

FILE COPY

INTERIM REPORT  
OF THE  
COMMITTEE ON JUDICIAL PERFORMANCE

January 1980



JUDICIAL PLANNING COUNCIL  
COMMITTEE ON JUDICIAL PERFORMANCE

COLORADO JUDICIAL DEPARTMENT  
TWO EAST FOURTEENTH AVENUE, ROOM 215  
DENVER, COLORADO 80203



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TWO EAST FOURTEENTH AVENUE, ROOM 215  
DENVER, COLORADO 80203  
(303) 861-1111

January 30, 1980

Honorable Donald P. Smith, Jr.  
Chairman  
Judicial Planning Council  
Colorado Judicial Department  
Two East 14th Avenue  
Denver, Colorado 80203

Dear Judge Smith:

I am pleased to transmit this Interim Report of the Committee on Judicial Performance.

The report is divided into four sections: an explanation of the purpose and background of the judicial performance study; an overview of judicial evaluation methods used in Colorado and other states; a discussion of the major findings resulting from the Committee's activities and deliberations; and tentative recommendations addressed to the Council.

The following summary outlines the major conclusions of the committee:

- The primary purposes of judicial evaluation should be to help the public in evaluating judges for voting purposes and to assist judges in their professional development.
- The voting public should have relevant information about the performance of judges. The information should not be so superficial as to be meaningless and misleading nor so complex and voluminous as to be beyond practical use by the public.
- The final decision on retention should remain with the electorate; therefore, evaluations should provide balanced profiles of judges rather than simple recommendations to retain or reject judges.

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- Judges should be evaluated against relevant performance standards and adherence to principles of law and not on the basis of personal, social, or political philosophies.
- The responsibility for evaluation should remain at the local level, but uniform standards and methods should be developed by an independent commission under the direction of the Supreme Court.
- Evaluation should be a positive and helpful experience. Individuals or groups who have direct and recurring contact with judges should have a role in evaluation. It should be as objective as possible, and judges should have opportunities to discuss evaluation results prior to dissemination.
- An evaluation program should be implemented in phases. The first phase should include the development and use of a uniform survey of (a) lawyers who appear before the judge who is being evaluated, and (b) jurors who have served in that judge's court. If either of these sources proves inadequate because of population size, interviews and other evaluation methods should be considered. The second phase should supplement the survey techniques with evaluation activities reaching other court constituencies. The entire program should be reviewed thoroughly within two years of its creation to determine if it is reasonably accomplishing its purposes.
- Evaluation results should be regularly and widely disseminated to the public through newspapers, radio, and television, or other appropriate methods that may vary with the locale.
- A judicial evaluation program should be implemented regardless of the method used to select judges.

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The Committee requests an extension of time to complete its final report. During this time, we suggest the Council circulate the interim report to its members, to all judges, to members of pertinent legislative committees, and to the news media.

We would like to see any comments you receive from the public or the judiciary. After reviewing this correspondence and completing our remaining work, we will prepare our final recommendations for presentation to the Judicial Planning Council.

Sincerely,

A handwritten signature in black ink, appearing to read "Daniel S. Hoffman", with a long horizontal flourish extending to the right.

Daniel S. Hoffman  
Chairman

DSH:ca

## MEMBERS OF THE COMMITTEE

Daniel S. Hoffman  
Chairman of the Committee  
Dean of the College of Law  
University of Denver

J. Robert Allshouse  
State Senator

Baxter W. Arnold  
County Judge  
Sterling, Colorado

Lewis T. Babcock  
District Judge  
La Junta, Colorado

Emily Bocko  
Board Member  
League of Women Voters  
of Colorado

Julian S. Garza, Jr.  
Regional Counsel  
Community Services  
Administration  
Denver, Colorado

Alex S. Keller  
Attorney at Law  
Denver, Colorado

Ken Kindelsperger  
Academic Vice-Chancellor  
(Retired)  
University of Denver

Harry O. Lawson  
Professor of Judicial  
Administration  
College of Law  
University of Denver

Ed Lehman  
Editor and Publisher  
Longmont Daily Times

George A. Manerbino  
County Judge  
Denver, Colorado

Charles D. Pierce  
Judge  
Colorado Court of Appeals

Roland Rautenstrauss  
Professor of Engineering  
and former President  
University of Colorado

Edith M. Sherman  
Professor of Social Work  
Graduate School of Social  
Work  
University of Denver

King M. Trimble  
State Representative

Anthony F. Vollack  
District Judge  
Golden, Colorado

## COMMITTEE STAFF

Staff for this study was provided by James D. Thomas, the State Court Administrator, and included:

E. Keith Stott, Jr.  
Deputy State Court Administrator and Study Director

Robert C. Cassidy  
Director of Field Services

Bernard D. Steinberg  
Legal Officer  
Judicial Department

Cindi D. Ackerman  
Secretary

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## INTRODUCTION

### Purpose

This report has four major objectives:

- To review the Committee's work since its inception;
- To discuss preliminary findings and conclusions;
- To stimulate and encourage input for future deliberations; and
- To serve as a working paper to develop final recommendations.

