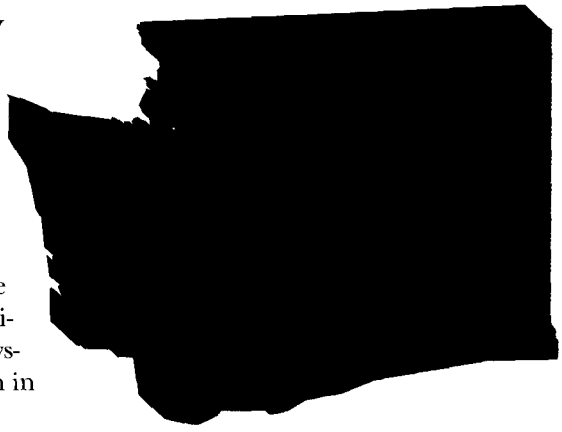
The RELATIONSHIP between judicial performance evaluations and judicial elections

by DAVID C. BRODY



A study in Washington state suggests evaluation programs can be effective in informing voters, helping judges, and promoting judicial independence.

"The quality of our justice in America patently hinges, in large measure, on the quality of our judges."[1]

The human dimension judges bring to the bench, with diverse judicial philosophies and personalities, is an asset to the American system of justice. It is the public's faith in the wisdom, common sense, and integrity of individual judges that is the backbone of the judiciary. Unfortunately, these very qualities can prove a liability when it comes to judicial elections.

Thirty states use popular elections (either partisan or non-partisan)[2] to select at least a portion of their judiciary, not to mention the large number of states that use retention elections as part of a merit appointment system. While selecting judges through popular elections does make a judge accountable to the people, it also presents many dangers. It can make judges shy away from making decisions and acting as they would without the presence of electoral pressures. Making anti-majoritarian decisions, developing innovative practices and procedures, and standing by one's beliefs—all qualities we want from our judges—can make a judge liable to electoral challenges based on unfair characterization, innuendo, and attack by special interests. This fact, when coupled with the dearth of information provided to voters in judicial elections, has been the cause of great concern across the nation for many years.

In an effort to combat this situation, since the 1970s states have been developing and

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1. Special Commission on Evaluation of Judicial Performance, AMERICAN BAR ASSOCIATION GUIDELINES FOR THE EVALUATION OF JUDICIAL PERFORMANCE, at i (1985).

2. In this article, partisan and non-partisan elections, which are closely related, are treated similarly. *See* Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?* 23 FLA. ST. U. L. REV. 1, 24 (1995).

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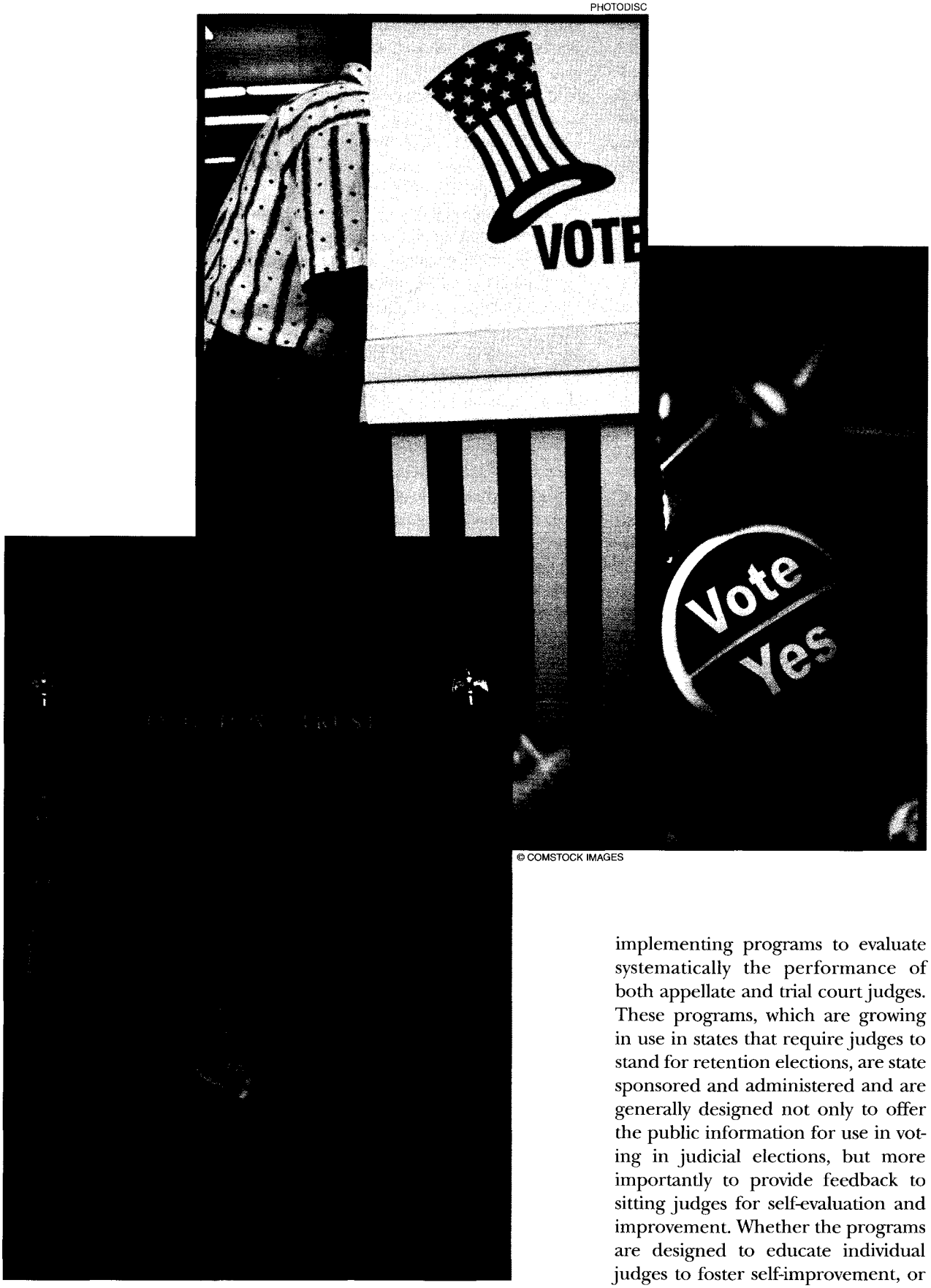

