



## 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](http://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.

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