### Background

The Committee on Judicial Performance (Committee) was created in June, 1979, by the Judicial Planning Council (JPC), an advisory body to the Supreme Court. The JPC is charged with organizational, operational, and policy-related research leading to improvements in the state's judicial system. Both the Committee and the JPC have memberships of judges, lawyers, and non-lawyers.

The Chief Justice of Colorado, in his instructions to the Committee, said lawyers and judges have long recognized that judges are selected on merit, but they are also aware that there is no method in this state of evaluating judicial performance thereafter. Therefore, the Chief Justice, acting under his constitutional responsibility to supervise all courts and all judges, directed the Committee to develop a plan to evaluate judges and to inform the public about judicial performance. The legislature has indicated its interest in the same subject matter through passage of House Bill 1033 during the 1979 session.

Developing an evaluation plan has not been easy, and it will not be finished during the short life of the Committee. Although much has been written about what makes a good judge, the Committee found no specific guidelines, standards, or methods for measuring and applying the criteria to judges on the bench. Existing instructions to judges regarding their behavior, such as the Colorado Code of Judicial Conduct, generally follow the ethical standards of the legal profession.

The vagueness or absence of judicial performance standards and methods to apply them generate many questions.

Trying to anticipate some of these, the Committee undertook a comprehensive research program. As a first step, the Committee studied techniques used by private and public organizations to assess employee performance. The Committee wanted to know if any states had adopted evaluation programs for their judges, and New Jersey, just completing a judicial evaluation study, shared its data with Colorado. The New Jersey study showed that only Alaska and the District of Columbia had established judicial evaluation programs and that no state other than New Jersey is seriously considering starting formal judicial evaluation in the near future.

As its second step, the Committee solicited the views of the judiciary and the public about evaluating judicial performance. The staff prepared and administered a survey to all state judges to determine their attitudes about evaluation criteria, methods for measuring performance, and effects of evaluation on judicial behavior. Ninety percent of the state judiciary responded, and the results are discussed later in this report. (Portions of the judges' survey were coordinated with a survey of court users which has not been completed but should be available for the final report.)

A different method was used to get public input. Several of the Committee's regular meetings were oriented to the public. At one meeting, for example, the Committee discussed the roles of newspapers, radio, and television in judicial evaluation and listened to a panel of their representatives. In addition to its regular meetings, the Commission scheduled seven "town meetings" in Greeley, Grand Junction, Durango, Pueblo, Colorado Springs, Denver, and Boulder. As a result, more than 200 citizens communicated with the Committee.

The work of the Committee was affected by several other groups. Although judicial selection and discipline were not within the scope of the Committee's study, they have logical relationships to performance and cannot be artificially separated from it. Consequently, the Interim Judiciary Committee of the General Assembly, which investigated judicial selection procedures,<sup>1</sup> and the Colorado Bar Association Committee on Judicial Selection and Tenure, which studied both judicial selection and discipline,<sup>2</sup> were observed by the Committee.

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<sup>1</sup>Colorado General Assembly Legislative Council, Recommendations for 1980: Committees on Judiciary, and Health, Environment, Welfare, and Institutions, Research Publication No. 246, (Denver: December 1979), pp. 1-33.

<sup>2</sup>Colorado Bar Association, Report of the Judicial Selection and Tenure Committee, (Denver: November 21, 1979).



The remainder of this report is divided into three sections. The first describes evaluation methods that have been tried here and in other states and three comprehensive evaluation programs either in use or under consideration. The second contains the findings and conclusions of the committee based on its research, public hearings, and surveys. The final part of the report contains the Committee's tentative recommendations.

This report reflects the findings and recommendations of the Committee in only the broadest way. More specific information, especially on the research, the surveys, and public input related to the study, will be in the final report.

## OVERVIEW OF JUDICIAL EVALUATION METHODS

Public concern about the selection, discipline and tenure of judges is not new. Judicial selection, discipline, and removal are controversial and have generated numerous complaints for many years. The responses to these complaints have varied throughout the country, but several trends are clear.

Thirty states and the District of Columbia now have some form of merit selection. Seven of these thirty-one jurisdictions use merit selection systems for all judges. The twenty states without merit selection are divided between gubernatorial appointment and public election. Legislation to create merit systems is pending in seven states.

States with merit selection systems typically use nominating commissions to examine judicial candidates. The commissions give a small list of nominees to the appointing authority, who then appoints from the list. Appointees are usually required to stand for retention on their records.

Forty-nine states and the District of Columbia now have judicial discipline commissions that supplement traditional removal procedures of impeachment, address, or recall. The State of Washington is the only exception, and legislation to create a discipline commission is pending there.

Colorado adopted selection and discipline reforms in 1966 by creating a nominating commission in each judicial district, a state-wide nominating commission for the appellate courts, and a state-wide qualifications commission. Each commission performs evaluative functions of interest to the Committee.

Many private organizations, such as bar associations, civic groups, court reformers, and newspapers, have developed other ways of monitoring or evaluating judicial performance. These are considered in the following sections.

