



State Measurement for Accountable, Responsive and Transparent (SMART) Government Act

C.R.S. 13-5.5-114 requires the State Commission to gather and maintain statewide data and post a statistical report of the statewide data on its website no later than thirty days prior to each retention election. The State Commission shall also report on the activities of the commissioners to the joint judiciary committee of the general assembly as part its SMART act presentation required by section 2-7-203 C.R.S (2017).

Mission

To provide judges and justices with useful information concerning their own performance, along with training resources to improve judicial performance as needed, while also establishing a comprehensive system of evaluating judicial performance to provide persons voting on the retention of judges and justices with fair, responsible, and constructive information about individual judicial performance.

Major Functions

The State Commission oversees the Office of Judicial Performance Evaluation and hires the Office's Executive Director. The Office of Judicial Performance Evaluation (Office) staffs the State and District Commissions on Judicial Performance, trains state and district commissioners, collects and disseminates data on judicial performance evaluations, including judicial performance surveys developed, distributed and collected pursuant to C.R.S. 13-5.5-105, conducts public education efforts concerning the judicial performance evaluations, measuring public awareness of the judicial performance evaluation process through regular polling, and other duties as assigned by the State Commission. In addition state and local commissions, totaling two hundred and thirty one commissioners, conduct evaluations of judges and justices by reviewing case management data and statistics, collecting information from courtroom observations, interviewing judges and other interested parties, reviewing judicial performance survey reports, reading authored opinions and decisions by individual judges, reviewing submitted comments about individual judges, and making recommendations and preparing narratives that reflect the results of performance evaluations for judges and justices. Commissioners conduct both interim and retention evaluations for judges eligible to receive those evaluations, based on appointment date and term of office.

Performance Measures

2022 Retention Evaluations

Commissions on Judicial Performance evaluated one hundred forty (140) judicial officers eligible to stand for retention in 2022. One hundred thirty-five (135) judicial officers declared their intent to stand for retention and appeared on the ballot. Five judges made the decision not to stand for retention after receiving an evaluation. Of the one hundred thirty-five judicial officers on the ballot, all were determined as “meeting performance standards” by Commissions on Judicial Performance.

Colorado voters retained 134 (99.3%) judges of the 135 judicial officers on the ballot. The one judge who was not retained, lost their retention with 49.05% of the county voting “yes retain” and 50.95% voting “no, do not retain”. Since 1990 Colorado voters have retained 99.9% of the judges standing for retention. Five judges who received a favorable recommendation by a commission (“retain” or “meets performance standards”) have not been retained by voters over the history of the program (1990-2022).

2023 Initial / Interim Evaluations

During the 2023 Interim evaluation cycle commissions on judicial performance were faced with a total of 165 evaluations across the state. Of the 165 judges, the commissions were required to conduct 71 initial evaluations for those judges serving their provisional term (all of those judges are subject to a retention evaluation in 2024). The remaining 94 judges received judicial performance survey reports. Commissions could choose to conduct an evaluation on those judges, or based on survey results and other factors, had the discretion to notify the judges they would not be subject to an evaluation. A “full evaluation” required the judge to provide examples of written or oral decisions (if they had been overturned by an appellate court, they are required to provide their opinion along with the reversing decision by the appellate court), undergo courtroom observation, and interview with the commission. The judge then receives an interim evaluation narrative outlining the evaluation findings along with professional development recommendations. Those evaluations were conducted between March 1, 2023, and July 1, 2023, with a few exceptions because of scheduling issues.

Public Engagement and Education

The Office completed transitioning to a Colorado.Gov website last year. The old website Coloradojudicialperformance.gov was decommissioned in November 2022. The Office continues to advertise the availability of judicial performance evaluation with radio and television spots through the Colorado

Broadcasters Association Non-Commercial Supporting Announcements (NCSA) Program, as well as a social media campaign utilizing Twitter, Facebook, and Instagram. We will continue to utilize new platforms as they come online and can serve our needs for increasing public awareness of judicial performance evaluations. The Office will continue to seek out and attend citizen engagement events prior to elections to promote “being an informed voter” by going to knowyourjudge.com.

Commissioner Education and Engagement

Office staff are required to train all judicial performance commissioners every retention cycle. Training has expanded to interim year evaluations to assist commissioners in providing meaningful professional development information to judges. The Office conducts both live and online training to meet commissioner needs. The curriculum is adjusted each year/cycle to reflect trends, statutory and rule changes, and feedback from past educational efforts. Training during the 2023 interim cycle was conducted at the district commission level through a mix of live in-person training and virtual meetings. The Office anticipates returning to in-person regional training in 2024. We think this will improve the effectiveness of training and increase retention of information. The virtual training clearly saw less learner engagement and retention of information, evidenced by Office staff needing to provide direction and correct information during the evaluation process.

Budget and Fiscal Responsibility

Our primary source of revenue is the “state commission on judicial performance cash fund” created in C.R.S. 13-5.5-115 (2017). The cash fund is funded by fees imposed on criminal cases that have reached a disposition. Those fees come from criminal matters in both county and district court. Cash fund revenues declined over time but have found stability in the last couple of years. 2023 witnessed increased revenues from court payments, as well as interest payments. Since the cash fund revenues did not cover total expenses for the program, in 2014 the State Commission in collaboration with the courts asked for an appropriation from the general fund to offset the decline in cash fund revenues. With this diversification of fund sources and fiscal restraint the program has become more financially stable within current program parameters. In fiscal year 2023, General fund allocation remained at \$214,500. Estimated revenue to the cash fund is \$423,607. We believe with fiscal monitoring, holding survey costs at current levels, and continued use of online meeting technologies for commission meetings we will maintain a healthy budget status allowing the office to explore hiring additional staff and explore program improvements. We are currently developing a decision item with the State Court Administrator’s Office for fiscal 2025 for a staff position in the Office.

Performance Goals

Ultimately, the goal of the program is to fully implement the legislative mandate of providing judicial officers with performance improvement measures through evaluation and providing voters quality performance information on those judicial officers appearing on the ballot. Performance improvement feedback occurs in both the interim and retention evaluation cycles. However, the 2017 reenactment of 13-5.5-101 et. seq. C.R.S. (2017) placed an emphasis on professional development feedback from commissions to judges in the interim evaluation cycles. Training conducted prior to the evaluations emphasized the importance of providing judicial officers with constructive feedback with an emphasis on professional development. While commissioners produced better evaluation narratives this year by effectively identifying strengths and growth areas within the evaluation process, they encountered challenges in providing suggestions and, in some cases, consequences for not improving performance in those identified areas that are actionable by the judge. We will continue to build resources for commissioners and judicial officers to better effectuate utilizing judicial performance evaluations for ongoing professional development. We will also explore program changes that have the potential to provide better performance feedback while reducing the time commitment for commissioners. We are certainly witnessing the impact on the retention of commissioners due to the amount of work and time volunteer commissions are putting in to complete both the retention and interim evaluations.

