

UNANNOTATED

Rules Governing the Judicial Performance Evaluation Commission

ARTICLE 1 General Provisions

28-101. Scope and title.

A. **Scope.** These rules govern the procedure for evaluating judges standing for retention and releasing of the information about judicial performance to the public prior to retention elections. These rules also govern the interim evaluations.

B. **Title.** These rules shall be known as the Rules Governing the Judicial Performance Evaluation Commission.

[Approved, effective February 25, 2002.]

28-102. Definitions.

As used in the Rules Governing the Judicial Performance Evaluation Commission:

A. "commission" means the Judicial Performance Evaluation Commission;

B. "judge" means a Supreme Court justice, Court of Appeals judge, district court judge or metropolitan court judge; and

C. "agent" means an agency authorized to perform work for the Judicial Performance Evaluation Commission.

[Approved, effective February 25, 2002.]

ARTICLE 2 Membership, Powers and Duties

28-201. Commission created; members; staff; meetings.

A. **Creation.** There is created the Judicial Performance Evaluation Commission. The commission shall be appointed by the Supreme Court and shall be under the direction of and shall be considered an arm of the Supreme Court. The commission shall consist of fifteen members, eight lay person members and seven lawyer members.

To assure that the commission reflects adequate representation of the ethnic, economic, geographic and political diversity of the state, the Supreme Court shall appoint members from a list of three names nominated for each position. A majority of the total number of appointed members of the commission shall constitute a quorum.

B. Nominations. Commission members shall be selected as follows:

- (1) two lay persons to be appointed from persons nominated by the governor;
- (2) two lay persons and one lawyer to be appointed from persons nominated by the chief justice;
- (3) one lay person and one lawyer to be appointed from persons nominated by the speaker of the house;
- (4) one lay person and one lawyer to be appointed from persons nominated by the president pro tem of the senate;
- (5) one lay person and one lawyer to be appointed from persons nominated by the minority leader of the house;
- (6) one lay person and one lawyer to be appointed from persons nominated by the minority leader of the senate; and
- (7) two lawyers to be appointed from persons nominated by the president of the state bar.

If a nominating authority does not submit names of nominees within a reasonable time, the chief justice shall nominate additional members for those positions.

The director of the Administrative Office of the Courts shall serve as an ex officio member of the commission.

C. Terms of office. The term of office of members of the commission shall be six (6) years. The initial terms shall be staggered so that the terms of five members shall expire at the end of each two (2) year period. No member shall serve more than two full terms.

D. Chair and vice chair. The Supreme Court shall appoint a chair and vice-chair. The chair of the commission shall vote only in the event of a tie.

E. Removal for cause. The Supreme Court may remove any member of the commission for cause. "Cause" means any malfeasance or nonfeasance in carrying out the commissioner's official duties and responsibilities, including improper disclosure of confidential information, failure to disclose any basis for recusal or to recuse when appropriate, advocating for or against the retention of any particular judge outside of

commission deliberations or failure to attend to the duties and responsibilities of the commission. If any commission member, including the chair or vice chair, shall be absent from three (3) consecutive commission meetings, that person is deemed to have resigned from the commission. Said resignation shall be reported to the Supreme Court by the chair or vice-chair in writing.

F. **Vacancies.** In the event of a vacancy during the term of a member of the commission, the Supreme Court shall appoint a person nominated for the position pursuant to Paragraph A of this rule to serve the remainder of the term.

G. **Subcommittees.** The commission may appoint subcommittees provided that any subcommittee evaluating a judge shall be broadly representative of the state as a whole.

H. **Staff.** The Administrative Office of the Courts shall staff the commission. The function of the staff is to assist the commission in the performance of its duties. Staff may attend but shall not participate in deliberations conducted by members of the commission concerning a retention recommendation.

I. **Meetings of the commission.** Except as provided in these rules, commission meetings shall be open to the public. The commission shall conduct its business in executive session which shall be closed to the public when the commission is conducting interviews or when the commission is discussing privileged matters; survey responses; comments to questionnaires; sensitive, personal information; draft narrative profiles; responses to draft narrative profiles or other confidential information.

J. **Reports.** The commission shall report to the Supreme Court as directed on its activities and recommendations.

[Approved, effective February 25, 2002; as amended by Supreme Court Order No. 10-8300-002, effective February 24, 2010.]

28-202. Judicial proceedings; excusals, recusals and withdrawals.

A. **Recusal.** A commissioner shall disclose to the commission any professional or personal relationship with a judge that may affect an unbiased evaluation of the judge including any litigation involving the judge and any family or business relationship with the judge.