### Lawyer polls

Long before the advent of nominating and disciplinary commissions, bar associations were trying to improve state and local judicial systems by the use of polls.<sup>3</sup>

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<sup>3</sup>This section is based on James H. Guterman and Errol E. Meidinger, In the Opinion of the Bar: A National Survey of Bar Polling Practices, (Chicago: American Judicature Society, 1977); and Cynthia Owen Philip, How Bar Associations Evaluate Sitting Judges, (New York: Institute of Judicial Administration, 1979).

Bar polls or lawyer surveys are the names for the process used to solicit lawyers' opinions about the capabilities or qualifications of judges. The first bar poll was conducted by the Chicago Bar Association in the late 1800s. Since then, more than fifty state and local bar associations have conducted polls. Some surveys are supplemented with hearings, written evaluations, or interviews.

Bar associations see judicial improvement as the main purpose of evaluation polls. They believe lawyers should take part in evaluations because, as a group, lawyers understand the complexities of judging better than anyone else. Ethical canons also place a responsibility on lawyers to aid in selecting high quality judges.

Generally, bar associations do not take positive or negative positions on judges who have been the subjects of their polls. They view polls as a public service and have left others, particularly the press, to inform the public and campaign for or against any judge. However, some associations no longer stay neutral. They support judges who do well in the polls while they ignore judges who do poorly. Only a few bar groups have actively campaigned against judges who did poorly in their polls.

In Colorado, local bar polls have been conducted in Boulder, Denver, Jefferson, El Paso, Arapahoe, Pueblo, and Mesa counties. In addition, the Colorado Bar Association has conducted several state-wide surveys. The polls have varied in complexity, sophistication, reliability, and cost.<sup>4</sup>

In 1978, the Denver Bar Association (DBA), using its own funds, developed and administered a survey about performance of judges and referees in Denver. It replaced an older and simpler lawyer poll of only those judges standing for retention. The 1978 survey covered all judges and more areas of judicial performance. For example, the 1976 poll asked only seven questions, and used a two-dimensional scale (yes/no or satisfactory/unsatisfactory) to respond. The 1978 poll contained three times as many categories, used rating scales, and analyzed the reliability of the responses statistically. Experience with the poll in the 1978 elections led to a number of improvements, including changing the rating scales, clarifying instructions, and eliminating redundancies and questions based on unobservable behavior.

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<sup>4</sup> Readers are encouraged to notify the Judicial Planning Council about the uses, characteristics, and results of polls conducted in Colorado communities.

## Court Observation

In the last ten years, court watching--the personal observation of judges and courts--has rapidly increased in popularity. It is a relatively new activity and is primarily a result of a lack of public confidence in social institutions including the courts. Organized citizens have manned court watching programs in California, Connecticut, Indiana, Ohio, Missouri, Massachusetts, Illinois, New York and other states. The Committee knows of no organized court watching programs in Colorado.<sup>5</sup>

Court watching programs vary in quality. The best are staffed by persons well trained in the court watching concept, court procedures, and observation techniques. Most projects are staffed by volunteers because of funding constraints. Many court watching programs have been sponsored by organizations with specific interests in courts or court proceedings, for example, the League of Women Voters, American Friends Service Committee, the American Civil Liberties Union, and church groups.

Some projects function only as a public presence in the courtroom. Others make detailed recommendations to judges or court administrators and promote court reform through legislation. Distorted findings and loss of credibility can result where court watching is aimed at proving a claim of discrimination or rating a judge according to perceived leniencies or sentencing practices.<sup>6</sup>

## News Media Evaluations

Many of the traditional methods for evaluating judges stop short of vigorous publication of evaluation results. Some bar associations publish their surveys, and the Alaska Judicial Council sends a summary of its various surveys to each voter in the state. Some disciplinary commissions make their letters of censure or reprimand public as part of their annual reports. But in most instances, the news media, primarily newspapers, have been the most active in disseminating information on judicial performance to local communities.

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<sup>5</sup>Any information about organized court watching programs in this state should be sent to the Judicial Planning Council.

<sup>6</sup>This summary was prepared from U.S. Department of Justice, Law Enforcement Assistance Administration, Citizen Court Watching: the Consumer's Perspective, (Washington, D.C.: Government Printing Office, 1977).

Newspapers take different stances on judicial evaluation in accordance with their particular interests in a judicial system. In some states, newspapers conduct their own polls, while in others, they sponsor and finance polls with bar associations. Several Colorado newspapers and some in other states publish survey information from bar **associations**, supplemented with biographies prepared by judges and information from investigative reporting.

Radio and television also have been involved in evaluating judges though not to the same extent as newspapers. One reason for this may be the flexibility and space available for an in-depth newspaper report compared to a time-restricted radio or television broadcast. As a speaker explained to the committee, people will obtain basic "lead" information from headlines, television, and radio reports. Then they turn to news articles for more thorough analyses of events that interest them. In Colorado, within the last several years, KOA is the only television station to have run an in-depth series profiling judges before elections. Other stations occasionally present programs on courts or specific cases of interest to the public, but issues, rather than judicial personalities, have dominated those programs.

