JUDICIAL PLANNING COUNCIL

COMMITTEE ON JUDICIAL PERFORMANCE

COLORADO JUDICIAL DEPARTMENT
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MINUTES OF THE EIGHTH COMMITTEE MEETING

Friday, December 14, 1979

The eighth meeting of the Committee on Judicial Performance was held on December 14, 1979, from 3:30 p.m. to 6:10 p.m. in Conference Room 210, at the address indicated above.

Committee members in attendance were:

Daniel S. Hoffman, Chairman
Baxter Arnold
Lewis Babcock
Emily Bocko
Alex Keller
Harry Lawson
Ed Lehman
George Manerbino
Charles Pierce
Roland Rautenstraus
Edith Sherman
Anthony Vollack

Staff support for the committee was provided by Keith Stott, Deputy State Court Administrator.

Welcome and Call to Order

Dean Hoffman opened the meeting by reminding members that this is the second meeting in a three-part series aimed at developing the final conclusions and recommendations for the committee. The committee's conclusions will be included in the interim progress report which will be prepared and submitted to the Judicial Planning Council in early January. As indicated by the letter to Judge Smith in the folders prepared for this meeting, the interim report would be circulated widely to provoke comments and ideas for the preparation for the final report and recommendations.

Membership Matters

Dean Hoffman informed the members that Peter Holme had resigned from the committee. He explained that Mr. Holme's letter was very thoughtful and he had received authorization to discuss the contents of the letter with the committee. In the letter, Mr. Holme described a number of concerns leading to the resignation.

A major concern was the assumption that periodic evaluation of judges is desirable either to meet some supposed public outcry or to respond to undocumented assertions of certain members of the legislature and the media that such an evaluation is of great importance. Even if this was true, it will be very difficult to develop and adminster a valid evaluation that would not be disruptive and damaging to the judicial branch and our system of government.

Mr. Holme felt strongly that only judges and lawyers can make the qualitative decisions and analyses necessary to evaluate judges in the absence of gross misconduct, senility, drug addiction, alcoholism, and other kinds of blatant characteristics. Paradoxically, the public probably would not give much credence to an evaluation by these two groups.

The pressure to come up with some form of affirmative plan was another concern. As one who loves the judicial system, Mr. Holme did not want to be in the position of letting the system down by creating an evaluation system that would be misleading. For example, he cited productivity as one element in evaluation that is absolutely useless. The inferences created by numbers are very misleading, especially if the groupd being evaluated doesn't have basic credibility. He was also very concerned about court watchers who may be interested but essentially uninformed volunteers who have enough spare time to act as monitors of members of the legal profession but may not have the background to enable them to understand the subtle intricacies of problems a professional group is trained to resolve.

Court watchers for judges would be as effective as lay doctor or teacher watchers. Judicial observation would be superficial and of little value no matter how well the intentions of the observer.

He also cautioned against the danger of promoting a popular type of image of what a judge should be. Some judges will seek to respond to that kind of pressure, even at the expense of content and expertise. It is the decision-making ability of a judge that is most important to the judicial process, and there is the possibility that evaluations will focus on behaviors or traits that are secondary to decision-making.

Finally, Mr. Holme was concerned that his negative prognosis for judicial evaluation would impede the committee effort. He did not want to stand in the way of the preparation of a useful product.

The resignation touched off a lengthy discussion about the committee's purposes and activities. Must the final report be unanimous? We would like to achieve a consensus in the final report, but minority viewpoints can be expressed. To artifically create consensus would be terribly wrong. Has interest in the committee's work decreased as evidenced by more absences? No, attendance has held fairly constant until the last couple of meetings. Ken Monfort has never been able to attend meetings, and Carol Green had offered to resign from the committee because of a conflict with her work. These and other questions served as the basis for the discussion that followed.

Committee Discussion of the Issues

For almost two hours the committee discussed a wide range of ideas. Much of the initial debate centered around whether or not the committee should provide a specific model for judicial evaluation. The baseline consensus seems to be the judicial system is working well, even though there are areas where improvement is needed. The political climate, however, seems to require that an evaluation program be developed.

The suggestion was made that the final report start out on the supposition that the court system is working well. It is infinitely better than the way is was operating in the past, and not much needs to be done to it. Whatever else is said after that simple affirmation should be an effort to try and assist the court to improve where it can. However, it may not be within the purview of the legislature to require that the judicial branch be evaluated.

One of the problems with the judicial system is that there has been a tragic under-publicizing of the role of the Judicial Qualifications Commission. In addition, the activities of the Commission need to be exposed to "sunshine". In terms of performance of the system, issues related to productivity do not appear to be important. Certainly none of the committee's work to date has revealed much concern over judicial productivity.

