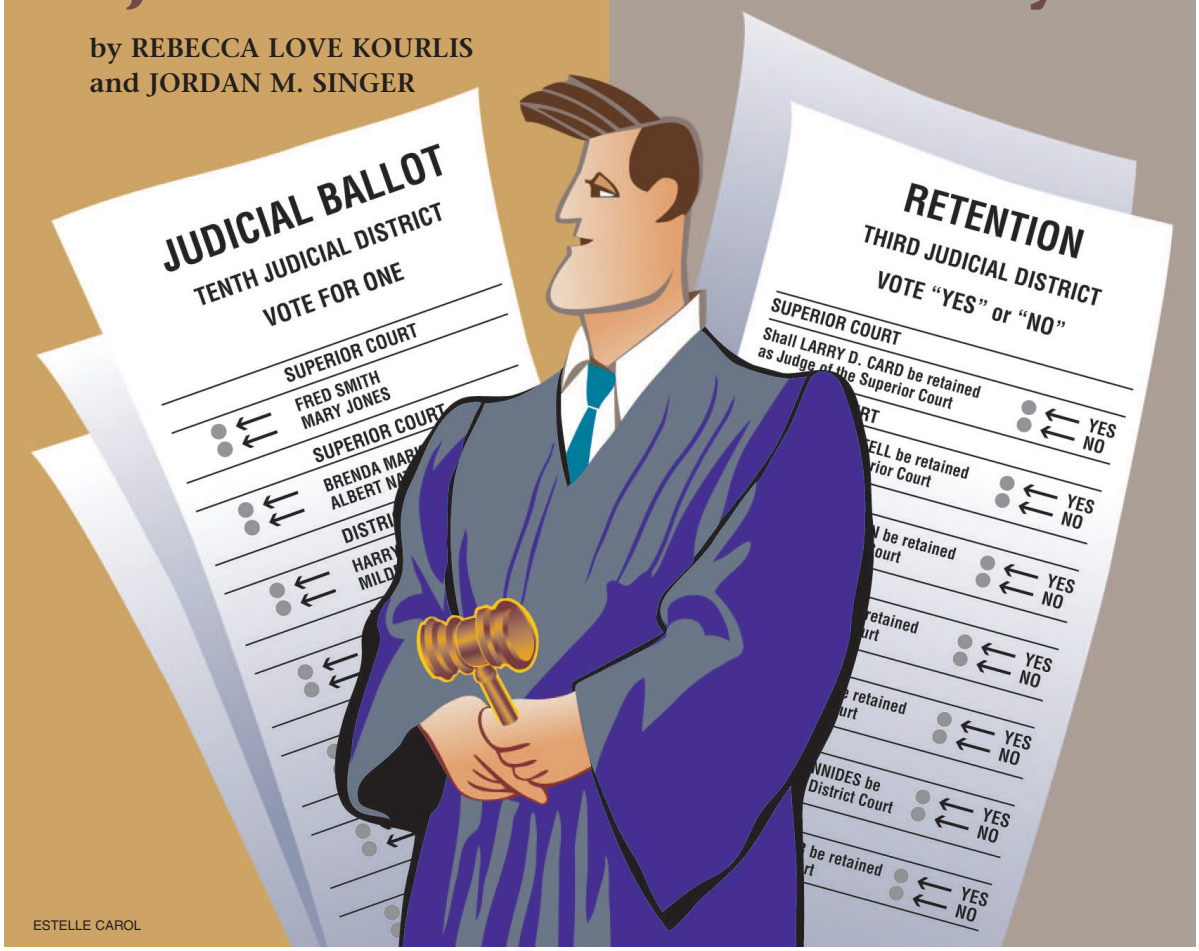
Using judicial performance evaluations to promote judicial accountability

by REBECCA LOVE KOURLIS
and JORDAN M. SINGER



ESTELLE CAROL

In November 2006, voters in several states faced ballot measures that would have crippled the ability of state courts to do the work we expect of them. The "JAIL 4 Judges" referendum would have subjected South Dakota's judges to civil and criminal penalties for deciding cases in ways that offended a small minority of citizens. A proposal in Montana threatened judges with special recall elections if they made unpopular decisions. In Colorado, a ballot initiative sought to penalize judicial experience by imposing retroactive term limits for appellate judges, a measure that would have ousted nearly half the sitting appellate bench. And Oregon voters considered whether to elect their appellate judges by geographic district, apparently intending to tie judicial candidates more closely to the values of a particular region of the state.

