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*Judicial Performance Review Commission in Colorado*

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# JUDICIAL PERFORMANCE REVIEW: A BALANCE BETWEEN JUDICIAL INDEPENDENCE AND PUBLIC ACCOUNTABILITY

## **Cover Page Footnote**

\* Jean Dubofsky is a member of the state Judicial Performance Review Commission in Colorado. She was a justice on the Colorado Supreme Court from 1979 until 1987. She has had an appellate practice since 1989. She graduated from Harvard Law School in 1967.

## JUDICIAL PERFORMANCE REVIEW: A BALANCE BETWEEN JUDICIAL INDEPENDENCE AND PUBLIC ACCOUNTABILITY

*Jean E. Dubofsky\**

Judicial performance review in Colorado is the most sophisticated method in the nation for providing information to voters in judicial retention elections.<sup>1</sup> Colorado has had a commission-based appointive system for judges—with the judges subject to periodic non-contested retention elections—for forty years. In the mid-1980s, some in Colorado thought that retention elections did not provide voters with enough information to hold judges accountable, and they sought to return the selection of judges to contested partisan elections. The performance review concept was a response to the call for more public accountability. But public accountability in Colorado—advanced by a commission without partisan balance—may encroach on judicial independence.<sup>2</sup>

This Article focuses on the role of judicial performance commissions that provide information to voters before non-contested retention elections for appointed judges. A performance commission might serve as a substitute for retention elections. But given the political climate in Colorado, where judges are subject to frequent public criticism, it is highly unlikely that retention elections, enshrined in the state constitution, will be replaced with periodic commission review. Questions that this Article will address include the following:

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\* Jean Dubofsky is a member of the state Judicial Performance Review Commission in Colorado. She was a justice on the Colorado Supreme Court from 1979 until 1987. She has had an appellate practice since 1989. She graduated from Harvard Law School in 1967.

1. See UNIV. OF DENVER, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., SHARED EXPECTATIONS, JUDICIAL ACCOUNTABILITY IN CONTEXT 20-56 (2006), available at <http://www.du.edu/legalinstitute/docs/jpe-final-report.pdf>.

2. The 2006 training manual for the commissions on judicial performance declares that Colorado's judicial merit selection and evaluation system "helps ensure judicial independence" and "promote[s] the judiciary's accountability to the public." According to the manual, judicial independence "provides a check and balance on the political (the legislature and the executive) branches of government." STATE OF COLORADO, COMMISSIONS ON JUDICIAL PERFORMANCE: TRAINING 2006, at 6-7 (2006) [hereinafter TRAINING 2006].

1. Who appoints the members of a judicial performance commission and should partisan balance be required?
2. What should commission members' qualifications be?
3. What are the appropriate criteria for evaluation of a judge's performance?
4. How does a commission obtain information about a judge?
5. What is done with the information obtained by the commission?
6. Should performance review include retired judges or magistrates who serve as-needed?
7. What kind of staffing and training is available for commissioners and who pays for it?
8. Does a performance review get rid of bad judges and assist voters in retaining good judges?
9. Should judges be subject to term limits?
10. To what degree does any performance evaluation limit judicial independence?

### I. AN OVERVIEW OF THE COMMISSION-BASED JUDICIAL SELECTION PROCESS IN COLORADO

Before discussing the role of judicial performance commissions, this Article describes the initial selection process for most judges in Colorado.<sup>3</sup> In 1966, Colorado voters adopted an amendment to the state constitution that provides an appointive process to select state court judges, replacing their direct election.<sup>4</sup> The appointive process (called a "modified Missouri Plan"<sup>5</sup>) consists of a state-wide appellate judicial nominating commission ("the supreme court nominating commission") and nominating commissions for county and district court trial judges in each judicial district ("the

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3. Municipal court judges and Denver County Court judges are not selected by this process. COLO. CONST. art. VI, § 26 (governing selection process for Denver County Court); art. VI, § 1, art. XX, § 6(c) (governing selection process for municipal courts); *Hardamon v. Mun. Court in and for City of Boulder*, 497 P.2d 1000, 1002 (Colo. 1972) (holding that home rule cities are constitutionally empowered to provide for judges, elected or appointed, who consider issues that are local or municipal in nature).

4. Act of Nov. 8, 1966, 1967 Colo. Sess. Laws ch. 455 (amending COLO. CONST. art. VI). The League of Women Voters, the Colorado Bar Association, and the Colorado Medical Society initiated the amendment; their success capped a twenty-six year effort to remove judges from contested elections. Gregory J. Hobbs, *Colorado Judicial Merit Selection—A Well-Deserved 40th Anniversary Celebration*, COLO. LAW., Apr. 2006, at 13, 13-14, 17.

5. Hobbs, *supra* note 4, at 14.

district nominating commissions").<sup>6</sup> For each judicial vacancy, a nominating commission sends two or three names selected from those who have applied for the position to the governor, who makes the final selection.<sup>7</sup>

The supreme court nominating commission consists of a lawyer and a lay person from each congressional district<sup>8</sup> and an additional lay person,<sup>9</sup> with the chief justice as the ex officio chair.<sup>10</sup> The district nominating commissions each have three attorney members and four lay members, all of whom reside in the judicial district, with one of the six justices of the state supreme court acting as the ex officio chair.<sup>11</sup> The governor, the attorney general, and the chief justice select the lawyer members of each commission by majority vote, and the governor selects the lay members.<sup>12</sup> No more than one-half of the commission members plus one can be members of the same political party<sup>13</sup> and all commission members serve a term of six years.<sup>14</sup> The commissions rely on staffing from the supreme court and the state court administrator's office, and receive some training provided by the state court administrator.<sup>15</sup>

When a judicial vacancy occurs, any person who meets the minimum qualifications to be a judge may file an application with the ex officio chair of the commission.<sup>16</sup> Immediately following inter-

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6. COLO. CONST. art. VI, § 24.

7. *Id.* The supreme court nominating commission must send three names to the governor for appellate court vacancies; district nominating commissions may send two or three names for county or district court vacancies. *Id.*

8. Colorado currently has seven congressional districts. Colo. Dep't of Educ., Colorado Congressional District Map, <http://www.cde.state.co.us/cdeboard/bdmap.htm> (last visited Oct. 13, 2006).

9. COLO. CONST. art. VI, § 24(2).

10. *Id.*

11. *Id.* § 24(3).

12. *Id.* § 24(4).

13. *Id.* §§ 24(2)-(3).

14. *Id.*

15. *Id.*

16. Colorado Judicial Branch's Judicial Vacancies and Appointments, <http://www.courts.state.co.us/exec/media/vacancy.htm> (last visited Oct. 16, 2006). The application is on a form provided by the supreme court and must be accompanied by letters of reference. See Judicial Nominating Comm'n, Application for Colorado State Court Judgeship, available at <http://www.courts.state.co.us/exec/vacancy.htm> (last visited Jan. 16, 2007). The commission selects the applicants whom it wishes to interview and conducts an interview, usually about thirty minutes, for each of the selected applicants. Some commissions prepare questions in advance; others conduct interviews on an ad hoc basis. There are no constitutional or statutory guidelines with respect to what the commissions are to consider.

views with the applicants, the commission votes on the names of two or three candidates to send to the governor.<sup>17</sup>

For many years, the entire nominating process was confidential by custom, as it was thought that confidentiality protected the law practices of those applicants who were not selected. For about twenty years following this period of confidentiality, the commission chair announced the names of the two or three nominees when the governor received the names. More recently, the names of those who apply often become public knowledge. Members of the nominating commissions call references listed in applications, and applicants encourage their supporters to contact the members of the commission. The nominees also organize campaigns to lobby the governor, as the governor or his staff usually interviews each of the nominees and his office conducts an independent check on their qualifications.