Performance Improvement Strategies

Program Evaluation

Colorado's Office of Judicial Performance Evaluation has been a member of the Judicial Performance Evaluation (JPE) working group hosted by the Institute for the Advancement of the American Legal System (IAALS) since its inception in 2007. The working group brings together state JPE programs to share program ideas, activities, and challenges on a quarterly basis. In 2021, members of the working group initiated the JPE 2.0 Task Force to examine whether JPE effectively meets the goal of offering judges constructive feedback for their professional development, alongside furnishing information to the public about the performance of judges seeking retention before their jurisdiction's voters. As part of the Task Force's work, a survey was conducted to gather judges' perspectives on the JPE process, seeking insights into 'What is working well?' and 'What challenges exist within the program?' Colorado judges participated along with seven other states with JPE programs. One hundred and thirteen judges participated in the survey.

Respondents were split on their overall satisfaction with the JPE process. 49.5% of the judges responding agreed that they were satisfied with the process and 55.2% agreed that the process has been beneficial to their professional development. 73.8% of respondents felt adequately informed about the JPE process. 64.3% of respondents believed the summary evaluation in the state voters guide was accurate. And 60.8% of respondents believed the JPE program increases their accountability to the public. But not all opinions were positive. Less than half of the judges (43.2%) agree the process evaluates their strengths and weaknesses fairly, only 40.4% of respondents agree that the program helps the public understand their work, and only 23.0% of respondents said the program increases their judicial independence.

When asked to evaluate the helpfulness of various components of the JPE process for understanding and improving judicial performance, most of the respondents agreed or strongly agreed that all components are helpful. Some of the components that were most frequently identified as helpful or very helpful were surveys of jurors (97.7%), surveys of court staff (92.0%), reports from courtroom observations (91.1%) and review of written orders and opinions (88.3%). When asked about the final evaluation reports, most respondents (66.3%) believed the final evaluation report accurately assessed their judicial performance. However, only 54.8% agreed the reports provided them with information to improve job performance. Interestingly, a large majority (92.3%) found their positive results to be expected while only 56.5% expected the critical results or constructive suggestions they received.

The most concerning finding from the survey is that a great majority of Colorado judges (85.7%) reported having specific concerns about the evaluation process, these results are considerably higher than the average percentage across the other eight states surveyed (58.7%). Responses to open-ended questions provide insights into these specific concerns. A summary of comments is below:

- Many of the concerns related to the process itself as well as the commissions, including worries about implicit bias in the survey process and the commission's ability to navigate that bias as well as their own biases.
- Respondents were also concerned about the emphasis placed on survey results. They expressed concern about the low number of responses, the influence biased respondents hold, lack of context around critical feedback, and a lack of follow-up.
- These concerns largely focused on the components that make up the process, with a specific focus on the survey and survey comments.

Respondents had specific suggestions, and many recommended increased trainings for the commissions to decrease bias throughout the process.

The results of surveys sent to Colorado judges are similar to those across all eight states, with slight differences. Colorado's level of satisfaction with the process (49.5%) is lower than the combined satisfaction across all eight states (68.1%). However, a majority of respondents across all states still had specific concerns about the process. National concerns are similar to the concerns most often voiced by Colorado judges: bias, a low number of survey responses, upsetting and inappropriate comments.

As a follow-up to national efforts the Colorado State Commission on Judicial Performance and the Office of Judicial Performance Evaluation, with assistance from IAALS, held a convening in March 2023. Participants included representatives from various bar associations, judicial performance commissioners, representatives from the Governor's office, State Public Defenders and Colorado District Attorney Council.

This meeting quickly brought to the forefront concerns about the current JPE program. Those concerns are shared by all stakeholders and focus on the fairness and accuracy of the evaluations, implicit bias in the evaluations, trust and confidence in the process, and capacity of the OJPE to effectively support commissioners and judicial officers during evaluations. An additional concern focused on the dual role of the evaluations to provide retention recommendations along with ongoing professional development. The tension comes from the retention recommendations having a negative connotation linking any bad evaluation with the threat of losing one's job and or professional reputation. Providing ongoing professional development guidance and support requires a more collaborative and supportive relationship than typically occurs in the retention process. When the two goals are linked any reference to a judge's poor performance or needing to improve is viewed with perceptions that they will be used in the retention narrative and result in a lesser recommendation. This can potentially lead to a non-retention vote, but more realistically affects an individual's reputation, character, and can impact future career advancement. If the goal is to help all judges improve in their performance, and by inference the quality of the judiciary, these interim evaluations should be viewed as a support system guiding professional development for all judges for the entirety of their judicial career.

To achieve this separation, there was unanimous support to explore splitting the program into two parts. One part focuses on building ongoing professional development resources for judges. The other part focused on providing voters with reliable performance information on judges standing for retention. With

additional staffing it would be feasible to create two units to address these different goals, all while utilizing: Commissions, Survey Processes, Oversight of the program, and Office infrastructure to support both efforts. Maintaining both functions in the OJPE would also maintain management and improvement of survey processes used for evaluations, allow for consistent training and support of those conducting evaluations, and provide a means to share information between the units. Like the current interim evaluation process, evaluations conducted for professional development would be confidential between the judge and an evaluation team. The primary goal would be to support a judges' professional development goals, then identify and implement educational strategies to achieve those goals. Retention evaluations would continue to be conducted by judicial performance commissioners and their performance recommendation and evaluation narrative would continue to be published on the OJPE.org website and in the Colorado Voter Information Guide (the Blue Book) to assist Colorado voters participate in judicial retention elections. The retention process would be limited to the judges standing for retention and appearing on the ballot. The State Commission and the Office of Judicial Performance Evaluation will continue to explore these suggestions through additional stakeholder convenings in 2024, aiming to better define how the two approaches would operate. This effort supports both professional development and voter information.

Colorado is the only state that conducts judicial performance evaluations utilizing multiple commissions. All other states have opted to use a single judicial performance commission for evaluation purposes. The benefit of having a single commission conducting evaluations, is it ensures consistent training of members and produces more consistent evaluations. One of the criticisms of Colorado's multiple commissions is that the evaluations are inconsistent across the various commissions, with the written evaluation narratives and recommendations varying greatly in how they discuss a judge's strengths and weaknesses. This is partly because each local commission is an independent commissions with limited staff support or oversight over the evaluation process and final narrative. The advantage of the district commission model, however, is having local commissioners evaluate their local judges. Particularly in less populated communities, the judges and commissioners know each other or at least have shared experiences in the community that can lead to an appreciation of what the community expects of its judges and reflects those expectations in the evaluation narratives.

An additional challenge with our multiple commissions is finding and retaining volunteer commissioners. In some of our more rural judicial districts we have exhausted the list of attorneys who have not served multiple terms on the

district commission. Under the current statute, these individuals are not eligible for appointment by the appointing authorities. In areas where there is a sufficient pool of attorneys, many report they are not interested in serving because of a concern that serving as a commissioner will negatively impact their trial practice or clients' interests. We are also seeing challenges arising with the increased workload commissioners face having to conduct evaluations every year. It is becoming difficult to balance the workload of the commission with other professional and volunteer commitments.