Each of these initiatives was couched as an effort to hold judges more accountable, "accountability" being defined (implicitly or explicitly) by their sponsors as adherence to the will of the majority. The chief architect of the Colorado initiative, for example, argued that term limits would make the judiciary as a whole "more responsive to the sovereign will of the people." Similarly, in Montana, proponents argued that recall of individual judges would "be a powerful tool for judicial accountability and democratic oversight of a branch of government that for too long has been too removed from the will of the people."

Although none of these initiatives was ultimately successful, those who want an effective, impartial judiciary can ill-afford to be complacent about the conditions that fueled their placement on the ballot. The public is increasingly being asked to hold judges accountable for the outcomes of specific cases, rather than the appropriateness of the process used to reach those outcomes. This

The authors would like to thank Institute for the Advancement of the American Legal System board members Russell Wheeler of the Governance Institute and Brookings Institution, and Lynn Mather of the Baldy Center for Law and Social Policy at the University of Buffalo, for their invaluable assistance in preparing this article.

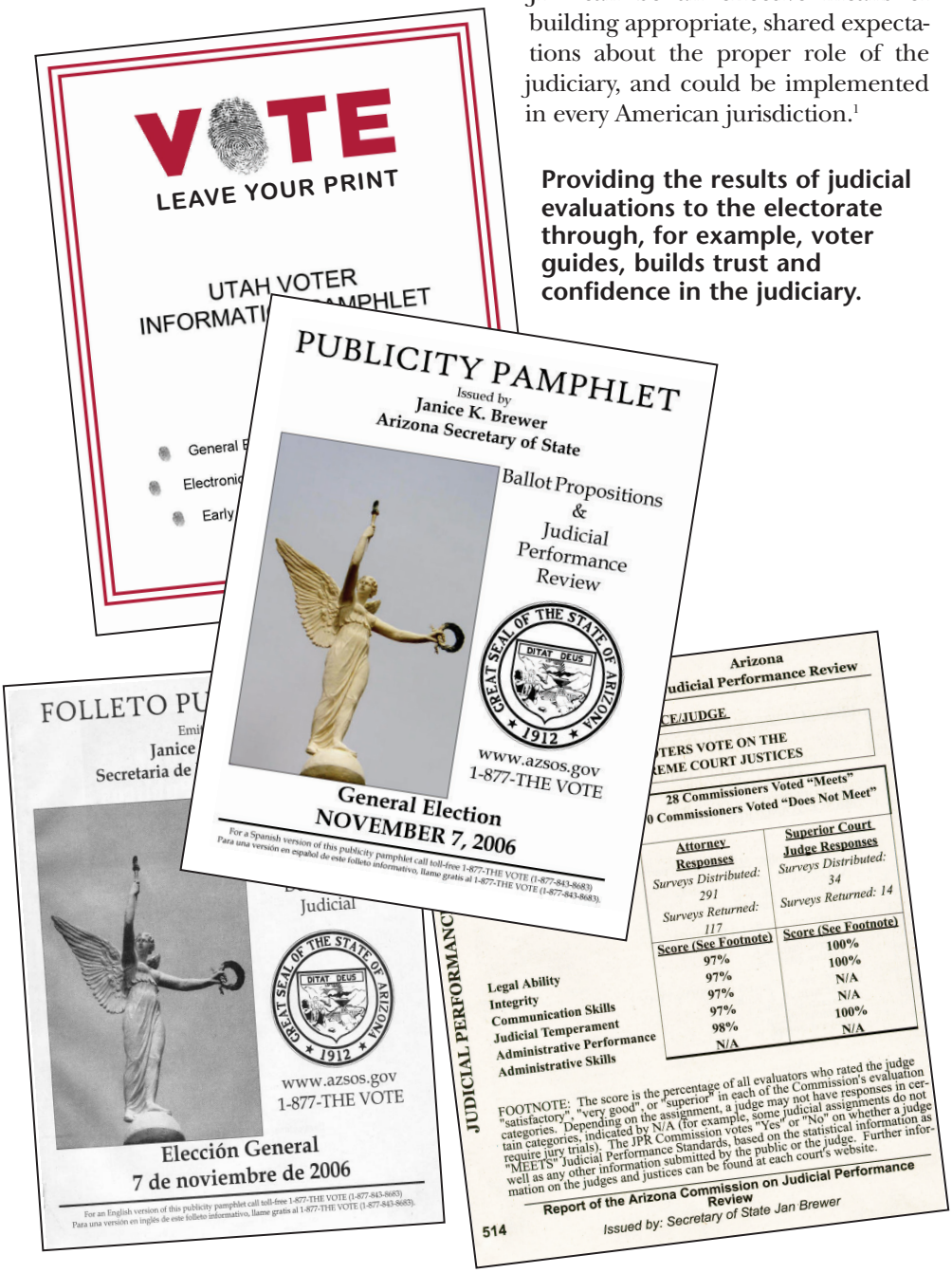
1. The study, entitled *Shared Expectations: Judicial Accountability in Context*, is available through the Institute's website, www.du.edu/legalinstitute.