For the most recent state supreme court appointment, the former chief counsel to the governor (who is in the last year of eight years in office) suggested two people whom she said the governor would like to see nominated.<sup>18</sup> Because the governor appointed, or had a hand in appointing, all of the members of the appellate nominating commission, it was not surprising that two of the three names forwarded to the governor, following the interviews, were the names his former counsel suggested.

The nomination and selection process moves quickly. The nominating commissions have no more than thirty days after a judge's death, retirement, tender of resignation, or removal from office to submit a list of nominees to the governor.<sup>19</sup> If the governor fails to make an appointment within fifteen days from the date the list is submitted to him, the chief justice of the supreme court has fifteen days to make the appointment.<sup>20</sup>

After a judge serves a provisional term of at least two years, the judge's name (if the judge files a declaration of intent to run for another term) will appear on the statewide ballot (if the judge serves on an appellate court) or on a county or district ballot (if the judge serves on the trial bench).<sup>21</sup> Voters determine by majority

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17. See generally Press Release, Colorado Judicial Branch, Judicial Selection and Retention in Colorado (Apr. 27, 2004) [hereinafter Judicial Selection Press Release], available at [http://www.courts.state.co.us/exec/media/notices/judicial\\_facts\\_4-04.doc](http://www.courts.state.co.us/exec/media/notices/judicial_facts_4-04.doc).

18. Howard Pankratz, *High Court Choices Lining Up*, DENV. POST, Dec. 7, 2005, at B-02.

19. COLO. CONST. art. VI, § 20(1).

20. *Id.*

21. *Id.* § 25.

vote if the named judge shall be retained in office for a term of years (four years for county judges, six years for district judges, eight years for appellate judges, and ten years for supreme court justices).<sup>22</sup> There is no limit on the number of times the judge may stand for retention, however, the Colorado Constitution requires a judge to retire at age seventy-two.<sup>23</sup>

The constitutional amendment approved by voters in 1966 to replace the contested election of judges included the establishment of a separate commission on judicial qualifications.<sup>24</sup> In 1982, the voters amended the constitution to rename the commission (it became the Colorado Commission on Judicial Discipline) and to change its structure.<sup>25</sup> The Commission on Judicial Discipline<sup>26</sup> can recommend removal or discipline of a state judge for willful misconduct in office, willful or persistent failure to perform judicial duties, intemperance, or violation of the Colorado Code of Judicial Conduct, and recommend retirement for disability interfering with the performance of judicial duties.<sup>27</sup> The supreme court determines whether to accept the Commission's recommendation.<sup>28</sup>

The judicial discipline commission's proceedings in individual cases are confidential, however, the commission's recommendation that a judge be removed from office is not confidential after it is filed with the supreme court.<sup>29</sup> The commission's annual report reflects that over the past thirty-nine years, twenty-four judges have been ordered to retire due to a disability, the commission has issued 166 private letters of admonition, reprimand, or censure against judges, and forty-seven judges have resigned during commission investigations.<sup>30</sup> Although on average six judges per year have been subject to commission action, it appears that no judge has been publicly sanctioned for wrongful conduct.<sup>31</sup>

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22. *Id.* §§ 7, 10(2), 16, 25; COLO. REV. STAT. § 13-4-104 (2005).

23. COLO. CONST. art. VI, § 23(1).

24. Colo. Comm'n on Judicial Discipline, *2005 Annual Report*, COLO. LAW., June 2006, at 6, 15.

25. *Id.*

26. The Commission members include two county court judges and two district court judges, who are selected by the supreme court, and two attorneys and four lay persons, who are selected by the governor and subject to confirmation by the senate. COLO. CONST. art. VI, § 23(3)(a).

27. *Id.* § 23(3)(d).

28. *Id.* § 23(3)(f).

29. *Id.* § 23(3)(g); COLO. REV. STAT. §§ 24-72-401 to -402 (2001).

30. Colo. Comm'n on Judicial Discipline, *supra* note 24, at 18.

31. *Id.*

The judicial discipline commission was not intended to replace impeachment of a judge.<sup>32</sup> In Colorado, the impeachment process for a public official begins in the House of Representatives by majority vote; after trial in the Senate, conviction requires a two-thirds vote.<sup>33</sup> A judge has not been impeached in Colorado in more than sixty-five years.<sup>34</sup>

## II. AN OVERVIEW OF JUDICIAL PERFORMANCE REVIEW IN COLORADO

During the early 1980s, there were several efforts to return judges to elected politics.<sup>35</sup> In response, the state supreme court formed a committee of prominent attorneys to recommend how voters might receive more information about the judges who were on the ballot. The court accepted the committee's recommendation to establish a statewide judicial performance commission to prepare information about each judge to be disseminated to voters.<sup>36</sup> Many judges opposed the idea, particularly because they were concerned about losing discretion over the length of prison sentences in individual cases if systemwide information revealed disparities in sentencing.<sup>37</sup>

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32. COLO. CONST. art. VI, § 23(3)(i).

33. *Id.* art. XIII, § 1.

34. Although impeachment had not been used in Colorado since 1938, a Colorado representative introduced a resolution to impeach a Denver district court judge in March 2004. Editorial, *Prudence Prevails for Judge*, DENV. POST, Apr. 29, 2004, at B-06. The representative was aided by Focus on the Family, a Christian ministry based in Colorado Springs, and sought to impeach the judge for his decision in a child custody case involving two lesbians who had split up. Chris Frates, *GOP Criticizes Group's Push to Impeach Judge*, DENV. POST, Apr. 18, 2004, at B-02. One of the two women embraced religious views that condemn homosexuality. Editorial, *Impeaching Judge Extreme*, ROCKY MTN. NEWS, Mar. 20, 2004, at C-15. After awarding joint custody, the judge ordered the adoptive mother who had renounced homosexuality not to expose the child to any homophobic religious teachings. *Id.* The House Judiciary Committee blocked the impeachment effort, but the representative said that he had conveyed a message to rein in judges from making law. Arthur Kane, *Panel Refuses to Impeach Judge*, DENV. POST, Apr. 28, 2004, at B-01.

35. Judicial Selection in the States, History of Judicial Selection Reform, [http://www.ajs.org/js/CO\\_history.htm](http://www.ajs.org/js/CO_history.htm) (last visited Oct. 26, 2006).

36. Unpublished report to the Colorado Supreme Court from a commission chaired by Denver attorney Daniel S. Hoffman. The author, as a justice on the supreme court at that time, had a role in the court's acceptance of the recommendation.

37. Conversations that the author had with judges around the state when she was a justice on the supreme court and was working on obtaining approval of a judicial performance commission support this anecdotal data.

