



## SMART Act Executive Summary

### Colorado Judicial Performance Evaluations

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

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

### Performance Improvement Strategies

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

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

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

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

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

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



**COLORADO**

**Office of Judicial  
Performance Evaluation**

Judicial Branch

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

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

### Mission

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

### Major Functions

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

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

## Performance Measures

### Judicial Performance Improvement - Interim Evaluations

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

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

### Retention Election Evaluations and Narratives

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

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

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

### Public Engagement and Education

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

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

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

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

### Commissioner Education and Training

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

### Budget and Fiscal Responsibility

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

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

## Performance Goals

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

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

## Performance Improvement Strategies

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

### Commissioner Vacancy Appointments

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

## Senior Judge Evaluations

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

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

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

### Performance Standard Threshold

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

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

## Survey Responses

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

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

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