#### Reactions from Others

Lawyer surveys and court watching are the most widely used methods for evaluating judges. Surveys of people dealing with courts are also used. The Alaska Judicial Council, for example, has surveyed police officers and jurors about the performance of judges. A few other states have also surveyed jurors but mostly on jurors' experiences rather than judicial behavior. All of these methods are open to criticisms about their techniques, the motivations behind the evaluations, the objectivity of the analyses and displays of evaluation data, and the criteria used to measure performance. The final report will include an analysis of these methods.

#### Three Evaluation Programs

Bar polls, court observation programs, and evaluations of judges by the news media generally are ad hoc and limited to specific judges. They are usually handled without outside financial support, although some court watching programs have received federal assistance. None of these has attempted to evaluate all of the judges within a state-wide court system as part of a continuing evaluation program.

Three evaluation programs are different, however. These programs require regular, comprehensive evaluations of judges within their jurisdictions. They combine evaluation with either selection or discipline, operate under specific

judicial or legislative direction, and are publicly funded. Alaska and the District of Columbia each operates an evaluation program, and New Jersey is presently considering the third program. These programs have specific, formal requirements and are outlined in the following sections.

Alaska. Each justice and judge is nominated by the Alaska Judicial Council, a seven-member body created by the state constitution. Following appointment by the governor for an initial three-year term, a judge runs for retention on a non-partisan ballot. A supreme court justice, if retained, serves for a ten-year term, while superior court judges (the equivalent of Colorado's district judges) serve a six-year term. District court magistrates (similar in jurisdiction to Colorado's county judges) are appointed by superior court judges for indefinite terms.

The Council also has a statutory duty to evaluate justices and judges standing for retention. It conducts its evaluations in two parts: first, a mail survey of attorneys, peace officers, and jurors regarding each judge on the ballot, and, second, personal interviews with a sample of attorneys with sufficient experience with any judge standing for retention. Surveys are based on random samplings of the populations involved, and the Council may change its sources of information at any time.<sup>7</sup>

The survey results are compared with the transcripts of the confidential interviews, and the Council then votes on a "qualified" or "unqualified" rating for each judge. The Council prepares summaries of the evaluations and includes them in a brochure produced by the Alaska Legislative Council and mailed before each election to each registered voter in the state. This is a state-funded operation.

The District of Columbia. Judicial candidates are nominated by an independent commission and appointed to fifteen year terms by the President of the United States, with the advice and consent of the Senate. Prior to the expiration of his term of office, a judge may file a declaration of candidacy for reappointment with the seven-member District of Columbia Commission on Judicial Disabilities and Tenure. The commission then prepares and submits to the President a written evaluation of the judge's performance and a statement of fitness for reappointment to another term. If no declaration is filed, the position becomes vacant, and the appointment process starts over.

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<sup>7</sup>Alaska Judicial Council, Report of the Results of the 1978 Alaska Judicial Survey, (Anchorage: August, 1978).

The commission's statutory responsibilities also involve investigating judicial conduct, imposing disciplinary sanctions, and ordering involuntary retirement of judges for medical reasons. The commission covers a total of fifty judges, including active judges and retired judges recalled to active service.

The commission uses four ratings in its evaluations. "Exceptionally well qualified" applies to a judge whose work product, dedication, demeanor, restraint, efficiency and legal scholarship are pre-eminent on the bench. "Well qualified" applies to a judge who accomplishes the judicial function with distinction and in a manner consistently reflecting credit on the judicial system. "Qualified" applies to a judge who either satisfactorily performs his assigned duties or exhibits strong positive attributes that materially offset negative ones. "Unqualified" applies to a judge the commission considers unfit for service.

A judge seeking reappointment and rated by the commission as exceptionally well qualified or well qualified is automatically reappointed. If a judge is rated as qualified, the President may reappoint that judge or another candidate. A judge rated as unqualified is not eligible for reappointment.

The commission's annual reports show reappointment evaluations as a large part of its work. Each evaluation includes the following elements: a written statement by the candidate about his judicial career, including an analysis of his work and his perceptions of problems of the courts; an interview with the candidate; information volunteered from lawyers and laymen; results of any lawyer polls; and interviews with chief judges and others at the option of the commission.<sup>8</sup>

New Jersey. All judges are appointed by the governor with the advice and consent of the state senate. Reappointments follow the same procedure. Supreme Court justices and superior court judges serve initial seven-year terms. A reappointed justice or judge serves until his retirement age. County judges must serve two five-year terms before being eligible for a tenure appointment.

In 1979, the Supreme Court's Committee on Judicial Evaluation and Performance recommended a formal program to evaluate judges. The recommendation received wide coverage in legal and judicial periodicals, and the Supreme Court has not yet acted upon it.

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<sup>8</sup>District of Columbia Commission on Judicial Disabilities and Tenure, Annual Reports for Fiscal Years 1976 and 1978, (Washington, D.C.).