The legislature codified the judicial performance commission concept in 1988.<sup>38</sup> The legislation created a statewide commission on judicial performance, which evaluates the appellate court judges and oversees the evaluation of county and district court trial judges by a judicial performance commission in each judicial district.<sup>39</sup> The state commission, however, may not substitute its evaluation for that of the local commission.<sup>40</sup> The ten members on the state commission and the ten members of each district commission are appointed by the legislative leadership, the governor, and the chief justice. The speaker of the house and the president of the senate each appoints one lawyer and one lay person, and the governor and the chief justice each appoints one lawyer and two lay persons.<sup>41</sup> Commission members may serve two four-year terms.<sup>42</sup>

By statute, the commissions consider the following criteria, if relevant, in evaluating judges: integrity; knowledge and understanding of substantive, procedural, and evidentiary law; communication skills; preparation, attentiveness, and control over judicial proceedings; sentencing practices; docket management and prompt case disposition; administrative skills; punctuality; effectiveness in working with participants in the judicial process; and service to the legal profession and the public.<sup>43</sup> The state court administrator collects computerized information about each case filed in all state courts. The information collected includes the names and addresses of the litigants, their attorneys, court personnel, and—if pertinent—the names and addresses of jurors and victims of crime.<sup>44</sup>

An opinion pollster, using questionnaires developed by the state commission, surveys lawyers, jurors, litigants, law enforcement personnel, district attorneys and public defenders, employees of local departments of social services, and victims of crime who have appeared before each judge, and collects information about how the

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38. COLO. REV. STAT. § 13-5.5-101 (2005). The law providing for the judicial performance review process will expire on June 30, 2009, unless renewed by the legislature. *Id.* § 13-5.5-109.

39. *Id.* § 13-5.5-103.

40. *Id.* § 13-5.5-101.

41. *Id.* §§ 13-5.5-102, -104.

42. *Id.* §§ 13-5.5-102(b), -104(b).

43. *Id.* § 13-5.5-103(1)(a). The commissions are not limited to the specified criteria. *Id.*

44. RULES GOVERNING COMMISSIONS ON JUDICIAL PERFORMANCE, rule 2(a), available at <http://www.cojudicialperformance.com/main.cfm?webdiv=529&top=182> (last visited Jan. 16, 2007) [hereinafter RULES GOVERNING COMMISSIONS].

judge meets the above criteria.<sup>45</sup> The pollster sends the surveys to randomly selected persons from each category who have appeared in each judge's courtroom.<sup>46</sup>

Before participating in the evaluation of a judge, each commission member must attend a biannual training session.<sup>47</sup> The commissions are required to interview each judge up for retention<sup>48</sup> and may conduct public hearings to solicit comments on the judges being evaluated.<sup>49</sup> In addition, the commissions receive information concerning the caseload and types of cases for each judge<sup>50</sup> and each judge prepares a self-evaluation on a form prepared by the state commission.<sup>51</sup> Finally, each commission member is to make at least one unannounced visit to the courtroom to observe the judge being evaluated.<sup>52</sup>

The results of the survey, courtroom observations by the members of the commission, and interviews with the judge, as well as people connected to the court system, assist each commission in determining whether to recommend retention of a judge by the electorate.<sup>53</sup> The commission's recommendation, as well as a narrative profile written by the commission<sup>54</sup> for each judge on the ballot in a given year appears in the "blue book," the publication issued by the legislative staff to explain initiated measures that will appear on the ballot.<sup>55</sup> If a commission recommends "do not retain" for a particular judge, the judge may campaign for retention.<sup>56</sup>

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45. COLO. REV. STAT. § 13-5.5-103(b); RULES GOVERNING COMMISSIONS, *supra* note 44, rule 2(a). The independent firm conducting the survey statistically analyzes the data collected. RULES GOVERNING COMMISSIONS, *supra* note 44, rule 7. Written comments from the survey are given to the commissions verbatim. *Id.*

46. RULES GOVERNING COMMISSIONS, *supra* note 44, rule 2(a).

47. *Id.* rule 6.

48. *Id.* rule 11.

49. *Id.* rule 2(f).

50. *Id.* rule 2(c).

51. *Id.* rule 2(g).

52. *Id.* rule 2(h).

53. The rules recommend that a judge who receives less than an average of 2.0 in response to survey questionnaires (where judges are rated on a scale of zero to four, with four being the highest rating) should receive a "do not retain" recommendation, subject to a number of exceptions. *Id.* rule 13(b).

54. If a judge chooses to reply to criticism, the judge's reply becomes part of the narrative, subject to the judge's right to have it removed. *Id.* rule 15(b).

55. The ballot information booklet is prepared under COLO. REV. STAT. § 1-40-124.5 (2000).

56. Under Canon 7(b) of the Colorado Code of Judicial Conduct, a judge who is a candidate for retention in office may engage in campaign activity if there is active opposition to her retention in office. COLORADO CODE OF JUDICIAL CONDUCT, Ca-

A commission may issue “no opinion” on retention if the commission believes that it has insufficient information to make a recommendation.<sup>57</sup> If a commission has “no opinion,” the commission must explain in writing (for publication in the “blue book”) why it has come to that conclusion.<sup>58</sup> The statute does not address whether a judge who receives “no opinion” is entitled to campaign for retention.

### III. THE EFFECTIVENESS OF JUDICIAL PERFORMANCE COMMISSIONS IN BALANCING JUDICIAL INDEPENDENCE AND PUBLIC ACCOUNTABILITY IS MIXED

The various forms that a judicial performance commission can take may increase public accountability at the expense of judicial independence. The balance between the two is affected by the considerations discussed in question and answer format below.

#### **Who appoints the members of a judicial performance commission? Should there be partisan balance on a commission?**

The effectiveness of a judicial performance commission is dependent primarily on who its members are. The primary structural problem with the Colorado judicial performance commissions is that the appointing authorities have complete control over the political make-up of the commissions, as there is no requirement for partisan balance. Thus, the commission membership depends upon the political affiliation of the appointing authorities. When the governor and the leadership of the state senate and the state house of representatives are from the same political party, as has been the case for four of the past eight years, they have the right to appoint seven members of each commission, and commission membership has been heavily weighted toward that party.<sup>59</sup> In contrast,

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non 7(b), available at <http://www.courts.state.co.us/exec/pubed/canons.htm> (last visited Jan. 16, 2007).

57. COLO. REV. STAT. §§ 13-5.5-106(1)(b), -106(2)(b) (2005); RULES GOVERNING COMMISSIONS, *supra* note 44, rules 13(d), 14.

58. COLO. REV. STAT. § 13-5.5-106(2)(b).

59. The chief justice appoints the remaining three members of each commission; her appointments have provided the political balance. Were she inclined to appoint members of the governor’s political party that controls the legislature, all the members of the performance commission could be affiliated with a single party. The current chair of the state judicial performance commission has suggested that the attorney general, who is the only lawyer elected by the citizens state-wide, should make the appointments now made by the chief justice. Paul Farley, *Speakout: Term Limits for Judges Unnecessary*, ROCKY MTN. NEWS, July 3, 2006, at 34A. The attor-

no more than one-half of the judicial nominating commission's members plus one may be members of the same political party.<sup>60</sup>

The subsequent temptation to be more critical of judges who were appointed when the governor was of the opposing party has proved irresistible for some commissions.<sup>61</sup> The impact on judicial independence is the consequent suggestion to judges that they should rule in a way that is acceptable to the dominant political membership on the performance commission. Judges might be removed from partisan elections, but depending upon the partisan make-up of the performance commission, they may remain subject to political pressure (public accountability) in ways that reduce their independence.

