

# **REPORT OF COMMUNITY AFFAIRS COMMITTEE REGARDING THE VOTERS' INFORMATION ABOUT JUDGES**

## **INTRODUCTION**

The Community Affairs Committee (the "Committee") of the Mound City Bar Association (the "MCBA") was tasked with reviewing, analyzing and making recommendations to the MCBA regarding the "2006 Voters' Information About Judges" (the "Survey") which is an evaluation survey of the judges serving under Missouri's Non-Partisan Plan who sought retention on the bench in the November 7, 2006 general election. The Survey was conducted by The Missouri Bar Association, the Bar Association of Metropolitan St. Louis and the Kansas City Metropolitan Bar Association (collectively, the "Bar Associations"). (*See* Tab 1)

On October 5, 2006, the MCBA held a special meeting to discuss its concerns about the Survey. Members of The Missouri Bar Association, who are also members of the MCBA were present at that meeting. Shortly thereafter, an editorial appeared in the St. Louis Post Dispatch on October 12, 2006 wherein it was recommended that County voters vote "NO" on the Honorable Judge Judy Draper's retention based on the results of the Survey. On October 17, 2006, the Mound City Bar Association sent a letter to the editor of the St. Louis Post Dispatch responding to the editorial. (*See* Tab 2) These events lead to the Committee's charge.

The Committee has completed its review of the Survey, which includes a statistical analysis of the survey results for 1998, 2000, 2002, 2004 and 2006 performed by a statistical expert. As a result of that review, this Committee has legitimate concerns about the method used to conduct the Survey and the statistical validity of the Survey.

This report provides a historical summary of the current judicial evaluation process, a detailed discussion of the Committee's review of the process, and the Committee's findings and recommendations regarding the judicial evaluation process.

## **HISTORICAL BACKGROUND<sup>1</sup>**

Since 1948, The Missouri Bar has asked lawyers to evaluate those judges seeking retention on the bench under the Missouri Non-Partisan Court Plan. This includes trial judges in the City of St. Louis, St. Louis County, Jackson County, Clay County and Platte County, as well as judges of the Supreme Court of Missouri and the three districts of the Missouri Court of Appeals.

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<sup>1</sup> The historical background on the judicial evaluation survey was taken verbatim from a 2004 "Report of the Special Committee to Review the Judicial Evaluation Survey" commissioned by then President of The Missouri Bar, William M. Corrigan, Jr. (*See* Tab 3)

Prior to 1992, the survey simply asked lawyers to vote “yes” or “no” as to whether a judge seeking retention should be retained.

However, in 1992 – in response to a significant downturn in the retention percentages for judges across the state – The Missouri Bar joined forces with the Bar Association of Metropolitan St. Louis (BAMSL) and the Kansas City Metropolitan Bar Association (KCMBA) to conduct a joint survey. BAMSL had previously conducted its own survey of trial judges in the St. Louis area, while KCMBA had conducted an evaluation of municipal judges in the Kansas City metro area.

To provide voters with a clearer picture of a judge’s qualifications, the joint judicial evaluation survey was adapted from the BAMSL survey, which had been conducted biennially since 1982 and included questions beyond the retention question itself. The BAMSL survey was first piloted and then based on a testing methodology designed to insure that survey categories and definitions were both meaningful and specific enough to make an objection (*sic*) determination, rather than one based on personal or social relationship. For example, lawyers were asked to evaluate appellate judges using a 1-5 grading system (with 1 equaling poor and 5 indicating excellent) on the following criteria: courtesy, fairness, clarity, integrity, and legal analysis. Trial court judges in the BAMSL survey were evaluated on the criteria of: attentiveness, courtesy, decisiveness, diligence, expeditiousness, impartiality, integrity, legal analysis, and settlement skills. These criteria were incorporated into the joint survey.