A recent study concludes that if properly designed and executed, judicial performance evaluations can be an effective means of building appropriate, shared expectations about the proper role of the judiciary, and could be implemented in every jurisdiction.

was not always the case. The time is ripe to return "judicial accountability" to its traditional role: a necessary partner, along with judicial independence, in ensuring an effective judicial branch.

This article summarizes the results of a recent comprehensive study of an existing but underutilized approach to process-oriented judicial accountability: judicial performance evaluation (JPE). The study, undertaken by the Institute for the Advancement of the American Legal System at the University of Denver, concluded that if properly designed and executed, JPE can be an effective means of building appropriate, shared expectations about the proper role of the judiciary, and could be implemented in every American jurisdiction.[1]

Providing the results of judicial evaluations to the electorate through, for example, voter guides, builds trust and confidence in the judiciary.



A primer on JPE

Nineteen states, plus the District of Columbia and Puerto Rico, employ some form of a judicial performance evaluation program (see "Overview of official judicial performance evaluation programs," page 204). These programs vary in their specifics—for example, they may use slightly different criteria for measuring judges' performance, or seek information from somewhat different sources, or share information with the public in different ways—but as a general rule all focus on whether judges are managing cases efficiently, deciding them on the basis of established facts and applicable law, explaining their decisions clearly, and exhibiting proper courtroom demeanor. In addition, regardless of the differences in their formats, JPE programs are uniformly process-oriented, not outcome-oriented: what matters is whether the judge handled a case in a balanced, fair, and efficient manner—not whether the ultimate decision in the case provoked limited or even widespread opposition.

Each judge is typically evaluated by an independent commission consisting both of attorneys and nonattorneys. The commission provides surveys to attorneys, jurors, and others who have interacted with the judge in a professional setting, asking for anonymous responses to questions about the judge's professional skills. In more comprehensive programs, the commission also reviews the judge's case management statistics and written opinions, solicits public comments on the judge's performance, and conducts one or more interviews with the judge. The commission then uses the collected information to measure each judge's performance against predetermined criteria. Because appellate judges typically work more collectively and have different roles in the judicial system, they generally are subject to different criteria than trial judges or magistrates.

JPE programs have been most commonly used in states employing

the "Missouri Plan" or "Nonpartisan Court Plan," so called because it was first adopted by Missouri voters in 1940. Under the Missouri Plan, judges are initially appointed to the bench through a merit selection process and subsequently participate in periodic retention elections. In a retention election, the judge runs uncontested, and the only question on the ballot is "Should Judge X be retained in office?" In most cases, if the sitting judge wins a simple majority of affirmative votes, he or she will continue to hold the office for another term.[2] In Missouri Plan states, JPE commissions generally make the results of each judicial evaluation available to the public well in advance of the judge's retention election. Where judges do not face retention elections, individual evaluations are generally kept confidential.