The perceived importance of the political make-up of the commissions can cause trouble, as reflected in a recent Colorado Supreme Court decision, *Romanoff v. State Commission on Judicial Performance*.<sup>62</sup> *Romanoff* arose from a dispute over the membership of the state judicial performance commission. In November 2004, the Democrats won control of both houses of the state legislature.<sup>63</sup> In early 2005, one day before the new Democratic leadership was to take office, the outgoing conservative Republican president of the Senate and the outgoing conservative Republican speaker of the House replaced two members of the commission (a lawyer who is a Democrat and a lawyer who is a moderate Republican) with two conservative Republican attorneys.<sup>64</sup> The new Democratic leadership rescinded the appointments and restored to their positions the two lawyers who had been on the commission.<sup>65</sup>

The conflicting appointments brought the work of the commission to a standstill.<sup>66</sup> The supreme court, using its power to issue

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ney general, however, is elected by partisan vote, and if the attorney general were to replace the chief justice as an appointing authority, all of the members of the commission could have the same political affiliation unless the law is changed to require partisan balance.

60. COLO. CONST. art. VI, §§ 24(2)-(3).

61. See *infra* notes 145-47 and accompanying text (describing a voter initiative that would remove all of the appellate judges appointed by the prior governor).

62. 126 P.3d 182 (Colo. 2006).

63. *Id.* at 185.

64. *Id.* The former president of the Senate has been a frequent critic of judges; he initiated a proposed constitutional amendment that would have established term limits for appellate judges. See *infra* note 145 and accompanying text.

65. *Romanoff*, 126 P.3d at 185.

66. *Id.* at 184.

writs of quo warranto,<sup>67</sup> held that the terms of the lawyers who had been restored to the commission by the Democratic leadership had expired.<sup>68</sup> Although the restored lawyers did not complete their four-year terms, earlier appointments to the commission by the legislative leadership were made in violation of the statutory scheme for staggered terms.<sup>69</sup> According to the court, the Republican appointing authority made one of the two appointments in an untimely manner, and the commission was to select the replacement for the Democratic lawyer.<sup>70</sup> The commission, dominated by Republicans, selected the Republican lawyer whose appointment was untimely.

Political considerations can be ameliorated if commission members are appointed by individuals not elected to political office. In Colorado before 1988, judicial performance review was conducted by bar associations.<sup>71</sup> Performance review by attorneys is less likely to be swayed by public opinion because attorneys are more likely to understand the importance of judicial independence. Attorneys are also more likely to provide sophisticated review of judicial performance.

The judicial performance commission concept in Colorado, however, was designed to provide more public input, and thus accountability, by expanding review beyond attorneys acting through bar associations. It is not surprising that the lay members of some of the commissions reflect generalized public opposition to so-called “activist judges.”<sup>72</sup> At the same time, one of the strengths of the judicial performance concept is that a judge who makes a politically unpopular decision required by statute or case law may find support for retention from a judicial performance commission. When the commission is perceived as having more lay members than attorney members, the general public may be more willing to accept its recommendation.

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67. COLO. CONST. art. VI, § 3. A writ of quo warranto is a common law writ “designed to test whether a person exercising power is legally entitled to do so.” BLACK’S LAW DICTIONARY 1256 (6th ed. 1990).

68. *Romanoff*, 126 P.3d at 192.

69. *Id.* at 189.

70. *Id.* at 192.

71. Colo. Bar Ass’n, Judicial Selection in Colorado—Fact Sheet, Fair and Impartial Courts, <http://www.cobar.org/group/index.cfm?category=2488&EntityID=cpsc> (last visited Oct. 26, 2006).

72. See, e.g., Richard L. Gabriel, *Term Limits for Judges: Still a Bad Idea*, Feb. 6, 2006, <http://www.coloradojudicialinstitute.org/downloads/> (select file titled “Term Limits Still a . . . 08-Aug-2006”).

Nevertheless, judicial reviews by bar associations could be expanded; non-attorney input could come from a number of organizations such as the League of Women Voters, Common Cause, business organizations, service clubs, labor unions, and religious groups. The concept of a process without members appointed by elected officials, however, creates a number of additional problems. Which bar associations participate? What organizations participate? And where does the money come from to provide information compiled by private groups to the general public?

In sum, who appoints the members of a judicial performance commission may not be as important as a requirement that the commission have partisan balance. Changes in the elected officials who appoint commission members may change the composition of commission membership, but one party could not dominate by more than a single vote if appointments by elected officials were restrained by the need to retain partisan balance. It may be simpler to have public accountability come by way of elected officials appointing the persons who provide the written reviews of the judges than it would be to enumerate the various organizations that could participate in such a review.

**Should there be racial, ethnic, gender, age, religious,  
or experience diversity on a commission?**

**What are the qualifications required for appointment  
to a commission?**

**If a prosecutor is a member of a commission, should the  
commission also include a public defender?**

**Should there be term limits for the members of the commission?**

In addition to not requiring partisan diversity, the statute that creates judicial performance commissions in Colorado does not require racial, ethnic, gender, religious, or geographic diversity.<sup>73</sup> At present, the appointments to the state commission reflect some gender, racial, and geographic diversity. The statute could encourage appointing authorities to consider diversity when making commission appointments.

Even though attorneys comprise a minority of performance commission members, they tend to dominate a commission's work.<sup>74</sup> Some attorney commission members have had no experience in

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73. COLO. REV. STAT. § 13-5.5-102 (2005).

74. This statement is based on the author's extensive experience as a member of the state judicial performance commission and as the trainer of members of local commissions.

court, and their sophistication about the workings of the court system is little more than that of the average lay person. The commission process can be improved if attorney members are required to have had experience in the court whose judges they evaluate, with attorney members of the state commission required to have either appellate or trial court experience, and attorney members of local commissions required to have had experience in the local trial courts. Lay members might be required to have some working knowledge of the court system, either as a litigant or a member of a group that works with or monitors the judicial process.<sup>75</sup>

Several local commissions have elected district attorneys as members.<sup>76</sup> The presence of an elected district attorney might encourage judges to favor the prosecutor in criminal cases, or at least create a public assumption that the judge will favor the prosecutor because the prosecutor has a direct vote in recommending a judge's retention by the electorate. At the same time, a prosecutor knows more about the judges in the district than anyone else because of the high percentage of criminal cases heard by judges and because the elected district attorney would have an employee on a near-daily basis in each judge's courtroom. If an elected district attorney (or an assistant district attorney) serves on a judicial performance commission, one could insist that a public defender also be a member of the commission.<sup>77</sup> But then, must one of the slots go to a domestic relations attorney, a plaintiff's personal-injury attorney, or an insurance defense counsel? In some areas of the state, there are few lawyers with courtroom experience other than the district attorneys and public defenders. Given public interest in criminal convictions and the length of prison sentences, the presence of an elected district attorney on a commission might increase the perception that judges are publicly accountable.

The Colorado judicial performance commission statute limits commission members to two four-year terms.<sup>78</sup> Term limits are important if elected officials are to have input into the make-up of the

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75. Senate confirmation of the legislative and gubernatorial appointments might weed out unqualified commission selections, but the confirmation process would be unwieldy unless limited to state commission members.

76. For example, the district attorney in El Paso County (Colorado Springs), elected in 2004, is also a member of the judicial performance commission that evaluates El Paso County judges. Office of the District Attorney, Fourth Judicial District, <http://dao.elpasoco.com> (last visited Jan. 16, 2007).

77. Regardless of whether a district attorney or a public defender is a member of a commission, performance commission surveys are sent to district attorneys and public defenders. COLO. REV. STAT. § 13-5.5-103(1)(b) (2006).

78. COLO. REV. STAT. §§ 13-5.5-102(b), -104(b) (2005).

commissions. Moreover, term limits allow more people to participate in judicial performance review, and the more people with a chance to participate in the judicial process, the more people who likely will become supporters of the commission-based appointive system for judges and judicial independence.

