



JUDICIAL PLANNING COUNCIL
COMMITTEE ON JUDICIAL PERFORMANCE

COLORADO JUDICIAL DEPARTMENT
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MINUTES OF THE ELEVENTH COMMITTEE MEETING

Friday, June 13, 1980

The eleventh meeting of the Committee on Judicial Performance was held on June 13, 1980, from 3:30 p.m. to 5:35 p.m. in Room 210 of the Colorado Judicial Building.

Committee members in attendance were:

Daniel S. Hoffman, Chairman
J. Robert Allshouse
Baxter Arnold
Lewis Babcock
Emily Bocko
Julian Garza, Jr.
Ken Kindlesperger
George Manerbino
Charles Pierce
Roland Rautenstrauss
Edith Sherman

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

Welcome and Call to Order

Dan Hoffman, Chairman, called the meeting to order and welcomed committee members to the first committee meeting in five months. The committee was scheduled to meet in May, but scheduling conflicts delayed the meeting until this month.

A working paper entitled, "Proposed Changes to the Interim Report," had been distributed to members in advance of today's meeting. Chairman Hoffman suggested that the proposed changes be treated on a page-by-page basis to simplify the discussion, although major revisions could be discussed in more detail. The committee agreed to this procedure.

Report on New Jersey Judicial Evaluation Program

Keith Stott distributed a memorandum for the committee which described the status of the New Jersey judicial evaluation program. He had talked with Justice Alan Handler of the

New Jersey Supreme Court earlier today regarding the status of the judicial evaluation program in that state. The recommendations have been adopted by the New Jersey Supreme Court and a permanent Committee on Judicial Evaluation and Performance has been created. The committee is comprised of seven members: a retired Supreme Court Justice as Chairman; a judge from the intermediate appellate court; an assignment (chief) judge; a trial judge from the civil division; a judge from the chancellor division; and two members from the bar association (the chairman of the standing committee concerned with judicial evaluation and a member of the Advisory Committee on Judicial Conduct). Public members will be appointed to the committee at a later date. Justice Handler is the Supreme Court's liaison with the committee, but he has no voting rights or specific committee responsibilities. The committee has met several times this year, and is beginning to explore some of the issues raised in the initial study on judicial performance evaluation.

Report on American Bar Association Activities

Mr. Stott reported on his conversation with Wantland Sandell, Director of Staff Activities for the American Bar Association's Judicial Administration Division. Mr. Sandell was interested in Colorado's research, and had called Judge Smith to obtain a copy of our report. He noted that the Criminal Justice Section of the ABA will be presenting a proposal at the ABA convention this summer which calls for a judicial evaluation study by that organization. Mr. Sandell would like to keep in touch with our project as we conclude our work.

Discussion of the Proposed Changes

1. Judge Pierce suggested a revision for item 4: "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, and their reports and evaluations should be independent of the control of any judge being evaluated. The evaluation should be as objective as possible and be for the release of the results to the public, the judges should have opportunities to discuss evaluation results with the group responsible for compiling and dissemination of the results."

2. The consensus of the committee was that the final report should not be greatly expanded except where required to clarify committee recommendations. Footnotes should be used sparingly, and significant commentaries or reports, such as the staff paper on the judicial survey, should be included as appendices. In item 13 for example, the explanation of the Colorado Code of Judicial Conduct should be very brief, if used at all.

3. Ken Kindlesperger indicated that he was very interested in the court-watching program. Although court-watching has been used in a number of states, nothing has been done in Colorado. Perhaps the committee can encourage volunteers to become active in this area. Judge Pierce pointed out that court-watching is indeed a worthwhile program, but as the committee had concluded in earlier meetings, it is very expensive to staff and operate. The committee had not recommended court-watching as a means of evaluating judicial performance for this reason. It may be possible to encourage volunteer court-watching in some courts on an experimental basis. Any experimental program should be monitored or at least encouraged to feed back their results to this committee or its successor. Mr. Kindlesperger would be interested in working with a volunteer group. He sees a distinct difference between an adversary-type court-watching and court-watching for public education purposes. Committee would be reluctant to endorse a court-watching program sponsored by a specific organization.