The proposed program provides for an assignment judge (equivalent to a chief district judge in Colorado) to assume the central role in evaluating judges within his vicinage (similar to district). The major source of evaluation information would be reputable and knowledgeable attorneys meeting with the assignment judge to critique other judges' performance. The assignment judge would also conduct an interview with the judge being evaluated, and hold regular meetings with judges in his vicinage to discuss and improve their performance. Appellate judges could comment on a trial judges' performance while reviewing the record in an appealed case. A professional staff to support the Committee and develop and administer lawyer polls would be located within the Administrative Office of the Courts.

Tenured judges would be evaluated with diminishing frequency. Nontenured judges would be evaluated more frequently and evaluations timed to help the governor make reappointments. This program views evaluation as more important for improving performance and enhancing judicial education programs than for purposes of reappointment.<sup>9</sup>

The New Jersey plan is primarily an internal program consistent with judges not standing for election or retention. District of Columbia judges are not elected either, but evaluations assist the President in making reappointments. Only Alaska goes directly to the voters with evaluations.

Each of these systems uses a broad spectrum of criteria. Some examples are legal knowledge, legal reasoning ability, knowledge of criminal and civil law, consideration of relevant sentencing factors, and human understanding. Alaska, with the most detailed criteria, publishes summaries of evaluation results for each judge. The District of Columbia evaluation letters are thorough and concise, but criteria are not as explicit. The letters are prepared for the President and published in the commission's annual report. The New Jersey proposal suggests the general criteria of competence, efficiency, and conduct, but it provides no specific details about the elements of each criteria.

All these evaluation programs emphasize improvement of judicial performance and independence of the judiciary, and none evaluates judicial philosophy. The District of Columbia commission says it is immaterial to its evaluation whether the judge is "liberal" or "conservative," "lenient,"

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<sup>9</sup>Alan B. Handlér, "A New Approach to Judicial Evaluation to Achieve Better Judicial Performance," State Court Journal 3(Summer 1979): 3-10, 41-43.



or "severe," or whether commission members agree or disagree with the merits of a judge's decisions or the trend of his or her legal thinking.

Each of these programs was tailored to meet specific needs; none is identical to another although common themes are evident. The programs do not provide a clear-cut model for Colorado, although each plan contains attractive features.

## FINDINGS AND CONCLUSIONS

### Introduction

The public is entitled to more information about the judiciary. The Committee heard complaints showing public confusion between state and federal courts and little understanding of the roles of state courts in the civil and criminal justice systems. Programs that will help reduce the potential for misunderstanding should be pursued with zeal.

Almost without exception, those who addressed the Committee during its public meetings spoke in favor of the merit system for selecting and retaining judges. Nevertheless, the Committee believes present selection and discipline systems can be improved. For example, the Committee heard frequent complaints about the secrecy surrounding the selection of judges and, particularly, the work of the Judicial Qualifications Commission. At the same time, the Committee saw significant interest in judicial evaluation. Private citizens, lawyers, and judges favor some type of system to evaluate judges and desire publication of information on judicial performance. The best way to accomplish this aim is a difficult problem. In searching for solutions, the Committee made the following findings and conclusions.

### Purposes of Evaluation

The primary purpose of judicial evaluation should be to improve the judicial system. A well designed and carefully implemented evaluation program benefits the judicial branch of government while serving both private citizens and judges.

Another purpose of judicial evaluation should be to assure that merit selection and retention work. An organized systematic evaluation of judges could provide the voter with information useful in deciding a retention question. This type of service would enhance and promote public confidence in the judicial system.

Judicial evaluation can provide feedback to the selectors of judges. Colorado has twenty-three nominating commissions with 165 members. While each commission has some criteria for selecting nominees, none has formal methods for re-examining its criteria. An evaluation system coordinated with judicial selection should help commissions verify and improve their selection techniques.

Regular performance evaluations should assist judges in their professional development. Judges now are limited in their evaluation of their own behavior or skills. Unlike the private sector, where high achievement can be rewarded with

increased compensation or other benefits, there are few tangible rewards for excellence in public service. Judges and other public servants must seek satisfaction in work well done, and voluntary improvement of performance stems usually from a sense of professionalism or commitment to high standards and ideals. By linking evaluations and continued education, especially now that continuing education is mandatory for judges, an evaluation program can be a positive tool for improving the judiciary. On the other hand, a premature or ill-conceived evaluation program may increase the deterrents to entering public service without providing benefits to either the judiciary or the public.

### Organization

Although the governor appoints judges, local nominating commissions are responsible for selecting qualified candidates. Commission members are familiar with local communities and with the character and fitness of members of the local bar. Judicial evaluation is analogous to selection; therefore, it also should be primarily a local function. Judges should be evaluated by those they serve, and the information generated should be distributed to the proper voter population.

The Committee debated using local nominating commissions to evaluate judges after the judges have been appointed. While the Committee believes that evaluation should be separate from the selection process, economy may dictate combining them into one commission at the local level. This is impossible at the present time because of constitutional restrictions on the scope and authority of nominating commissions. Therefore, until constitutional changes are made or an alternative system developed, local bar associations may provide the best vehicle for administering judicial evaluations.

Local citizens, however, cannot provide all the expertise needed to analyze performance. Therefore, a coordinating unit at the state level should provide technical support, uniform standards for evaluation, and policy guidelines for dissemination and use of data. For economic and practical reasons, it should be small. The majority of its members should be non-lawyers to assure appropriate public involvement.