**What are the appropriate criteria for evaluation of a judge's performance: i.e., demeanor, patience, tolerance, willingness to work hard, ability to deal with complex issues, knowledge of substantive and procedural law, integrity, control over judicial proceedings, docket management skills, attentiveness, communication skills, and public service? Should sentencing practices be included?**

The evaluations by judicial performance commissions assist voters in deciding which judges to retain and provide the judges with information to help them improve their performance. The Colorado judicial performance statute lists the qualities and skills that trial and appellate judges should have, including "integrity, knowledge and understanding of substantive, procedural, and evidentiary law; communications skills; preparation, attentiveness, and control over judicial proceedings; sentencing practices; docket management and prompt case disposition; administrative skills; punctuality; effectiveness in working with participants in the judicial process; and service to the legal profession and the public."<sup>79</sup> The surveys sent to court participants are more detailed.<sup>80</sup>

Many of the necessary personal qualities and skills of trial and appellate judges are significantly different. For example, a trial court judge interacts with the public far more than an appellate judge does, and patience, good communication, and docket man-

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79. *Id.* § 13-5.5-103(1)(a).

80. The surveys for non-attorney court participants ask them to evaluate trial judges on demeanor, fairness, communications, diligence, and application of law. The surveys for attorneys ask them to evaluate trial judges on case management; application and knowledge of law, including issuing consistent sentences in criminal cases when the circumstances are similar; communications; demeanor; and diligence. Both surveys have numerous questions within each of the topics. The appellate questionnaire for attorneys is shorter and emphasizes evaluation of judicial opinions that adequately explain the basis of the court's decision and that refrain from reaching issues that need not be decided. A separate questionnaire for the evaluation of appellate judges is sent to trial judges. All of the surveys ask the evaluator to provide written comments about the judge being evaluated. The form of the surveys can be found at Comm'n on Judicial Performance, The Honorable Michael K. Singer, 2006 Judicial Performance Survey, 13th Judicial District, at 93-96 (Apr. 26, 2006), <http://www.cojudicialperformance.com/images/retentionpdfs/Dst13MichaelKSinger.pdf> [hereinafter Singer Survey].

agement skills are more important. For an appellate judge, the abilities to research and write well and to work in a collegial setting are more important.

It is difficult for a judicial performance commission to assess the collegial work of appellate judges because the work is confidential and done as members of a panel. Moreover, it is difficult for a commission to evaluate the opinions authored by a particular appellate judge for writing ability and research skills because of the unacknowledged assistance to appellate judges by law clerks and staff attorneys. In addition, the quality of the lawyering in a particular case, both at the trial and appellate level, constrains the ability of an appellate judge to reach what might be a more sensible result. The best way to evaluate an appellate judge may be by looking at the quality of the judge's work over a broad range of cases; trial court judges, who read many of an appellate court's decisions, may be in a better position to make such an assessment than are the attorneys who may focus only on cases in their area of practice.<sup>81</sup>

Criminal sentencing is an important aspect of judicial accountability to the general public. Because stories about crime sell newspapers (and television news programs), the public tends to think that the only cases handled by judges are criminal cases. If a sentence seems too lenient in a publicized criminal case, the average voter may conclude that the judge who did not punish the defendant sufficiently is someone who should not be a judge. Reflecting public concern about criminal sentencing, the judicial performance surveys for trial court judges ask "How biased do you think Judge X is towards the defense or the prosecution?" and "How lenient or harsh do you think the sentences handed down by Judge X are?"<sup>82</sup>

In order to be "tough" on crime, the Colorado legislature has limited judicial discretion in sentencing by enacting mandatory minimum sentences for many crimes.<sup>83</sup> The problem with mandatory minimum sentences is that they are fashioned as "one-size-fits all." The harshness of sentencing schemes in particular cases may be ameliorated by judicial discretion, but any judge who reduces a sentence below the mandatory minimum risks being

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81. As discussed below, trial court judges participate in the evaluation surveys of appellate judges at a much higher rate than do attorneys. See *infra* note 96 and accompanying text.

82. See, e.g., Comm'n on Judicial Performance, The Honorable Marilyn Kay Leonard, 2006 Judicial Performance Survey, 18th Judicial District, at 11-12 (Apr. 26, 2006), <http://www.cojudicialperformance.com/images/retentionpdfs/Dst18MarilynKayLeonard.pdf>.

83. COLO. REV. STAT. § 18-1.3-401(8) (2004).

viewed as “too soft” on crime. Consequently, many persons who do not belong in prison for long periods of time may serve lengthy prison terms.

“Sentencing practices” are not qualities or skills of a trial court judge. Rather, sentencing practices—if considered by a local commission—reflect whether the judge imposes more lenient sentences than the statutory mandatory sentence provision calls for or, where statutes allow sentencing within a range of years, whether the judge consistently sentences at the low or high end of the range. The rules promulgated by the state commission direct a district court administrator to provide a local commission, upon request, with the number of sentence modifications that a trial court judge has made under the statute that provides mandatory minimum sentences for persons convicted of enumerated violent crimes.<sup>84</sup> If a judge determines that a sentence below the mandatory minimum is appropriate, the judge is required to notify the state court administrator of the unusual and extenuating circumstances that justified the modification.<sup>85</sup> Thus, when a local commission requests the information and the judge has imposed a sentence below the mandatory minimum, the commission may view the judge as too lenient. The resulting reluctance of a judge to impose a lower sentence where appropriate is a loss of judicial independence.

**From whom is information about a judge obtained?**

**If surveys of courtroom participants are used, what are the surveys for and how does a commission ensure their accuracy?**

**Should commissioners observe the judge in the courtroom or hold public hearings?**

**Should performance commissions have access to information about specific instances of misconduct or disability provided to a judicial discipline commission?**

**Does a judge have an opportunity to reply to criticism?**

The statute directs the state commission to develop surveys for lawyers, jurors, litigants, law enforcement personnel, attorneys with the district attorney’s and public defender’s offices, employees of local departments of social services, victims of crime, other judges, and court personnel.<sup>86</sup> The surveys of participants in the litigation process are the chief source of information about a

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84. *Id.*

85. COLO. REV. STAT. §16-11-309(1)(a) (2006); RULES GOVERNING COMMISSIONS, *supra* note 44, rule 2(c).

86. COLO. REV. STAT. § 13-5.5-103(1)(b).

judge's performance and are intended to provide objective information. The surveys in Colorado have been conducted by a well-regarded pollster with many years' experience surveying public opinion.<sup>87</sup>

The state judicial department provides the pollster with the names and addresses of people from its ICON data base<sup>88</sup> who in the past twelve months have been in the courtrooms of the judges up for retention; where there are more than 400 potential respondents, a random sample is drawn.<sup>89</sup> The pollster mails each person in the sample database an initial questionnaire with an introductory letter and a postage-paid return envelope. Not more than two questionnaires are sent to any one respondent, regardless of how many times the respondent may have been in the courtrooms of the judicial district or the appellate courts. The response rate is calculated as the number of completed questionnaires divided by the number of eligible respondents who received a questionnaire.<sup>90</sup> In 2006, over fifty percent of attorneys who received questionnaires responded.<sup>91</sup> The response rate for non-attorneys was much lower—thirty-three percent, with the highest percentage response rate from employees of the court and jurors.<sup>92</sup>

The surveys used in Colorado do not distinguish, for example, between court personnel and victims of crime; anyone who is not an attorney answers the same questions.<sup>93</sup> The survey forms direct the person completing the questionnaire to grade the judge in each of the listed areas; if the person does not have enough information, the person is to mark "No Grade."<sup>94</sup> Nevertheless, the respondent may base her answer on very limited exposure to the judge. Although respondents grade a judge with an "A," "B," "C," "D," or "F," they are not all grading the same performance—the answers of a respondent who saw a judge briefly at a sentencing proceeding

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87. Talmey-Drake Res. & Strategy, Inc., Boulder, Colorado.