While evaluating judges seeking retention, lawyers were asked to rate only those judges about whom they had direct and personal knowledge. In addition, trial judges in the City of St. Louis and St. Louis County were only evaluated by those attorneys who had made a minimum of 20 appearances within the previous four years in the courts of either the 21st Judicial Circuit or the 22nd Judicial Circuit. This information – a BAMSL requirement for participation in the joint survey – is provided to The Missouri Bar by St. Louis-based REJIS (Regional Justice and Information Service).

Lawyers completing the survey place the ballots into postage-paid envelopes that are mailed to the Economic and Policy Analysis Research Center at the University of Missouri-Columbia, which tabulates the results. Once all ballots have been received, the results of the survey are provided to The Missouri Bar.

Beginning in 1992, the results of the judicial evaluation survey have been published in a booklet, “Voters’ Information About Judges.” The booklet provides standardized biographical information on each judge seeking retention, a photo of each judge, and the results of the survey itself. Three separate versions of the booklet are produced – one for the St. Louis metropolitan area, one for the Jackson/Clay/Platte area, and a third covering just judges of the Supreme Court and Missouri Court of Appeals. Typically, 50,000 copies of each version are printed.

The booklets are distributed in a variety of ways. BAMSL and KCMBA have largely taken responsibility for distributing those versions of the booklet applicable to their locales. The rest are distributed by The Missouri Bar via placement in libraries, courthouses, senior citizen centers, and other public entities. In addition, many copies are distributed in response to phone calls, letters or e-mails from individuals who have heard of the booklets' availability via press releases and other announcements from the participating bar organizations.

The advent of the Internet in recent years has provided an even easier way for public distribution of the survey results, as they are prominently displayed on The Missouri Bar's website until the general election.

As a result of its work, the task force made the following recommendations:

“1. The ballot asking lawyers to evaluate trial judges in the 6<sup>th</sup>, 7<sup>th</sup>, 16<sup>th</sup>, 21<sup>st</sup> and 22<sup>nd</sup> judicial circuits should be revised to reflect the new criteria indicated on the attached sample ballot.

2. The ballot asking lawyers to evaluate appellate judges (the Supreme Court of Missouri and all three districts of the Missouri Court of Appeals) should be revised to reflect the new criteria indicated on the attached sample ballot.

3. A juror evaluation of trial judges should be instituted to provide information on how citizens view judges' performance and to provide an additional layer of credibility to the survey. To that end, a pilot project should be instituted in one of the major metropolitan areas to refine the methodology and mechanics of such an endeavor. The results of that pilot project would then be considered in implementing juror evaluations of all non-partisan trial judges seeking retention in 2008.

4. KCMBA should consider adopting the criteria used in St. Louis for identification of lawyers who will receive the trial judges' ballot (a minimum of 20 appearances in the circuit court during the previous years).

5. Both KCMBA and BAMSL should pay their share of the costs involved in conducting the judicial evaluation survey.

6. The Clay County and Platte County trial judge ballots should be combined into one ballot, with that ballot sent to all lawyers in those two circuits. This is in recognition of the fact that lawyers from one circuit regularly practice in front of judges from the other.

7. KCMBA and BAMSL should continue to explore new and innovative ways to make sure that the citizens within the metropolitan areas they serve are aware of the judicial evaluation survey's existence as a reliable source of information about judges seeking retention. Meanwhile, The Missouri Bar should continue to publicize the availability of the survey results via its website, press contents and public service announcements.

8. The three participating bar organizations should strongly consider converting the lawyer portion of the judicial evaluation survey to

an online format in 2008. Whatever concerns members may have regarding the confidentiality of the information they provide regarding individual judges in an electronic format are more than balanced by the efficiency, ease of tabulation, and cost savings realized by an online survey.

9. The Special Committee to Review the Judicial Evaluation Survey should continue its existence through 2008 in order to consider and oversee implementation of both a possible juror survey and an online survey of lawyers.”

### **THE COMMITTEE’S REVIEW**

The Committee does not dispute that the Bar Associations provide a critical service to the public by providing information about the judges seeking retention to the bench. Nonetheless, the Survey methodology must be sufficient to accomplish its intended purpose of educating the public about the judges based on merit and competency. While the Committee believes that the criteria used to judge the judges are fair, our concern is that the process utilized to apply the criteria converts the Survey to nothing more than a popularity contest.