The need for JPE

Judicial performance evaluations are likely to promote judicial accountability in three ways. First, JPE programs can provide a valuable source of information to voters about their judges and judicial candidates. In many states where judges face elections to hold or remain in office, JPE programs may provide the only substantive, neutral source of information about judges on the ballot. This information is critically important. Without adequate, accurate information, voters generally decline to cast ballots in judicial elections.[3] Furthermore, many of those who do vote choose to elect or retain a judge based not on the judge's performance, but on the judge's ethnicity, gender, name, party affiliation, or length of time on the bench, or even for no articulable reason whatsoever.[4]

Surveys in 2004—one of a national sample, another in New York—suggest that voters would much prefer to make informed choices about their judges. More than two-thirds of respondents in the national survey agreed that "receiving a nonpartisan voter guide containing background information on judicial candidates would make them more likely to vote in judicial elections."[5] A report on the New York survey said that 88 percent of the respondents "believe that voter guides are a useful way to educate the public about judicial elections."[6] The inclusion of performance evaluations in voter guides can help fill the information gap.

The limited empirical research on voters' use of performance evaluation information suggests that the information substantially informs voting choices. In one study of four major metropolitan areas in states using JPE, 66-76 percent of the voters surveyed responded that the official evaluation information either helped their voting decision or served as the basis for that decision.[7] A majority of respondents in each of the four cities who said they were familiar with the evaluation reports also stated that "the information influenced their voting decisions, added confidence to their voting choices, [and] made them more likely to vote in judicial elections."[8]

JPE programs can also build shared expectations about the judiciary 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 pressure on voters to "hold judges accountable" for politically unpopular outcomes in specific cases, or to vote for judicial candidates based on those candidates' personal opinions on hot-button political issues. That pressure reflects claims that too many judges are merely "legislating from the bench," and that judicial opinions are examples of policymaking rather than application of existing law.

For example, judicial candidates in Iowa's November 2006 election were asked by one coalition to complete 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.[9] Widespread use of JPE programs can dilute this threat to judicial independence by shifting public focus away from political positions or particular case outcomes and toward the process of adjudication. JPE programs can measure the characteristics expected from an independent, knowledgeable judge: impartiality, temperance, knowledge of the law, fair application of the law, and efficiency. The voter who thinks of a judge in these terms, rather than as a robed policymaker, is arguably more likely to vote carefully and objectively

2. Two states, Illinois and New Mexico, require a supermajority to secure retention.

3. *See* "Report of the Commission to Promote Public Confidence in Judicial Elections" 38 (2004) (on file with authors), *available at* http://www.courts.state.ny.us/reports/JudicialElectionsReport.pdf (hereinafter "Feerick Commission Report") (58% of New York voters said they did not vote in judicial elections because they lacked candidate information); *see also* 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) (finding a high rate of abstentions among voters who had no information on the judges facing retention).

4. *See* Larry Aspin et al., *Thirty Years of Judicial 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); 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 the gender of the candidates, in elections for associate justices of the Ohio Supreme Court in 1986 and 1988); Anthony Champagne & Greg Theilemann, *Awareness of Trial Court Judges*, 74 JUDICATURE 271, 271 (1991); 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 affiliation"); Griffin & Horan, *supra* n. 3, at 74; Jona Goldschmidt, *Selection and Retention of Judges: Is Florida's Present System Still the Best Compromise?*, 49 U. MIAMI L. REV. 1, 6 (1994).

5. *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).

6. Feerick Commission Report, *supra* n. 3, at 39.

7. Kevin M. Esterling and Kathleen M. Sampson, JUDICIAL RETENTION EVALUATION PROGRAMS IN FOUR STATES: A REPORT WITH RECOMMENDATIONS 39 (Chicago: American Judicature Society, 1998).

8. *Id.* at 40.

9. *See* "Iowans Concerned About Judges, 2006 Judicial Voters' Guide Questionnaire for Judicial Candidates" (on file with authors), *available at* http://www.iowansconcernedaboutjudges.org/doc/Survey.pdf. Similar questionnaires greeted judicial candidates in other states.

in a judicial election.

