

**REPORT OF THE JUDICIAL COUNCIL
JUDICIAL PERFORMANCE ADVISORY COMMITTEE**

INTRODUCTION

Unlike individuals in other professions, judges rarely receive meaningful "feedback" concerning their job performance and are often unaware of areas in which they can improve the performance of their duties. In addition, providing objective information on the performance of judges in merit selection jurisdictions makes judicial retention elections more meaningful contests. Judicial performance evaluation programs can assist in both of these areas.

The first judicial performance evaluation programs were adopted in the 1970's. Alaska, in 1976, was the first state to adopt a judicial performance evaluation program to not only provide information to the judges for self-improvement, but to provide information to assist voters in retention elections of judges. Since that time Arizona, Colorado, New Mexico, Tennessee and Utah have created such dual purpose programs. In addition, Virginia recently created a program that provides evaluations to judges for self-improvement and will be used by the Legislature in judicial elections. (Virginia is one of two states in which the legislature re-elects judges.) Approximately twelve additional states conduct judicial performance evaluations only for the purpose of self-improvement.

Unlike judicial performance evaluation programs that are conducted by bar associations, interest groups or other entities, the type of program recommended by this report is established by law or court rule, funded by the state and professionally designed and managed. Such a program will not only seek the opinions of lawyers, but utilize broad-based surveys of court users and others who are in a position to evaluate judicial performance, such as jurors, litigants, witnesses and court staff.

BACKGROUND OF STUDY & COMMITTEE

At its November 5, 2004 meeting, the Kansas Judicial Council agreed to undertake a study of judicial performance evaluations. The Council appointed a new advisory committee to undertake the study. The persons appointed to the Judicial Council Judicial Performance Advisory Committee are:

Stephen D. Hill, Chair, Topeka, member of the Kansas Court of Appeals and served on the Kansas Justice Commission which prepared the Kansas Citizen's Justice Initiative.

Edward E. Bouker, Hays, District Judge in the 23rd Judicial District.

Paul T. Davis, Lawrence, State Representative from the 46th District, practicing lawyer and former General Counsel for the Kansas Bar Association.

S. Lewis Ebert, Topeka, President and CEO of the Kansas Chamber.

Michael D. Farmer, Wichita, Executive Director of the Kansas Catholic Conference and former member of the Kansas House of Representatives.

Dennis L. Gillen, Wichita, practicing lawyer with the firm of Depew, Gillen, Rathbun and McInteer, LC.

Joyce K. Grover, Topeka, Legal Advocacy Coordinator for the Kansas Coalition Against Sexual and Domestic Violence.

Jennifer Lynn Jones, Wichita, Municipal Judge, former District Judge and member of the Commission on Judicial Qualifications.

Nancy Kindling, Topeka, representative of the Kansas League of Women Voters.

Stacy Leeds, Lawrence, Professor at University of Kansas School of Law, member with experience evaluating tribal courts.

John L. Petterson, Topeka, retired newspaper journalist.

Tom Saxton, Jr., Iola, District Magistrate Judge in the 31st Judicial District.

Fred Six, Lawrence, retired Supreme Court Justice.

Richard M. Smith, Mound City, District Judge in the 6th Judicial District and member of the Executive Board of the Kansas District Judges Association.

SCOPE AND METHOD OF STUDY

The Judicial Performance Advisory Committee met eight times between February and November of 2005. The scope of the Committee's work is to study the subject of judicial performance evaluations and to recommend to the Judicial Council whether or not such a system should be adopted in Kansas.

In undertaking its assignment, the Committee:

- Considered a number of relevant articles, reports, statutes, court rules and memoranda. A list of the materials considered by the Committee is attached to this

report at pages 9 and 10 and a copy of the materials is on file in the Judicial Council Office.

- Interviewed, discussed the nature of the work required by the position and solicited input about judicial performance evaluations from: an elected district magistrate judge; a merit selected district magistrate judge; an elected district judge; a merit selected district judge; two members of the Kansas Court of Appeals and a Supreme Court Justice (Retired).
- Considered necessary skills and possible evaluation criteria for Kansas judges.
- Compiled, discussed and answered a number of questions that the Committee thought necessary to resolve prior to making recommendations.
- Discussed the judicial evaluation programs of the other states, including the rules under which they operate and the makeup of each state's governing body.
- Reviewed a memorandum from the staff which contained a summary of discussions with the administrators in the states which utilize judicial performance evaluations for both evaluating the judges and assisting the voters in making retention election decisions. The memorandum discussed the budget of each state, how the budget is funded, the number of employees, whether there was a pilot project, start up costs and how evaluations are distributed to voters.
- Reviewed samples of questionnaires and voter guides from other states.
- Reviewed the American Bar Association's "Guidelines for the Evaluation of Judicial Performance" and spent one full meeting with Dr. Malia Reddick, Reporter for the ABA Committee that revised the guidelines, discussing the ABA Guidelines and issues relating to judicial performance evaluations.

