

RULE CHANGE 2016()

CHAPTER 37

**RULES GOVERNING THE COMMISSIONS
ON JUDICIAL PERFORMANCE**

The State Commission on Judicial Performance
with the approval of the Supreme Court
Repeals and Readopts the following rules
pursuant to section 13-5.5-103(1)(o)(I), C.R.S.

ANALYSIS BY RULE

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Rule 1. Appointments.

(a) State and district commissioners shall be appointed to four-year terms, expiring on November 30 in odd-numbered years. A commissioner who resigns or moves out of the district or state shall advise the chair of the commission, the appointing authority, and the executive director of the Office of Judicial Performance Evaluation. The chair of a commission shall advise the appointing authority and the executive director of the Office of Judicial Performance Evaluation of any vacancy, and the date of the vacancy, if known. The executive director of the Office of Judicial Performance Evaluation shall within five days, in writing, advise the appropriate appointing authority of the vacancy, whether the vacancy must be filled with an attorney or a non-attorney, and that if no appointment is made within forty-five days of the vacancy, the state commission shall make the appointment.

(b) The executive director of the Office of Judicial Performance Evaluation shall cause to be published and posted at all times on the office's web site the names of the state and district commissioners and the name, address, telephone number, and e-mail address of the executive director of the Office of Judicial Performance Evaluation and each district administrator.

(c) The state commission may recommend to the appointing authority that a member of any commission be removed for cause pursuant to section 13-5.5-104, C.R.S. "Cause" means any malfeasance or nonfeasance in carrying out the commissioner's official duties and responsibilities, including improper disclosure of confidential information, failure to disclose any basis for recusal or to recuse when appropriate, publicly advocating for or against the retention of any particular justice or judge, and failure to participate in three consecutive meetings.

Rule 2. Officers.

Commissions shall elect a chair and a vice-chair, one of whom should be an attorney, and one of whom should not be an attorney, to serve two-year terms. The terms of the chairs and vice-chairs of the commissions shall expire on November 30 of each even-numbered year.

Rule 3. Procedures.

(a) A majority of the total number of appointed members of a commission shall constitute a quorum. The procedures adopted by the state commission shall be used for the conduct of all meetings, evaluations, and other business, except as otherwise provided by these rules or statute.

(b) The state commission shall, prior to final promulgation of any proposed rule, post a notice of the proposed rule, allow for a period of public comment, and give the public an opportunity to address the commission concerning the proposed rule at a public hearing.

Rule 4. Meetings.

(a) Although judicial performance commissions are not subject to the Colorado open meetings law, section 24-6-402, C.R.S., they should attempt to comply as fully as practicable with the spirit of that law.

(b) The state commission should post a notice on its web site, including specific agenda information where possible, not less than twenty-four hours prior to the holding of any meeting at which a quorum of the state commission is expected to be in attendance.

(c) The state commission shall conduct all business publicly, unless it has decided to proceed in executive session in accordance with these rules. No proposed policy, position, resolution, rule, regulation, or formal action shall be adopted at any executive session.

Rule 5. Executive Sessions.

A motion to go into executive session must be approved by a two-thirds vote of the commissioners, and for only the following purposes:

(a) Consideration of confidential materials as part of an evaluation of a judge or justice, including deliberations. Members of other commissions and staff may not be present during such consideration;

(b) Conferences with an attorney representing the commission concerning disputes involving the commission;

(c) Investigation of charges or complaints against an employee or consideration of dismissal, discipline, promotion, demotion, or compensation of an employee;

(d) Specialized details of security arrangements or investigations, including where disclosure of the matters discussed might reveal information that could be used for the purpose of committing, or avoiding prosecution for, a violation of the law; or

(e) Any other matter required to be kept confidential by state or federal statutes or rules, including these rules.

Rule 6. Recusal.

(a) A commissioner shall:

(i) Disclose to the commission any professional or personal relationship or interest with respect to a judge or justice that may affect an unbiased evaluation of the judge or justice, including any litigation involving the judge or justice and the commissioner, the commissioner's family, or the commissioner's financial interest. A commission may require recusal of one of its members on account of such relationship or interest upon a two-thirds vote of the other commissioners;

(ii) Recuse himself or herself from any evaluation of the person who appointed the commissioner;

(iii) Recuse himself or herself from participating in the consideration and vote on any matter involving the evaluation of a judge or justice for failure of a commissioner to meet the training, courtroom observation, interview, or opinion review responsibilities provided by these rules, unless excused by a two-thirds vote of the other commissioners; and

(iv) Once recused, not be present during any part of the evaluation of the judge or justice.