Finally, judges themselves stand to benefit from the formal feedback of an evaluation. Each evaluated judge receives concrete information about the strengths and weakness of his or her performance, creating individualized opportunities for professional self-improvement. JPE programs can provide judges with feedback that simply could not, or would not, be captured through any other medium. This is particularly true for interpersonal performance issues such as courtroom demeanor, which a judge cannot truly evaluate for him- or herself and which lawyers, jurors, and litigants are unlikely to comment upon except through formal, anonymous evaluations.[10]

Judicial support for JPE

Despite the natural human aversion to being reviewed, sitting judges who have participated in performance evaluation programs have expressed support for them. A 1998 survey of judges in the four states with the most developed JPE programs (Alaska, Arizona, Colorado and Utah) found that:

- A very high percentage of judges in all four states agreed 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 said that commission members understand their role as judges;
- Majorities in each state agreed that commission members understand the importance of judicial independence; and
- Majorities of judges in each state said that the evaluation process makes them appropriately accountable for their job performance.[11]

Similarly, judges who took part in a 2001 pilot study in Washington State had "predominantly positive" comments about the experience, and reported that the information they received was useful, had not been previously available, and could not have been transmitted through a means other than anonymous surveys.[12] Federal judges who participated in a 1991 pilot program also assessed the value of judicial performance evaluation as "overwhelmingly positive."[13] As one federal judge put it, "this project is extremely worthwhile to me. Although I would feel distressed if the responses were critical and unfavorable, I still want to know."[14]

Judges have occasionally opposed JPE programs in the abstract, based on fears that evaluations lie in the hands of unreliable, and potentially partisan, evaluation commissions.[15] But the risk of commission bias can be reduced through appropriate safeguards, such as partisan balance, requiring formal training for commission members, and formal approval of commission members by the legislature or another body. Moreover, in reality judicial elections have been politicized far more frequently when the public is *not* able to rely on performance reviews as a source of information. In the last 20 years, the most notorious examples of campaigns to remove judges from the bench—Rose Bird, Joseph Grodin and Cruz Reynoso in California, David Lanphier in Nebraska, and Penny White in Tennessee—occurred in states where official, formal evaluations of each judge's performance were not available to voters at the time of the election. As a result, one or two controversial issues became the focus of the campaign. It is telling that some of the strongest advocates of JPE are individuals whose time on the bench was cut short or threatened by segments of the public demanding particular outcomes in individual cases.[16]

Variation and innovations

As noted above, JPE programs have varied somewhat in their implementation. Several western states have adopted quite comprehensive JPE programs, which feature predetermined standards for judicial performance, thorough collection of information, and widespread dissemination of results. Other states have been more limited in their data collection, or have debated whether, and the extent to which, evaluation results should be kept confidential. In addition, different jurisdictions have sought information from different sources. These program variations reveal a number of innovations to the evaluation process, which other jurisdictions may want to consider.

The first innovation is broadening the pool of survey participants beyond attorneys. For example, an increasing number of states now survey jurors on the judge's clarity, demeanor, and level of preparedness at trial. New Mexico has broadened the pool even more significantly, providing surveys for appellate court judges to court staff, other appellate judges, trial court judges whose cases have been appealed, the judge's cur-

10. *See, e.g.*, Editorial, *The Judicial Survey*, 155 N.J.L.J. 748 (Feb. 15, 1999) (noting that "[t]he tradition of deference may serve to conceal that information [on courtroom demeanor] 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.").

11. *Supra* n. 7, at xvii.

12. American Judicature Society – Washington Chapter, Committee on Judicial Performance Standards and Evaluation, FINAL REPORT OF THE WASHINGTON STATE JUDICIAL PERFORMANCE EVALUATION PILOT PROJECT 29 (2002).

13. Darlene R. Davis, JUDICIAL EVALUATION PILOT PROJECT OF THE JUDICIAL CONFERENCE COMMITTEE ON THE JUDICIAL BRANCH 9 (Federal Judicial Center, 1991). The pilot project evaluated all district court, magistrate, and bankruptcy court judges in one judicial district, the Central District of Illinois. The pilot program limited its information collection to anonymous attorney survey responses in five areas of judicial performance: integrity, judicial temperament, legal ability, decisiveness, and diligence. *Id.* at 5. Although participation was voluntary, every judge in the district chose to participate. *See id.* at 2.

14. *Id.* at 8.

15. *See generally, e.g.*, Jacqueline R. Griffin, *Judging the Judges*, 21 LITIGATION 5 (1995).

16. *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."); Leonard Post, *ABA Offers New Way to Judge the Judges*, NAT'L L.J., May 5, 2005, at 4 (noting that Virginia's JPE program was spurred by Justice Barbara Milano Keenan, who faced opposition to her reappointment by the state legislature in 2003 because of a dissent she wrote in a 1995 case involving the custody of a child by a homosexual parent).