The Colorado Commission on Judicial Qualifications is the only organization that evaluates any portion of judicial conduct. More accurately, the commission evaluates judicial misconduct, an activity that often requires confidentiality and may impose disciplinary sanctions. Judicial performance evaluation, on the other hand, generates information for public consumption, focuses on improving judicial performance

or conduct, and increases public knowledge of the judicial system.

These two tasks are not compatible. The true evaluation process--the development of performance standards and the assessment of each judge in light of these standards-- should be separate from the discipline of a particular judge for misconduct.

### Evaluation Criteria

The Committee frequently discussed several key questions related to evaluation criteria: what makes a good judge; how is good judicial performance recognized; which performance measures can provide useful information to the judiciary and the public? Citizens and Committee members alike agreed that it is easier to answer the inverse of these questions than it is to come up with positive, meaningful criteria for performance evaluation.

The Committee began its study by asking state judges which evaluation criteria they think are important.<sup>10</sup> This was done by conducting a survey during the September, 1979, judicial conference. Ninety percent of the state's 231 judges participated.

One part of the survey asked judges to express their agreement or disagreement with using each of forty-seven items on a list of criteria prepared from the literature and common to many bar polls. The criteria may be grouped in the general categories listed below. (The examples described in each category are representative of the complete list; they do not cover all items.)

- Technical qualifications, such as legal knowledge and ability, correct application of legal principles, intellect, and experience;
- Work habits, including diligence and industry, control of court proceedings, efficient use of time, and punctuality and promptness.

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<sup>10</sup>The survey discussed in this section did not include municipal judges. Municipal courts are not a part of the state court system.

- Interpersonal characteristics, such as neutrality and fairness, patience and tolerance, compassion and humanity, concern for parties and witnesses, the ability to communicate, and a sense of humor;
- Personal characteristics covering such traits as conscientiousness, humility, general health, common sense and sound judgment, moral values and ethics, mental and emotional stability, independence, and a willingness to learn and improve;
- Productivity factors related to workload, including the number of cases decided or opinions written, and the number of hearings held; and
- Miscellaneous items covering speaking skills, writing ability, the reasonableness of sentences imposed, and the ability to handle complex cases.

The entire survey will be analyzed in detail in the final report. The preliminary analysis of this part of the survey shows various criteria have varying degrees of usefulness and importance (they should not be treated equally), and criteria are different for appellate and trial judges. To illustrate, the trial and appellate judges selected the following as the top ten criteria.

#### CRITERIA RECEIVING HIGHEST RATINGS BY ALL JUDGES

<u>For Appellate Judges</u>	<u>For Trial Judges</u>
Quality of reasoning in decision or opinions	Neutrality and fairness
Conscientiousness	Common sense and sound judgment
Legal knowledge	Conscientiousness
Neutrality and fairness	Ability to make decisions
Common sense and sound judgment	Courtesy, consideration, and respect for others
Intellectual honesty	Attentiveness
Ability to make decisions	Mental and emotional stability
Legal Ability	Concern for parties and witnesses
Intellectual and moral courage	Punctuality and promptness
Ability to handle complex cases	Intellectual honesty

The judges ranked the following factors lowest:

CRITERIA RECEIVING LOWEST RATINGS BY ALL JUDGES

<u>For Appellate Judges</u>	<u>For Trial Judges</u>
Kindness	Sense of humor
Sense of humor	Appearance
Appearance	Writing ability
Administrative ability	Speaking skills
Reasonableness of sentences imposed	Settlement efficiency
Speaking skills	Administrative ability
Quantity of hearings held	Quantity of cases decided or opinions written
Involvement in civic activities	Quantity of hearings held
Settlement efficiency	Involvement in civic activities
Age	Age

While there are some similarities there are also clear distinctions. It appears, therefore, that different performance standards should be developed for the two different types of judges.

The Committee feels that judges should be evaluated on performance but not personal, social, or political philosophies. It is difficult enough just to evaluate performance even without concern for philosophical issues. Elements and standards of performance must be selected; an effective data collection system must be created; methods of analyzing the data must be established; and, the fair, objective, and proper use of evaluation results must be determined. Overshadowing the interrelationships of these problems is the amount and complexity of the data that will be produced. This raises the question of whether the costs of evaluating some components of performance will exceed the expected benefits.

An example is productivity. Many techniques exist to measure productivity. However, quantity of matters processed and quality of justice rendered are not the same, and even may conflict. Consequently, simple measures of activity are

not meaningful measures of productivity.

Copious information can be collected on simplistic productivity indicators such as numbers of hearings; numbers of orders; numbers of motions decided; numbers of settlements; numbers of trials to court or jury; complexity of matters heard, and so forth. After all this information is collected, analyzed, and explained, evaluators will have to distinguish between types of cases and individual judge responsibilities. The workload of the judge who handles a relatively few complex civil or criminal trials each year cannot be fairly compared with that of the judge who processes thousands of traffic cases. The measurable productivity of the chief judge of a district will be different from that of other trial judges who do not have the chief judge's administrative responsibilities.