Finally, during discussions about JPE 2.0 the rules for recusal of commissioners from individual judge evaluations have come under scrutiny. The feeling is that current rules do not require recusal in enough circumstances or allow for a judge to challenge when a commissioner does not recuse and require disqualification. Other states have these provisions in their judicial performance rules. Colorado should consider updating the recusal provisions of the statute.

There have been suggestions in the media that the JPE process does not provide a sufficient depiction of a judge's performance because they do not include some elements in the evaluation process. These elements include reports on judicial discipline findings, appellate reversal rates, and compliance with disclosure requirements.

Access to judicial discipline findings will likely be addressed if the Constitutional Amendment (HCR23-1001), on the ballot in 2024, is approved. The amendments make proceedings public at the commencement of formal proceedings. This should provide commissions on judicial performance access to judicial discipline proceedings of a serious nature and allow the commissions to disclose that information as part of the evaluation narrative and recommendation.

Appellate reversal rates raise other challenges for implementation. First, it would be limited to District Court Judges who have had a decision appealed to the Court of Appeals or Supreme Court. County court appeals are handled by the District Court. It would be difficult to monitor these appeals and district court decisions without some type of tracking program. This highlights the second issue on how the commissioners would obtain information on what cases had been appealed, how they would evaluate the higher courts decision (for example whether it identifies judicial error or is a clarification of law or legal standard), and how that would be reported. Alaska is the only state with a judicial performance evaluation system that has included the review of reversals, or in their case "how often a trial judge's decisions were affirmed on

appeal, in the evaluation process. This work is conducted by staff of the Judicial Council and utilizes an established rubric during the assessment. The narrative announcing the evaluation outcome simply states, under other performance indicators, how the judge performed in these areas. The Judicial Council also publishes, as part of each judge's evaluation, a report of "Affirmance Rates" for all judges on the ballot. This reveals the number of cases reviewed by the Council for Civil and Criminal matters and provides an affirmance rate (percentage) for each judge. The report provides voters with background information, a methodology for determining the affirmance rate, and instructions, including that different types of cases are affirmed at different rates; comparing judges is not always helpful because of different caseloads; and the number of cases decided on appeal varies greatly because of the judge's length of service. If Colorado wanted to include an affirmance/reversal rate standard in the evaluation, additional staff would be needed to conduct the evaluations and create reports for the various commissions. Commissions currently require each judge to provide a written decision that was reversed on appeal (if applicable) and the reversing decision. By reviewing the decisions, side by side, commissioners can assess a judge's writing skills, legal knowledge, and determine how the reversing court decided to reverse the decision. I find this to be a more qualitative assessment of the judge's performance than relying on a percentage from a small sample.

Past legislative proposals have required commissions to assess a judge's compliance with disclosure requirements, criminal background checks, and other more objective standards (such as clearance rates, recusals etc.). Again, these are activities volunteer citizen commissions would not be able to conduct on their own. Additional staff in the Office of Judicial Performance Evaluations would be needed to conduct these types of audits and generate reports for the various commissions. Since the disclosure requirements are already mandatory for a sitting judge, requiring commissions to report whether a judge has met these requirements may not add value to the assessment of overall judicial performance.

The State Commission on Judicial Performance and the Executive Director believe these issues should be studied further before bringing forward any legislative proposals. The Executive Director will conduct additional meetings with stakeholders this fall and into the winter months of 2024 with the purpose of further assessing challenges and solutions for the current JPE program. While the initial feedback has provided preliminary ideas for improving the program, it lacks the voices of additional stakeholders. Time will allow the State Commission and Executive Director to develop goals and a strategic plan

addressing programmatic changes that come forward from a stakeholder engagement process.

Submitted by:

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Office of Judicial Performance Evaluation
October 31, 2023

State Measurement for Accountable, Responsive and Transparent (SMART) Government Act

SMART Act Executive Summary

Colorado Judicial Performance Evaluation

These evaluations provide judges and justices with useful information concerning their own performance, along with training resources to improve judicial performance as needed, while also establishing a comprehensive system of evaluating judicial performance that gives voters fair, responsible, and constructive information about individual judicial performance. This work is accomplished by 231 volunteer commissioners in the twenty-two judicial districts and the State Commission. The Office of Judicial Performance Evaluation (Office), as directed by the State Commission, provides administrative and financial oversight, program support and training to appointed commissioners.

- ❖ With program improvements implemented as a result of the 2019 legislative changes, judicial performance evaluations in the 2020 retention election cycle continued to see greater use and acceptance from the public. Commissions delivered stronger narratives and recommendations and voters closely followed commissioner recommendations. This was evidenced by voters not retaining one of two judges found not to meet performance standards and lowering affirmative vote percentages when a judge received a less than unanimous “meets performance standards” from a commission.
- ❖ Colorado voters report increased awareness of judicial performance evaluations and improved recollection of receiving the blue book in the mail. Eighty-two percent of voters said they used the voter guide to review judicial performance evaluations prior to voting.
- ❖ 2019 witnessed the first “full” interim evaluations following changes to the governing statute in 2017 and 2019. These evaluations provide performance feedback for purposes of performance improvement while holding judges accountable through a judicial improvement plan when needed. In 2019, five judges were asked to participate in judicial improvement plans. During retention evaluations, commissions evaluate whether a judge complied with

any applicable improvement plan. If not, a commission is required to find the judge does not meet performance standards. During the 2020 retention cycle, two of the five judges with judicial improvement plans did not demonstrate satisfactory improvement and their commissions found they “did not meet performance standards.”

Performance Improvement Strategies

The State Commission is satisfied with how commissions are functioning under the legislative changes made in 2017 and 2019. While we have no recommended legislative changes currently, the State Commission is prepared to work with legislators by answering any questions or concerns about our current evaluation processes, and addressing any suggested changes to the process brought forward by public and legislator concerns raised by the issues currently facing the judiciary. One reform the State Commission would strongly support is receiving access to any findings of misconduct by a judge, whether issued by the Colorado Commission on Judicial Discipline or any other state agency, along with any sanctions imposed. Commission access to this information would go a long way to ensure judicial performance narratives are providing fair, accurate and complete performance information voters can rely on while deciding to retain or not retain a judge.

State Measurement for Accountable, Responsive and Transparent (SMART) Government Act

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Mission

To provide judges and justices and with useful information concerning their own performance, along with training resources to improve judicial performance as needed, while also establishing a comprehensive system of evaluating judicial performance to provide persons voting on the retention of judges and justices with fair, responsible, and constructive information about individual judicial performance.