First, a significant component to the validity of the Survey must be that the lawyers have personal knowledge about the judge evaluated. The MCBA requested and received from The Missouri Bar the criteria used to select the lawyers who received the Survey. Based on the information provided, The Missouri Bar requested that the Regional Justice and Information Service (“REJIS”) extract the names of those attorneys who met the minimum criteria established by BAMSL. Specifically, REJIS was requested to look for “...the names of those attorneys who have made a minimum of 20 appearances in the Circuit Courts of the 21<sup>st</sup> Judicial Circuit and/or 22<sup>nd</sup> Judicial Circuit over the course of the last four years.” (See Tab 4). Accordingly, lawyers who made a minimum of 20 appearances in the Circuit Courts of the 21<sup>st</sup> Judicial Circuit or the 22<sup>nd</sup> Judicial Circuit over the course of the last four (4) years were then sent the questionnaire.

The instructions that accompanied the questionnaire sent to those lawyers provided:

“ ...Please objectively evaluate each judge independently of all other judges. In the case of trial level judges, evaluate only those judges for whom you have sufficient personal experience or direct knowledge within the last four (4) years to provide an informed opinion based on:

1. The commencement of one or more trials before the individual judge (“commencement” means started formal presentation of evidence or testimony); or
2. Appearances before the individual judge on contested matters other than trials. Contested matters include pre-trial and post-trial

motions, except motions to compel answers to interrogatories, and settlement conferences. In the case of appellate judges, evaluate only those judges for whom you have sufficient personal experience or direct knowledge to provide an informed opinion. Answers should be based upon personal knowledge and experience within the last four (4) years.”(See Tab 5)

Since the Survey was sent to lawyers who had made a minimum of 20 appearances in either the Circuit Courts of St. Louis County or St. Louis City, there was nothing to prohibit a lawyer who had not appeared before a judge listed in the Survey from evaluating that judge. The absence of adequate safeguards to ensure that only lawyers with “personal knowledge” about a judge respond to the Survey provides too much opportunity for a lawyer or group of lawyers at odds with a judge over an opinion or ruling, or for any other reason, to manipulate the results.

For example, 302 lawyers responded to the Survey for Judge Draper, who assumed her position on the Associate Circuit Court in the County in May 2004. It is presumed that all 302 of the lawyers who evaluated her had actually appeared in her courtroom. A letter to the editor of the St. Louis-Post Dispatch written by former St. Louis County Circuit Judge Susan Block, which appeared on October 16, 2006, asserts that all of these lawyers could not have appeared before Judge Draper during the brief period of time that she has been on the bench. (See Tab 6). If this assertion is correct, it would render Judge Draper’s Survey results suspect.

The Committee did indeed make an attempt to verify the number of attorneys who had appeared before both Judge Judy Draper and Judge Brenda Stith Loftin during the relevant time period. (See Tab 7). The Clerk of the County Court, who is the custodian of the files and records of the Circuit Court of St. Louis County, responded that the “information sought was not contained in any report used by this Court..., it would be available, if at all, only by the production of a non-standard report prepared from compiled information, Operating Rule 2.03(e). Operating Rule 2 imposes no duty to produce non-standard reports, Operating Rule 2.02. Furthermore, there is no obligation for the courts to compile information from court records, Operating Rule 2.07. For these reasons, I must deny your requests.”

It was further stated:

“Should your requests be occasioned by the results of the recent 2006 Judicial Evaluation Survey, you should note that:

1) While permission was granted for REJIS to provide BAMSL and the Missouri Bar with the report used to develop the list of lawyers appearing in this Circuit to whom surveys were mailed, that report was prepared by REJIS at the cost of the requesting parties, and was delivered directly to those parties; and,

2) That report listed only the names of lawyers who had at least twenty filings with this Circuit over a preceding four-year period, and so would not provide the number of lawyers appearing before any specific Judge.” (See Tab 8).