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implementing programs to evaluate systematically the performance of both appellate and trial court judges. These programs, which are growing in use in states that require judges to stand for retention elections, are state sponsored and administered and are generally designed not only to offer the public information for use in voting in judicial elections, but more importantly to provide feedback to sitting judges for self-evaluation and improvement. Whether the programs are designed to educate individual judges to foster self-improvement, or

to inform the public to increase participation rates in judicial elections and trust in the court system, such programs have the potential to be extremely valuable both to a state's judiciary and to its citizenry.

Unfortunately, to date not a single state whose judiciary is selected through partisan or non-partisan elections undertakes judicial performance evaluations to inform the public about the quality of work conducted by state and local judges. Washington state, which selects judges through non-partisan elections, falls under this rubric. Despite its progressiveness in many areas, Washington state does not operate a government-sponsored judicial performance evaluation (JPE) program.

In 1999, the Washington chapter of the American Judicature Society established a committee to design and test a judicial performance evaluation program for superior court judges that would foster judicial self-improvement and provide information to voters in judicial elections. The goal was to develop, implement, and analyze procedures and instruments that could be used in a JPE program in a state with an elected judiciary. This article presents the results of this pilot study.

Performance evaluation history

The first state-sponsored judicial performance evaluation program was established in Alaska in 1975. In 1985, the American Bar Association developed a set of proposed guidelines for the implementation and operation of such programs. Since that time, dozens of states have instituted JPE programs with varying components and purposes. While JPE programs are relatively new, several have been found to serve the purpose for which they were designed and do not have a negative impact on judicial independence or behavior.[3]

Shortly after the ABA developed its guidelines, discussion began in Washington state about the development of a JPE program. In 1985, Washington's Judicial Performance Evaluation Task Force was established, with Justice Robert Utter serving as chair. Over the next several years, the task force designed and field-tested evaluation instruments in the district, municipal, and superior courts (the appellate and supreme courts decided against implementation, due to concerns about collegiality.) In the end, the District and Municipal Judges' Association and the Superior Court Judges' Association decided against implementation of the program, due to concerns about confidentiality.

In 1995, the state established the Walsh Commission—24 members appointed by Governor Lowry and Chief Justice Christine Durham who were charged with examining and suggesting improvements to the judicial selection system in Washington. Among the nine specific recommendations made by the commission was that "[a] process for collecting and publishing information about judicial performance shall be created under the authority of the Supreme Court."[4] However, since the release of the Walsh Commission's final report in 1996, there has been minimal, if any, state action to develop a JPE program.

Pilot evaluation project

In the fall of 1998, AJS's Washington chapter was founded. At that time, the chapter's membership prioritized the development of a set of performance standards for judges and a means of measuring and evaluating such standards. Shortly thereafter, a subcommittee was formed to carry out these tasks. Many months later, the subcommittee had designed the evaluation program that was used in the pilot project that is the basis of this report. The JPE program is predicated on two aims: judicial self-improvement and providing relevant, reliable, and unbiased information to the public for use in judicial elections. Due to their importance in evaluating the program and pilot project, these goals are discussed in detail below.

Goal one: fostering judicial self-improvement. Periodic review and evaluation of a judge's effectiveness can provide information that offers the judge insight into his or her performance and how others perceive it. Such insight can help foster a judge's quest for individual and system-wide excellence. For several reasons, JPE programs are uniquely able to provide this:

- Information can be obtained from a variety of relevant, broadly based sources.
- Information obtained is anonymous.
- Information is solicited only from people who have appeared before the judge.

Multiple-source performance evaluations provide greater richness in feedback to evaluatees than do single-source evaluations or bar polls. In the case of evaluations of judges, obtaining critiques from three disparate groups of observers—lawyers, witnesses, and jurors—provides varied information for judges to consider.