Major Functions

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Performance Measures

Judicial Performance Improvement - Interim Evaluations

C.R.S. 13-5.5-109 (2019) requires that within the first two years of a justice's or judge's appointment to the bench the appropriate commission shall conduct an initial evaluation of each justice or judge. It is discretionary for commissions to conduct interim evaluations for other justices and judges during the years between when the justice or judge stands for retention. The Office continues the practice of evaluating district and county judges during the third year of a term, evaluating court of appeals judges during the third and fifth year of a term and the supreme court justices during the third and seventh year of a term. However, we now have annual response data from judicial performance surveys for every justice and judge. For initial evaluations, the statute requires commissions to conduct a full evaluation, including a narrative report which is provided to the judge and the chief judge/justice of the court. A commission may recommend a judge participate in a "judicial improvement plan" during the interim evaluation period. If it is the recommendation of a commission that a judge participate in an judicial improvement plan, and the judge does not satisfactorily complete the plan, during the next retention evaluation the commission will automatically issue a "does not meet performance standards" designation in their performance evaluation summary. Commissions began the first "full" interim evaluations in 2019, following the changes to the governing statute in 2017 and 2019. The State Commission determined all justices and judges eligible for an initial evaluation would receive a full evaluation. For the 2021 interim evaluation cycle, only justices and judges who are serving in their provisional term will receive a full evaluation. Commissions will determine whether justices and judges who are serving a regular term of office will be required to participate in a full evaluation. If a commission determines a justice or judges does not require a full evaluation, they will provide the judge with an explanation of their reasons for not requiring the full evaluation.

The Office is also required to analyze judicial performance evaluation results along with survey results and provide the feedback to the State Court Administrator's Office regarding training needs identified to improve overall judge performance through judicial training. That information has been provided to the State Court's Judicial Educator for program planning purposes. The Office and SCAO Judicial Educator often discuss the training needs of the judiciary based on performance feedback and through working with judges participating in judicial improvement plans.

Retention Election Evaluations and Narratives

The Office continues to improve the information for voters that is contained in each evaluation narrative. This is done through the revision of rules and the required training of commissioners as they prepare to conduct evaluations. The Office also works closely with the survey vendor to maximize the number of surveys completed by invitees for each judge. While we tweak the survey process to increase the eligible pool of survey participants, survey completion rates continue to be impacted by sample size and voluntary participation of target groups, particularly for individual parties (both civil and criminal litigants) asked to participate in the process. Through training efforts, state and district commissions have shown greater reliance on other evaluation factors in conjunction with survey reports. They have become better consumers of data and adjusted their findings to reflect those changes. The use of a performance matrix has assisted commissioners to evaluate all performance criteria objectively and compare criteria across evaluation methods.

2018 was the first cycle in which commissioners were required to use a “performance standards matrix” during the evaluation process. Commissioners provided feedback on the matrix with some positive and negative reactions. The primary negative reaction had to do with requiring the completion of the matrix and the amount of time it added to the process. Commissioners did find the tool useful in that it added more objectivity to subjective criteria. Some felt the matrix should be a suggested tool rather than a requirement. Again, the main concerns were time requirements and some redundancy with other tools provided to guide decision reviews and courtroom observation. In response the Office developed a performance scorecard that allows commissioners to plot judicial performance of all judges on one sheet of paper.

Public Engagement and Education

The Office is responsible for public engagement and education. Our efforts focus on outreach strategies using social media, radio, and television messaging highlighting the availability of judicial performance evaluations. The Office works with the Colorado Broadcasters Association to amplify our messaging. Social media messaging and radio/television messaging are shared and distributed through the CBA’s member stations. In the three retention cycles where we have utilized the CBA’s “non-commercial supporting announcements” program we have increased referrals to the OJPE website with longer retention of viewers, especially as citizens received their “blue book” and more so as they receive their ballots. During the 2020 elections the OJPE.org website recorded over 3.5 million pageviews - a new record for the site since we began monitoring user engagement data for the website.

Office staff engage in citizen awareness and engagement events. In the past staff have gone into the community and engaged citizens in conversations about judicial selection, retention, and evaluation. Unfortunately, those activities were suspended because of the COVID pandemic. This is a good opportunity for us to educate citizens about judicial elections, but also for us to learn what citizens understand and desire from the program. In many cases, we are educating the public on why we don't provide certain information under a "merit" based system. In the office we have standing orders to answer the phone and have conversations with callers. We find these enriched conversations go a long way in helping citizens understand the system, even when we don't give them what they want. We also speak with any group that asks us to participate in a program and present on judicial selection, retention, and evaluation. In 2020, participation in these activities was limited to remote platforms but a number of organizations held these events with our participation.

Finally, we work to update and refresh the official website continuously. Our website serves to inform, educate and serve as a repository for historical information. We mean for the website to be the comprehensive source on judicial selection, retention and evaluation. The website is now housed under colorado.gov and has been redesigned to meet the states website standards.

Commissioner Education and Engagement

Office staff train all judicial performance commissioners every retention cycle. Training expanded to interim year evaluation in 2018/2019 to ensure commissioners are clear about the process, and most importantly, when and how to recommend a judge participate in a "judicial improvement plan." The office conducts both live and online training to meet commissioner needs. The curriculum is adjusted each year/cycle to reflect trends, statutory and rule changes, and feedback from past educational efforts. Training during the 2020 retention cycle was first planned and conducted through live in-person training. After successfully completing three live training events we were forced, due to the pandemic and stay at home orders, to move the remaining trainings to an online format.

Budget and Fiscal Responsibility

Our primary source of revenue is the "state commission on judicial performance cash fund create in C.R.S. 13-5.5-115 (2017) which is similar to former section 13-5.5-107 as it existed prior to 2017. The cash fund is funded by fees imposed on criminal cases that have reached a disposition. Those fees come from criminal matters in

both county and district court. The cash fund revenues have declined over time but have found stability in the last couple of years. Since the cash fund revenues do not cover total expenses for the program, the State Commission in 2014 asked for an appropriation from the general fund to offset the decline in cash fund revenues. With this diversification of fund sources and fiscal restraint the program has become more financially stable within current program parameters. For fiscal year 2021 General fund dollars were reduced by \$100,000. The Office agreed to that reduction to support efforts to address the economic downturn in 2020. We believe with fiscal monitoring, holding survey costs at current levels, and continued use of online meeting technologies for commission meetings we will maintain healthy budget status during these difficult times.

Performance Goals

Ultimately, the goal of the program is to fully implement the legislative mandate of providing judicial officers with performance improvement measures through evaluation and providing voters quality performance information on those judges appearing on the ballot. Performance improvement occurs in both the interim and retention evaluation cycles, with judges attending to commission recommendations and expressing appreciation for the performance feedback. They willingly engage with commissions and often express their appreciation of the system and performance feedback they receive. Those who have been recommended for participation in a “judicial improvement plan” for the most part, have engaged in the plan’s recommended activities and shown performance improvement from their efforts.