If this simple affirmation is insufficient and there is a political need for evaluation model, then the committee could suggest a "bare bones" mechanism together with cost estimates for implementing such a system. Some committee members expressed the hope that something useful might be given to the court so that it could respond on the issue of evaluation before the legislature felt compelled to get involved again. Other committee members did not disagree with this point of view but expressed some anger at the need to "pander" to what may be limited, if not foolish, points of

view. The system works well, and we are talking about evaluating very high quality professional people. A detailed evaluation is not merited. On the other hand, it is hard to argue with a need for increased accountability. The problem really centers on how to increase accountability through bona fide rather than cosmetic changes.

Legislators do have to take on the concerns of the public, and many people don't know much about the courts. The judicial system, particularly its selection and disciplinary proceedings must be more visible. And even if the legislature does not have any authority to exert this kind of control or influence over the judicial system, the court may be able to put evaluation and educational programs into effect on its own accord. On the other hand, for an evaluation program to succeed, the gathering of information would probably need to be detached from the judicial system itself in order to have real credibility, the program would have to have a great deal of visibility, and some group would have to have the responsiblity for evaluation as its single purpose so that it would take the initiative to do the necessary gathering.

The discussion then moved to consideration of the groups that could be involved in judicial performance evaluation. The chairman asked if it would help the public if it knew what jurors felt or thought about a judge's performance. But this is a very complicated question. Jurors, as a group, and lawyers seem to be two groups that could be used for evaluating judges. Police and social workers could also have some valuable input. Trained court watchers were not seen as a viable means for evaluating judges because of the expense involved. But even if jurors and other groups could be used in evaluation, the question is how the information would be collected and disseminated. Some committee members expressed concern that the public would not read or digest information produced in an evaluation performance report. Even so, the consensus seemed to be that when dealing with issues of public accountability, the right to have information available if desired is important, even though it may not be used.

To illustrate the difficulty in determining if a recognizable group such as jurors should be used for evaluation, the committee talked about the extent of individual judge exposure to jurors. Some judges never have regular jury trials. Do we permit jurors to make evaluations of judges on the basis of one contact? Jurors would add to the credibility of an evaluation report, but how much weight should be given to a jury poll? Also, which evaluation criteria should be rated

by jurors? Clearly, they do not have the ability to determine technical qualifications of judges, so a survey of judges might be limited to judicial behaviors or traits.

The public would probably perceive juror evaluations as having more credibility than lawyer evaluations of judges, even though lawyers would have more understanding of the judicial process and the complexity of issues involved. But jurors may not have as uniform a feeling about a judge as lawyers who practice regularly before a judge. The real issue seems to be the weight that would be given juror evaluations. Juror attitudes would also be affected by the kind of case the judge has. If it is a "nice, clean" case with few delays or tough issues, then the judge might make a more favorable impression upon a jury than in a case that went on for weeks and was subject to many legal nuances.

In summary, the consensus of the committee was that jurors had a role in the evaluation process but it is hard to know how much weight should be given to juror polls. Jurors are one of the groups, but they may be suitable for only certain kinds of critieria and certain types of cases. Witnesses were rejected as evaluators because of the perceived credibility problem. A judge and jury is constantly being forced to determine whether or not witnesses are telling the truth. Witnesses are only in the courtroom for a limited purpose, and they may have too many biases at the start of a trial to be able to evaluate a judge objectively. If jurors are used, then they should be given second priority over lawyers. The final model for evaluation could prioritize different evaluation groups. In other words, lawyer surveys could be the first component of an evaluation model followed by a juror component as needed or as economically feasible.

After discussing these issues, the committee then considered whether or not there was a real need for judicial evaluation and if the committee had the capacity to develop an affirmative, meaningful evaluation program. The unanimous consensus at this time (several committee members had to leave early), was that the committee should continue to develop an affirmative evaluation model. The most useful model would be one that included surveys of the constituencies that have the most direct contact with judges. A model that relies heavily on a subjective, investigative approach to evaluation was rejected. For example, evaluations that rely fully on interviews with small groups of lawyers or others who come in contact with a judge was rejected in favor of a broader base survey type evaluation. Lawyers who practice before the judge and jurors were agreed upon as the two groups best equipped to evaluate a judges performance. The final committee report, however, should also include an explanation of why the committee felt that other groups would not be better. We should also emphasize our feelings about the appropriate educational function of evaluation.