Attorneys are clearly in an excellent position to observe a judge's performance in the courtroom and view judges from the perspective of a trained legal professional. Thus, their input in an evaluation program is essential. Witnesses and jurors view trial court judges quite differently. They are disinterested parties who appear in court as laypersons, often in response to a subpoena or jury summons. They provide a window through which the community views its judges and court system in general. Through a JPE program, judges can be told of both positive and negative perceptions and observations that they would be unlikely to hear otherwise. Such information can then be used as individual judges deem appropriate.

Goal two: providing information to the electorate. The citizens of Washington are blessed with an

3. Susan M. Olson, *Voter Mobilization in Judicial Retention Elections: Performance Evaluation and Organized Opposition*, 22 JUST. SYS. J. 263 (2001); Kevin Esterling & Kathleen M. Sampson, JUDICIAL RETENTION EVALUATION PROGRAMS IN FOUR STATES: A REPORT WITH RECOMMENDATIONS (Chicago: AJS, 1997); Kevin Esterling, *Judicial accountability the right way*, 82 JUDICATURE 206 (1999).

4. Walsh Commission, WALSH COMMISSION FINAL REPORT: THE PEOPLE SHALL JUDGE, Recommendation 3 (Olympia, Wash.: Administrative Office of the Courts,1996).

excellent judiciary. While this opinion and the high quality of justice provided by the state's courts are well known to attorneys, jurists, and scholars throughout the state and beyond, these attributes are underappreciated by the general public. This is perhaps most evident when it comes to the election of judges. While the Washington state constitution provides for the election of judges, less than a third of eligible voters take part in voting for judges.

Such low participation is present nationwide in judicial elections. Research has consistently shown that the chief reason for this is voters' lack of relevant knowledge regarding candidates for judgeships. Sadly, voters in most judicial elections are provided very little information about judicial candidates. Moreover, the information they receive is often biased, a distortion of facts based on isolated cases or issues that is funded by special interest groups. This has the dual effect of turning the average voter away from the polls and giving more weight to the voter who is unduly influenced by faulty, inflammatory information.

Research has also consistently shown that much of the public does not make use of the minimal information it is provided about candidates in judicial elections. Consider the following observations:

- In the 1998 Washington state primary and general elections, only one out of four voters believed they had enough information about the judicial candidates.[5]

Voters in most judicial elections are provided very little information about judicial candidates.

- In the 1998 Washington state primary and general elections, less than half of voters were able to distinguish between candidates who appeared on the ballot and bogus candidates.[6]
- In the 1979 general election, only 14 percent of voters in Lubbock, Texas, could identify a single judicial candidate on the ballot.[7]
- In the 1980 judicial retention elections in Wyoming, almost 25 percent of voters did not know why they voted as they did.[8]

The lack of relevant information affects judicial elections in a number of ways. When at the polls (for other concurrent contests), voters who lack knowledge about judicial candidates are much less likely to vote in judicial elections.[9] The result is that a small minority of the electorate, many of whom do not have a rational basis for their vote, often decides judicial races. Moreover, the less informed voters are, the more susceptible they are to deceptive and/or negative campaigning.[10] This is especially true when one or both candidates in a race spend a great deal of money on vacuous media images, negative advertising, or misleading campaign literature.[11]

Just as importantly, voters who do cast votes but who do not possess relevant information upon which to support their vote often base their choices on inappropriate cues, such as a candidate's name, ethnicity, gender, or position on the ballot.[12] So, while popular elections, on the surface, would seem to further the democratic ideal, it has been noted that "democracy is a poor name for a system in which voters routinely vote for people they know nothing about."[13]

Adding to the problems associated with judicial elections is the role the judiciary has in the American system of government. The judiciary was designed largely to protect individuals from oppression by the government and improper majoritarian demands. Consequently, it is often the duty of judges to make unpopular decisions that preserve the rights and liberties of individuals. Politicians, potential or actual challengers, and special interest groups can use such decisions to mount an effective electoral challenge to a sitting judge. That is exactly what has been happening (increasingly so) over the past two decades.

In recent years, judicial elections have become notably "nastier and noisier."[14] A challenger now commonly focuses on isolated cases, employs distorted facts, and exploits the anti-crime sentiment felt by a majority of citizens to mischaracterize an incumbent's performance on the bench. Similarly disconcerting, special interest groups have spent millions of dollars attacking incumbent judges who do not adhere to their agendas. Judges often must withstand criticism from prominent politicians about rulings in individual cases—such as New York Governor George Pataki labeling specific decisions "junk justice," or Tennessee Governor Don Sundquist asking rhetorically, "Should a judge look over his shoulder [when making decisions] about whether they're going to be thrown out of office? I hope so."[15] Statements such as these have the potential to severely hinder