88. "ICON" is the Integrated Colorado On-Line Network, a computerized database of court records used by the State Judicial Department. Colorado Integrated Criminal Justice Information System, [http://www.state.co.us/gov\\_dir/cicjjs/AgencySystems/agency-jud.html](http://www.state.co.us/gov_dir/cicjjs/AgencySystems/agency-jud.html) (last visited Jan. 16, 2007).

89. See Singer Survey, *supra* note 80, at 2 (indicating that in 2006, Talmey-Drake attempted to contact more than 75,000 people who had been in the courtrooms of the judges facing a retention vote; more than 21,000 people responded—4,600 to the attorney survey and over 17,000 to the non-attorney survey).

90. *Id.* at 66-87.

91. *Id.* at 90.

92. *Id.*

93. *Id.* at 66-87.

94. See *id.*

are given the same weight as those of a respondent who watched a judge over the course of a multi-week trial.<sup>95</sup> The answers from relatively small numbers of attorneys to questions about the appellate judges may not be statistically sound; the far more numerous answers from trial court judges, who often read all of the appellate courts' decisions, are more reliable.<sup>96</sup>

Commissions are reminded that the weight given to any group's survey results should be in relation to the proportion of group members who completed the survey.<sup>97</sup> For example, the commissions are told that if only twenty of the 100 attorneys (selected randomly) who appeared before a particular judge returned the questionnaire, and twenty-five percent of those attorneys thought that the judge was biased, the percentage may not be representative.<sup>98</sup>

From answers to the questionnaires, a commission may be able to focus on the judges who are not performing their jobs as they should be. The commission rules suggest that a judge who receives more than an average of 2.0—a "C"—in response to questions in the attorney and non-attorney surveys should be "strongly considered" for a recommendation of "Retain."<sup>99</sup> There are exceptions to this suggestion: the judge has an unusually large caseload, the judge has been on the bench a short time, the survey results are inaccurate, or the judge receives an "overall retention rating of 80 percent or more of the combined percentage results of 'strongly recommend be retained in office' or 'somewhat recommend be retained in office' in either the attorney or non-attorney survey results."<sup>100</sup>

In addition to the persons to be surveyed,<sup>101</sup> commissions may interview persons who have appeared before the judge on a regular basis.<sup>102</sup> If a commission chooses to interview persons with professional contact with the judge, the commission must supply the judge with a written summary of the substance of the interview that preserves the anonymity of the interviewee.<sup>103</sup> Commissions may

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95. *See id.* at 89-96 (describing the methodology used in conducting the surveys).

96. *Id.*

97. TRAINING 2006, *supra* note 2, at 38.

98. *Id.* at 39.

99. *Id.* at 24, rule 13(b). The state commission has proposed a change in the rule that would increase the average from 2.0 to 3.0, a "B." The rule change has not yet been forwarded to the supreme court for approval.

100. *Id.* rule 13(b)(V).

101. COLO. REV. STAT. ANN. § 13-5.5-103(1)(b) (West 2005).

102. *See* RULES GOVERNING COMMISSIONS, *supra* note 44, rule 2(d).

103. *Id.*

also consider written information concerning the judge if the information contains the author's name and address.<sup>104</sup>

A commission may conduct a public hearing to solicit public comment on the judges being evaluated.<sup>105</sup> Experienced commissioners tend to think that the public hearings are a waste of time.<sup>106</sup> Often, the persons who appear are disgruntled domestic relations litigants; a commission cannot review the substance of rulings in domestic relations cases, or any other type of case, because such review is for the appellate courts.<sup>107</sup> If a judge shows bias based on gender in domestic relations cases or is impatient with domestic relations litigants, the surveys (and accompanying comments) should provide sufficient information to replace what can be learned in a public hearing. If an individual litigant wishes to complain to a judicial performance commission about a particular judge, the complaint can be reviewed more efficiently if it is in written form. Nothing prevents the commission from interviewing a complainant who first makes her complaint in writing.<sup>108</sup>

A commission can also obtain information from other sources maintained by the state court administrator or the clerks of the appellate courts.<sup>109</sup> Such information includes the caseload and types of cases for a particular judge, the number of trials to the court, the number of jury trials before a judge, open case reports, and case aging reports. Additionally, each member of a commission is required to observe unannounced the proceedings in the courtroom of at least one of the judges up for retention.<sup>110</sup>

Finally, each judge subject to review fills out a self-evaluation form developed by the state commission.<sup>111</sup> The form asks a judge to assess her own legal ability, integrity, communication skills, judicial temperament, administrative skills, settlement activities, and overall performance.<sup>112</sup> The judge is also asked to assess her community reputation, describe her judicial philosophy, and list

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104. *Id.* rule 2(e).

105. *Id.* rule 2(f) (although the wording of the rule indicates only that commissions "may" hold public hearings, the rules then state that "commissions are encouraged to conduct" such hearings).

106. The author, as a member of the state commission, has heard from other state commissioners, as well as from local commissioners, that hearings often are a waste of time.

107. *See supra* note 106.

108. *See* Judicial Selection Press Release, *supra* note 17.

109. *See* RULES GOVERNING COMMISSIONS, *supra* note 44, rule 2(c).

110. *Id.* rule 2(h).

111. *Id.* rule 2(g).

112. *Id.*

strengths, weaknesses, and goals for development.<sup>113</sup> The information provided by the self-evaluation form is useful for the interview required of each judge, but the information—as well as any written comments included with a survey—is not to be made public.<sup>114</sup> The reason for confidentiality is to encourage a judge to be self-critical. Even so, judges' own evaluations often are too self-serving; no one can possibly be as good as some judges seem to think they are.

Judges have the opportunity to reply to criticism, both in writing and during a second interview with the commissions.<sup>115</sup> The reply and second interview can be helpful to both the judge and the commission because the judge will have a sense of the commission's concerns and can supply information that will make the evaluation more accurate. Some judges, however, are so defensive about their performances that they have difficulty hearing the commissions' concerns and responding in a way that will improve their evaluations.

While one would think that information collected by the judicial discipline commission would be particularly pertinent to evaluation of judges, the judicial discipline commission's research is confidential, and the discipline commission refuses to share any of its confidential information about a judge who is up for retention with the judicial performance commissions.<sup>116</sup> Under the state constitution, information gathered about a judge during a judicial discipline commission investigation can be released to an evaluating government agency only if the judge signs a waiver.<sup>117</sup> The judicial performance review commissions apparently have never sought information concerning the conduct of a particular judge from the judicial discipline commission by requesting the judge to sign a waiver for purposes of a retention evaluation.

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113. *Id.*

114. *See id.* rules 2(g), 8-10.

115. *Id.* rule 15.

116. The author knows of no case in Colorado in which the judicial discipline commission's research has been shared or released to a judicial performance commission; the head of the judicial discipline commission thinks that the commission should not share the information and no one has ever challenged him.

117. COLO. CONST. art. VI, § 23(3)(g); COLO. REV. STAT. §§ 24-72-401, -402 (2006); COLORADO RULES OF JUDICIAL DISCIPLINE, rule 6(c)(6) (2001).