Without further information, we cannot determine whether or not the number of 302 is accurate. The manner in which the questionnaire was disseminated, however, provides reason for doubt.

It is important to note that the process for evaluating the judges consists only of survey responses from lawyers and jurors. The questionnaire was developed for jurors following the recommendation of the task force which studied the surveys in 2004. While the Committee agrees that data from jurors is an excellent evaluation source, not all judges, for instance Judge Draper, have the benefit of juror feedback.

### **STATISTICAL ANALYSIS OF THE SURVEY**

Dr. Gary Burger<sup>2</sup>, Professor Emeritus, University of Missouri – St. Louis, analyzed the lawyers’ ratings of judges for the years 1998, 2000, 2002, 2004 and 2006 (the “Burger Study”). (See Tab 9). The analysis revealed that there were statistically significant differences associated with the type of court, gender, ethnicity and the particular combination of gender and ethnicity. The Burger Study described these differences as follows:

#### **Court Differences**

The mean or average retention ratings differed significantly by the type of Court involved. The Court of Appeals was the highest rated at 86.41% while the City Circuit Court was rated at 84% and the County Court was rated at 80.45%. The difference between the Court of Appeals and the County Circuit Court (the largest of the differences) was statistically significant, but the other mean differences were not.

#### **Gender Differences**

Males were rated significantly higher (85.84%) than were females (76.69%).

#### **Ethnicity Differences**

Caucasians were rated significantly higher (85.44%) than were African-Americans (75.19%). This pattern was present for all three Courts.

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<sup>2</sup>Dr. Gary Burger was the Chair of the Department of Psychology, University of Missouri – St. Louis for twenty (20) years and taught doctoral level courses in statistics and measurement for almost forty (40) years. Dr. Burger is the spouse of St. Louis City Circuit Judge Joan Burger.

### **Combination of Gender and Ethnicity**

The presence of significant differences due to the particular combination of gender and ethnicity (an interaction) means that the gender and ethnicity differences described above must be qualified. The significant interaction means that the effect of one factor depends on the level of the other factor. In this case, the differences due to ethnicity depend on whether one is looking at males or females (or, alternatively, the differences due to gender depend on whether one is looking at African-Americans or Caucasians). Of the four groups that could be formed by classifying judges by both gender and ethnicity, female African-Americans were rated significantly lower (66.3%) than female Caucasians (83.10%), male African-Americans (84.02%), and male Caucasians (86.21%). The differences involving the other three groups were not statistically significant. The magnitude of the differences involving the female African-American are quite striking, and perhaps do not need a formal statistical test to emphasize their magnitude.

### **Gender and Ethnicity Combinations within each Court**

The differences among the four groups above were also examined within each of the three types of courts, and the significant differences described above involving female African-Americans having significantly lower ratings than the other groups were generally replicated. There were only two exceptions. For the Court of Appeals, the female African-Americans (76.15%) were not significantly lower than the female Caucasians (83.62%). They were significantly lower than the other two groups. Statistically, this was probably due to the small sample size (2) that was involved as the difference in the ratings is large.

For the St. Louis City Circuit Court, in addition to the significant differences involving the low rated female African-Americans, the female Caucasians (82.89%) were also rated significantly lower than the male Caucasians (89.13%). (*See Burger Study*, at 3 and 4)

### **Number of Responses Per Judge**

The Burger Study also examined the average number of responses per judge. There were “significant differences in terms of Court, with the Court of Appeals (534), the County Circuit Court (351) and the City Circuit Court (242) all differing significantly. Males had significantly more ratings than Females (362 vs. 320), and Caucasians had significantly more ratings than African Americans (368 vs. 288).” (*Id.* at 5). The Committee would therefore question whether minimum thresholds for the number of respondents and response rates were established, which challenges the statistical validity of the results.