During the 2020 elections, we continued to see voters use and trust in commission evaluations. 2018 was the first year the program used the “meets/does not meet performance standards” recommendations. In 2018, we witnessed voters following the recommendations of the commissions closely: voters did not retain the two judges receiving “does not meet performance standards” recommendations, while the affirmative vote percentages for those judges receiving less than a unanimous recommendation of “meets performance standards” was directly impacted in election results. In 2020, while the trend in judges receiving less than unanimous commissioner support in their narratives continued to garner lower affirmative vote percentages on retention, voters split on the retention of the two judges receiving “does not meet performance standards” recommendations from their commissions. There was some distinct difference in these judges' circumstances: one was a district court judge in a large suburban district, while the other was a part-time county judge in a rural district. The suburban judge had a number of newspaper articles highlighting the negative commissioner recommendation. As far as we know, there was no local press regarding the commission’s recommendation for the part-time rural judge. The part-time judge is a non-

attorney and was appointed to the position after no attorney applied for the judgeship. This judge may be viewed as having stepped up to help his community. By way of comparison, we had another non-attorney judge, who while receiving a “meets performance standards” recommendation by a split vote, was retained by voters with a lower affirmative vote percentage than the part-time non-attorney judge whose commission found he didn’t meet performance standards.

The Office also received numerous comments from voters about the usefulness and quality of the narratives and other information available on the Office of Judicial Performance website. This is a trend that seems to be carrying forward from previous years.

Performance Improvement Strategies

Legislative Changes

Since the corrections passed in 2019 to C.R.S. 13-5.5-101 et seq., the State Commission has no new request for legislative changes.

With recent allegations of misconduct in the judiciary and concerns over judicial branch transparency and accountability, the State Commission is prepared to work with legislators by answering any questions or concerns about our current evaluation processes and addressing any suggested changes to the process. One reform the State Commission would strongly support is receiving access to any findings of misconduct by a judge, whether issued by the Colorado Commission on Judicial Discipline or any other state agency, along with any sanctions imposed. Commission access to this information would go a long way to ensure judicial performance narratives are providing fair, accurate and complete performance information voters can rely on while deciding to retain or not retain a judge.

2020 Judicial Performance Evaluation Statistical Report

Pursuant to C.R.S. § 13-5.5-114(1)

Of the 118 judicial officers eligible to stand for retention in 2020, 107 were evaluated by State and District Commissions. One hundred and three (103) judicial officers declared their intent to stand for retention and will appear on the ballot in 2020. (See Table A for a breakdown by judge type.) Commissions evaluated four additional judges not standing for retention.

State and District Commissions determined 101 of 103 (98%) judicial officers met performance standards. Of the remaining two, District Commissions determined judges did not meet performance standards.

Table A			
Justices and Judges Standing for Retention in 2020			
Judge Type	Regular	Provisional*	Total
Supreme Court	0	2	2
Court of Appeals	0	2	2
District Court	38	20	58
County Court	21	20	41
Grand Total	59	44	103

*Judges are first appointed by the Governor to serve a provisional term of office of at least two years before appearing on the ballot for retention. If retained, they next appear on the ballot after having served a regular term of office.



SMART Act Executive Summary

Colorado Judicial Performance Evaluations

These evaluations provide judges, justices and senior judges with useful information concerning their own performance, along with training resources to improve judicial performance as needed, while also establishing a comprehensive system of evaluating judicial performance that gives voters fair, responsible, and constructive information about individual judicial performance. This work is accomplished by 231 volunteer commissioners in the twenty-two judicial districts and State Commission. The Office of Judicial Performance Evaluation (Office), as directed by the State Commission, provides administration, financial, program support and training to appointed commissioners.

- ❖ With program improvements implemented as a result of the 2017 legislative changes, judicial performance evaluations in the 2018 retention election cycle saw greater use and acceptance from the public; commissioners delivered stronger narratives and recommendations; and voters followed commissioner recommendations by not retaining the two judges who were found to not meet performance standards following their evaluations.
- ❖ Colorado voters report increased awareness of judicial performance evaluations and improved recollection of receiving the blue book in the mail; two-thirds of voters said they used the voter guide to review judicial performance evaluations prior to voting.
- ❖ The new interim evaluation process is underway with full evaluations, including evaluation narratives, to be conducted by commissions in 2019. The State Commission anticipates judges will pay close attention to these evaluations, as they provide performance feedback for purposes of performance improvement while holding judges accountable through a performance improvement plan when needed. During retention evaluations the commissions will evaluate whether a judge complied with any applicable improvement plan. If not, a commission is required to find the judge does not meet performance standards.

Performance Improvement Strategies

While the State Commission is pleased with the outcomes resulting from the 2017 legislation, the State Commission suggests the legislature reconsider several provisions in C.R.S. 13-5.5-101 et seq. (2017) this session: Commissioner Vacancy Appointments, Senior Judge Evaluations, the Performance Standard Threshold, and Survey Responses.

- ❖ **Commissioner Vacancy Appointments** - The State Commission recommends the statute be returned to its previous structure, wherein the State Commission will be responsible for filling vacancy appointments when the appointing authority fails to make an appointment within forty-five days of a vacancy. The State Commission respectfully suggests the following language for 13-5.5-104(5)(b): "...If the original appointing authority fails to make the appointment within forty-five days after the date of the vacancy, the

state commission shall make the appointment.” Lengthy delays in vacancy appointments significantly hampered the work of commissions during the 2018 evaluation cycle. Fourteen vacancies affecting eleven Judicial Districts remained unfilled while commissioners were conducting evaluations. The State Commission is well-equipped to expeditiously fill vacancies and ensure commissions are fully staffed and trained during evaluation cycles.

- ❖ **Senior Judge Evaluations** - The State Commission believes the evaluation of senior judges rightfully belongs in the Office of the State Court Administrator (SCAO), with support from the Office of Judicial Performance Evaluation, as needed. The State Commission recommends C.R.S. 13-5.5-111 be removed and all references to senior judges deleted from C.R.S. 13-5.5-101 et seq. (2017). The unpredictable timing of appointments of senior judges effectively precludes the State Commissions from gathering enough evaluation materials to complete a performance evaluation. The SCAO continues to evaluate senior judge performance based on their assignments and contract with the Court.
- ❖ **Performance Standards Threshold** - The State Commission feels the use of the “standards matrix,” different evaluation methods, the checks and balances of group decision making, and weighing the totality of that information provide a judge with enough information for why a commission made their performance determination without defining a threshold. The State Commission recommends that C.R.S.13-5.5-105(2)(h)(II) either be amended or deleted. If amended, the State Commission suggests simply deleting “and a clear description of the threshold for the recommendation ‘meets performance standards’ or ‘does not meet performance standards’ and how that information will be made available to the public.” C.R.S.13-5.5-105(2)(h)(II) would read: “The creation of a standards matrix related to the performance evaluation criteria set forth in section 13-5.5-107.”
- ❖ **Survey Responses** - The State Commission believes the program should survey Coloradans on all Colorado judges every year. By surveying and generating reports on an annual basis, the Office would capture feedback from a larger number of responders who have appeared before each judge over their entire term of office. With this comparative data, commissions would be able to evaluate and highlight performance trends for a judge and assist their development by making more objective performance improvement recommendations. Making such a shift would have a significant increased survey cost if current requirements were unchanged. The State Commission sees the following options to achieve this strategy:
 - Fund the current system to allow for surveying of all judges every year. This would require a substantial increase in current funding. While some groups would remain good responders (attorneys, court staff, jurors), those groups that are poor responders (litigants, law enforcement, crime victims) would likely continue to have poor response rates. Under this option we would be increasing costs without addressing significant issues with our survey response rates.
 - Fund the current system but allow the Office to reduce expenses by providing only one survey mailing, as opposed to three mailings, to each identified

litigant, law enforcement officer, and crime victim. This would likely reduce the response rate for a group of responders that already has the lowest response rate (below 8%) amongst all required survey groups but with significant cost savings.

