



STATE COMMISSION ON JUDICIAL PERFORMANCE

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Colorado's Commissions on Judicial Performance ("JPCs") were created by the legislature to establish a comprehensive system of evaluating judicial performance to provide persons voting on the retention of judges and justices with fair, responsible, and constructive information about individual judicial performance C.R.S 13-5.5-101(2)(b) (2019). One of the other important roles the JPCs serve is to provide initial and interim evaluations to assist judges in improving their performance which helps ensure the quality of Colorado's judiciary. Interim evaluations provide judges with valuable feedback on how to better meet the statutory criteria C.R.S. 13-5.5-109 (2019). This feedback helps judges who are already meeting standards excel and can help struggling judges improve via a performance improvement plan C.R.S. 13-5.5-110 (2019). In evaluating individual judges, commissioners review survey reports of collected responses from attorneys and non-attorneys who have appeared before the judge, case management data, review written opinions and orders, conduct courtroom observations, review information provided to the commission by interested individuals either in writing or through interviews, and conduct an interview with the judge. JPCs are limited to evaluating statutorily defined criteria: integrity, legal knowledge, communication skills, judicial temperament, administrative performance, and service to the legal profession and the public by participating in service-oriented efforts designed to educate the public about the legal system and improve the legal system C.R.S 13-5.5-107 (2019). Current statutory language and rules governing JPCs are silent on the use of disciplinary information from the Colorado Commission on Judicial Discipline in the evaluation process.

The evaluation narratives published for use by voters have long been criticized for not providing information about a judge or justice's disciplinary record, if any. This criticism is understandable where disciplinary issues relate to the statutory criteria JPCs apply in evaluating judges. Colorado Rules of Judicial Discipline Rule 6.5(d)(4) provides, that under certain circumstances, confidentiality does not apply to disclosures:

In response to an inquiry by the Office of Judicial Performance Evaluation ("Judicial Performance") if the Commission determines, in its discretion, that disclosure to Judicial Performance is consistent with its Constitutional mandate under Rule 1(b) and on the condition that Judicial Performance will not publicly disclose such information or its source without independent verification by Judicial Performance.

While this rule permits the Commission on Judicial Discipline to provide some information to JPCs, it severely limits how JPCs could use non-public information. In early 2022 the State Commission sought cooperation from the Commission on Judicial Discipline to develop joint rules that would expand sharing information regarding judicial

discipline records between the two commissions. In part, because of the current investigations addressing judicial misconduct, these discussions were postponed until there is some resolution of the issues currently before the Interim Legislative Committee on Judicial Discipline.

To better fulfill their statutory and constitutional obligations, JCPs should have access to information of judicial discipline maintained by the Colorado Commission on Judicial Discipline. Providing JCPs access to disciplinary information bearing on statutory retention criteria can only enhance public confidence in the narrative evaluations prepared by JCPs and the value of interim evaluations for improving judicial performance. Access to that information under the current rules will require careful study and consideration by the two commissions because disciplinary information only becomes public once the Commission on Judicial Discipline files a recommendation for “removal, retirement, suspension, censure, reprimand, or discipline” with the supreme court. As a result, any new rules governing how JCPs use disciplinary information must ensure that non-public disciplinary information remains confidential while providing guidance on how JCPs can take such information into account in evaluating whether judges meet the statutory criteria. However, if the Constitution were amended so disciplinary information became public at an earlier stage in the Commission on Judicial Discipline’s work—at the end of the investigation phase or beginning of the formal proceedings stage for example—JCPs would be able to access and use that information as part of their evaluation process, perhaps without complex rules and procedures defined by the two commissions. In most cases under the current rules, by the time disciplinary information becomes public and JCPs can directly refer to disciplinary information in their evaluations, the issue is moot. By that point, the judge has either decided not to stand for retention or resigned, and judicial performance evaluations are not conducted or not published.

The Commission on Judicial Discipline did not provide a recommendation to the Interim Committee for when discipline proceedings/information should become available (CCJD Report page 21). JCPs also do not have a specific recommendation as to the “borderline” between when information remains confidential and is available to the public. Colorado’s Judicial Performance Commissions ask that discipline information be made available to the public at an earlier stage in the Colorado Judicial Discipline process. If that occurred, JCPs would be able to use the information at a stage in their evaluations to better assist the judge with performance improvement recommendations or making decisions regarding retention. Again, it would be unlikely that any additional rules or legislative changes would be required if the information was public and accessible at an earlier stage.

On behalf of the State Commission,

/s/ Thomas Neville

Thomas Neville, Chair