The Burger Study does not reach conclusions regarding the reasons for the differences documented in the study. As noted therein, the “differences could reflect bias

on the part of the lawyers, real differences in performance, problems with the rating scales and process, or some combination of these factors. The data from this study, taken alone, do not argue in favor of one or another of these or other possible explanations. Additional information would have to be available to sort out possible sources of the differences.” (*Id.* at 5).

Notably, the Burger Study queries whether multiple measures should be employed to validly assess the judge’s performance (*Id.* at 5 and 6). The Burger Study raises a legitimate concern. This Committee agrees that multiple sources of data should be utilized to evaluate the performance of the judges. Although survey results from lawyers may provide valuable information, a valid assessment of the judges’ performance should come from multiple sources. While each source provides valuable information, none by itself provides the complete picture.

### **SURVEY RESULTS FOR CAUCASIAN FEMALE AND AFRICAN-AMERICAN FEMALE JUDGES**

The Committee believes that the survey results for female judges, in general, and for African-American female judges, in particular, for the period from 1998 to 2006 raise concerns which must be addressed.

The Burger Study effectively illustrates that in the surveys conducted from 1998 to 2006, male judges were rated significantly higher (85.84%) than female judges (76.69%) for all three courts. The differences in the survey results are even more alarming when the results for female African-American judges are examined. Female African-American judges were rated significantly lower (66.37%) than female Caucasian judges (83.10%), male African-American judges (84.02%) and male Caucasian judges (86.21%).

This overall pattern strongly suggests that the level of awareness regarding both gender and racial bias must be heightened.

Task forces which have studied gender bias in the court system are legion. Indeed, the Supreme Court of Missouri established a Gender and Justice Task Force in 1990 which conducted a major study of gender bias in Missouri. The members of that task force were appointed by the Supreme Court and The Missouri Bar. According to the task force report, hearings were held throughout Missouri, and extensive surveys of lawyers, court officials and judges were conducted. The task force studied five areas: domestic violence, family law, criminal justice, treatment of persons in and by the courts, and judicial selection. Thereafter, it issued a detailed report of the discrimination found relating to both women in the profession and women in their interactions with the justice system. *See* Report of the Missouri Task Force on Gender and Justice (March 1993) (Tab 10).

Although the task force was only charged with examining gender bias in the court system, when it became apparent that the effects of gender and race bias on the

administration of justice were often intertwined, the task force also received information on racial bias. It concluded that there was a need for a separate task force to study racial bias in the court system and there was need to work to eliminate racial bias. (*Id.* at 2 and 10).

In a supplemental report issued by the Gender Fairness Implementation Committee (the “Implementation Committee”) in May 1997, it was acknowledged that the “Gender Task Force recommended that a task force be formed to study whether racial bias existed in the administration of justice in Missouri.” *Id.* at 11. It was further stated therein that “*there was the additional recommendation that The Missouri Bar provide educational programs to sensitize attorneys, judges and court personnel to the issues of racial bias in courts.*” *Id.* (emphasis added). Although that report states that there was no consensus among the various groups polled regarding the establishment of a task force to study racial bias, the Implementation Committee recommended that the “*Judicial Education Committee, OSCA and The Missouri Bar CLE Committee include issues of racial bias, as well as gender bias, in their programming on equal justice concepts.*” *Id.* at 12. (emphasis added). (See Tab 11).

The Gender and Justice Task Force and the Implementation Committee each emphasized the need to sensitize attorneys, judges and court personnel to the issues of gender and racial bias. The Committee believes the survey results for female judges from 1998 to 2006 reflect that need. This is particularly true when one examines the survey results for the female African-American judges.

The unique problems faced by women of color were recently highlighted in a report by the ABA Commission on Women in the Profession entitled “Visible Invisibility: Women of Color in Law Firms.” The Executive Summary to the report is *available at* <http://www.abanet.org/women/2006wocannual.html> and the entire report may be ordered through that source. Although the report examined the experiences of women of color who had worked in law firms of at least 25 attorneys, some of its findings are quite relevant and worth pointing out here.