The committee also concluded that the feelings aren't that strong in this state about performance evaluation. There appears to be deep public concern about some of the complex cases noted in the news media. But there is not that much concern about the day-to-day operations of the state courts. There has been a very unsuccessful effort to educate the public about how the state court system works. In addition, it is not likely that the voting public would analyze and read evaluation materials in depth. Therefore, an evaluation system should be relatively simple or moderate in its approach and should try to avoid complexity.

Committee Discussion about Evaluation Mechanisms and Methods

After concluding that an evaluation plan should be prepared and that lawyers and jurors should be surveyed as part of the evaluation process, the committee considered the different types of commissions that could be given responsiblity for conducting evaluations and some of the techniques that might be used. Even though judges are always being evaluated by those with whom they come in contact, some independent group needs to collect, analyze, and furnish information to the public about judicial performance.

The Judicial Qualifications Commission and the various nominating commissions were suggested as established organizations that possibly could be assigned evaluation functions. Several objections were raised with using the Qualifications Commission to evaluate the performance of judges. First, the committee had concluded that evaluations ought to be locally administered. The Qualifications Commission is a state-level organization with no local responsibilities or representatives. Second, several committee members saw a substantial conflict with having the body that recommends the removal of judges put in charge of evaluating them. This implies that the commission will be able to do indirectly what it doesn't have enough evidence to support directly. This would put the Commission in a dual role, and it already has the role of judge and jury in that it conducts its own hearings, makes it own findings, and operates with little public disclosure. Third, there is a substantial difference between the gross misconduct of a judge which typically comes before the Commission and the evaluation of the day-to-day performance of a judge. It could be difficult for the Commission to separate these two distinct points of view. To do so, it would probably have to create subcommittees, in which case, it would really be two commissions. If this were the case, then a separate commission might as well be set up in the first place. And last, the committee was concerned that there would be too much power placed in the Qualifications Commission. If anything, the public meetings revealed that local citizens are interested enough in their judges to resent placing the responsibility for evaluating judges for retention election purposes in a small commission located in Denver.

SKI
DECEMBER 1979

Weak-Side Cure

Do things go more smoothly when you turn to one side but less so when you turn to the other? You have a weak-side turn.

BY DOUG PFEIFFER

A turn to the right used to be my personal nemesis. Either I stemmed and lost time getting into the fall line, or I fell to the outside of my tracks, while veering off into the hill.

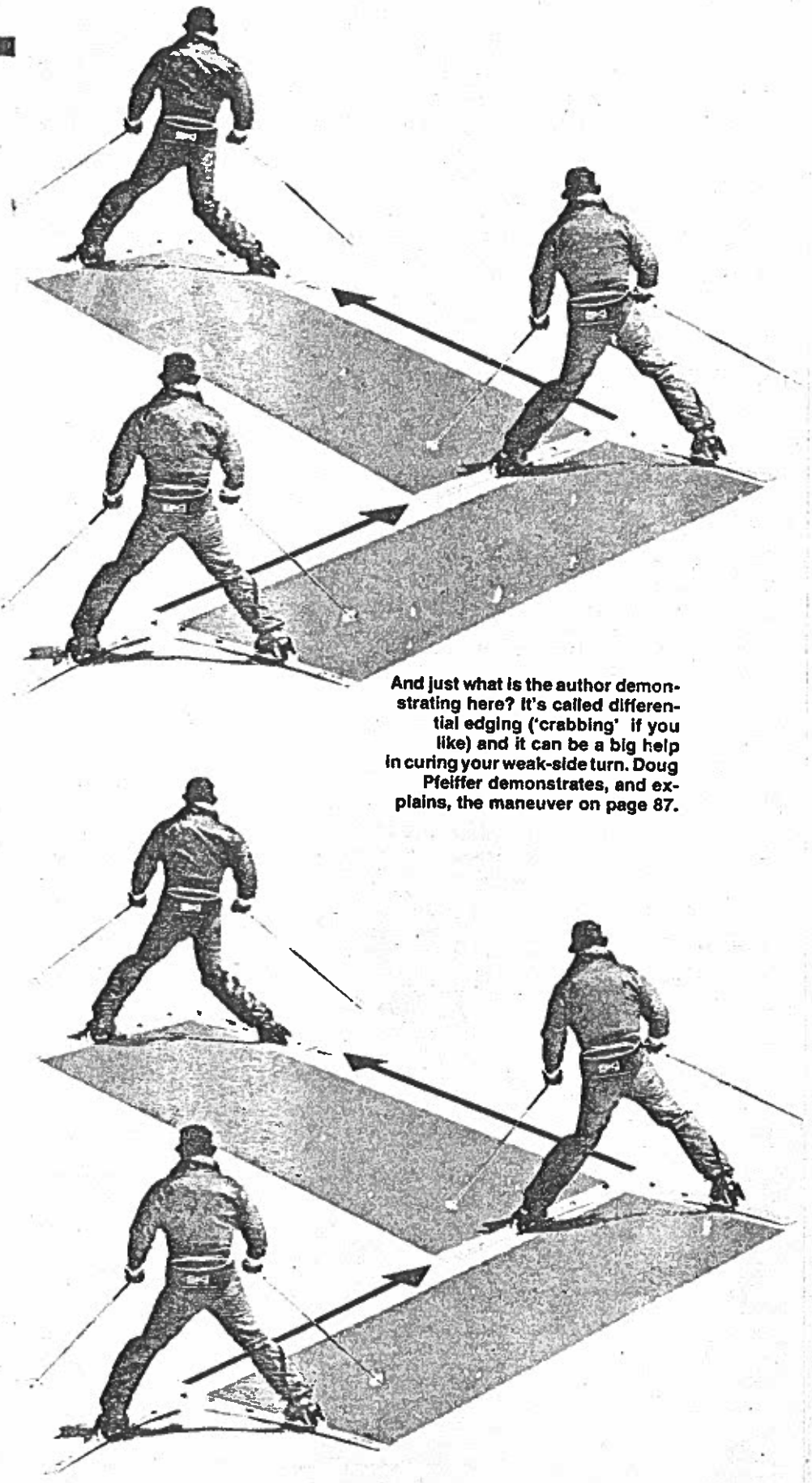
But no more. I found a cure. Or perhaps it was Réal Charette who led me to the discovery years ago when I was an instructor for him at Gray Rocks Inn near Mont Tremblant, Quebec.