- What is done with the information obtained?  
How is it provided to voters in a manner that will be of  
assistance before casting a retention vote?  
Does the information collected help a judge improve  
judicial performance?  
Should mid-term evaluations be supplied to the public?  
How much of the evaluative process should be confidential?**

Each commission is charged with the responsibility of writing narrative profiles for the judges subject to a retention vote; the task cannot be delegated to a staff member.<sup>118</sup> The content and style of the profiles are inconsistent: some profiles provide more information than others; some are written in such general terms that they convey little sense of an individual judge's strengths and weaknesses; some commissions believe that the profiles should contain a significant amount of negative material while others believe that judges who work hard should receive accolades.

Regardless of the content of the narrative profiles, not many voters read the "blue book" containing the narrative profiles that are sent to the households of all registered voters.<sup>119</sup> Voters probably pay more attention to newspaper editorials. Many voters do not vote for the judges, either because they believe that they do not know enough about an individual judge to cast an informed vote or because the retention votes are near the end of what often are very long ballots.<sup>120</sup>

If the performance commission review can avoid an adversarial tone, the information provided by surveys and through interviews of the judges can assist a judge in understanding how she is perceived by others in the courtroom. Judges in general receive very little feedback about their performance because those persons who are regularly in the courtroom may be dependent upon the judge's good will. When the evaluation process is confidential, the information given to the judge is more likely to be accurate (because

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118. RULES GOVERNING COMMISSIONS, *supra* note 44, rule 14.

119. The 2006 blue book contains information about state-wide initiatives and referenda, as well as narrative profiles of the judges. Information about judges begins at page 101, and of those voters who read the blue book, few get to the judge narratives. The profiles are available online at Commissions on Judicial Performance, Recommendations for Judicial Retention, <http://www.cojudicialperformance.com/retention-list.cfm?year=2006> (last visited Jan. 16, 2007).

120. In addition to partisan elected official races, ballots in Colorado can contain numerous measures referred by the legislature or initiated by petition, as well as all of the elections authorizing increased taxes or spending required by the Taxpayer's Bill of Rights. COLO. CONST. art. X, § 20.

critics will not be afraid to come forward) and more likely to effect change (because judges are less likely to be overly defensive).

Beginning in 2008, the judicial performance commissions will also evaluate judges mid-term in an effort to provide judges with feedback about how a variety of court constituencies view their performance with respect to the statutory criteria.<sup>121</sup> Funds are available to pay for interim surveys, but the volunteers who serve on the performance commissions (and the attorneys and court personnel who fill out the surveys) may be reluctant to take on the additional work.

Interim evaluations are most useful to new judges and to judges who have become less patient because they have been on the bench for a long time. There is little reason to supply the interim evaluations to the public; presumably the public needs information about a judge only if the judge is on a retention ballot.

#### **Should performance review include retired judges who serve as-needed or magistrates?**

Magistrates—appointed by the chief judge in each judicial district—perform an increasing number of judicial tasks, especially in fast-growing areas of the state.<sup>122</sup> Magistrates are not subject to retention elections, and the only oversight for magistrates has been provided by chief judges.<sup>123</sup> The judicial performance review statute provides that magistrates should be subject to performance reviews in each odd-numbered year (the years when judges would not be subject to review).<sup>124</sup> The commissions have not begun to evaluate magistrates, and again, volunteer commissioners may be reluctant to take on the additional work of reviewing magistrates, particularly in the largest judicial districts.

Retired judges serve on an as-needed basis.<sup>125</sup> The chief justice appoints them to the retired judges' program, for which they receive an additional amount of pension and can serve until age eighty-four.<sup>126</sup> The state court administrator's office matches a retired judge with a judicial district that needs additional help for a single day or for a particular case or series of matters.<sup>127</sup> Retired

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121. The state judicial performance commission has authorized interim surveys, to be accomplished beginning in 2008.

122. COLO. REV. STAT. § 13-5-201 (2005).

123. *Id.*

124. *Id.* § 13-5.5-106(3)(a)(II).

125. COLO. CONST. art. VI, § 5(3).

126. COLO. REV. STAT. § 24-51-1105.

127. Judicial Selection Press Release, *supra* note 17.

judges do not appear on retention ballots and are not subject to any form of continuing performance review.<sup>128</sup>

**What kind of staffing and training is available for commissioners and who pays for it?**

The executive director for the state commission provides training materials and sessions, coordinates collection of survey data and convening of commission meetings, transmits commission reports for publication in the “blue book,” and makes sure that appointments to commissions are timely.<sup>129</sup> The district administrator for each judicial district staffs the district commissions.<sup>130</sup> Activities of the commissions are funded by an increase in docket fees, effective June 6, 2003, collected in criminal cases<sup>131</sup> and for traffic infractions.<sup>132</sup>

The training materials and biannual training sessions are comprehensive, but they are not a substitute for a commission member’s sophistication with respect to how courts work and should work. Individual commission members are not prevented from speaking with local court officials and persons who appear regularly in the courts about how the courts operate and how particular judges are viewed, but individual self-training projects are not encouraged.<sup>133</sup> Each commission is expected to conduct its work as an entity, dependent upon the experience primarily of the attorney members.

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128. COLO. REV. STAT. § 13-5.5-101.

129. *Id.* § 13-5.5-103(1)(j).

130. *Id.* § 13-5.5-104(2).

131. *Id.* §§ 13-5.5-107, 13-32-105(1)(b).

132. *Id.* §§ 13-5.5-107, 42-4-1710(4)(a)(II). Unexpended amounts in the judicial performance cash fund at the end of a fiscal year are to remain in the fund unless the chief justice of the supreme court reduces the amount of the uncommitted reserve in the fund to meet constitutional limits on state spending. *Id.* §§ 13-5.5-107, 13-32-105.5.

133. This observation is based on the author’s experience as a trainer of local commission members.

**Does a performance review result in the over-retention of incompetent or controversial judges?**

**Are more judges rejected by the voters if there are no performance reviews?**

**Are capable judges who have been involved in controversial cases protected from rejection by the voters if a performance commission recommends that they be retained?**

Very few judges have received a “do not retain” evaluation, and even fewer have been rejected by the voters. Between 1988 and 2004, 743 judges were reviewed;<sup>134</sup> commissions recommended retention for 714 judges, “do not retain” for fourteen,<sup>135</sup> and offered ten “no opinions.”<sup>136</sup> Of the fourteen judges who were not recommended for retention, the voters rejected only six of them.<sup>137</sup>

Rejection most often occurs in a small community, where the judge may have ruled on a case (even a single divorce case) in a manner that gave rise to significant criticism. Often, judges who believe that their evaluation will not be favorable choose not to seek retention; the date by which a judge must decide whether to seek retention is after the judge has been provided with the judicial performance commission’s review, but before its recommendation becomes public knowledge.<sup>138</sup> Therefore, the number of “do not retain” evaluations and subsequent voter rejections is not a true measure of the effectiveness of the performance commission evaluations.

Moreover, if the commission-based appointive system for judges is working properly and judges are selected carefully, one would expect that not many judges would be removed by the voters. Sometimes the selection commissions cannot anticipate a person’s judicial temperament or patience. Sometimes judges themselves will not know whether they will jump to decisions too quickly, without listening to all sides of a case, or find themselves paralyzed by indecision. A performance review for judges who are intemperate or indecisive may assist them in remedying their shortcomings, or—if a particular judge has been unable to address such issues—recommend that she not continue as a judge.

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134. TRAINING 2006, *supra* note 2, at 10.