No attorney shall request that a judge be recused from hearing a case in which an attorney has entered an appearance solely on the basis that the attorney is a present or past member of the commission.

B. **Recusal of judge.** A judge may not file a recusal in a judicial proceeding solely on the basis that an attorney, party, or witness appearing in the proceeding is a past or present member of the commission.

C. **Withdrawal.** An attorney who is serving or has served as a member of a commission may not withdraw nor be requested to withdraw from any judicial proceeding solely on the basis that the attorney has served or is serving on the commission, nor should a judge grant an attorney's request to withdraw from a case solely on the basis that an attorney, party, or witness is serving as a commissioner.

D. **Peremptory challenge; disqualification.** Nothing in these rules shall prevent or prohibit

(1) any party or attorney from exercising a peremptory election to excuse a judge pursuant to Rule 1-088.1 NMRA or Rule 5-106 NMRA; or

(2) the disqualification of a judge pursuant to Rule 21-400 NMRA of the Code of Judicial Conduct.

[Approved, effective February 25, 2002; as amended by Supreme Court Order No. 10-8300-002, effective February 24, 2010.]

28-203. Powers and duties of the commission.

A. **Commission duties.** The commission shall

(1) evaluate the professional performance of judges eligible for retention elections who have served at least two (2) years in the judicial position to be evaluated or have sufficient data to achieve a statistically valid sample to be evaluated. However, upon a request of a judge, and at the discretion of the commission, a judge who does not have sufficient data to achieve a statistically valid sample to be evaluated may be interviewed and provided feedback;

(2) ensure that its data collection and analysis processes are methodologically sound;

(3) distribute questionnaires, conduct interviews and produce and distribute narrative profiles as provided in these rules;

(4) obtain a self assessment from each judge to be evaluated;

(5) conduct an interview with each judge being evaluated after the commission's review of a judge's information is complete. Neither the commission nor the judge may waive the interview process;

(6) review any responses received from a judge prior to making any recommendation; and

(7) release a final narrative and recommendation to the public on each judge subject to a retention election not less than forty-five (45) days prior to the general election.

B. Commission powers. The commission may

(1) obtain information on the performance of each judge to be evaluated from lawyers, including prosecutors, public defenders and private attorneys who have appeared before the judge, litigants, jurors, court staff, other judges serving on the same court and judicial resource personnel, including but not limited to, probation officers, law enforcement, social service caseworkers and CASA volunteers; and

(2) if time and resources permit, conduct mid-term evaluations midway through a judge's term of office for the purpose of improving the judge's performance. Mid-term evaluations shall not be released to the public, except as provided in Subparagraph (1) of Paragraph F of Rule 28-205 NMRA.

[Approved, effective February 25, 2002; as amended by Supreme Court Order No. 07-8300, effective August 31, 2007; by Supreme Court Order No. 10-8300-002, effective February 24, 2010.]

28-204. Sources of information to be used for evaluations.

A. **Sources.** The commission in evaluating the professional performance of a judge shall rely on the official sources of information set out in Rule 28-301 NMRA.

B. **Respondent lists.** At the request of the commission, the Administrative Office of the Courts shall prepare and make available to the commission the names of the following persons:

- (1) jurors except jurors in cases with a pending motion for new trial;
- (2) lawyers;
- (3) litigants;
- (4) law enforcement personnel;
- (5) court staff;
- (6) other judges serving on the same court or in the same district;
- (7) quasi-judicial officers serving in the same court;

(8) probation officers, social caseworkers, CASA volunteers and other resource individuals who have appeared before the judge or who have provided assistance to the court;

(9) judges who have reviewed on appeal the rulings of the judge;

(10) law professors; and

(11) parties who have appeared before the judge.

C. Questionnaires. The commission shall develop questionnaires that will be used to survey such persons as the commission determines to be appropriate who have had sufficient experience with a judge to form an opinion about the performance of a judge, such as

(1) jurors except jurors in cases with a pending motion for new trial;

(2) lawyers;

(3) litigants;

(4) law enforcement personnel;

(5) court staff;

(6) other judges serving on the same court or in the same district;

(7) quasi-judicial officers serving in the same court;

(8) probation officers, social caseworkers, CASA volunteers and other resource individuals who have appeared before the judge or who have provided assistance to the court;

(9) judges who have reviewed on appeal the rulings of the judge;

(10) law professors; and

(11) parties who have appeared before the judge.

D. Survey sample. Surveys shall be done by mail, on-line or by telephone among those persons listed in Paragraph C in sufficient numbers to achieve a statistically valid sample.