Overview of official judicial perfomance evaluation programs

State or jurisdiction	Participating judges/frequency	Public dissemination?
Alaska	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	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	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	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.	Those seeking reappointment or senior status/ Upon seeking reappointment or senior status	No
Florida	Voluntary, informal program; appears to vary from circuit to circuit/No evaluations	No – evaluation forms go directly to judge with committee reviews
Hawaii	All full-time judges/As retention and appointment decisions warrant	Summary reports are disseminated; individual results are kept confidential.
Idaho	District magistrates only/After initial 18-month term of office	No
Illinois	Voluntary/N/A	No – evaluation data is kept strictly confidential
Kansas*	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	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
Minnesota	Voluntary/Varies by judicial district	Varies; some districts issue reports or summary information
New Hampshire	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	All judges/Second and fifth year after appointment	No – strictly confidential.
New Mexico	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	N/A/Every 3 years	N/A
Rhode Island	All judges/Every 2 years	No – sent to Chief Justice of Supreme Court and Chief Judge of each district court only.
Tennessee	Appellate judges seeking retention/Every 8 years, prior to retention election daily newspaper	Yes – final report of less than 600 words per judge is published at least 180 days before qualifying deadline in general circulation

Overview of official judicial perfomance evaluation programs

State or jurisdiction	Participating judges/frequency	Public dissemination?
Utah	All judges/Every 2 years	Yes – published in voter information pamphlet and posted on governor's website.
Vermont	Judges seeking retention/Prior to retention elections	Report for each judge seeking retention presented to the General Assembly for consideration
Virginia	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*.

*The Kansas program is brand new and has not had the opportunity to conduct any evaluations.

rent and former law clerks, and law professors (who are asked to evaluate the clarity and accuracy of the judge's published opinions). Trial judge surveys in New Mexico are sent to lawyers and jurors, as well as court staff, law enforcement personnel, probation officers, psychologists, citizen review volunteers, social workers, interpreters, and court-appointed special advocates. Courts in Minnesota have also reached out to a non-traditional resource, sending detailed questionnaires to litigants to gauge their perception of how they were treated and their overall satisfaction with the court process.

Another innovation is the use of trained court observers in Alaska and New York. In Alaska, independent court observers receive approximately 40 hours of advance training, and are assigned to sit in on court proceedings at unscheduled intervals. As many as 15 observers review each judge. They observe both criminal and civil matters, and review court proceedings ranging from jury trials to motion hearings and arraignments. Observers give both numerical ratings 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?" All observer data for each judge are compiled into a one-page evaluation that sets out the total number of hours the judge was observed, the types of cases observed, and the average rating the judge received in each category. While New York does not have an official JPE program, an independent organization, the Fund for Modern Courts, sponsors similar regular, public court monitoring (complete with detailed observer reports) throughout the state.

A third innovation is the development of benchmarks for judicial performance. Established benchmarks for (among other things) a judge's case management skills and performance in survey responses provide a clear guide for judges and the public as to expected standards for the judiciary, and give evaluation commissions a framework for assessing each judge's performance. Benchmarks also reduce the opportunity for mischief by an evaluation commission that might be inclined (for whatever reason) to recommend retention of a subpar judge or against retention of an excellent one.

Utah has taken the lead in setting bright-line rules, instructing its evaluation commissions to base their recommendations on the judge's ability to meet six predetermined benchmarks. These include: (1) a favorable rating by at least 70 percent of the respondents on at least 75 percent of the attorney survey questions; (2) for trial judges, a favorable rating by at least 70 percent of the respondents on at least 75 percent of the juror survey questions; (3) compliance with rigid timing requirements for disposition of cases; (4) at least 30 hours of judicial education per year; (5) substantial compliance with the Code of Judicial Conduct; and (6) physical and mental fitness for office.[17]

A fourth development involves mentoring of evaluated judges. Arizona has established three-member "conference teams" for each evaluated judge, consisting of another judge, a member of the state bar, and a member of the public. The conference team meets with the judge to formulate a written self-improvement plan based upon the judge's self-evaluation, public comments, and survey results. Conference teams work separately from evaluation commissions, and are prohibited by rule from "participat[ing] in formulating any finding as to whether a judge or justice meets judicial performance standards."[18] Justices on the New Hampshire Supreme Court also engage in

17. *See, e.g.*, UTAH VOTER INFORMATION PAMPHLET (General Election Nov. 5, 2002) at 60 (on file with authors), *available at* http://elections.utah.gov/GOV_election_pamphleWEB.pdf.