(b) An attorney serving as a commissioner shall not request that a judge or justice being evaluated by the commission be recused from hearing a case in which the attorney appears as counsel of record, or request permission to withdraw from a case pending before a judge or justice being evaluated, solely on the basis that the attorney is serving as a judicial performance commissioner.

(c) An attorney who appears in a matter where opposing counsel or a witness serves as a member of a judicial performance commission which is evaluating the judge or justice before

whom the matter is set may not seek withdrawal of the attorney, exclusion of the witness, or recusal of the judge or justice solely on the basis that the opposing counsel or witness is serving as a judicial performance commissioner.

(d) A judge or justice being evaluated by a judicial performance commission may not recuse himself or herself from a case in which an attorney, party, or witness is a judicial performance commissioner, nor should a judge or justice grant an attorney's request to withdraw from a case, solely on the basis that the attorney, party, or witness is serving as a judicial performance commissioner.

Rule 7. Staff.

(a) The executive director of the Office of Judicial Performance Evaluation, district administrators, and their staffs shall assist their respective commissions in the performance of their duties, including making meeting and interview arrangements, obtaining and distributing information, and posting notices. Neither district administrators nor their staff shall participate in interviews or deliberations conducted by the commission concerning the evaluation of any judge or justice or assist in the drafting of narratives.

(b) The executive director of the Office of Judicial Performance Evaluation may attend meetings, interviews, and deliberations in an advisory capacity when requested or agreed to by a commission. The executive director shall not vote on the recommendation of a judge or justice, or participate in the initial drafting of a narrative.

Rule 8. Chief Justice or Chief Judge.

Prior to beginning any evaluations, each commission shall meet with the chief justice or chief judge of the court for which there is a judge or justice to be evaluated that year. The meeting is to allow the chief justice or chief judge to provide an overview of the court.

Rule 9. Training.

The Office of Judicial Performance Evaluation shall provide training each retention year that is reasonably accessible and convenient to all commissioners. Each commissioner shall attend one training session, or an appropriate alternative as developed by the Office of Judicial Performance Evaluation, each year in which the commissioner is to evaluate a judge or justice.

Rule 10. Trial Judge Evaluations.

(a) The state commission shall develop three separate survey questionnaires: one shall be for appellate judges and justices concerning each trial judge being evaluated; one shall be for attorneys, including prosecutors, public defenders, and private attorneys, who have appeared before the trial judge; and one shall be for non-attorneys, including jurors, litigants, law enforcement personnel, employees of the court, court interpreters, employees of probation offices, employees of local departments of social services, and victims of crimes, who have appeared before each trial judge being evaluated. Surveys shall be conducted on a continuing basis, and results provided to the district commission and the trial judge. To ensure the anonymity of respondents, a district commission shall not receive completed questionnaires, and

all reports of the results shall be based on aggregate data. Comments shall be separated from completed questionnaires before the comments are forwarded to the trial judge being evaluated.

(b) The district commission shall ensure that each trial judge being evaluated receives adequate observation.

(c) To the extent possible, the district administrator shall provide the district commission with information from the current term of office for each trial judge being evaluated, including the judge's caseload, the types of cases, an open case report, and a case aging report.

(d) The state commission shall develop self-evaluation forms that shall be completed by each trial judge being evaluated.

(e) Each trial judge being evaluated shall submit to the district commission not less than three decisions he or she issued, including, if applicable, one of which was reversed on appeal, together with the reversing opinion, if applicable. The judge may choose written or transcribed decisions for submission. Each district commission shall review the three decisions or transcripts and any others authored by the trial judge that the commission in its discretion may select for compliance with the statutory criteria for legal knowledge, thoroughness of findings, clarity of expression, logical reasoning, and application of the law to the facts presented. All decisions and opinions submitted or reviewed shall have been issued during the judge's current term.