- Amend C.R.S. 13-5.5-105(2)(d)(I) to provide the State Commission with greater flexibility in selecting who to survey in the most cost-effective manner, allowing for annual survey collection on all judges and justices. The State Commission proposes using only electronic survey collection methods as a means of cost-effectively collecting survey responses on all judges and justices annually. We currently have access to email addresses for attorneys, employees of the court, court interpreters, employees of probation offices, and employees of local departments of social services. We anticipate we could gain access to juror email addresses in short order by working with the State Court Administrator. We do not currently have access to email addresses for litigants, law enforcement and crime victims, but we understand those addresses may become available in the future. Although this shift in practice would limit official surveying by mail of litigants, law enforcement and crime victims at present, those groups would continue to be able to—and would be encouraged to—provide feedback by completing an online survey on the program’s website. Litigants, law enforcement, and crime victims have always been our lowest responders, with response rates below 8% after removing significant numbers of potential responders due to bad mailing addresses and returned mail because the responder is no longer at the address. We anticipate that savings generated by eliminating multiple mailings of pen-and-paper survey questionnaires to these groups would offset the increased funding needed to survey all other statutorily identified groups on an annual basis for every judge. The remaining groups are strong responders (with over 30% response rates), and with more frequent surveying they should provide an adequate representation of responses from attorney and non-attorney groups for evaluation purposes. As email and mobile phone information for litigants becomes available through court records, the State Commission will reevaluate inclusion of litigants, law enforcement and crime victims in the survey process. The State Commission recommends that C.R.S. 13-5.5-105(2)(d)(I) be amended to read: “To develop surveys to evaluate the performance of justices and judges by court users, including but not limited to attorneys; jurors; attorneys within the district attorneys’ and public defenders’ offices; employees of the court; court interpreters; employees of probation offices; and employees of local departments of social services.



COLORADO

**Office of Judicial
Performance Evaluation**

Judicial Branch

State Measurement for Accountable, Responsive and Transparent (SMART) Government Act

C.R.S. 13-5.5-114 requires the State Commission to gather and maintain statewide data and post a statistical report of the statewide data on its website no later than thirty days prior to each retention election. The State Commission shall also report on the activities of the commissioners to the joint judiciary committee of the general assembly as part its SMART act presentation required by C.R.S. 2-7-203 C.R.S (2017).

Mission

To provide judges, justices and senior judges with useful information concerning their own performance, along with training resources to improve judicial performance as needed, while also establishing a comprehensive system of evaluating judicial performance, so as to provide persons voting on the retention of judges and justices with fair, responsible, and constructive information about individual judicial performance.

Major Functions

The State Commission oversees the Office of Judicial Performance Evaluation and hires the office's Executive Director. The Office of Judicial Performance Evaluation (Office) staffs the State and District Commission on Judicial Performance, trains state and district commissioners, collects and disseminates data on judicial performance evaluations, including judicial performance surveys developed, distributed and collected pursuant to C.R.S. 13-5.5-105, conducts public education efforts concerning the judicial performance evaluations, measuring public awareness of the judicial performance evaluation process through regular polling, and other duties as assigned by the State Commission. In addition, state and local commissions totaling 231 commissioners, conduct evaluations of judges and justices by reviewing case management data and statistics, collecting information from courtroom observations, interviewing judges and other interested parties, reviewing judicial performance survey reports, reading authored opinions and decisions of individual judges, reviewing submitted comments about individual judges, and making recommendations and preparing narratives that reflect the results of performance evaluations of justices and judges. Commissioners conduct

both interim and retention cycle evaluation for judges eligible to receive those evaluations based on appointment date and term of office.

Performance Measures

Judicial Performance Improvement - Interim Evaluations

In the 2017 legislation, the legislature required provisional judges to receive an interim evaluation from a judicial performance commission. It is discretionary for the Office to conduct interim evaluations for other judges. The Office has continued the practice of evaluating County and District Judges during the third year of a term, evaluating Court of Appeal judges during the third and fifth year of a term and the Justices of the Supreme Court during the third and seventh year of a term. The 2017 legislation also requires commissions to conduct a full evaluation including a narrative report which is provided to the judge and the chief judge/justice of the court. Commissions may recommend a judge participate in an “improvement plan” during the interim evaluation period. If it is the recommendation of a commission that a judge participate in an improvement plan, and the judge does not satisfactorily complete the plan, during the next retention evaluation the Commission will automatically issue a “does not meet performance standards” designation in their performance evaluation summary. Commissions will begin the interim evaluations during January 2019. Surveying on those judges/justices eligible to receive interim evaluations began in April 2018 and will continue through mid-January 2019.

The Office is also required to analyze judicial performance evaluation results along with survey results and provide feedback to the State Court Administrator’s Office regarding training needs identified during the analysis that will help to improve overall judge performance through judicial training. That information is provided to the State Court’s Judicial Educator for program planning purposes.

Retention Election Evaluations and Narratives

Prior to every general election the Commissions on Judicial Performance Evaluations conduct retention evaluations for all judges eligible to stand for retention in the general election. Commissioners are required to complete a comprehensive evaluation based on the criteria defined by C.R.S 3-5.5-107. The criteria include measures for integrity, legal knowledge, communication skills, judicial temperament, administrative performance, and service to the legal profession and the public. Commissions are required to consider case management data and statistics, review written judicial opinions and orders, collect information from courtroom observations, interview justices and judges, accept information and documents from interested persons, including judicial

performance surveys, and make recommendation and prepare narratives that reflect the results of performance evaluations C.R.S 13-5.5-105. In 2018 the State and District Commissions on Judicial Performance Evaluations completed 136 evaluations of justices and judges eligible to stand for retention. Of the 136, 128 judges filed the required “Declaration of Intent to Run for Retention” with the Secretary of State's Office and appeared on the ballot. Of the 128 justices and judges on the ballot 126 were found to “meet performance standards” by the commissions. Two judges were found to “not meet performance standards.” Voters did not retain those two judges. The other 126 justices and judges were retained by voters.