5. Charles H. Sheldon & Nicholas P. Lovrich Jr., *Voter knowledge, behavior, and attitudes in primary and general judicial elections*, 82 JUDICATURE 216 (1999).
6. *Id.*
7. Sara Mathias, ELECTING JUSTICE: A HANDBOOK OF JUDICIAL ELECTION REFORMS (Chicago: AJS,1990).
8. Kenyon Griffin and Michael J. Horan, *Patterns of voting behavior in judicial retention elections for supreme court justices in Wyoming*, 67 JUDICATURE 68 (1983).
9. *See, e.g.*, Nicholas P. Lovrich, John C. Pierce, & Charles H. Sheldon, *Citizen knowledge and voting in judicial elections*, 73 JUDICATURE 28 (1989); Webster, *supra* n. 2.
10. Mathias, *supra* n. 7; Robert L. Brown, *From Whence Cometh our State Appellate Judges: Popular Election Versus the Missouri Plan*, 20 U. ARK. LITTLE ROCK L.J. 313 (1998).
11. *Id.*; Webster, *supra* n. 2.
12. *Id.*; Phillip Dubois, *Voting Cues in Nonpartisan Trial Court Elections: A Multivariate Assessment*, 18 LAW & SOC'Y REV. 395 (1984).
13. Joel Achenbach, *Why Reporters Love Elections*, 49 U. MIAMI L. REV. 155, 158 (1994).
14. Judith L. Maute, *Selecting Justice in State Courts: The Ballot Box or the Backroom?* 41 S. TEX. L. REV. 1197, 1224 (2000).

judicial independence.

These tactics are all the more troubling due to ethical restrictions prohibiting judges from discussing specific cases or issues as directed by judicial canons. This is still the case following the 2002 Supreme Court decision in *Republican Party of Minnesota v. White.* Clearly, *White* curtails a state's ability to limit what judicial candidates can say and may grant sitting judges more leeway in responding to case- or issue-specific charges levied against them in a campaign. It is also likely, however, to increase the frequency in which case-specific, ideological positions on hot-button issues are brought into a campaign, thereby having a negative effect on judicial independence.

Proponents of JPE programs contend that sanctioned evaluations of judges actually increase judicial independence. They argue that "judicial independence is the independence of judges in their judicial capacity from control by inappropriate external forces, pressures, or threats."[16] Consequently, providing voters with relevant, unbiased information about a judge's performance derived from both attorneys and laypeople largely neutralizes negative campaign tactics. As stated in a recent law review article by former Tennessee Supreme Court Justice Penny White, a notorious victim of negative campaign tactics who was defeated in the 1996 elections, "Much of the success of those who seek to destroy judicial independence results from the lack of available information upon which to base one's decisions in judicial elections."[17]

Use of JPE programs

While the statements above doubtlessly apply to both retention and contested elections, and contested elections are much more likely to have active campaigns, judicial performance evaluation programs similar to the one discussed in this article are conducted *only* in states that select judges via merit selection/retention election systems. Given this fact, it is appropriate to briefly consider why.

Table 1. Demographic and geographical make-up of judges in study

Size of county	Number of judges
Large	4
Mid-size	4
Small	2
Geographic location	
West of Cascades	6
East of Cascades	4
Gender	
Male	5
Female	5

Length of time on bench ranged from less than 1 year to more than 20 years.

When the development of a JPE system has been suggested in Washington state, it has been vigorously attacked from dual fronts.[18] Ironically, the fairness of such a system has been attacked equally by those interested in fostering judicial incumbency as well as those whose goal is to enhance the ability of candidates to mount an electoral challenge against an incumbent. On the one hand, it is argued that it is unfair to require that a sitting judge submit to an evaluation the results of which are made public while his or her challenger is not evaluated. On the other hand, it is claimed that it is not fair to permit a sitting judge to have the advantage of standing behind a state-sponsored evaluation while the challenger is not provided a similar opportunity. The fascinating aspect of these arguments is that the pro-incumbent side assumes the evaluation will be negative, thus damaging re-election efforts, while the pro-challenger side assumes it will be positive, thus serving as a stamp of approval or endorsement of the sitting judge.

Regardless of the accuracy of these assumptions, one would be correct in concluding that a positive evaluation would benefit a sitting judge and a negative result would be detrimental. That being said, one must be mindful that the purpose of JPE programs is to provide voters with information upon which to base their vote. If some information is better

Proponents of JPE programs contend that sanctioned evaluations of judges actually increase judicial independence.

15. Greg B. Smith, *Megan's Law Gets Curbed by Judge,* New York Daily News, Sept. 25, 1996, at 5; Wade, *White's Defeat Poses a Legal Dilemma: How is a Replacement Justice Picked?* Memphis Commercial Appeal, Aug. 3, 1996, at A1.

16. Penny J. White, *Judging Judges: Securing Judicial Independence by Use of Judicial Performance Evaluations,* 29 FORDHAM URB. L.J. 1053, 1076 (2002).

17. *Id.* at 1059.

18. Washington State Fall Judicial Conference, Spokane, Wash. (October 2002); "Choosing Judges in Judicial Elections," Washington State Bar Association Annual Meeting, Spokane, Wash. (September 2000); "Judicial Performance Evaluation: How Shall the People Decide?" King County Bench–Bar Conference, Kent, Wash. (November 1999). Videotapes of these conferences are available upon request from the author.