Charette pointed out that even good skiers had basic flaws that come to light when you slow them down. Speed, because it adds force to your body movements, often helps you to power your way around a turn in a slipshod way. It can be a real coverup for your lack of finesse in the ankles—a deficiency often present as you turn in one particular direction.

Ask a hotshot to go slow, with skis wedged out, and to make or try to make a series of well-rounded, smoothly linked snowplow turns. Sure enough, an experienced eye can usually spot a basic flaw in the very foundations of a person's skiing within three snowplow turns on smooth-packed surfaces.

That flaw, a loose connection between knees and skis, is either mechanical or biomechanical.

You can no more build a solid house on weak footings than you can a strong skier on a shaky platform. Any weakness and wobbling, between knees and skis, usually shows up at speed as an uncontrollable arm



And just what is the author demonstrating here? It's called differential edging ('crabbing' if you like) and it can be a big help in curing your weak-side turn. Doug Pfeiffer demonstrates, and explains, the maneuver on page 87.

The committee then considered the use of judicial nominating commissions. At first, the use of these commissions were thought to be less than desirable for some of the same reasons described above for rejecting the Qualifications Commission. The key concerns were that nominating commissions might not be able to evaluate fairly those judges who might not have been their favorites at the time of appointment of the governor, and the combination of selection and evaluation would result in a loss of credibility. This first argument was rejected because of the regular turnover of committee members, and the second was not considered a major concern by most of the committee. It was also suggested that nominating commissions would be less than objective in their approach to performance evaluation. This issue caused a substantial amount of discussion and debate which was resolved by the committee deciding that objectivity could be preserved by requiring local nominating commissions to rely primarily on survey instruments that would help assure objectivity in the process, e.g., surveys of lawyers and jurors. Subjective techniques such as interviews were rejected by the committee. In addition, the nominating commissions should be seen as the collectors and disseminators of evaluation information (this would have the side benefit of giving them more visibility in local communities) but the analytical and interpretive functions should be separate.

This discussion led to a consideration of the concept of a "meaningful evaluation profile" for judges. What would be in such a profile and how would it be used? How much information beyond surveys would be gathered? The committee concluded that a profile of a judge could be put together by local organization responsible for evaluation, but the profile should be based upon objective information from surveys or other gathered from surveys or other means. The profile could include a biographical sketch prepared by judges according to acceptable formats, together with sections on technical and other qualifications prepared by the local committees but based on survey data. Information from interviews with lawyers or other judges should not be used. What happens if the nominating commission splits its vote over an evaluation? This should be reported as a fact, and readers would have to decide what kind of interpretation to give such information. The profile should be used to give a balanced overview of a judge's performance rather than a simple, yes-no recommendation about retention.

