

RULE CHANGE 2011(17)

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 state commission. The chair of a commission shall advise the appointing authority and the state commission 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, 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 adoption of any proposed policy, position, resolution, rule, regulation, or formal action shall occur 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 justice or judge, 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 the 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 justice or judge that may affect an unbiased evaluation of the justice or judge, including any litigation involving the justice or judge 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 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 justice or judge 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;

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

(b) An attorney serving as a commissioner shall not request that a justice or judge 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 justice or judge 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 justice or judge before

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

(d) A justice or judge 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 justice or judge 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.

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 meeting and interview arrangements, obtaining and distributing information, and posting notices. Staff shall not participate in interviews or deliberations conducted by the commission concerning the evaluation of any justice or judge nor the drafting of narratives.

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 justice or judge to be evaluated that year. The meeting is to allow the chief justice or chief judge to provide an overview of the court, and shall not concern the evaluation of any justice or judge's performance, unless the commission had previously made a recommendation for improvement for a justice or judge being evaluated that year.

Rule 9. Training.

The state commission shall provide training bi-annually that is reasonably accessible and convenient to all commissioners. Each commissioner shall attend one training session, or an appropriate alternative as determined by the state commission, each year in which the commissioner is to evaluate a justice or judge.

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 district judge; 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, including the percentage responding as "undecided or don't know

enough to respond.” Comments shall be separated from completed questionnaires before the comments are forwarded to the trial judge whom each comment concerns.

(b) Each district commissioner shall make unannounced visits to the courtroom to observe at least three of the trial judges being evaluated. The district commission shall ensure that each trial judge being evaluated receives adequate observation.

(c) The district administrator shall provide the district commission with information concerning the caseload, case types, open case reports and case aging reports, and sentence modifications pursuant to section 18-1.3-406, C.R.S. for each trial judge during the period of evaluation, to the extent possible.

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

(e) Each district judge shall submit to the district commission not less than three decisions he or she issued, one of which was reversed on appeal, together with the reversing opinion, if applicable. Each county judge shall submit to the district commission transcripts of three findings of fact, conclusions of law, and orders, one of which was reversed on appeal, together with the reversing decision, if applicable. 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 and for 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) A district commission may interview district and county court judges and other persons and accept information and documentation from interested persons, if the person provides his or her name and address. The district commission shall provide the trial judge with a written summary of any oral information, and a copy of any written information, no later than ten days prior to the 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 four 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; one shall be for other appellate judges and justices, and staff attorneys; and one shall be for employees of the court. 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, including the percentage responding as “undecided or don’t know enough to respond.” Comments shall be separated before the comments are forwarded to the appellate judge or justice whom each comment concerns.

(b) Each state commissioner shall make unannounced visits to the courtroom to observe at least three of the appellate judges or justices being evaluated. The state commission shall ensure that each appellate judge or justice being evaluated receives adequate observation.

(c) The clerks of the supreme court and the court of appeals shall provide the state commission with information concerning opinions authored including concurrences and dissents, and cases on desk reports excluding case names for each appellate judge or justice during the period of evaluation, to the extent possible.

(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, at least one of which is a separate concurrence or dissent, if applicable, and one of which was reversed on appeal, together with the reversing opinion, if applicable, and in the case of a judge of the court of appeals, at least one unpublished 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 and for 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 justices and appellate court judges and other persons and accept information and documentation from interested persons, if the person provides his or her name and address. The state commission shall provide the appellate judge or justice with a written summary of any oral information, and a copy of any written information, no later than ten days prior to the 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) Following the evaluation based upon the survey data, courtroom observations, case information, self-evaluations, review of decisions, interviews, and any other written or oral information received, a commission shall prepare a recommendation regarding the retention of each justice or judge. 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) A commission shall consider a recommendation of "retain" for any justice or judge who receives an average of at least 3.0 on a 4.0 scale for the questionnaire responses, and issued no decision or opinion more than 180 days after a matter was briefed, argued, or otherwise submitted to the court for decision, whichever is latest, unless the other evaluation information indicates a significant performance problem, such as poor judicial temperament.

(c) A commission shall consider a recommendation of "do not retain" for any justice or judge who receives less than an average of 3.0 on a 4.0 scale for the questionnaire responses, unless:

(i) The nature or high number of cases of a justice or judge's docket or caseload is such that it cannot appropriately be managed in a timely manner. This may be particularly true for a provisional justice or judge, who when appointed may inherit a significantly high number of cases that cannot be managed quickly; or

(ii) The commission believes that with additional experience on the bench and a commitment to improve his or her judicial skills, the justice or judge should be given more time to develop his or her judicial skills. The justice or judge must agree to the recommendations contained in a performance plan that identifies areas of significantly poor performance and makes specific recommendations for improvement.

Rule 13. Narratives.

(a) Within ten days following the interview, a commission shall provide the justice or judge a complete 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, and volunteer or other community work;

(iii) A description of the performance of the justice or judge over the past term, including any areas of notably strong or weak performance, any deficiencies identified in the interim evaluation, and 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;

(iv) A description of the groups of respondents surveyed, whether any of the groups surveyed had an insufficient response rate, the percentage of responses received from each group who recommend that a justice or judge be retained, the percentage received from each group who recommend that a justice or judge not be retained, and the percentage received from each group indicating "undecided or don't know enough to make a recommendation."

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

(c) Any commission issuing a "do not retain" or "no opinion" recommendation shall, at the justice or judge's request, include a response from the justice or judge of not more than 100 words. The commission may then change its vote count or revise the draft narrative, and shall provide the justice or judge with the final narrative within ten days following the receipt of the response.

(d) If the commission has identified one or more areas of significantly poor performance, it may recommend to the chief justice or chief judge that the justice or judge be placed on an improvement plan.

Rule 14. Confidentiality.

(a) 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 11(f), content of 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 (g) and 11(f) and (g), may be summarized for use in a narrative. No commissioner may publicly discuss the substance of the evaluation of any particular justice or judge. 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 justices and judges.

(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 report shall be made available only to commissioners, the justice or judge being evaluated, and the chief justice or chief judge.

(c) Otherwise confidential information may be released only under the following circumstances:

(i) To the supreme court attorney regulation committee, if an allegation is made against a justice or judge in the course of the evaluation process which, if true, would constitute a violation of the Colorado rules of professional conduct, on the same basis as that body provides confidential information to the state commission;

(ii) To the commission on judicial discipline, if an allegation is made against a justice or judge in the course of the evaluation process, which, if true, would constitute a violation of the code of judicial conduct, or which would constitute extra-judicial conduct that reflects adversely on the judiciary, on the same basis as that body provides confidential information to the state commission; or

(iii) With the consent of the justice or judge. A justice or judge 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, justice or judge 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, December 8, 2011, effective January 1, 2012.

By the Court:

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