Table 2. Number of survey respondents

Judge ID	Attorneys	Witnesses	Jurors
1	21	0	8
2	22	4	7
3	42	8	21
4	33	16	16
5	34	10	15
6	53	20	39
7	16	3	42
8	—	5	29
9	70	0	0
10	26	0	0
Total	317	66	177

Note: Surveys were not distributed to attorneys who appeared before Judge 8. Judges 9 and 10 did not preside over any jury trials or evidentiary hearings during the evaluation period. No witnesses who appeared before Judge 1 during the evaluation period submitted completed surveys.

than no information, then the delivery of information on only one candidate, so long as such information is reliable, does provide assistance to the voter. Practical suggestions for the implementation of JPE programs in states with contested elections are discussed below.

The pilot project

In designing the pilot project, several key issues needed to be addressed. These included:

- Which judges would be evaluated?
- How would the judges be selected?
- What criteria should be used in the evaluation?
- Where should the information be obtained?
- How should confidentiality and anonymity be maintained?

Selection of judges. In an effort to obtain information that would be beneficial to judges and policy makers statewide, the committee strove to choose participating judges who possess differing levels of experience, have varying bench assignments (civil, criminal, domestic, etc.), preside over areas with differing demographic characteristics, and are from a number of dissimilar counties. Specifically, judges were selected on the basis of the location and size (based on population and number of superior court judges) of the jurisdiction in which they sit, the length of time they have served on the superior court bench, and their gender. Judges were guaranteed anonymity with regard to evaluation results; only the principal researcher knows evaluation results and feedback for each participating judge. In all, 10 judges volunteered and served as participants in the study. Their demographic and geographical make-up are presented in Table 1.[19]

Sources of information. In an effort to acquire information from

Table 3. Profile of responding attorneys

Gender	Male	238 (76%)
	Female	73 (24%)
Race	White	294 (94%)
	African American	4 (1%)
	Asian/Pacific Islander	7 (2%)
	Native American	3 (1%)
	Other	4 (1%)
Ethnicity	Hispanic	4 (1%)
	Non-Hispanic	308 (99%)
Years in practice	1–2 years	11 (4%)
	3–5 years	37 (12%)
	6–10 years	61 (20%)
	11–20 years	111 (36%)
	More than 20 years	90 (29%)
	Range	1–50 years
	Average	15.63 years
Area of specialization	Private criminal defense	18 (6%)
	Public criminal defense	36 (12%)
	Prosecution	36 (12%)
	Private civil matters	204 (65%)
	Other	14 (4%)
Type of office	Sole practitioner	87 (28%)
	Private firm with between 2 and 5 attorneys	71 (23%)
	Private firm with more than 5 attorneys	69 (22%)
	Prosecutor's/attorney general's office	46 (15%)
	Public defender's office	38 (12%)
Comments provided	Yes	95 (30%)
	No	222 (70%)

19. Regression analysis did not reveal any relationships between demographics and other characteristics of the judges being evaluated and results received in the evaluation.

differing perspectives, information was obtained from three sources:[20]

1. Attorneys who appeared before the judge in April, May, and June 2001;

2. Witnesses who testified before the judge in July, August, and September 2001;

3. Trial jurors in the judge's court during July, August, and September 2001.

Surveys were distributed to respondents in the following way: Attorneys were mailed survey packets[21] to their addresses as listed by the Washington State Bar Association. Attorneys who did not return a completed survey after three weeks were mailed a second packet. Jurors and witnesses were handed survey packets upon the completion of their service or testimony by court staff. Due to this method of distribution, second waves were not conducted for witnesses and jurors. In all, 317 attorneys, 177 jurors, and 66 witnesses returned completed surveys. The breakdown of the groups among the 10 judges is shown in Table 2.

Results

Attorneys. Surveys were mailed to 588 attorneys who had appeared before a participating judge during the designated time period; 317 returned completed questionnaires, providing a response rate of 53.9 percent.[22] The demographic breakdown of respondents, which is set out in Table 3, is not dissimilar to the membership of the Washington State Bar Association.

Respondents also represented varied fields of law and types of practice. In short, the study was able to obtain a representative sample of attorneys who practice in the superior court.[23]

The responses from attorneys showed significant variance on two dimensions: scores varied significantly both between individual judges and specific questions and categories (see Tables 4 and 5). This indicates that the survey instrument was specific enough to measure different opinions on specific areas of interest. In terms of judicial self-improvement, the variance and the information it provides are critical.

Table 4. Components of scale for attorney ratings of judges

Legal ability
Possesses excellent legal reasoning ability.
Possesses excellent knowledge of substantive law.
Possesses excellent knowledge of rules of procedure and evidence.
Keeps current on the law.

Integrity
Avoids impropriety or the appearance of impropriety.
Treats people equally regardless of race, gender, economic status, or any other factor.
Treats attorneys equally regardless of status or affiliations.
Considers both sides of an argument before rendering a decision.
Bases decisions on the law.