The Office continues to improve the information provided to voters contained in each evaluation narrative. Improvements are made through revision to the Rules Governing Commissions on Judicial Performance and conveyed to the Commissioners at the required commissioner training which occurs prior to the start of performance evaluations. The Office works closely with the survey vendor to maximize the number of surveys completed by invitees for each judge. While we tweak the survey process to increase the eligible pool of survey participants, survey completion rates continue to be impacted by sample size and voluntary participation of targeted groups, particularly for individual parties (both civil and criminal litigants) asked to participate in the process. Through training efforts state and district commissions have shown greater reliance on other evaluation factors in conjunction with survey reports. They have become better consumers of data and have adjusted their findings to reflect those changes. The use of a performance matrix assists commissioners to evaluate all performance criteria more objectively and compare criteria across evaluation modalities.

Public Engagement and Education

The Office is responsible for public engagement and education. Our efforts focus on outreach strategies using social media, radio and television messaging which highlights the availability of judicial performance evaluations. The Office works with the Colorado Broadcasters Association to amplify our messaging. Social media messaging and radio/television messaging are shared and distributed through CBA's member stations. In the two retention cycles utilizing the CBA's “non-commercial supporting announcements” program we have experienced increased referrals to the OJPE website with improved visitor activity and engagement. This is especially true after citizens received their “blue book” and mail-in ballots.

Office staff also participate in citizen awareness and engagement events. Staff go into the community and engage citizens in conversations about judicial selection,

evaluation, and retention. This is a good opportunity for staff to educate citizens about judicial elections, but also for staff to learn what citizens understand and desire from the program. Staff find these enriched conversations go a long way in helping citizens understand the system, even when we can't give them certain types of information they want.

Finally, we continuously work to update and refresh the official OJPE website www.ojpe.org. Our website serves to inform, educate and share historical information. We mean it to be the comprehensive resource on judicial selection, evaluation, and retention.

Commissioner Education and Training

Volunteer Commissioners are the foundation of the Judicial Performance Evaluation program. The 231 Commissioners serving on the State and District Commissions are responsible for the evaluation of Colorado's Judges and the completion of the judicial performance narratives. Training and retaining commissioners ensure program goals are achieved and comply with the statute and Rules Governing Commissions on Judicial Performance. Office staff conduct training for all judicial performance commissioners prior to the retention evaluation cycles. Training is expanding to interim year evaluations in 2018/2019 to ensure commissioners are clear about the process, and most importantly, when and how to recommend a judge participate in a "performance improvement plan." The Office conducts both live and on-line training to meet commissioner needs. The curriculum is adjusted each year/cycle to reflect trends, statutory and rule changes, and feedback from past trainings. Education is an intensive but important commitment for the Office. Through these trainings Office staff develop relationships with commissioners and because of those relationships commissioners use the Office as a resource when conducting evaluations. Education and training efforts ensure consistency in evaluations across commissions. While each commission is independent in their work, they are guided by the statute, rules and training which details how commissioners are to conduct the evaluations.

Budget and Fiscal Responsibility

The primary source of revenue for the program is the "state commission on judicial performance cash fund" created in C.R.S. 13-5.5-115 (2017) which is similar to former section 13-5.5-107 as it existed prior to 2017. The Cash Fund is funded by fees imposed on criminal cases that have reached a disposition. Those fees come from criminal matters in both county and district court. Cash Fund revenues have declined over time but have recently found stability in the last couple of years.

Since the Cash Fund revenues do not cover total program expenses, in 2014 the State Commission asked for an appropriation from the General Fund to offset the decline in Cash Fund revenues. With the diversification of funding sources and fiscal restraint, the program has become more financially stable within current program parameters. This stability may be impacted as we fully implement interim evaluations and make changes in the survey process to improve survey response rates.

Performance Goals

Ultimately, the goal of the program is to fully implement the legislative mandate of providing judicial officers with performance improvement measures through evaluations and providing voters with quality performance information about the judges appearing on the ballot. Performance improvement for judges occurs in both the interim and retention evaluation cycles. However, the commissions' narratives tend to be the primary focus for commissions and judges in retention years, as this can have an impact on judges being retained by voters. Judges do attend to the commission recommendations and appreciate the performance feedback; however, and rightfully so, judges focus very much on having a positive narrative for voter reference. The program will have a much better sense of the impact of interim evaluations on changing or enhancing judicial performance after the 2019 interim evaluations are completed.

Colorado voters find value in the commissions' narratives while making retention decisions about the judges appearing on their ballot. In 2018, voters decided not to retain the only two judges receiving "does not meet performance standards." Furthermore, judges who did not receive a unanimous vote that they "meet performance standards" received lower affirmative vote percentages amongst all the judges. This was evidenced in the results for two judges receiving evenly split votes (5-5), which requires a "meets performance standards" recommendation. The official election results show these two judges received much lower affirmative vote percentages, with one judge receiving 51.37% to retain, and the other receiving 54.40% to retain. The overall average affirmative vote percentages for retained judges is 74.09%. The Office also received numerous comments from voters about the usefulness and quality of the commission narratives, in addition to other information available on the OJPE website.

Performance Improvement Strategies

There are a few of provisions in C.R.S. 13-5.5-101 et seq. (2017) that the State Commission suggest the legislature reconsider in the 2019 session. These include: Commissioner Vacancy Appointments, Senior Judge Evaluations, the Performance Standard Threshold and Required Survey Recipient Identities.

Commissioner Vacancy Appointments

Because volunteer commissioners are responsible for completing judicial performance evaluations it is imperative the commissions are fully staffed. During the 2018 judicial performance evaluations fifteen commissioner vacancies affecting nine Judicial Districts remained unfilled while commissioners were conducting evaluations. Appointing authorities are challenged each year with finding candidates to fill positions on the various performance commissions. Vacancy appointments can be even more challenging for appointing authorities, particularly for legislative authorities, because they occur at random times. While appointing authorities are responsible for filing any vacancies that occur under their authority, they must fill the vacancy within a 45-day period. If they fail to fill the vacancy, under the current statute, 13-5.5-104(5)(b), the Governor's office is responsible for filling these unfilled vacancies. The commission vacancies mentioned previously are the result of shifting the responsibility for filling unfilled vacancy appointments to the Governor's office. Prior to the 2017 change, the State Commission filled commissioner vacancies when the original appointing authority failed to appoint within the 45-day deadline. Office staff played a critical role in finding applicants for these vacancies, in part because the Office was solely focused on finding qualified candidates interested in serving their communities and ready to play a role in improving the court system through performance evaluations. The Office focused recruitment on referrals from sitting commissioners, court personnel and other community members. Since the focus was on getting names before the State Commission as quickly as possible, State Commission vacancy appointments tended to be timely. Based on the need to ensure Commissions are functioning at full strength and the State Commission's success in filling those hard to fill vacancies the State Commission recommends the statute be revised back to the previous structure, wherein the State Commission will be responsible for filling these vacancy appointments, and respectfully suggests the following language for 13-5.5-104(5)(b): "...If the original appointing authority fails to make the appointment within forty-five days after the date of the vacancy, the state commission shall make the appointment."