4. In order to keep the bulk of the final report to a minimum, the newspaper articles referred to in item 21 do not need to be attached in the appendix.

5. Use of judicial evaluation for management of judicial personnel as noted in item 31, should be a long-range goal of judicial performance. However, the committee feels that there is too much to do immediately to include this concept as a recommendation. Our focus must be providing information to the public.

6. In reference to item 27, the committee accepted or rejected the existing evaluation for the following reasons: the New Jersey program seems to be a matter of "the foxes watching the chickens"; in terms of the Alaska program, the committee felt that some of the groups might not be valid groups, that is, they have special interests, such as the police; judges see bar polls as having more credibility for them than other types of methods; court-watching is too expensive because professional trainers are required.

7. The committee discussed the idea that local bar associations should be given the responsibility for administering the program (item 34). Many bar associations don't conduct polls now. However, bar associations don't have a public constituency, which was the advantage of the type of evaluation program and organization suggested by this committee. The issue of credibility was central to the discussion, and the committee decided to adhere to its original recommendation of a committee of lawyers and non-lawyers to conduct a poll at the local level. The language in our final report

ought to indicate "until such time as," and we need to acknowledge the need for local bar associations to interact with the state agency involved in performance evaluation, even if it is on an interim basis. The committee does not want to suggest that all a performance commission do is act as a facilitator for bar association surveys. Instead, the commission should have the right, in the absence of other techniques, to work with local bar associations conducting surveys of lawyers. As a practical matter, it will need the cooperation of the bar association to make the program work.

8. On item 32, the committee would be interested in including an example of criteria used by nominating commissions if such are available in this state. These materials could be included in the appendix as appropriate.

9. In reference to item 40, the committee discussed the issue of productivity at length. It is possible to develop productivity information, but the cost of doing so is exceedingly great and far outweighs the benefits. Thus, the use of productivity data in performance evaluation should be highlighted as a role in the future, but it is beyond anticipated funding at the present time. Also, we may not want to use the term "productivity," because productivity is very complicated and difficult to measure. "Activity," on the other hand, is relatively easy to measure. The reference in item 40 should be changed to indicate that many techniques exist to measure activity, and the report may include common definitions of activity and productivity in a footnote. Trying to analyze productivity, particularly in terms of looking at quality of judges' work, becomes mind-boggling on a state-wide basis. Judge Manerbino mentioned the use of a daily activity report in the Denver County Court. While this is a useful management tool for a presiding judge, it is extremely difficult to disseminate this type of information to the public. Without any discussion with individual judges, the raw data from activity reports can be very misleading. We need greater clarity, but not necessarily more length, involving this issue.

10. In terms of item 42, some of the reasons the committee supported surveys are: lawyers have an opportunity to observe judges; lawyers are knowledgeable in the areas in which judges are working; and lawyers have a self-interest in making sure that there are good judges on the bench. The common denominator is that lawyers and jurors are participants in the process and evaluations would not be merely on the basis of reputation. The people you can reach with a survey are people who participate in the system. Finally, surveys may not be objective but they are efficient: you can reach a larger number of people at a lower per unit cost.

11. In item 43, we are not suggesting the same type of questionnaire for jurors. Two surveys will be prepared--one appropriate for lawyers and one for jurors. The kinds of characteristics the jurors will be asked to comment on are different from those for lawyers, although there may be some overlap. Keith Stott noted that the jury utilization management project is using a juror exit questionnaire form. It may be that in the near future a means of reaching jurors quickly and inexpensively may be in place for adaptation to judicial performance evaluation. (A copy of this form is attached to the minutes.) Judge Babcock noted that the one-day/one-trial system is a two-edge sword in terms of judicial evaluation. On the one hand, it increases the number of people who have contact with the judicial system, while on the other, it decreases the amount of contact with the court system. When jurors are used for a longer period of time, they have more trials before the same judge.

12. The committee discussed the difficulty with interviewing judges and lawyers (item 45). This technique may need to be used in small areas where there are few jury trials. The committee concluded that the language ought to remain the same. To go further with more specific recommendations may involve creating standards, e.g., what is the minimum number of jury trials before you have to go to interviews, etc. The setting of standards will go hand in hand with the development of survey instruments. Only then will a performance committee be able to say that if a judge falls below a certain level of performance, he cannot be endorsed for judicial office.