Communication
Communicates clearly and logically while in court.
Prepares clear and logical written decisions.

Professionalism
Has appropriate level of compassion.
Acts in a dignified manner.
Treats people with courtesy.
Acts with patience and self-control.
Exhibits judicial courage in making difficult or unpopular decisions.
Promotes public confidence in the courts.

Administration
Is punctual and prepared for court.
Maintains control over the courtroom.
Appropriately enforces court rules, orders, and deadlines.
Makes decisions and rulings in a prompt, timely manner.
Manages his or her calendar efficiently.

Written comments provided by respondents provide the best information that can be used by a judge for self-improvement. Nearly 100 attorney respondents provided written comments on their questionnaires. While most responses were favorable, roughly 25 percent could be considered "constructive criticism." For example:

> Judge's knowledge and legal skills are impressive, but his/her people skills need improvement. His/her control of the courtroom would be no less effective if he/she would speak louder. The control technique of almost whispering is both annoying and insulting.

> Judge [X] requires promptness in his/her courtroom that is reasonable but he/she is not always on the bench on time. He/she does not treat lawyers with as much respect as other judges do. He/she clearly sees lawyers as lower in the hierarchy of the court and treats them that way.

Although such comments are clearly critical, they also address items that, if true: a) are not the type of information an attorney would feel comfortable conveying to a judge, b) are items of which the judge should be made aware, and c)

20. For logistical reasons, surveys were distributed to attorneys who appeared before the judge in the three months prior to when surveyed jurors and witnesses appeared before the judge. Since a number of attorneys would have appeared before the court during both time periods, this distribution method was not deemed to be problematic.

21. Survey packets included a cover letter, questionnaire, and postage-paid, business class return envelope addressed to researchers at Washington State University–Spokane.

22. Response rates were not obtained for jurors or witnesses, due to the direct distribution of surveys to these groups by court personnel.

23. Regression analysis did not reveal any relationships between attorney characteristics and survey responses.

Table 5. Average scores from attorneys for trait categories

Judge ID	Legal ability	Integrity	Communication	Professionalism	Administration
1	4.21	4.34	3.87	4.08	4.02
	(.682)	(.542)	(.412)	(.264)	(.437)
2	3.68	4.01	4.77	4.01	3.89
	(1.08)	(.867)	(.723)	(.859)	(.770)
3	4.27	4.44	4.17	4.24	4.02
	(.747)	(.552)	(.903)	(.435)	(.773)
4	3.73	3.81	3.94	3.97	4.03
	(1.40)	(1.28)	(1.02)	(1.12)	(.789)
5	3.31	3.90	3.17	3.80	4.02
	(1.25)	(.954)	(.864)	(.732)	(.537)
6	4.64	4.59	4.51	4.57	4.58
	(.538)	(.393)	(.454)	(.401)	(.411)
7	4.39	4.29	4.13	4.38	4.24
	(1.02)	(.950)	(1.06)	(.593)	(.965)
9	4.50	4.53	4.38	4.61	4.57
	(.507)	(.514)	(.571)	(.470)	(.509)
10	4.21	4.40	4.22	4.33	4.30
	(.856)	(.688)	(.913)	(.584)	(.584)
Overall Average	4.10	4.26	4.13	4.22	4.19

Standard deviations in parentheses

Note: Attorneys gave each judge a score of 1 to 5 for each component, with 1 being lowest (strongly disagree with statement) and 5 being highest (strongly agree with statement).

can be addressed, if necessary, by the judge.

Jurors. Of the 10 judges evaluated, eight presided over jury trials during the evaluation period; 177 completed surveys were returned by jurors. (See Table 6 for a profile of jurors). While the responses provided by attorneys showed significant variance, responses by jurors showed very little variance either between respondents or between questions. Nearly all juror respondents had overwhelmingly positive views of the presiding judge as well as his/her staff. (Average scores received by juror respondents are presented in Table 7.) While one needs to be cautious when looking at survey data that contain minimal variance, the results obtained from juror respondents were not surprising. In fact, they can be considered very desirable from a systemic perspective.

The written comments provided by jurors further illustrate the importance of how they view the trial court judge. Consider:

> Thought judge did an excellent job. Felt my time spent as a juror was very worthwhile.

> Judge epitomizes what I would consider the best of courtroom procedure. Yet he/she maintained a level of personal (as opposed to aloof) communications with the jury. We of the jury became very much a part of our judicial system and were made aware of our importance to the proceedings.

> This was definitely one of the most positive and interesting experiences of

Table 6. Profile of juror respondents

Gender	Male	74 (42%)
	Female	103 (58%)
Race	White	166 (94%)
	African American	3 (2%)
	Asian/Pacific Islander	5 (3%)
	Native American	3 (2%)
Ethnicity	Hispanic	3 (2%)
	Non-Hispanic	174 (98%)
Age	Range	19–79 years
	Average	50 years
Comments provided	Yes	54 (30%)
	No	123 (70%)

Table 7. Overall averages for juror and witness responses

	Jurors	Witnesses
Judge ID		
1	4.85	—
2	4.88	4.94
3	4.85	4.71
4	4.86	4.46
5	4.82	4.23
6	4.83	4.54
7	4.74	4.93
8	4.83	4.73
Overall average	4.83	4.65

Note: Jurors and witnesses gave each judge a score of 1 to 5 for each component, with 1 being lowest (strongly disagree with statement) and 5 being highest (strongly agree with statement).