The Committee concluded that measuring productivity would be, at the very least, extremely complex and costly.

As another illustration, voluminous detail can be collected about the sentencing practices of judges. But such information would be of little benefit unless the circumstances of each case also were analyzed. Trial judges sentence convicted defendants within statutorily prescribed ranges of penalties, and they are generally guided by information in pre-sentence investigation reports and recommendations of prosecution and defense counsel. An evaluation of a judge on harshness or leniency in criminal sentencing or supposed conservative or liberal beliefs could easily mislead the public if a comprehensive and costly analysis of the facts and the law of each individual case is not added.

Other examples may be cited, but this brief discussion of the extraordinary complexity involved in using productivity and sentencing to measure judicial performance warns of the danger in oversimplifying criteria, particularly in an initial phase of an evaluation program.

#### Methods of Evaluation

Performance evaluation is always complex. Private industry has spent large sums of money developing methods for appraising the performance of lower and mid-level employees. It has yet to be more than modestly successful in formally assessing high-level executives or professional staff.

It is even harder to appraise performance objectively

when intangibles are involved. The final indicator of performance in the private sector is profitability. There is no comparable indicator for judges. Unlike the marketplace, which provides a reflection of general public tastes or needs, justice is determined case by case and may even run counter to some public perceptions or expectations.

The more complex the activity or the greater the responsibility, the harder it is to evaluate performance objectively. Top executives, college professors, high-level government administrators, doctors, lawyers, judges, and many other professionals constantly exercise a high degree of personal discretion and judgment. This activity cannot be assessed in terms of numbers on scales or checklists. Many qualities can be measured only by colleagues familiar with professional standards or with similar backgrounds and abilities. The public hearings showed a general consensus that a judge's legal capabilities and qualifications could be evaluated best by other similarly qualified persons, for example, by lawyers who practice before the judge or by other experienced judges.

Surveys are the closest thing to objective evaluations. The Committee therefore concludes that in the first phase of an evaluation program the most appropriate method to use is to survey lawyers who have practiced before the judge being evaluated and jurors who have served in that judge's court. Judges have a great deal of confidence in being evaluated by lawyers who practice before them. However, the public has some reservations about stacking the evaluation process with members of the "legal fraternity" to which judges belong. Many speakers had felt that other persons involved in the judicial process such as other judges, jurors, and court watchers should participate.

Participants in the public hearings generally agreed that a trained court observer program would be a useful part of an evaluation system. Some favored court watching as an alternative to jury service. However, the cost of training the large number of observers needed limits the wide use of court watching, especially at the beginning of a comprehensive evaluation program.

The Committee studied many evaluation techniques used in business and government. A discussion of the strengths and weaknesses of each technique is beyond the scope of this interim report. However, on the basis of its initial study, the Committee feels that bar polls can be improved. One place to begin is the preparation of better rating scales and more accurate criteria using performance appraisal methodologies developed in industry.



The Committee favors the concept of interviews with judges and lawyers, such as those conducted by the District of Columbia Commission on Selection and Tenure. These should come after Colorado gains experience with survey techniques, except in areas where surveys cannot be effectively used. For example, different approaches to evaluation may need to be designed for rural and urban areas. Surveys are appropriate where there are large lawyer populations, but interviews or other methods should be used where there are insufficient lawyers or jurors to provide a sound data base for a survey.

#### Frequency of Evaluation

Colorado judges have differing terms of office: supreme court justices, ten years; court of appeals judges, eight years; district judges, six years; and county judges, four years. In the judicial survey, most judges favored evaluations either every two years or twice each term. The Committee concluded that each judge should be evaluated prior to his first retention election, and after that trial court judges should be evaluated every two years, and appellate judges every four years.

#### Use and Dissemination of Results

Handling results poses additional problems. Evaluation of professional performance is complex, and reducing evaluation to misleading simple comparisons can be tempting. The differences between most judges are relatively small and difficult to measure. Therefore, evaluation should not rank judges on a comparative basis. Each judge should be compared only with an objective set of standards. Evaluation data should be presented to voters as part of a "judicial profile" containing biographical and other information no later than three months before a judge's retention election. The other contents of the profile will be discussed in the final report.

The recommended state commission on judicial performance should develop uniform guidelines for the use and publication of evaluation results. The commission also should conduct regular studies to determine which performance criteria and publication methods are most helpful to voters and judges and should make changes as needed.

Evaluation data should be collected and disseminated locally, and local organizations should communicate results to the public using all means reasonably available. Different programs could be developed for various areas of the state, if needed, but uniform guidelines should take into account the most effective ways of disseminating data. All

local programs should be state funded and follow the state-wide guidelines established by the commission.

### Summary

The ideas and concepts described in this section were discussed at length by the Committee, and they will be explored in more detail in the final report. The following recapitulation outlines the themes that will guide final deliberations.

1. The voting public should have relevant information about the performance of judges.

2. Complex evaluation should be avoided in favor of basic information that the public can use effectively.

3. The final decision on retention should remain with the electorate. Evaluations, therefore, should provide balanced profiles of judges rather than simple recommendations to retain or reject judges.