According to the study “women of color experience a double whammy of gender and race, unlike white women or even men of color who share at least one of these characteristics (gender or race) with those in the upper strata of management.” *Id.* at 5. The report notes that women of color in the public sector, solo practice, and in corporations have similar concerns that should also be brought to light and addressed.

Long before the 2006 report “Visible Invisibility: Women of Color in Law Firms”, a 1994 report by the Multi-Cultural Woman Attorney’s Network, “The Burdens of Both, The Privileges of Neither,” pointed out that since “one’s race, ethnicity or gender negatively impacts one’s success and acceptance in the greater society, then certainly a combination of race, ethnicity and gender would be even more potent – and possibly be more disadvantageous.” (See “The Burdens of Both, The Privileges of Neither,” A Report of the Multicultural Woman Attorney’s Network, A Joint Project of the ABA Commission on Women in the Profession and the Commission on Opportunities

for Minorities in the Profession, at 6 (August 6, 1994). The compelling differences between the ratings for African-American female judges and other judges certainly appear to support this proposition. To be sure, no real progress will be made unless the existence of gender and racial bias is acknowledged and meaningful steps are taken to address their existence.

To emphasize the point, the following chart shows the ratings for all African-American female judges from 1998 to 2006 and their lowest rating areas:

## **Survey Results for African-American Female Judges**

### **1998 – 2006**

<b><u>1998</u></b>	<b><u>Court</u></b>	<b><u>Lowest Rating Area 1-5 Scale</u></b>
Brenda Stith Loftin	21 <sup>st</sup>	Legal Analysis (2.34)
Iris G. Ferguson	22 <sup>nd</sup>	Legal Analysis (2.63)
<b><u>2000</u></b>	<b><u>Court</u></b>	<b><u>Lowest Rating Area 1-5 Scale</u></b>
Sandra Farragut-Hemphill	21 <sup>st</sup>	Legal Analysis (2.83)
Angela Turner Quigless	22 <sup>nd</sup>	Legal Analysis (2.68)
<b><u>2002</u></b>	<b><u>Court</u></b>	<b><u>Lowest Rating Area 1-5 Scale</u></b>
Brenda Stith Loftin	21 <sup>st</sup>	Legal Analysis (2.26)
Evelyn M. Baker	22 <sup>nd</sup>	Expeditious (2.96)
Nannette Aliece Baker	22 <sup>nd</sup>	Settlement Skills (3.75)
<b><u>2004</u></b>	<b><u>Court</u></b>	<b><u>Lowest Rating Area 1-5 Scale</u></b>
Sandra Farragut-Hemphill	21 <sup>st</sup>	Legal Analysis (2.75)
Gloria Clark Reno	21 <sup>st</sup>	Legal Analysis (2.75)
Angela Turner Quigless	22 <sup>nd</sup>	Legal Analysis (3.12)
Calea Stovall-Reid	22 <sup>nd</sup>	Legal Analysis (3.06)
<b><u>2006</u></b>	<b><u>Court</u></b>	<b><u>Lowest Rating Area 1-5 Scale</u></b>
Nannette A. Baker	MO Court of Appeals	Making the correct decision based upon the law and facts (3.61)
Brenda Stith Loftin	21 <sup>st</sup>	Using good judgment in application of relevant law and rules (1.98)
Paula Perkins Bryant	22 <sup>nd</sup>	Beginning court on time (3.17)
Barbara T. Peebles	22 <sup>nd</sup>	Beginning court on time (3.18)

As the Burger Study indicated, the “magnitude of the differences involving the female African-American are quite striking, and perhaps do not need a formal statistical test to emphasize their magnitude.” (*See* Burger Study, *supra*, at 4). Further, the Committee believes it is altogether telling that the female African-American judges were rated the lowest in “legal analysis,” which goes to the essence of their competency to be judges.