(f) The district commission may interview judges and justices, other than the judge being evaluated, and other interested persons. The commission shall agree to meet with a representative of the District Attorney and a representative of the Public Defender when a request is made, provided that the request is made no later than the first day of April of the relevant retention year. The commission shall provide adequate notice and work with the representatives to schedule a convenient date and time for meeting. In addition, the commission shall accept information and documentation from any interested person, provided the person (i) submits his or her name and address, and (ii) submits the information and/or documentation to the commission by the first day of April of the relevant retention year. The district commission shall provide the trial judge being evaluated with a written summary of any oral information, and a copy of any written information, no later than ten days prior to his or her interview with the commission. The trial judge also may submit additional written information to the commission prior to or after the interview.

(g) The district commission shall interview each trial judge being evaluated following its initial review of information.

Rule 11. Appellate Judge and Justice Evaluations.

(a) The state commission shall develop three separate survey questionnaires: one shall be for trial judges concerning each appellate judge or justice being evaluated; one shall be for attorneys, including prosecutors, public defenders, and private attorneys, who have appeared before the appellate judge or justice; and one shall be for other appellate judges and justices, and staff attorneys. Surveys shall be conducted on a continuing basis, and results provided to the state commission and the appellate judge or justice. To ensure the anonymity of respondents, the state commission shall not receive completed questionnaires, and all reports of the results shall

be based on aggregate data. Comments shall be separated from completed questionnaires before the comments are forwarded to the appellate judge or justice.

(b) The state commission shall ensure that each appellate judge or justice being evaluated receives adequate observation through visits to the courtroom.

(c) To the extent possible, the clerk of the supreme court and the court of appeals shall provide the state commission with information from the current term of office for each appellate judge or justice being evaluated, including a list of all opinions authored and a cases on desk report.

(d) The state commission shall develop self-evaluation forms that shall be completed by each appellate judge or justice being evaluated.

(e) Each appellate judge or justice shall submit to the state commission five opinions he or she authored, including both civil and criminal cases. These opinions shall include, if applicable, at least one separate concurrence or dissent, at least one unpublished opinion, and at least one opinion which was reversed on appeal, together with the reversing opinion. The state commission shall review the five opinions and any others authored by the appellate judge or justice that the commission in its discretion may select for compliance with the statutory criteria for legal knowledge, adherence to the record, clarity of expression, logical reasoning, and application of the law to the facts presented. All opinions submitted or reviewed shall have been issued during the appellate judge or justice's current term.

(f) The state commission may interview judges and justices, other than the judge or justice being evaluated, and other interested persons, and shall accept information and documentation from any interested person, provided the person (i) submits his or her name and address, and (ii) submits the information and/or documentation to the commission by the first day of April of the relevant retention year. The state commission shall provide the appellate judge or justice being evaluated with a written summary of any oral information, and a copy of any written information, no later than ten days prior to his or her interview with the commission. The appellate judge or justice also may submit additional written information to the commission prior to or after the interview.

(g) The state commission shall interview each appellate judge or justice being evaluated following its initial review of information.

Rule 12. Recommendations.

(a) A commission shall consider the final survey report, courtroom observations, case information, self-evaluation, review of decisions, interviews, and any other written or oral information received, and then shall prepare a recommendation regarding the retention of each judge or justice being evaluated. The recommendation shall be "retain," "do not retain," or "no opinion." The recommendation of "no opinion" shall be given only when the commission is equally divided, and as such shall not be counted for or against retention. Individual commissioners may not vote "no opinion," but shall vote to retain, or to not retain, or shall recuse themselves.

(b) If a commission has identified one or more areas of significantly poor performance, regardless of its recommendation regarding retention, it may recommend that the judge or justice participate in a performance improvement plan.

Rule 13. Narratives.

(a) Within ten days following the interview, a commission shall provide the judge or justice a written draft of the narrative supporting the recommendation. A narrative shall consist of four short paragraphs totaling not more than 500 words, as follows:

(i) The retention recommendation, including the number of commissioners who voted for and against retention;

(ii) Undergraduate and law schools attended, previous substantial legal or public employment, relevant professional activities or awards, volunteer or other community work, and any other relevant biographical information the commission believes may be of assistance to the public in making an informed voting decision;

(iii) Evaluation methods used by the commission and the percentages of responses from each surveyed group recommending that a judge or justice be retained or not be retained, or making no recommendation that a judge or justice be retained. A commission may report the number of survey respondents from each surveyed group, if the commission believes the information may be of assistance to the public in making an informed voting decision; and

(iv) A description of the performance of the judge or justice over the past term, including any areas of notably strong or weak performance with respect to the judicial performance criteria contained in section 13-5.5-105.5(1) and (2), C.R.S., any deficiencies reflected in the interim evaluation, the extent to which such deficiency has been satisfactorily addressed, and any additional information that the commission believes may be of assistance to the public in making an informed voting decision.