The committee considered the composition of the local nominating commissions. Alex Keller mentioned that the Colorado Bar Association has already approached the legislature with recommendations for expanding the membership of the commissions. (The CBA proposals were sent to committee members about two weeks ago.) Each commission presently consists of three attorneys appointed by majority vote of the

governor, and attorney general, and four citizens appointed by the governor. The CBA proposal calls for two additional members, only one of which would be an attorney, appointed by the General Assembly.

Toward an Evaluation Model

During the last part of the meeting, an affirmative evaluation model began to emerge. The broad parameters of this model are summarized here, and it will be discussed in more detail during the next meeting.

Local nominating commissions could be used for evaluating the performance of judges. The commissions would be responsible for collecting information about judges and disseminating it to local news media and the public (issues related to dissemination were not discussed). The work of the local commissions could be coordinated by a state-level group responsible for designing uniform standards of evaluation, preparing uniform survey instruments, and conducting ongoing research in the area of performance evaluation.

Several combinations of alternatives for the state commission were discussed. From a structural standpoint, the state group could be an entirely new and independent commission, or it could be created by and as a part of the Judicial Department, or it could be a combination of Judicial Department and legislative appointements. The state group or commission should have full-time, professional staff and be able to contract with experts in survey and evaluation techniques as needed. The staff could be independent of the Judicial Department, a part of the state court administrator's staff but working exclusively on commission activities, or judicial branch staff organized along the lines of the board of continuing legal and judicial education or the commission which handles grievances against attorneys.

The state and local groups would focus on the collection and dissemination of objective information about judges. The committee prefers that this data be restricted to surveys of lawyers and jurors until expertise can be developed and a need is demonstrated (and cost justified) for more precise or extensive information. The data used by the local groups should not be a mere compilation of raw data, so the subjective analysis of raw data from surveys should be done by professional commission staff and fed back to local commissions.

The consensus of the committee was that the basic retention question should be preserved for the electorate. Local commissions should try to give the public more information about judges, but they should not attempt to tell the electorate how to decide the basic question. The evaluation

should be an objective explanation of what and how well a judge does his or her work. The commissions should not get involved in collateral issues, such as the problems of the judiciary, nor should they use more subjective techniques such as interviews with judges (this is particularly true in rural areas where as many as a third of the practicing bar may be represented on nominating commissions). The nominating commissions seem more suitable for certifying the legitimacy of the information gathering process rather than trying to interpret evaluation data.

Committee members also suggested that if local nominating commissions cannot be used at the present time because of constitutional restrictions on the scope of their authority, then the Supreme Court may want to set up an interim state-level commission that would begin to work with bar groups on surveys of lawyers. An interim commission should be able to begin developing expertise in the area until it could expand its activities to local areas. Also, any changes now being proposed by the CBA should include the concept of changing the authority of local commissions to permit addition of evaluation functions. However, restrictive or mandatory language should be avoided (this could be handled by permitting local nominating commissions to become involved in evaluations as authorized by legislation or court rule). Finally, the committee's final report should avoid elitism. It should describe an affirmative direction but also explain why certain methods or models were not selected. It should also explain how other constituencies can be tapped as commissions develop expertise.

Preparation of the Interim Report

The deadline for the approval of the interim progress report is January 11. A rough draft or outline will be readied for a January 4th meeting.

Schedule of Meetings

The next committee meeting will be held on Friday, December 21 at 3:30 p.m. in the Colorado State Judicial Building.

Tentative meetings are scheduled for January 4 and 11.

Adjournment

The meeting adjourned at 6:10 p.m.

Attachment

Attached is a copy of the chart displayed on the wall during the meeting.

ATTACHMENT

Chart Used at CJP Meeting

December 14, 1979

* Judges being evaluated for retention should not be evaluated on the basis of personal social or political philosophy.
* Individuals or grops (e.g. police, soical workers, lawyers) who have direct and recurring contact with a judge should have a role in evaluation.
* Uniform evaluation standards should be used, but they should be locally administered.
* There should be an officially designated (state-level?) group to coordinate evaluation methods, summarize findings, and provide guidance to local groups.
* Voting public should have relevant information which is regularly and widely disseminated.
* Evaluations should be aimed at a more "gross" or overall level rather than a determination of relative degrees of quality among judges.
* Complex evaluations should be avoided in favor of the more limited information the "public" can use.
* Perhaps there should be a two-phase approach: (1) initial screeing; (2) more detailed look at those who "fail" first phase.
* Evaluation should provide "meaningful" profile rather than ultimate recommendation.
* Methods of P.E. may vary with locale.
* Judges should have opportunities to discuss evaluation results prior to dissemination.