E. Interviews with judges. The Administrative Office of the Courts shall schedule interview sessions for judges with the commission. All efforts shall be made to accommodate court dockets and calendars of the commission members and the judges;

F. Oral interviews. The commission, at its sole discretion, may conduct interviews with persons who have appeared before the judge on a regular basis. The commission shall ensure that the persons interviewed represent a balanced cross-section of persons who have had professional contact with the judge. The judge shall be provided with a written summary of the pertinent information concerning that judge, preserving the confidentiality of the person interviewed while advising the judge of the substance of the interview.

G. Courtroom observation. The commission may, at its sole discretion, observe a judge in the performance of duty in the courtroom. No observation may be conducted by fewer than two members of the commission or its agents.

H. Statistics. At the request of the commission, information concerning the caseload, excusals and recusals and case types of a judge being evaluated shall be provided to the chair of the commission by the Administrative Office of the Courts.

[Approved, effective February 25, 2002; as amended by Supreme Court Order No. 07-8300-028, effective August 31, 2007; by Supreme Court Order No. 10-8300-002, effective February 24, 2010.]

28-205. Confidentiality of information.

A. Information to be provided to the commission. The commission shall not receive

- (1) the original questionnaires;
- (2) demographic information unless the analysis of such information by the commission's agent proves to be statistically significant and affects the evaluation of the overall professional performance of the judge being evaluated;
- (3) any survey results concerning any judge being evaluated if a statistically valid sample has not been collected as determined by the commission, or upon recommendation by its agent.

B. Completed questionnaires. To ensure confidentiality of respondents' questionnaires, prior to submission of the results of the completed questionnaires to the commission, the commission's agent shall not provide the individual questionnaires to the commission and shall retype any handwritten comments or notes.

C. Release of information. The Administrative Office of the Courts or the commission's agent shall not reveal the contents of any questionnaire or comment concerning a judge to anyone other than commission members.

The commission shall provide any negative comments from the surveys to the judge who is the subject of the comment, unless doing so would reveal the identity of the

person making the comment, in which case the commission shall summarize the substance of the comments and provide the summary to the judge. The commission's agent shall provide to the commission a reproduction of all written survey comments. Since the comments may be shared with the judge, they must be redacted to remove any information that would identify the person commenting. However, the judicial performance evaluation report that is released to the public shall not include survey comments.

D. Release of information to judge. Any judge being evaluated shall be provided with a summary of the pertinent evaluation information, excluding any information that may identify a respondent. The judge shall receive the information not less than ten (10) days prior to any scheduled interview.

E. Information entitled to protection. Information relating to a judge that is obtained pursuant to these rules shall not be a public record under the Inspection of Public Records Act. Members of the commission and its staff shall not disclose any information other than as provided by this rule.

F. Disclosure of confidential information.

(1) The chair of the commission may release certain confidential information concerning the judge in the following circumstances if

(a) a nominating commission requests information concerning the appointment of a judge or former judge to another appointed position and the judge signs a waiver for this purpose; or

(b) the chief justice requests information pertaining to the appointment or assignment of a retired judge to judicial duties and the judge signs a waiver for this purpose.

(2) Upon a majority vote of the commission, with the approval of the Supreme Court, the commission may release certain confidential information concerning the judge in the following circumstances if

(a) an inquiry is initiated which becomes the subject of widespread concern, the release of information would benefit the judge and the public and the judge signs a waiver for this purpose;

(b) a government agency requests information concerning the appointment of a judge or former judge to another appointed position and the judge signs a waiver for this purpose; or

(c) an agency authorized to investigate the qualifications of persons for admission to practice law requires information in order to evaluate a judge's application for admission to the bar of another state and the judge signs a waiver for this purpose.

G. **Waiver.** A judge may waive confidentiality of information by disclosing confidential information relating to the judge to persons other than members of the commission, its staff, the judge's staff, attorneys or advisors.

H. **Identity of respondents not subject to exception or waiver.** Under no circumstance may the commission or any member of its staff release information that may identify or lead to the identification of a person providing information or making comments regarding a judge.

I. **Retention of information.** The commission's agent may not purge information without the prior approval of the commission. The commission or its agent shall destroy all raw questionnaires after the data has been entered and the commission has accepted the aggregate data tables.

J. **Participation in other activities.** Other than the chair or a designee of the chair, no commission member, staff member or agent of the commission may publicly discuss the narrative profile, the retention recommendation or any other information relating to a specific judge except as it relates to the development of the process of judicial evaluation. The commission may designate a sole or primary spokesperson to publicly discuss the process of evaluating the judges.

[Approved, effective February 25, 2002; as amended by Supreme Court Order No. 07-8300-028, effective August 31, 2007; by Supreme Court Order No. 10-8300-002, effective February 24, 2010.]