## THE COMMITTEE'S FINDINGS

The American Bar Association promulgated guidelines for evaluating state court judges in 1985. The purpose of the guidelines was to promote judicial self-improvement and provide relevant information to those responsible for retention of judges in office. *See* American Bar Association Special Committee on Evaluation of Judicial Performance, Guidelines for the Evaluation of Judicial Performance (1985), Guideline 1-1.1. The American Bar Association revised the guidelines in February 2005. *See* American Bar Association, Guidelines for the Evaluation of Judicial Performance (February 2005) (*available at* [http://www.abanet.org/jd/lawyersconf/pdf/jpec\\_final\\_commentary.pdf](http://www.abanet.org/jd/lawyersconf/pdf/jpec_final_commentary.pdf)) (the “2005 Guidelines”). The 2005 Guidelines recommend, among other things, that information for judicial evaluations be sought from multiple reliable sources, that sources be limited to those with personal and current knowledge, and that minimum thresholds for response rates and number of respondents be established. Those Guidelines provide, in pertinent part, as follows:

### I. GOALS

Guideline 1-1. Judicial evaluation programs improve the performance of individual judges and the judiciary as a whole. All court systems should develop and implement a formal program for the evaluation of judicial performance.

Guideline 1-2. In jurisdictions where judges are subject to reappointment, retention, or reelection, judicial evaluation programs enable those responsible for continuing judges in office to make informed decisions.

### II. USES

Guideline 2-1. Primary uses of judicial performance evaluation include promoting judicial self-improvement, **enhancing the quality of the judiciary as a whole, and providing relevant information to those responsible for continuing judges in office.** (emphasis added)

### VI. METHODOLOGY

Guideline 6-4. The evaluation process must ensure the anonymity of individual respondents.

Guideline 6-5. Reliable sources of information should be developed for judicial evaluation programs.

-5.1. **Multiple sources should be used whenever feasible.** (emphasis added)

-1.1. Potential sources of information for trial judge evaluations include attorneys, jurors, litigants, and witnesses who have appeared before the judge; non-judicial

court staff, social service personnel, and law enforcement officials who have had regular contact with the judge; and appellate judges who have reviewed the judge's decisions.

-1.2. Potential sources of information for appellate judge evaluations include attorneys who have appeared before the judge, non-judicial court staff who have had regular contact with the judge, other appellate judges, and trial court judges whose decisions have been reviewed by the judge.

-5.2. Sources should be limited to those with **“personal and current knowledge”** of the judge. (emphasis added)

-5.3. Objective sources of information may include public records.

Guideline 6-6. At the outset of the evaluation program, program administrators should **establish minimum thresholds for both response rates and number of respondents**. (emphasis added)

Guideline 6-7. **Questionnaire content and wording should be structured with the relevant respondent group, and the nature and extent of that group's interaction with judges, in mind**. (emphasis added) In most instances, it will be necessary to use a different performance questionnaire for each respondent group.

As indicated by the 2005 Guidelines, there is growing recognition that judicial performance evaluation does not simply benefit the public; it also provides needed feedback to sitting judges and creates opportunities for improvement. *See* “Shared Expectations, Judicial Accountability in Context”, Institute For The Advancement of the American Legal System, University of Denver (2006) at 18. (*available at* [www.du.edu/legalinstitute](http://www.du.edu/legalinstitute)). As a result, six (6) states with non-partisan court plans like Missouri's, which is also referred to as “the Missouri Plan,” now have wide-scale, official programs for judicial performance evaluation and may be considered the leaders of the comprehensive judicial performance evaluation movement: Alaska, Arizona, Colorado, New Mexico, Tennessee and Utah. *Id.* at 20<sup>3</sup>. These states utilize some form of evaluation committee, anonymous surveys and public information campaigns as part of the evaluation. *Id.* Kansas also recently passed a judicial performance statute which is similar to the Colorado statute. (*See* House Substitute for Senate Bill No. 357)

The process for evaluating judges in Missouri should also be more comprehensive. Critics have observed that “bar surveys alone cannot account properly, if at all, for the reaction of jurors, litigants, witnesses, and court staff; the judge's ability as a case manager; or impartial courtroom observation. And because they are limited to the opinions of attorneys, they may not be treated with the same gravity as more inclusive studies.” *See* “Shared Expectations, Judicial Accountability in Context,” *supra*, at 61.