Senior Judge Evaluations

In response to concerns voiced by a small but vocal group of citizens during testimony before the house judiciary committee the legislature included senior judges in judicial performance evaluations. The intent was to provide information to the people of Colorado regarding the performance of senior judges throughout the state C.R.S. 13-5.5-101(1)(b) as well as to increase transparency and accountability for judges, justices and senior judges C.R.S. 13-5.5-101(1)(c). Under current law the State Commission is charged with evaluating the performance of “senior judges” and reporting their finding to the Chief Justice for consideration when making senior judge appointments. Evaluations conducted by the State Commission are not public under the statute.

Senior judges play a critical role in the judicial branch. They serve limited appointments to address trial judge conflicts, provide coverage for vacations, trainings, and other docket coverage issues. The time senior judges serve is limited by contract, need and availability. Senior judge assignments are managed by the State Court Administrators Office, with input from judicial districts, and approved by the Chief Justice. Because these appointments are not permanent, assignments are short term in nature, and the senior judge can serve in various judicial districts throughout the state. Evaluating senior judges under the statutory scheme for judicial performance and the Rules Governing Commission on Judicial Performance has presented challenges for the State Commission. One example of the challenge faced in evaluating senior judges is in collecting enough survey responses from lawyers and non-lawyers to provide useful information to the evaluation process. The Office has been collecting survey responses for all senior judges since the 2017 legislation became effective. The overall number of responses for senior judges are the lowest of any judge being evaluated even after rolling responses from multiple years. Additionally, we have little to no information about when a senior judge will be sitting on a case or for how long. This makes it virtually impossible for State Commission members to conduct court room observations, a key aspect of performance evaluations. It is also difficult to review written or oral decisions from senior judges for evaluation purposes. The State Court Administrators Office continues to conduct evaluations on senior judges as part of the “Senior Judge Program.” Those evaluations have been part of the materials used to make recommendations regarding appointment of senior judges to the Chief Justice. The Office has collaborated and assisted the State Court Administrator and Chief Justice by providing past judicial performance evaluations

on judges seeking to enter the senior judge program and will continue to do so. The State Commission believes the evaluation of “senior judges” rightfully belongs in the State Court Administrator Office, with support from the Office, as needed. The State Commission recommends the reference to conducting evaluations of senior judges be removed from the responsibilities of the State Commission and all references to senior judges be removed from C.R.S. 13-5.5-101 et seq. (2017).

Performance Standard Threshold

Defining a threshold value for when a judge “meets” or “does not meet” performance standards has been debated by the State Commission for many years. Past rules defined an overall score of 3.0 from survey responses as a presumption or threshold of receiving a recommendation by the commission for retention. The State Commission recommended removal of the threshold score and presumption, and the Supreme Court approved the recommendation, in 2016. At the time, the State Commission felt the totality of the information commissioners received and used during a judicial performance evaluation provided a more reliable metric for determining judicial performance than reliance on the survey report alone. In 2017 the legislature introduced language that requires the creation of a clear description of the thresholds for the recommendation of “meets performance standards” or “does not meet performance standards” C.R.S. 13-5.5-105 (2)(h)(II) (2017). The legislative record provided little guidance on how or what the commission should consider in defining such a “threshold.” The Commission struggled with the contradiction between the new statutory requirements and past policy decisions while developing the “performance standards matrix.” Given the subjective nature of the performance criteria in C.R.S. 13-5.5-107 and the requirement that all criteria and evaluation methods are to be considered in making a performance determination, the State Commission was unable to define a “threshold” for when a judge “meets” or “does not meet” performance standards. Rather, the Rules Governing Commission on Judicial Performance, adopted by the State Commission in 2018, require commissioners to determine whether a judge is “meeting” or “not meeting” performance standards based on the “totality” of evaluation information collected and considered by each commissioner. After each commissioner has determined their performance findings, the commission, after deliberation, must make a final recommendation on performance that is supported by the entire commission. Commissions are required to support their conclusion in the performance evaluation narrative by providing information on performance strengths and weakness identified in the evaluation. The State Commission feels the use of the “matrix,” different evaluation methods, the checks and balance of group decision making, and weighing the totality of all that information provides a judge with enough information for why a commission made their performance

determination. The State Commission recommends that C.R.S. 13-5.5-105 (2)(h)(II) be amended to read “The creation of a standards matrix related to the performance evaluation criteria set forth in section 13-5.5-107” and drop all reference to a performance score threshold.

Survey Responses

An ongoing concern of the program on the part of judges, commissioners and citizens is the overall low number of responses received in the survey process, particularly for provisional judges and those serving the more rural jurisdictions. While the State Commission has instituted changes to our current survey practices, there has not been a significant increase in responses. However, the problem is isolated to the non-attorney group, and in particular litigants. The challenges we face are in getting surveys into litigants' hands and in getting them to complete and return the surveys by mail (they are provided self-addressed and stamped return envelopes). Whether or not this is a significant problem may be one of perception rather than actual concern. The survey responses for attorneys are typically near the 30 percent range and the other non-attorney groups including court staff and jurors is in the 30 percent rate as well. For the most part the information garnered by the surveys is reliable and valid feedback from those who choose to respond to the survey. Surveys are but one piece of the evaluation process. They provide direct feedback from litigants, court personnel, attorneys and jurors about their experience. That feedback gives commissioners insight into what strengths and weaknesses a judge may have. Commissioners can confirm or dispute survey feedback during their evaluations using courtroom observations, interviews with the judge and other interested parties, the decision reviews, and other information. In other words the commissioners are able to analyze the survey reports and then work with other evaluation tools to determine if a judge is meeting performance standards or not.

Having said that, the State Commission would prefer to increase the sample size and response rate for judges. We believe the only effective way to achieve this would be to survey on all the judges every year. By surveying and generating reports on an annual basis, we would be capturing feedback from a larger number of litigants and attorneys who have appeared before each judge during each term of office. With comparative data we would be able to highlight and evaluate performance trends for a judge and assist their development by making performance improvement recommendations. Making such a shift would, however, have a significant increased survey cost if current requirements were unchanged.

Judicial Performance initially evaluated all judges on an annual basis. The survey contract at that time exceeded \$800,000 annually. A significant part of those expenses was in printing and mailing survey booklets to litigants and attorneys. Those costs, though limited to litigant surveys, would be similar today. We have not been able to shift litigant surveys completely to an online response. Because we lack litigant email addresses, we must continue to solicit survey responses through multiple paper mailings. A possible solution to the issue would be to stop surveying litigants on their experience. This group is our lowest responder (at less than 8%) while having the highest survey costs. If we eliminated mailing litigants' surveys, we would experience significant cost savings. Litigants would, however, still have an opportunity to provide judicial performance feedback. Any person who is interested in evaluating a judge can do so at any time on our website. The savings from this shift would certainly make it more feasible to survey all other groups on each judge each year with perhaps only a modest increase in general fund allocation. This would require a change in the statute dropping litigants, including self-represented parties, from the required groups to be surveyed on judicial performance. The State Commission sees the change as significantly addressing survey criticisms and eliminating waste from mailings that do not achieve results.