28-206. Evaluations and interviews.

A. **Review of information.** The commission shall complete the review of information concerning each judge being evaluated expeditiously following receipt of all information.

B. **Interview.** The commission shall schedule and conduct an interview with each judge being evaluated after the commission's review of information is complete. Neither the commission nor the judge may waive the interview process. The interview shall be conducted for such a period of time as is necessary to address the concerns of the commission members and the judge being evaluated. Prior to the interview, the judge may submit written information to the commission.

C. **Evaluation guidelines.** The commission may follow, but shall not be limited to, the guidelines set forth in Rule 28-401 NMRA, the criteria used in evaluating the performance of judges.

D. **Preparation of narrative profile.** Following an interview, the chair of the commission shall provide the judge, in writing, a complete draft of the narrative profile. The narrative profile shall conform to the requirements provided by Rule 28-302 NMRA of these rules. Preparation of the narrative profile may not be delegated to any court

employee or judicial officer. A draft of a narrative profile shall not be released to any person other than the judge being evaluated.

E. Response to narrative profile. Any judge being evaluated may respond to a draft of a narrative profile, in writing, within ten (10) days of receipt of the draft. A response must be directed to the chair of the commission. If the responding judge requests an additional interview with the commission, the judge may be given an opportunity to meet with the commission to address the contents of the narrative profile. The commission may redraft the narrative profile prior to releasing it to the public.

F. Changes to final narrative. The commission, upon a change of circumstances, after notice to the judge has the discretion to revise the final narrative or recommendation.

G. Release of the narrative profile and recommendation. The narrative profile and the recommendation of the commission will be released to the judge within fourteen (14) days following completion of the narrative profile and recommendation, and to the public no less than forty-five (45) days before the general election.

[Approved, effective February 25, 2002.]

ARTICLE 3

Membership, Powers and Duties

28-301. Judicial evaluations.

In evaluating a judge's performance, the commission may consider utilizing any of the following:

A. an analysis of a judge's results from the completed surveys prepared by either a private professional company experienced in social science and research or professionals from an institution of higher education located within this state with expertise in social science research;

B. a review of judge's workload, conformance with judicial time standards, the number of excusals and recusals, cases pending and cases completed;

C. any findings and recommendations of the Judicial Standards Commission and Supreme Court on extrajudicial conduct that reflected adversely on the judiciary;

D. surveys made pursuant to these rules;

E. observations;

F. interviews; and

G. any other information deemed appropriate by the commission.

[Approved, effective February 25, 2002; as amended by Supreme Court Order No. 10-8300-002, effective February 24, 2010.]

28-302. Narrative profile requirements.

A. **Reports.** The commission shall prepare and submit a proposed narrative profile of each judge who is subject to evaluation. Preparation of the narrative profile may not be delegated to any court employee or judicial officer. The commission shall not release the proposed narrative profile to any person other than the judge whom it concerns.

B. **Contents of narrative profile.** A "narrative profile" is an overall summary of a judge's performance and shall include

- (1) the name of the judge;
- (2) the performance of the judge, including any areas of exemplary or distinguishing performance and any areas of notably strong or weak performance;
- (3) the judicial position including any court division;
- (4) the number of years in the position;
- (5) information specific to the work of the judge;
- (6) a proposed recommendation; and
- (7) any additional information that the commission believes may be of assistance to the public in making an informed voting decision.

C. **Other information in profile.** A narrative profile may contain any other information concerning a judge including

- (1) professional association activities;
- (2) recent awards and honors;
- (3) volunteer or other community work;
- (4) if it is believed by the commission to be relevant to its recommendation, biographical data such as undergraduate school information, educational degrees or other historical information not directly related to the practice of law; and
- (5) a photograph of the judge taken within the last twelve (12) months.

[Approved, effective February 25, 2002; as amended by Supreme Court Order No. 10-8300-002, effective February 24, 2010.]

28-303. Evaluation procedure.

A. **Review of information.** Upon receipt of a report and completion of the review of all information collected from questionnaires pursuant to Rule 28-205 NMRA, the commission shall schedule an interview with the judge being evaluated.

B. **Evaluation guidelines.** The commission may follow, but shall not be limited to, the guidelines set forth in Rule 28-401 NMRA regarding the criteria used in evaluating the performance of judges.

C. **Mandatory interview.** Each judge subject to a mid-term or retention election evaluation shall be interviewed by the commission. Neither the commission nor the judge may waive the interview. The interview shall be conducted for such a period of time as is necessary to address the concerns of the commission members and the judge being evaluated. Prior to the interview, the judge may submit written information to the commission.