FINDINGS OF THE COMMITTEE

Judicial Independence

Any judicial evaluation program created in Kansas should be structured and implemented in such a fashion that it will not impair judicial independence. The evaluation process should be free from political, ideological and issue-oriented considerations.

Goals

The goals of a judicial evaluation program should be to improve the performance of the individual judges and justices and thereby the judiciary as a whole, and to disseminate the data and

results from the evaluation program to voters in retention districts to assist them in making informed decisions about continuing judges and justices in office.

Uses

Information from the judicial performance evaluations should be used to promote judicial self-improvement, enhance the quality of the judiciary as a whole and provide relevant information to the voters. In addition, the information can be utilized to determine appropriate topics for presentation at judicial education conferences.

Dissemination

Dissemination of the information should be in voters guides, in mailings, on the internet or to the individual judge privately, as is appropriate.

The dissemination of data and results from a judicial evaluation should be consistent with the use made of that information. If a judge or justice is running for statewide retention, then information should be disseminated statewide. If a judge is running for retention in a local district, the voters of that district should be given information concerning the results of the performance evaluation.

When a judicial evaluation is performed only for self-improvement, those individual results should be provided only to the judge evaluated and anonymously to those preparing judicial education programs so that continuing judicial education can be used to improve any weaknesses that may be revealed.

For judicial evaluations publicly disseminated, those results should include assessments of a judge's overall performance and all recommendations about whether a judge should be continued in office. The judge who is the subject of the evaluation should have an opportunity to review, respond, and meet with members of the evaluation body before the results are made public.

Administration And Support

The ultimate authority over the development and implementation of a judicial performance evaluation program in Kansas should be placed with the Judicial Council. Staff support and adequate funding should be made available to support a judicial evaluation program of high quality.

The judicial evaluation program could be developed systematically and implemented in progressive stages. Any such evaluation program should remain flexible so that it may be modified as needed. The Judicial Council should have the ultimate responsibility for the evaluation program and should conduct periodic assessments of its own program to determine if changes are needed.

Criteria

A judge should be evaluated on legal ability that includes the following criteria:

1. Legal reasoning ability.
2. Knowledge of substantive law.
3. Knowledge of rules of procedure and evidence.
4. Keeping current on developments of law procedure and evidence.

A judge should be evaluated concerning his or her integrity and impartiality and the following should be considered:

1. Avoidance of impropriety or the appearance of impropriety.
2. Treating all people with dignity and respect.
3. Absence of favor or disfavor toward anyone including but not limited to favor or disfavor based upon race, sex, religion, national origin, disability, age, sexual orientation, or socio-economic status.
4. Acting fairly by giving people individual consideration.
5. Consideration of both sides of an argument before rendering a decision.
6. Basing decisions on the law and the facts without regard to the ability of the parties or counsel and with an open mind in considering all issues.
7. Ability to make difficult or unpopular decisions.

A judge's communications skills should be evaluated:

1. A judge should be evaluated on whether or not he or she has clear and logical oral communication while in court.
2. The judge must make clear and logical written decisions.

Judge's professionalism and temperament should be evaluated on whether or not:

1. They act in a dignified manner.
2. They treat people with courtesy.
3. They act with patience and self-control.

4. They deal with pro se litigants and pro se litigation fairly and effectively.
5. They participate and provide leadership, to an appropriate degree, of professional development activities.
6. They promote public understanding of, and confidence, in the court.

A judge's administrative ability should be evaluated by answering the following:

1. Is the judge punctual and prepared for court?
2. Does the judge maintain control of the courtroom?
3. Is there an appropriate enforcement of court rules, orders, and deadlines?
4. Does the judge make decisions and rulings in a prompt, timely manner?
5. Does the judge manage his or her calendar efficiently?
6. Does the judge use pretrial conference and alternative dispute resolution mechanisms as appropriate?
7. Does the judge demonstrate appropriate innovation in using technology to improve the administration of justice?
8. Does the judge promote a productive work environment with other judges and court staff?
9. Does the judge act in such fashion to ensure that disabilities and linguistic and cultural differences do not limit access to Kansas courts?