18. R. P. JUD. PERF. REV. ARIZ. 6(f)(2), *quoted in* A. John Pelander, *Judicial Performance Review in Arizona: Goals, Practical Effects and Concerns*, 30 ARIZ. ST. L.J. 643, 690-93 (1998) (alteration in Pelander).

peer review, completing individual self-evaluations and then collectively discussing them to identify personal strengths and weaknesses.

A fifth innovation is the development of formal processes to appeal the commission's evaluation and recommendation. In Colorado, an evaluated judge is permitted to review the commission's draft profile and recommendation before it is made available to the public; if the judge disagrees with the evaluation, he or she may request an additional interview with the commission or, where retention is not recommended, attach a statement of his or her own position to the profile when it is sent to the public. Similarly, in Arizona the judge is permitted to review the evaluative report and submit comments before the report is disseminated to the public.

A sixth innovation is partnership between the state judiciary and state and local bar associations to develop JPE programs.[19] Bar polls are frequently used to evaluate judicial performance, but alone they cannot account for important measures such as case management statistics and courtroom observation. Furthermore, bar polls have been criticized by some as unscientific or haphazard. By working directly with the judiciary to convert existing bar polls into more comprehensive programs, bar associations can build trust with the judiciary and provide a more useful product for the public.

A final development is the growth of creative efforts to disseminate results, including the increasingly sophisticated use of performance commission websites. One obstacle to comprehensive programs is the cost of disseminating evaluation results, particularly if evaluations are conducted frequently. Costs, however, can be reduced significantly by posting evaluation results online, provided that the public is made aware of the website and the information is easy to access.

Indeed, the value of JPE programs is tied directly to the extent to which the results are shared with the public. Providing the results of individual judicial evaluations to the electorate (both directly and through the news media) in a manner that is easily understood builds trust and confidence in the judiciary by identifying judges with outstanding performance and identifying those who need improvement. The broad public discussion of judicial performance standards and results reinforces the expectation that judicial accountability should be process-oriented rather than outcome-oriented, and increases the profile of the evaluation commission, which encourages greater participation in the JPE process. Lack of transparency, by contrast, tends to promote suspicion about the evaluation process (from both judges and the public), causes the public to become disinterested or apathetic about its judges, and invites the creation of informal judicial rankings and polls to fill the information gap.

JPE has yet to gain widespread application, but the innovations described above are working in states that have adopted them. Whether improving an existing JPE program or starting one from scratch, evaluation commissions would benefit greatly from frequent sharing of ideas with their peers in other jurisdictions.

Nationwide value

Judicial performance evaluation has value regardless of how a state chooses its judges. JPE has been used most frequently, and in its most robust form, in Missouri Plan states. This is not surprising, since voters in retention elections are natural consumers of information on the performance of sitting judges. However, many of the benefits of JPE also translate to jurisdictions where judges are chosen through contested elections. Limited JPE programs in Washington and New York, among other states, strongly suggest that comprehensive performance evaluation and widespread public dissemination of evaluation results would have a positive effect on judicial elections, by informing voters about the performance of their judges and judicial candidates, and reducing the need for voters to rely on expensive and politically charged campaign advertisements.

The most significant obstacle to the broad implementation of JPE programs in contested election states is the concern that a candidate who is not currently on the bench cannot be evaluated in the same way as a sitting judge. This concern is well-taken, but it is not insurmountable. Even candidates who have not previously held judicial office can be evaluated on the skills they would expect to use on the bench. Judicial candidates are almost always attorneys or judges on lower courts, and would be expected to have skills and knowledge that are measurable in much the same way as the skills and knowledge of an incumbent judge. For example, an attorney could be evaluated on his or her disposition, timeliness, responsiveness, fairness in negotiating with opposing counsel, use of facts and appropriate sources of law in briefs, and the like. Sources of information on the attorney candidate's performance might include:

- Surveys of members of the bar, especially attorneys who have worked with and against the candidate in recent cases;
- 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 or witnesses;
- Surveys and/or consultation with sitting judges (allowing for partisan balance among the judges consulted if desired);
- Review of selected submissions to the court, including a variety of motions and briefs; and
- Management of cases for which the candidate was the lead attorney, looking for compliance with court time frames and other rules and the