(b) The judge or justice being evaluated may respond in writing to the draft narrative within seven days of receipt of the draft. The judge or justice may provide feedback on or corrections to the draft narrative language, and may request an additional interview. Any additional interview shall be held within fourteen days of the request. The commission may revise the draft narrative, and shall provide the judge or justice with the final narrative within fourteen days following the written response or additional interview.

(c) Any commission issuing a “do not retain” or “no opinion” recommendation shall, at the judge or justice's request, include a response from the judge or justice of not more than 100 words. The judge or justice shall have seven days from receipt of the commission's final recommendation and narrative to submit the 100 word response to the chair of the commission or the executive director of the Office of Judicial Performance Evaluation, who will forward the response to the commission. The commission may then change its vote count or revise the narrative, and shall provide the judge or justice with the final narrative within seven days following the receipt of the response.

(d) Regardless of its recommendation regarding retention, a commission may, in its narrative, inform the voters that the commission has recommended that the judge or justice participate in a performance improvement plan.

Rule 14. Confidentiality.

(a) Individual survey responses, all comments in survey reports, self-evaluations, personal information protected under section 24-72-204(3)(a)(II), C.R.S., additional oral or written information under Rules 10(f) and 10(g) and 11(f) and 11(g), content of performance improvement plans, any matter discussed in executive session under Rule 5, and complaints, responses, and decisions under Rule 16 shall remain confidential except as otherwise specifically provided in these rules. Information from comments in survey reports, self-evaluations, and additional oral or written information under Rules 10(f) and 10(g) and 11(f) and 11(g) may be summarized for use in a narrative. No commissioner may publicly discuss the substance of the evaluation of any particular judge or justice. Each commission may designate a sole or primary spokesperson to publicly discuss, between July 1 and December 31 of an election year, the process of evaluating the judges and justices.

(b) All recommendations, narratives, and survey reports are confidential until released to the public on the first day following the deadline for judges to declare their intent to stand for retention. Any comments included in the survey report shall be made available only to the commissioners, the judge or justice being evaluated, the chief justice or chief judge, and the staff development administrator responsible for judicial education when assisting a judge or justice participating in a performance improvement plan.

(c) Otherwise confidential information may be released only:

(i) To the Supreme Court Office of Attorney Regulation, if an allegation is made against a judge or justice in the course of the evaluation process which, if true, would constitute a violation of the Colorado Rules of Professional Conduct;

(ii) To the Supreme Court Commission on Judicial Discipline, if an allegation is made against a judge or justice in the course of the evaluation process which, if true, would constitute a violation of the Colorado Code of Judicial Conduct.

(d) A judge or justice disclosing otherwise confidential information shall be deemed to have consented to the release of related confidential information.

Rule 15. Records.

Upon completing its required recommendations and narratives, each commission shall collect all documents and other information, including all copies, received regarding the justices or judges evaluated. Each commission shall forward the documents and other information, including all copies, to the state commission within 30 days following submission of their recommendations and narratives to the state commission. The state commission shall establish guidelines regarding retention of evaluation information, which shall be made available to commissions in subsequent judicial performance evaluation cycles.

Rule 16. Complaints.

(a) Any commissioner, judge, or justice may file a written complaint with the state commission regarding any alleged violation of these rules or the statutes governing judicial performance commissions. The state commission shall provide a copy to the chair of the particular district commission, who shall provide a written response. The state commission shall make an independent review and provide its decision to the district commission along with any

remedial instructions. The state commission may not reverse any retention recommendation, but may cause a rebuttal to be published with the district commission's recommendation or direct a district commission to revise a narrative within ten days. Should the district commission fail to satisfactorily comply, the state commission may, in its discretion, rewrite the narrative.

(b) The state commission may, following the redaction of confidential information, publically disclose a complaint, response, and the state commission's decision.

Amended and Adopted by the Court, En Banc, March 17, 2016, effective immediately.

By the Court:

**Nancy E. Rice
Chief Justice, Colorado Supreme Court**