

January 19, 1999

MEMORANDUM VIA FACSIMILE TRANSMISSION AND EXPRESS MAIL

To: Ms. Nike J. Baas
Researcher
Ministry of Justice
Wetenschappelijk Onderzoek-en
Documentatiecentrum

From: Roderic L. Woodson
Chairman
D.C. Bar Judicial Evaluation Committee

Re: Techniques of Judicial Evaluation

Ms. Baas -

My apologies for not responding earlier to your inquiry (copy attached), as the end of the year proved far busier in my practice than I expected. Please note my comments in the order presented by your communication:

Inquiry No. 1. The role of the Minister of Justice/the executive power in the development of standards and systems in the different states of The USA and in the Federation; If there are one or more standardized systems

As a general matter, the Executive authority does not play a role in developing standards and systems for measuring judicial performance or implementing systems for the administration of justice other than the role of criminal prosecutor. The reason is found in our concept of "separation of powers" of the government. These powers (executive, legislative and judicial) are held by different branches of government: (i) executive power is held by the President in the federal government and a "governor" in the various state governments (ii) legislative power is held by the Congress in the federal government and the legislatures in the states variously called a "state legislature" or "state assembly" and (iii) judicial power is held by the Supreme Court of the United States in the federal government and the "supreme court" or "court of appeals" in the various states. The separation of powers is articulated in the federal Constitution and the constitutions of each state. Since the "judicial power" is held only by the courts, then only the courts

hold **enforceable** power to implement judicial performance standards for the administration of justice.

At the state level, it is useful to know that most state court systems have three (3) tiers of judges: (i) trial court judges (ii) intermediate appellate court judges and (iii) supreme court judges. Normally, the state supreme court will grant specific authority to a committee or board whose charge is to establish and operate a judicial evaluation program for all state judges.

The federal court system, by contrast, has no such formal mechanism. The reason is that, unlike state court judges who are either elected or appointed for a specific term of office, federal judges are appointed for life. Once appointed a federal judge, those individuals serve unless removed from office by the U.S. Congress for "high crimes and misdemeanors" under the federal Constitution. Thus, the evaluation techniques often used for state court judges are not used to evaluate federal judges.

Inquiry No. 2 Which standards are used as indicators of the (judicial and organizational) quality of the administration of justice

In 1985, the Special Committee On Evaluation Of Judicial Performance of the American Bar Association issued its report on "Guidelines For The Evaluation Of Judicial Performance" ("ABA Report"). A copy of the ABA Report is enclosed which contains extensive citation to relevant authorities. This document, which should be of value in your analysis, outlines judicial performance guidelines in five (5) broad categories:

- (i) goals and uses of judicial evaluation;
- (ii) administration and support of evaluation techniques;
- (iii) criteria used in judicial evaluation;
- (iv) methodology for judicial evaluation; and,
- (v) uses and dissemination of evaluation results.

Your attention is invited, particularly, to the "Commentary" portion of each guideline.

As a general matter, the ABA Report emphasizes that judicial evaluation is and should be directed toward judicial self-improvement only, and implemented in ways which do not impair the independence of the judiciary. Inherent in this approach is the notion of confidentiality and accountability -- that is, the results of judicial evaluations are not to be publicly disclosed and should not be used for disciplinary purposes. Thus, the audience for evaluation results are limited to the individual judges evaluated, the presiding judge of the affected court and the Supreme Court of the jurisdiction.

Not all states which have implemented a judicial evaluation process adhere to the guidelines presented in the ABA Report. The primary difference is the use and

dissemination of evaluation results. See, "Selected Characteristics of Judicial Performance Evaluation Programs (1993)" enclosed. In several states, evaluation results are made available to authorities considering an individual judge's candidacy for reappointment or are publicly disclosed to assist voters in judicial retention elections.

Inquiry No. 3 Which systems are used to measure and guarantee the quality of the administration of justice (visitation, reviewing colleagues, self-assessment, surveys to "consumers", etc.)

The techniques generally employed in judicial evaluations are outlined below:

(a) Surveys. This is a common approach in almost all judicial evaluation processes. Surveys are primarily taken from attorneys who practice before the courts whose judges are being evaluated. While the survey instruments used may vary -- that is, the types of questions posed by the survey form -- the identity of the attorney responding is not revealed on the instrument. Normally, the attorneys receiving the survey instrument are selected through a random sampling from the entire pool of attorneys who practice before the court. These attorneys are selected based upon court records of appearances.

Other surveys may be taken of litigants, witnesses, and experts whose testimony is heard by the court. These types of surveys are used carefully and only for specific purposes because such persons are not usually familiar enough with the judicial process to render opinions beyond their own interests. Thus, surveys of this nature may be seen as a method for validation or corroboration of attorney survey results.