19. *See, e.g.*, Hawaii State Bar Association, Standing Committee on Judicial Administration, *Report: Regarding a Judicial Evaluation Program*, 3-DEC HAW. B.J. 9, 9 (1999) (describing efforts to work with the state judiciary to implement a JPE program); Press Release, Missouri Bar Association, Judicial Evaluations Available Online to the Public (on file with author), *available at* http://www.showmecourts.org (noting that for the first time, the Missouri bar would be surveying jurors as part of its bar poll for the 2006 election).

number of times the candidate requested extensions or continuances.

This form of evaluation, while not identical to judicial evaluation, would provide a reasonably fair and accurate basis for comparison between the candidates. More importantly, it would frame the comparison in terms of objective, process-directed criteria expected of any judge, helping voters to cast an informed ballot. The evaluation commission obviously should not endorse a particular candidate in a contested election, but it can state whether each candidate has met the predetermined benchmarks to be considered qualified for office.

Even candidates who have not previously held judicial office can be evaluated on the skills they would expect to use on the bench.

JPE programs can also be adapted to jurisdictions where judges are appointed and do not have to face the voters directly. For example, approximately half the federal judiciary serves terms of office, and performance evaluations could assist with reappointment decisions. Even for judges with life tenure and no expectation of changing jobs, performance evaluation serves as an incentive to identify areas for self-improvement, and to confirm strengths on the bench. For the public, regular and frequent dissemination of evaluation results allows citizens to observe growth in judicial performance, enhances public trust and confidence, and reinforces the expectation that the proper criteria for judicial accountability focus on the adjudicative process, not particular case outcomes.

Recommendations

The Institute's report details a significant number of recommendations for implementing a comprehensive, well-functioning JPE program. These detailed recommendations fall within six general categories, and may be summarized as follows:

- *Conduct evaluations regularly.* Each sitting judge should be evaluated on a regular schedule, at least twice during each term of office or, if there is no set term, at least once every three years. Regular evaluations help judges improve more quickly, and help the public accept neutral measures of judicial performance more readily.
- *Choose neutral criteria.* Evaluations should emphasize apolitical metrics of judicial performance, and should be based primarily on performance against predetermined benchmarks. Where judges and the public understand and accept the goals and substance of performance benchmarks, shared expectations about judicial performance are apt to develop more easily.
- *Cast a wide net for collecting information.* An evaluation commission should gather a broad and deep set of information on the judge's performance, seeking information that is timely and based on personal knowledge when applicable. Such information should include survey data, review of case management skills and written opinions, courtroom observation, and information gained from interviews with the judge. The commission should issue a report concerning each judge's performance based on the collected information. Evaluation criteria should be as comprehensive as possible, and any report or recommendation should represent a thorough analysis of the judge's performance.
- *Create trustworthy evaluation commissions.* Each evaluation commission should be independent and more or less balanced between attorneys and non-attorneys and along partisan lines. Depending on the size of the commission, gender and geographic balance may also be appropriate. The less opportunity for bias in the commission, the more likely the public will receive its evaluations positively.
- *Be open.* The evaluation process should be transparent both to the judge being evaluated and to the public. Judges and citizens should know exactly why the commission made the recommendation or evaluation it did. Those who do not understand the process are unlikely to give it proper credence.
- *Share the results.* Evaluation results should be widely disseminated to the public through voter guides, newspapers of general circulation, and the Internet. No matter how comprehensive the evaluation, shared expectations cannot be developed if the public is unaware of, or unable to access, the results.

****

Rarely does a process that has been in use for three decades qualify as an important "discovery," but for the majority of state and federal courts, JPE is exactly that. It is an important component to balancing judicial accountability and judicial independence. It identifies the proper criteria by which to review a judge, without invading the province of judicial independence so critical to our democracy. And it serves as a valuable educational tool both for judges and the public they serve. For every court system in the United States, judicial performance evaluation is an idea whose moment has come.

REBECCA LOVE KOURLIS
is executive director of the Institute for the Advancement of the American Legal System.

JORDAN M. SINGER
is director of research at the Institute for the Advancement of the American Legal System. (jordan.singer@du.edu)