13. The committee discussed the need to include more materials in the appendices. As long as we can compile certain materials, then perhaps we should include it as an appendix so that the information will be available to the future commission.

14. In item 53, the committee felt that it was up to local areas to select appropriate options for distributing performance results. In smaller communities, newspapers may be the most desirable way to disseminate results. Each area needs to determine the proper mix.

15. In terms of item 57, the committee members do not agree that peer evaluations are important enough to include in the first phase of the evaluation program. However, members of the committee noted that peer evaluations are generally reliable or useful because as members of the "system," judges know how well their fellow judges are doing. Judges can put what they hear about others into a context which others do not. Although it would not be unreasonable to include peer evaluations in the first phase, there could be as many problems as there would be advantages to such a system. Several

of the members of the committee who are on university faculties, noted that there is a serious problem with using peer evaluations for teachers. Teachers tend to be supercritical when it comes to issues such as tenure for other teachers. Even so, after many hundreds of years, this is the basic evaluation technique which universities have evolved.

16. In terms of the use of evaluation information for improving individual performance (item 58), the committee is not in the position to pursue this idea at the present time. The concept is correct, but the committee cannot recommend it because of the complexity and the costs involved. Our key focus is how to give the electorate some information, not how to improve judges. It would be great to have a tool to help the judges improve their performance, but it's not possible in terms of the economics involved. Perhaps the report should point out that internal court management and improving judges are worthy goals. To implement them appropriately, however, would require more resources than this committee has been considering. The committee did not feel it could go beyond what it has done already in terms of recommending this procedure for informing the public.

17. This discussion led to an argument about the sequence and frequency of evaluations. Should a judge's evaluation be made public only before retention election or should it be made public every time it is given? The simple fact that evaluations are public is one of the main arguments for expecting performance to improve. There may not be significant enough advantages to an individual judge to provide him with confidential evaluations. If you start being selective about which results are to be published, then there will be problems. The commission's role should be open and public on everything that it does; the general credibility of the process will be seriously affected if all evaluation results are not published. There is psychological gain to come out of this process for the public and there is useful information which will be produced in terms of retention elections. We should not deny the fact that we are trying to do something to help judges improve their performance, but that is not the central thrust of the committee's work. Our purpose is to help voters confront the retention election process because, at the moment, they don't have any other way of coping with that process.

18. There was some confusion by the committee on the point of when the first evaluation would be done. The report recommends that the first evaluation be done prior to the first retention election of a judge. This would occur within two or three years of appointment for all new judges. A commission on judicial performance has an obligation to the public to do an evaluation prior to the first retention election. If it doesn't do such an evaluation, then there is no sense

for having the commission. After discussion, the consensus was that the committee position should remain the same as to when the evaluations would be done and whether or not they would be made public. The only difference or suggestion was that we emphasize that evaluation results are to be disseminated to the public in the form deemed most effective by the local group.

19. The committee discussed whether or not a commission on judicial performance should be created by the Supreme Court in the absence of specific funding from the legislature. The unanimous conclusion was that if the legislature was not willing to fund a complete proposal, then the judiciary should not try and do something on its own. The approach of the commission on judicial performance should be professional from the very start: it should not have to "beg, borrow or steal" to exist.

Subcommittee to Review Draft of the Final Report

Chairman Hoffman appointed the following committee members and staff to serve as a drafting committee for the final report: Charles Pierce, Emily Bocko, Ken Kindlesperger, Dan Hoffman, and Keith Stott. This subcommittee will not meet until sometime in July following staff vacations.

Schedule

No dates were set for future meetings. Committee members were advised to reserve August 20 for a possible meeting. The next meeting of the Judicial Planning Committee is scheduled for that date, and it may be possible to arrange a joint meeting to review the final report at that time.

The final draft of the report will be circulated to committee members when it is finished. If no major revisions are needed, then it may not be necessary to meet again.

Other Business

Emily Bocko noted that the League of Women Voters will be doing another brochure on judges prior to the general elections. The brochure will be sent out all over the state, and Mrs. Bocko will send copies to the committee.

Adjournment

The committee adjourned at 5:35 p.m.

KS:emb
Attachment