Table 8. Profile of witness respondents

Gender	Male	45 (68%)
	Female	21 (32%)
Age	Range	22–78 years
	Average	49 years
Race	White	60 (91%)
	African American	1 (1.5%)
	Asian/Pacific Islander	1 (1.5%)
	Native American	3 (4.5%)
	Other	1 (1.5%)
Ethnicity	Non-Hispanic	66 (100%)
Litigant	Yes	12 (18%)
	No	54 (82%)
Type of witness	Lay witness	27 (41%)
	Expert witness	25 (40%)
	Law enforcement	12 (18%)
	Social services	2 (3%)
Comments provided	Yes	21 (32%)
	No	45 (68%)

> my life. I have a new respect for [X] County Superior Court.

Witnesses. Compared to the number of jurors and attorneys who completed questionnaires, a relatively small number of witnesses participated. (See Table 8 for a profile of witnesses). This is not surprising, and for several reasons was anticipated. The vast majority of witnesses have a limited opportunity to observe courtroom proceedings and the actions of the trial judge. Their time in the courtroom is generally limited to the time that they are testifying. (Exceptions to this are law enforcement officers, community corrections personnel, social service workers, and expert witnesses who routinely testify in court proceedings.) In addition, court staff distributed the surveys to witnesses as they were leaving the courtroom following the conclusion of their testimony. (Occasionally, due to other staff duties being performed, witnesses did not even receive surveys.)

It is likely that witnesses with little interest in the case, and little information on which to base an opinion of the judge's performance, were not highly motivated to complete the questionnaire. Witnesses who were given surveys were not identified, thereby preventing as well the opportunity to conduct multiple waves of survey distribution. Finally, the low number of witness surveys may have been due to the relatively short time period used for data collection. Not only was data collection limited to three months, but every judge in the study was away for a minimum of one week during the study.

While there were fewer witness participants than jurors, they shared the same high opinion of the judges. Average scores received from witness participants are presented in Table 7.

As with jurors, the importance of including witnesses in a JPE program from an individual and systemic perspective is found in the written comments that these witnesses provided:

> I appeared twice in the judge's court—once as a litigant and once as a witness in another case. I was very impressed with his/her preparation, intelligence, and grasp of the facts of the cases. He/she was calm, thorough, and careful. He/she seemed to have a good knowledge [of] the law and was willing to check anything he/she wasn't sure about. After several discouraging experiences in family court with commissioners, this judge was a welcome change. He/she restored my faith in the court system as he/she followed the rules and gave each party time to have a say. I trusted him/her to make a fair decision based on the facts and the law.

> The judge made me feel comfortable, and he/she had a nice smile when he/she swore me in and that let me feel he/she was comfortable with me.

> The judge led a very professional court. He/she was very professional, yet understanding and compassionate towards the jurors and people involved in the case. He/she seemed very much in charge and prepared. It was a pleasure to be a part of the judicial system in his/her courtroom.

These comments not only provide information that is helpful to the judge being evaluated, but also illustrate the importance that a person's experience in court has on his or her perception of the overall judicial system.

Comparing ratings

Among the results produced by the surveys, what stands out the most is the difference in perceptions of judicial performance between attorneys and laypersons. This difference, which is consistently (if not universally) present in states that use multi-respondent evaluation programs, can likely be attributed to several factors.

Laypersons tend to hold authority figures in high esteem. A trial judge appears before jurors and witnesses while seated high on the bench, dressed in judicial garb, and in control of the courtroom, so the regard they hold for the authority figure sitting before them is likely to be high. This, in turn, shapes their evaluation of his or her performance. This respect is likely to be highly prevalent among individuals who are not only willing to appear for jury duty, but are actually seated on a jury.

A second reason for the discrepancy between ratings given judges by attorneys and laypersons is the knowledge base possessed by the different classes of respondents regarding the operations of a trial court. Laypersons who are unfamiliar with court procedures may well be impressed by the judge's control of the courtroom and conduct of the proceedings. Attorneys, on the other hand, are familiar with courtroom procedures as well as the behavior and actions of judges. Accordingly, attorneys are more likely to provide comparatively lower ratings for judges, because they have a more extensive basis for evaluation.

Judges' feedback

In assessing an evaluation program, it is important to consider whether the program's participants accept its purpose and design. While being evaluated is difficult for any person, increased concern and apprehension are rational and reasonable responses from individuals who are not only in the public eye but whose very position is based upon the approval of the electorate. Accordingly, it was deemed critical to "debrief" the judges who were evaluated in the study to gain an understanding of their reaction to its substantive and procedural aspects.

It is important to consider whether the program's participants accept its purpose and design.