135. *Id.*

136. *Id.*

137. *Id.*

138. Judges must declare their intent to stand for retention not less than three months prior to the general election. COLO. CONST. art. VI, § 25.

Judges in general remain skeptical about performance reviews, although a performance commission retention recommendation can be helpful to a judge who has been subject to public criticism for a decision in a controversial case.<sup>139</sup> Judicial concern about performance reviews is not completely misplaced. A relatively large percentage of the voters in a retention election votes “no” because of a general public skepticism about judges. This skepticism has been fanned in recent years by public criticism of decisions in particular cases: for example, the pledge of allegiance to the flag case,<sup>140</sup> the Terri Schiavo case,<sup>141</sup> and high profile criminal cases like the prosecution of O.J. Simpson.<sup>142</sup> The legislature did not require partisan balance on the judicial performance commissions (as the voters did for nominating commissions),<sup>143</sup> and in the past few years, the governor and legislative leaders have appointed as commission members libertarians and social conservatives who want to increase public criticism of the judiciary.<sup>144</sup>

**Should judges be subject to term limits?  
If so, how long should a judge serve?**

The former President of the State Senate proposed a constitutional amendment that would have required appellate judges to be subject to retention elections every four years and to serve no more than ten years.<sup>145</sup> The ten-year cap would have removed from the supreme court five justices and from the court of appeals seven judges who were appointed by the Democrat who left office as governor nearly eight years ago. The Colorado Bar Association led

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139. The author, as a member of the state judicial performance commission, speaks to groups of judges about performance review; she responds to skeptics by noting cases where judges who have been assigned and decided controversial cases have later been retained after favorable judicial performance reviews. *See supra* note 34.

140. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (overturning *Newdow v. U.S. Congress*, 328 F.3d 466 (9th Cir. 2003)).

141. *See Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1289 (11th Cir. 2005).

142. *See Rufo v. Simpson*, 86 Cal. App. 4th 573 (Cal. Ct. App. 2001). Simpson was acquitted in the criminal case, so there is no reported decision. *Id.* at 582.

143. Fact Sheet, Colo. Bar Ass'n, Judicial Selection in Colorado: Fair and Impartial Courts, <http://www.cobar.org/Docs/judicialselection%2Epdf> (last visited Jan. 16, 2007).

144. The author, as a member of the state judicial performance commission, participates in the training of members of local commissions; she has observed an increase in the number of commission members who think that judicial performance commissions should get rid of “activist judges.”

145. Proposed Constitutional Amendment for 2006 Ballot, Initiative #90, *available at* <http://www.cobar.org/Docs/BallotTitle90%2Epdf> (last visited Jan. 16, 2007).

the opposition to the proposal.<sup>146</sup> Colorado voters rejected the proposal on November 7, 2006.<sup>147</sup>

The Colorado Bar Association argues that the proposal for term limits “reflects a fundamental misunderstanding of the differences in our three branches of government and the need for independent courts.”<sup>148</sup> Included in the bar association arguments are the following. First, “accountability already exists” through the merit system for appointment, judicial performance review, and retention elections.<sup>149</sup> Second, a maximum service of ten years is too short for a judgeship applicant to give up a law practice.<sup>150</sup> Third, term limits that require a judge to be on the ballot so often interfere with judicial independence, and the ten-year limit on service will end productive careers of good judges too soon.<sup>151</sup> Fourth, “just because term limits are in place for . . . executive and legislative” elected officials does not mean that term limits are appropriate for judges, who “garner increased knowledge through years on the bench” and who have the “power to rule only on cases brought before the court.”<sup>152</sup> Fifth, there is no valid non-partisan reason to end the terms of all of the appellate judges who were appointed by the prior governor.<sup>153</sup>

Granted, some judges remain on the bench too long. It is easy to lose patience with litigants whose problems seem petty or with repetitious legal issues. The judicial performance review system can better address whether some judges have become arrogant or impatient. There is no reason to adopt term limits, especially such short limits, to remove all judges—the temperate as well as the intemperate.

### **To what degree does any performance evaluation limit judicial independence?**

Performance review is justified when it is limited to a judge’s demeanor or efficiency; it is not intended, however, to evaluate the legal correctness of a judge’s decisions. Performance review, if

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146. Letter from Colo. Bar Ass’n to Its Members (June 28, 2006), available at <http://www.cobar.org/group/display.cfm?GenID=8712>.

147. Howard Pankratz, *Capping Judges’ Tenure is Rejected*, DENV. POST, Nov. 8, 2006, at B-09.

148. Letter from Colo. Bar Ass’n to Its Members, *supra* note 146.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

conducted in a non-partisan manner, should not limit judicial independence.

Unfortunately, most public opposition to judges is now couched as opposition to “activist judges.” An “activist judge” is one who has decided a case in a way that the critic does not like.<sup>154</sup> The disagreement is with the substance or result of the decision, the very issues that judicial performance review is not intended to address.<sup>155</sup> Consequently, the concept of judicial performance review may be at cross-purposes with the type of accountability that the general public seeks. The direct election of judges in contested elections is seen as a means to give voters more control over their government and to reverse decisions that a majority of the voters do not like.

Whether the judicial performance commission form of public accountability is sufficient to block additional efforts to return judges to contested political elections remains to be seen. The most recent effort to cut back on judicial independence in Colorado was the proposed constitutional amendment to create term limits for state appellate judges. The measure garnered enough signatures to appear on the ballot, and in late September polling showed that fifty-four percent of likely voters supported it.<sup>156</sup> After a campaign in which the proponents criticized “activist judges” and “runaway courts,”<sup>157</sup> a Colorado Bar Association-led coalition convinced a majority of voters to reject term limits for judges.<sup>158</sup>

### CONCLUSION

Most people want a neutral judge, one who will listen to both sides of a case and respond in a fair manner.<sup>159</sup> Whether the issue is abortion, contract interpretation, or theft, litigants are entitled to a judge who has not pre-judged the case. Historically, courts were intended to protect minorities when majoritarian interests, protected by the other two branches of government, threatened to de-

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154. Paul Gerwitz & Chad Golder, *So Who Are the Activists?*, N.Y. TIMES, Oct. 6, 2005, at A19.

155. RULES GOVERNING COMMISSIONS, *supra* note 44, rule 2(i).

156. Sara Burnett, *Fate of Several Initiatives Seen in 'Dire Straits'*, ROCKYMOUNTAINNEWS.COM, Sept. 20, 2006, [http://www.rockymountainnews.com/drmn/elections/article/0,2808,DRMN\\_24736\\_5007167,co.html](http://www.rockymountainnews.com/drmn/elections/article/0,2808,DRMN_24736_5007167,co.html).

157. *See* Limit the Judges, Campaign for Judicial Term Limits, <http://www.limitthejudges.com> (last visited Jan. 16, 2007).

158. Pankratz, *supra* note 147, at B-09.

159. TRAINING 2006, *supra* note 2, at 7.

prive them of fair treatment.<sup>160</sup> All of the methods that promote public accountability for judges need to be limited when they become no more than another means of expressing the views of the majority, and thus weaken the ability of judges to hear each case on its merits.

In Colorado, the independence of the judiciary needs to be protected, perhaps more than at any other time in the state's history. While public accountability is important, it is achieved through the executive and legislative branches of the government. The courts function best if judges are free to decide each case without regard to how the general public might put a thumb on the scales of justice. To the degree that judicial performance commissions can protect judicial independence, while providing voters in retention elections with sufficient information to make a decision about whether a particular judge should be retained, Colorado's model is one that can prove helpful to other states.

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160. *Id.*