Appellate Courts

An appellate court judge or justice should also be evaluated on the quality of his or her preparation for and participation in oral argument and on his or her effectiveness in working with other judges and justices on the courts.

Methodology

The use of surveys and information gained from personal interviews should be used in the judicial evaluation process. This information should be collected, organized, and analyzed in performing surveys. Experts should be retained to develop methods for evaluating judges and

collecting and analyzing the data obtained. Any evaluative portion of any questionnaire concerning a judge should ask respondents to assess the judge's performance with respect to actual behavioral examples instead of general qualities such as legal ability and temperament. Behavior-based survey instruments avoid biases that commonly affect survey questionnaires. The evaluation process must ensure the anonymity of any individual respondent. Reliable sources of information should be developed for judicial evaluations.

Potential sources for information for trial judges include attorneys, jurors, litigants, witnesses who appear before the judge, non-judicial court staff, social service personnel and appellate judges who have had regular contact with the judge, and appellate judges who have reviewed the judge's decisions.

Potential sources of information for appellate judges include attorneys who have appeared before the judge, non-judicial court staff who have had regular contact with the judge, other appellate judges, and trial court judges whose decisions have been reviewed by the judge.

In all cases, sources should be limited to those with personal and current knowledge of the judge being evaluated. Public record information should be obtained as needed. At the outset of the evaluation program in Kansas, the Commission should establish minimum thresholds for response rates and the number of respondents. Questionnaires should be structured for the relevant respondent group and the nature and extent of that group's interaction with the judges must be kept in mind. It is contemplated that a different performance questionnaire for each respondent group would be necessary. Judges should be evaluated periodically. A private evaluation of the judge for judicial improvement should be conducted within the first year of taking office and again midterm, and a public evaluation should be conducted so that the results can be released in June before a November retention election.

RECOMMENDATIONS

The Judicial Council Judicial Performance Advisory Committee recommends:

1. Kansas implement a program of judicial performance evaluations for the purposes of providing information for self-improvement to all judges of the district court and appellate judges and justices and to disseminate the data and results from the program to voters in jurisdictions where judges and justices are subject to retention elections to enable voters to make informed decisions about continuing judges and justices in office.

2. A Commission on Judicial Performance be established as an independent committee of the Kansas Judicial Council and be composed of non-lawyers, lawyers and judges or justices who have outstanding competence and reputations.

3. The Commission utilize experts in designing instruments and techniques to be utilized in the program to survey persons who have directly observed the performance of all Kansas judges and justices.

4. The surveys be dispersed, collected and tabulated in a confidential manner and be designed to evaluate judges and justices in areas of legal ability, integrity, impartiality, communication skills, professionalism, temperament, administrative capacity and any other areas the Commission finds are appropriate.

5. The Commission develop performance standards, a dissemination plan, a procedure for responses to the evaluations by judges and justices and a mechanism to incorporate evaluation results in the designing of judicial education programs. The Commission also adopt rules for implementation of the process, subject to approval by the Kansas Supreme Court.

6. The program be adequately funded and not be undertaken, or be discontinued if undertaken, if the funding is not adequate.

PROPOSED LEGISLATION

Attached to this report at pages 11 to 13 is a draft of proposed legislation. The legislation is not extremely detailed because it is the opinion of the Committee that giving the Commission broad outlines is desirable and the Commission will develop more detailed procedures for the operation of the program as the day-to-day challenges of implementing and operating the program become clear. The Committee did not draft proposed rules because it is of the opinion of the Committee that the Commission that is given the responsibility, and will face the day-to-day challenges of administration of the program, should develop its own rules.

MATERIALS DISTRIBUTED TO
THE JUDICIAL COUNCIL
JUDICIAL PERFORMANCE ADVISORY COMMITTEE
2005

"American Bar Association Guidelines for Evaluation of Judicial Performance." Feb., 2005.

"Analysis of the 2004 Ballot Proposals." Legislative Council of the Colorado General Assembly. Research Publication No. 527-4, 2004.

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Pelander, John A. "Judicial Performance Review in Arizona: Goals, Practical Effects and Concerns." Arizona State Law Journal. Fall, 1998.

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"Scope and Goal." Kansas Judicial Council Judicial Performance Advisory Committee. 2005.

State of Kansas. House Bill No. 2341. Legislative Session, 2003.

State of Kansas. "Jurisdiction, The District Magistrate Judge has Jurisdiction in the Following Types of Cases:" Kansas District Magistrate Judges Association.