4. The primary purposes of judicial evaluation should be to help the public in evaluating judges for voting and other purposes, to improve the judicial system by assuring that merit selection and retention work, and to assist judges in their professional development. Moreover, whether judges are selected by merit or elected, evaluation is an important aspect of judicial performance and should be instituted.

5. Judges should be evaluated against relevant performance standards and adherence to principles of laws. They should not be evaluated on the basis of personal, social, or political philosophies.

6. A two-step approach to evaluation should be used: first, an initial screening of all judges to identify those meeting performance standards, and second, a more intensive examination of judges whose performance is marginal or questionable.

7. An independent commission with professional, full-time staff should be given responsibility to develop uniform performance standards, coordinate evaluation programs, conduct research in performance measurement, and provide guidance for the use and dissemination of evaluation results.

8. The responsibility for evaluation should remain at the local level. Uniform standards and methods should be used, but they should be administered locally for trial judges and statewide for appellate judges.

9. Evaluation results should be regularly and widely disseminated to the public through newspapers, radio, and television, or other appropriate methods that may vary with the locale.

10. Individuals or groups who have direct and recurring contact with judges should have a role in evaluation.

11. Evaluation should be a positive and helpful experience. It should be as objective as possible, and judges should have opportunities to discuss evaluation results prior to dissemination.

12. An evaluation program should be implemented in phases. The initial phase should include surveys of lawyers and jurors who have had direct experience before a judge. Subsequent phases could reach other constituencies.

13. An evaluation program should undergo a "sunset" review within two years of its creation to determine if it is effectively informing the electorate about the judicial performance.

Finally, the Committee concluded that a judicial evaluation program should be developed and implemented regardless of the method used to select judges in this state. But evaluating judges and informing the public about judicial performance are challenging responsibilities that must be carried out with a sense of balance. Succumbing to the temptation to achieve simplicity could lead to superficiality, and such a system would be worse than none. On the other hand, a comprehensive system could be so complex and time consuming that its benefits would be more illusory than real. A discussion of the concept of balance and a more thorough analysis of the possible consequences of an evaluation program will be included in the final report.

## TENTATIVE RECOMMENDATIONS

The Committee on Judicial Performance submits the following recommendations to the Judicial Planning Council for review and further action.

1. The Supreme Court should create a commission on judicial performance to design and implement an evaluation program for the state judiciary.
2. The commission should be relatively small with a preponderance of non-lawyer members. As one illustration, the following composition might be appropriate: one appellate judge; one district judge; one county court judge; one lawyer; and five non-lawyers. Where feasible, a member should provide a bridge to another organization concerned with judicial evaluation. For example, the lawyer member could be on the appropriate Colorado Bar Association Committee, another member could be on a nominating commission, and so forth. At least two members should live outside the metropolitan areas of the state.
3. During its initial phase, the commission should:
  - a. Identify a basic set of judicial evaluation criteria;
  - b. Monitor and evaluate bar associations' surveys;
  - c. Develop and test lawyer and juror surveys that can be used in different areas of the state;
  - d. Prepare alternatives to surveys where necessary and appropriate;
  - e. Develop and test an evaluation profile for judges;
  - f. In cooperation with newspapers, radio, and television, develop guidelines for use and publication of evaluation data; and
  - g. Cooperate with selection and discipline commissions in activities of mutual interest.
4. In order to benefit from the experience of conducting surveys in conjunction with elections, the commission should be organized no later than July 1, 1980. It can then work with and monitor lawyer polls conducted by bar associations prior

to the November, 1980, general elections.

5. The commission should continue for at least two years. The Supreme Court should then decide if it should continue into a second phase in which it could expand its evaluation activities to include: peer evaluations; trained court observers; surveys of court users, such as witnesses and litigants; productivity and sentencing data; and other appropriate methods.
6. The commission should be independently staffed and funded, although as a practical matter, its staff may be located in the State Court Administrator's office.
7. The Supreme Court should immediately request the General Assembly to appropriate funds for the commission during the 1980 session, as an amendment to the Judicial Department budget. (A minimum first-year budget of \$97,000 would provide two professional staff, a secretary, rent for three offices, operating expenses, travel, lodging, and per diem for nine commission members, and limited access to specialists in performance measurement.)
8. The Committee does not recommend that local nominating commissions be required to evaluate judges, but thinks they should be able to, if conditions warrant, in accordance with Supreme Court rules governing their activities. Therefore, to preserve this option, the Supreme Court may want to recommend to the General Assembly that concurrent resolutions for changes in the constitutional provisions governing judicial nominating commissions be revised so local nominating commissions may be used to evaluate judges.

The work of the commission on judicial performance should supplement, but not supercede, the authority and responsibility of the Chief Justice to supervise and administer the Colorado judicial department. It should provide the public and the judges information that will make retention elections more meaningful and professional development a reality. The commission should not attempt to remove the basic decision making responsibility for retaining judges from the electorate. To these ends, the Committee sees the creation of the commission as an investment in the future of the Colorado Judicial Department; one that should be made with due deliberation and careful planning.