(b) Objective Data. The wide-spread use of automated caseload data by court systems allows access to a large data base of information on the activity of an individual judge. From the types of cases heard, the complexity of cases, and the number and identity of litigants to the time consumed in bringing cases to resolution are readily available.

(c) Peer Evaluation. Several states use evaluation techniques involving assessment of a judge's individual performance by other judges. These techniques include direct courtroom observation; review of courtroom proceedings preserved on videotape; and, review of written opinions.

(d) Self-Assessment. This methodology involves use of a self-assessment questionnaire which must be completed by the individual judge. An important component in this approach is a requirement that individual judges complete a training program designed to assist the judge in examining their own judicial skills.

(e) Videotaping Courtroom Proceedings. This method of judicial evaluation features several components. First, a selection of the class of individuals who are to

view the videotape for evaluation purposes. Are they attorneys, peer judges, reappointment authorities, or some combination thereof? The answer is most often determined by the goal of judicial evaluation.

Second, should the videotaping be announced or unannounced? The "unannounced" approach may seem the obvious answer to obtain a candid perspective. However, "announced" videotaping may offer the individual judge the opportunity to produce a "benchmark" of his best performance which he or she may then use to improve his or her general performance.

The choice is often tied to the goal of judicial performance. If the goal, for example, is evaluation for purposes of reappointment, then the "unannounced" approach may be used. By contrast, if the goal is judicial self-improvement, the "announced" approach may be more useful.

Inquiry No. 4 Which measures/strategies do you want to use or are you already using in The USA to introduce such a quality system

At the outset, it is important to note how judges of the District of Columbia Courts are selected and retained. Candidates are screened by the Judicial Nomination Commission, a body established by legislative enactment, and which is composed of seven individuals appointed by the U.S. President, the Mayor, the City Council, the D.C. Bar, and the U.S. District Court. This commission then nominates three (3) candidates for each judicial vacancy to the U.S. President, who then selects one nominee for appointment to a fifteen (15) year term on the court. This nominee must then be confirmed by the U.S. Senate. This process is much like that utilized to appoint judges to the U.S. federal court system. After serving his or her fifteen year term, an individual judge who seeks another appointment or senior status, must do so before a second commission.

This second commission, known as the Commission on Judicial Disabilities and Tenure has a composition similar to that of the Judicial Nomination Commission, and is also established by legislative enactment. The Tenure Commission handles formal complaints against D.C. judges, and recommends judges for reappointment or senior status after retirement.

The District of Columbia Bar Association currently uses an attorney survey to conduct its judicial evaluation program. The goal of our evaluation program is judicial self-improvement. This goal is implemented through feedback of the survey results to the individual judge being evaluated and the presiding judge of his or her court. The basic idea is that attorneys, as licensed officers of the Court through their D.C. Bar membership, have a vested interest in improving the administration of justice, as well as the appearance and reality that justice is being served to District of Columbia citizens.

While our survey results are generally confidential, the results obtained for particular judges may be disclosed to the Commission on Judicial Disabilities and Tenure during their consideration of complaints, reappointments, or requests for senior status

Our Judicial Evaluation Survey has been in existence for more than twenty-five (25) years. The survey instrument we use has been modified several times over this period, and is currently undergoing another review and refinement under the supervision of the Judicial Evaluation Committee ("Committee").

An important feature of this new review is inclusion of the D.C. court judges in the effort. The D.C. trial court has appointed an ad hoc committee of its judges to provide constructive comment and criticism of the current survey instrument with suggestions for modification and improvement. The Committee's work is still underway, and it is anticipated that modification of the survey instrument and methodology will take place in stages over the next two (2) years.

Inquiry No. 5 How much time has to be reserved for implementation of such a system, in review of the present developments.

It is my view that initial design and implementation of a judicial performance evaluation system takes two to three years. The most critical debate centers on the goal(s) of judicial evaluation. Judicial self-improvement, judicial retention, judicial discipline, and judicial independence are the corner-stones of such a debate. Sufficient time must be provided to hear and consider all views on these matters, create an appropriate evaluation mechanism, and see to its implementation. If sufficient time is not allotted, the evaluation process will not have needed credibility.

Moreover, judicial evaluation is a dynamic process requiring on-going analysis, modification and refinement. Even when general agreement on the goals of judicial evaluation has been obtained, the methodologies for implementation of those goals should be scrutinized regularly to improve the usefulness of evaluation results.

Further, it is most important to remember that judges are people also. While they may be intelligent and thoughtful individuals (hopefully), good judicial skills are learned through a combination of training and experience. No individual comes to the bench fully prepared. Whatever evaluation goals and methodologies are identified and implemented must recognize this important reality.

I trust that these comments prove helpful, and if further information is needed, please do not hesitate to contact me.