To do this, we provided participating judges with tabulations of responses as well as written comments provided by respondents who participated in their evaluation. Additionally, each judge was given a one-page questionnaire to obtain feedback on the operation and utility of the pilot project. Seven judges returned questionnaires. Their comments were predominantly positive.

Each of the seven judges stated that the JPE process was useful to them. Their sentiment, in general, was that:

- The information obtained is useful.
- The procedure is a good vehicle to let litigants, witnesses, and jurors "vent" and give feedback to the system.
- The information given to the judges has not previously been available.

The judges did have several suggestions for improving the JPE process used in this study. Two of these are:

- Provide more specific information about negative perceptions by respondent. For example, if a number of respondents said that a judge treated people unfairly, provide information about whether this is based on race, gender, income, etc.
- Provide space for comments after each section to encourage more written feedback.

The positive response of the Washington judges is similar to the response of judges in other states with evaluation programs. Social scientific research on the effect of JPE programs has been quite favorable. Several studies have shown that judges who have been subject to evaluation have not felt a decrease in judicial independence.[24] Moreover, research indicates that most judges studied believe that JPE programs are beneficial and approve of their use.[25] Finally, voters surveyed in states that use JPE programs to inform the public have found the information to be helpful in voting in retention elections and have stated they would be more likely to vote in a judicial election because of the information they were given.[26] In a leading study,[27] Kevin Esterling reported that a significant majority of judges in four states with performance evaluation programs that provide information to voters (Alaska, Arizona, Colorado, and Utah) believed that:

- Appropriate criteria were used to evaluate their performance;
- Information provided to them would help them improve their performance; and

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24. *See, e.g.*, Esterling and Sampson, *supra* n.3.
25. Esterling, *supra* n. 3.
26. Esterling & Sampson, *supra* n. 3.
27. Esterling, *supra* n. 3, at 212, 214.

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• The evaluation process does not undermine their independence.

What did we learn?

While this study provided useful information about the operation and development of a judicial performance evaluation program, implementation in Washington state, where judges are selected through nonpartisan elections, is uncertain. As discussed above, no states that select judges through popular elections use judicial performance evaluations to provide information to the electorate. A key question that must be considered in conjunction with this study is whether it is practical to provide voters with information on a sitting judge without putting his/her electoral challenger at a disadvantage. I believe it is.

When a sitting superior court judge is up for re-election, he or she may face two distinct types of challengers: a person sitting as a judge on a lower-level court or an attorney who is not sitting as a judge. Depending on which type of candidate is involved, distinct processes can be used to provide voters with relevant information.

If a challenger is sitting as a judge on a lower level court than the court to which he or she is hoping to be elected, an evaluation program similar to the one conducted for superior court judges could be implemented. Such an evaluation would be very similar to those conducted for superior court judges.

On the other hand, if the challenger is not a sitting judge, it is still possible to provide voters with information about the candidate. A state could conduct an evaluation of a challenger's qualities relevant to sitting on the bench by obtaining information from individuals who have interacted with the challenger in his or her capacity as an attorney. These individuals could include members of the bar, particularly attorneys who have worked with or against the candidate in prior cases, former clients, judges, local court staff, and possibly jurors or witnesses involved in recent trials where the candidate served as counsel. While the information provided would not be identical to that provided by the evaluation of a sitting judge, it would provide a basis for a voter to consider qualities in the candidate pertinent to sitting as a judge.

It is also important to note that this study did not address a number of relevant items that are therefore not discussed in this report. It did not consider the means currently used to evaluate judges and inform voters that are conducted at the county level. Such local, bar-sponsored programs do serve a function but were not considered in evaluating the pilot program. Additionally, while the program tested means of obtaining information that could be used by voters in judicial elections, it did not address or consider the means and form by which such information would be communicated.

That being said, the design, implementation, and analysis of the judicial performance evaluation pilot project produced an abundance of useful information for judges, scholars, attorneys, and policy makers to consider. Highlights of things learned include:

• Witnesses and jurors view trial court judges differently than do attorneys.

• Attorneys across the state are willing to participate in an evaluation program in a meaningful manner.

• Judges found the information provided informative and helpful.

• Judges received information from attorneys, jurors, and witnesses that they otherwise would not have.

• Judges would like the forms used to encourage and facilitate participants to provide additional written comments.

• The method for distributing surveys to witnesses needs to be re-evaluated.

• An evaluation program such as the one used in the pilot study can be performed at a relatively low cost.[28]

In short, we learned that judges who participated in the JPE program think that it was beneficial. It was able to provide them with useful information without affecting their independence. Moreover, if the voters of Washington state behave like the voters in states where similar programs have been implemented and evaluated, the tested program has the potential to increase intelligent participation in judicial elections as well as increase the public's confidence in the judiciary. Lastly, the pilot project and this report should provide citizens and policy makers in not just Washington but other states with substantive material to use in considering whether to implement a judicial performance evaluation program.

Judges who participated in the JPE program think that it was beneficial.

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28. The total cost of the project was approximately $3,000.