D. **Preparation of narrative profile.** Following an interview, the chair of the commission shall provide the judge, in writing, a complete draft of the narrative summary and proposed retention recommendation. The narrative profile shall conform to the requirements provided by Rules 28-301 and 28-302 NMRA of these rules.

E. **Response to narrative profile.** Within ten (10) days after receipt of draft of the narrative summary and proposed retention recommendation, the judge being evaluated may respond to the proposed draft narrative summary and proposed recommendation. Any response shall be directed to the chair of the commission. If the responding judge requests an additional interview with the commission, the judge may be given an opportunity to meet with the commission to address the contents of the narrative profile. The commission may redraft the narrative profile prior to releasing it to the public.

F. **Recommendation.** In addition to the information included in a narrative profile, the commission shall make a recommendation regarding the retention of each judge who has declared intent to stand for retention. The recommendation shall be "Retain", "Do not retain" or "No opinion". A recommendation of "Retain" or "Do not retain" shall require at least eight (8) affirmative votes of the commission. A "No opinion" recommendation shall be given only when the commission concludes that the results of the information gathered are not sufficiently clear to make a firm recommendation. A "No opinion" recommendation shall be accompanied by a detailed explanation. Any commission member may abstain from voting.

G. **Changes to final narrative.** The commission, upon a change of circumstances, after notice to the judge has the discretion to revise the final narrative or recommendation.

H. Release of the narrative profile and recommendation. The narrative profile and the recommendation of the commission will be released to the judge within fourteen (14) days following completion of the narrative profile and recommendation, and to the public no less than forty-five (45) days before the general election.

The following shall apply to the dissemination of judicial performance evaluations of judges subject to retention elections:

(1) **General distribution.** The commission may make the information, or a summary of the information, available in a printed medium at courthouses, libraries, retail and other practical outlets.

(2) **Newspaper.** The information, or a summary of the information, may be provided to newspapers and other print media.

(3) **Radio and Television.** The commission may utilize public service announcement air time on radio and television stations. Public service announcements will direct the listener to the availability of the information.

(4) **Internet.** The commission may post narrative profiles and retention recommendations on its website.

(5) **Paid advertising.** The commission may purchase paid advertising as it deems appropriate.

I. Non-participation by judges. The commission, at its sole discretion, may recommend "Do not retain" when a judge refuses to participate in the evaluation process.

J. Preparation of Interim Evaluation Report. Following an interview, the chair of the commission shall provide the judge in writing with a draft Interim Evaluation Report, including an overall assessment of the judge, as well as specific strengths (if any), specific weaknesses (if any), and an improvement plan, if needed. The commission shall follow-up with the judge as needed on the improvement plan.

[Approved, effective February 25, 2002; as amended by Supreme Court Order No. 10-8300-002, effective February 24, 2010.]

ARTICLE 4

Standards of Performance

28-401. Criteria for evaluation of judicial performance.

A. Integrity and impartiality. The integrity and impartiality of each judge should be evaluated with the goal of determining if

- (1) the judge's conduct is free from impropriety or the appearance of impropriety;
- (2) the judge makes finding of facts and interpretation of law without regard for the possibility of public criticism;
- (3) the judge treats all parties equally and fairly;
- (4) the judge's behavior is consistent and free from the appearance of favoritism;
- (5) the outcome of cases is not prejudged; and
- (6) the judge's actions and decisions display basic fairness and justice.

B. Knowledge and understanding of the law. A judge should be evaluated on the judge's knowledge, understanding and appropriate application of the law and rules of procedure, including

- (1) the applicable rules of procedure;
- (2) the Rules of Evidence;
- (3) substantive law; and
- (4) the ability to understand the facts presented and apply the law to those facts.

C. Communication skills. A judge should be evaluated on the judge's communication skills, including

- (1) the sensitivity of the judge to the impact of the judge's nonverbal communications;
- (2) the courtesy and fairness displayed to all parties and participants in proceedings;
- (3) whether the judge's verbal communications are clear, complete and logical; and
- (4) whether a judge's written communications are clear, complete and logical.

D. Case management. A judge should be evaluated on the judge's management of the docket and cases assigned to the judge, including:

- (1) discharging responsibilities diligently;

(2) meeting time commitments and acting as promptly and efficiently as possible in scheduling and disposition of cases;

(3) considering the availability of settlement and alternative resolution processes and the cost of litigation;

(4) punctuality and efficient use of time; and

(5) maintenance or proper control over the courtroom.

[Approved, effective February 25, 2002; as amended by Supreme Court Order No. 10-8300-002, effective February 24, 2010.]