"Supreme Court Internal Operating Procedures, Internal Rules Supreme Court of Kansas.", State of Kansas. Amended May, 2005.

"Supreme Court of the State of Tennessee (Rules 25 -39)." 1981.

Utah Constitution. "Utah Code Section 78-3-21. Judicial Council--Creation--Members--Terms and Election--Responsibilities--Reports."

White, Penny J. "Judging Judges: Securing Judicial Independence by Use of Judicial Performance Evaluations." Fordham Urban Law Journal. February, 2002.

An Act concerning judges and justices; evaluating the performance thereof.

Be it enacted by the Legislature of the State of Kansas:

Section 1. A Commission on Judicial Performance is hereby established as an independent committee of the Kansas Judicial Council. The budget of the Commission shall be a part of the budget of the Judicial Council and the Judicial Council shall provide administrative assistance to the Commission. The Commission on Judicial Qualifications and the Office of Judicial Administration shall assist the Commission on Judicial Performance, if requested by the Commission.

Sec. 2. (a) The Commission shall consist of thirteen members appointed by the Judicial Council. The Council shall appoint Commission members of outstanding competence and reputation. Six members of the Commission shall be non-lawyers and six members of the Commission shall be lawyers, justices or judges. The Judicial Council shall also appoint the Chair of the Commission who may be a lawyer, justice or judge. At least one non-lawyer Commission member and at least one lawyer, justice or judge Commission member shall reside in each Congressional district. The rules of the Commission shall provide that the terms of the Commission members are staggered.

(b) For the purposes of this section:

- (1) "lawyer" means an attorney registered as active pursuant to Supreme Court Rule No. 208.
- (2) "judge" means a current or retired Kansas judge of the district court and a current or retired judge of the Kansas Court of Appeals.
- (3) "justice" means a current or retired justice of the Kansas Supreme Court.

Sec. 3. The goals of the judicial performance evaluation process are: (a) to improve the judicial performance of individual judges and justices and thereby improve the judiciary as a whole; (b) in jurisdictions where judges and justices are subject to retention elections, to disseminate the results from the judicial evaluation program to enable voters to make informed decisions about continuing judges and justices in office, and (c) to protect judicial independence while promoting public accountability of the judiciary.

Sec. 4. The Commission shall, with the aid of professionals where appropriate:

(a) create surveys of court users who have directly observed the judge's or justice's performance or interacted with the judge or justice, including attorneys, litigants, jurors, and other persons the Commission deems appropriate. The surveys shall be dispersed, collected and tabulated by an independent organization or in any other manner that insures confidentiality. The surveys shall ask those surveyed to evaluate the judges and justices on his or her legal ability, integrity, impartiality, communication skills, professionalism, temperament and administrative capacity suitable to the jurisdiction and level of court.

(b) develop clear, measurable, performance standards upon which the survey questions are based.

(c) develop dissemination plans that: (1) protect confidentiality when the performance evaluation is used only for self-improvement; (2) make the judicial evaluation results widely available when they are to be used to assist voters in evaluating the performance of judges and justices subject to retention elections and (3) make public recommendations regarding whether or not to retain judges subject to retention elections.

(d) develop a procedure for judges and justices to receive and respond to survey results before such results are made public.

(e) establish a mechanism to incorporate evaluation results in designing judicial education programs; and

(f) adopt rules for implementation of this process, subject to approval by the Kansas Supreme Court.

Sec. 5. Evaluation results are confidential and may only be disclosed in accordance with the rules of the Commission or the Kansas Supreme Court. Evaluation of judges subject to political elections shall be used solely for self-improvement. A judge subject to political elections shall not reveal data from any portion of the survey or the results of the survey.

Sec. 6. Upon certification by the Commission to the Judicial Council that (a) funding is not adequate to support a judicial evaluation program of high quality or (b) the Kansas Supreme Court has failed to adopt appropriate rules as set forth herein or (c) in the opinion of the Commission the program is no longer of appropriate value, then the program may be reduced in scope or discontinued as determined by the Judicial Council.

Sec. 7. There is hereby established in the state treasury the judicial performance fund. All expenditures from the judicial performance fund shall be made in accordance with appropriation acts and upon warrants of the director of accounts and reports issued pursuant to expenditures approved by the chairperson of the Kansas Judicial Council or by the person or persons designated by the chairperson of the Kansas Judicial Council.

Sec. 8. (Note: This section and following sections will contain amendments to the various docket fee statutes to provide funding for the program).

Sec. _____. This act shall take effect and be in force from and after its publication in the statute book.