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<sup>3</sup> *See* “Shared Expectations, Judicial Accountability in Context,” *supra*, at 20-41 for a comparative analysis of judicial performance evaluation programs in these states

“Bar polls also fall short because they usually are not designed to foster individual judicial self-improvement. Rather, they merely provide a snapshot of the judge’s performance shortly before the election, giving the judge little or no opportunity to develop better practices before facing the voters. Recognizing this limitation, some in Missouri are now seeking to replace bar polls with a robust JPE program. One such advocate, Dr. Gregory Casey has recommended that Missouri adopt an ongoing assessment program complete with a judicial performance evaluation commission, based on the Colorado model.” (citations omitted). *Id.* at 62. The Committee agrees.

### **The Colorado Judicial Performance Commission**

Colorado has a comprehensive judicial evaluation process. In 1998, Commissions on Judicial Performance were created by the Colorado General Assembly “for the purpose of providing voters with fair, responsible and constructive evaluations of trial and appellate judges and justices seeking retention in general elections. *See Colo. Rev. Stat. §13-5.5-101 et. seq.* There is a commission that has statewide jurisdiction to conduct evaluations for appellate judges and twenty-two (22) local commissions, which conduct evaluations for trial judges in each judicial district. *Id.* §§13-5.5102(1(a) and 104(1)(a). The evaluations are also intended to provide judges with information that can be used to improve their professional skills. Towards this end, recommendations to the voters regarding the retention of an individual judge are based on questionnaire results, an interview with the judge (which includes self-evaluation completed by the judge), self-evaluation completed by the judge and courtroom observation. The methodology is outlined as follows:

- Questionnaires are sent to a random number of attorneys (including district attorneys and public defenders), litigants, jurors, crime victims, law enforcement personnel, social services caseworkers, probation officers and court personnel. Deputy sheriffs assigned to the courthouse are also surveyed.
- The specific criteria used to evaluate a judge’s performance include, but are not limited to:

- Integrity Communication Skills
- Control over Judicial Proceedings Prompt Case Disposition
- Sentencing Practices Preparation
- Attentiveness Docket Management
- Punctuality Administrative Skills
- Legal Ability
- Knowledge and understanding of substantive, procedural and evidentiary law

- Additional areas of inquiry include whether a judge:
  - Is courteous
  - Treats all parties who appear in the courtroom equally

- Displays a sense of justice
  - Provides clear written and oral decisions
  - Displays appropriate demeanor
  - Displays compassion
- Commissions consistently look at the Rules of Professional Conduct and Code of Judicial Conduct.
  - Other information that may be used by the Commission to make recommendations to the voters regarding the retention of an individual judge includes:
    - Caseload statistics
    - Oral interviews with people appearing before the judge on a regular basis (judges/magistrates shall be provided with a written summary that preserves the anonymity of the interviewee)
    - Public Hearings
    - Documentation from interested parties
    - Number of court trials and court trial days
    - Number of jury trials and jury trial days
    - Sentence modifications pursuant to section 16-11-309, C.R.S.
    - Effective for the 2006 judicial performance evaluations and evaluations thereafter, open case reports and case aging reports
  - Commissions complete a written narrative profile for each judge standing for retention. The commissions must provide one of the following recommendations: “Retain”, “Do Not Retain”, or “No Opinion”. These profiles are released to the public on the first day following the deadline for judges to declare their intent to stand for retention.

The surveys are sent in a “Blue Book” to every voter in the state. In Colorado, as in Missouri, judges seeking retention are required to get 50% + 1 vote to be retained. In a telephone interview with Jane Howell, the Executive Director of the Colorado Commission on Judicial Performance, we discussed whether “gender and cultural sensitivity issues” had surfaced in the evaluation process. Ms. Howell advised that training for the judicial commissions includes training regarding gender and cultural sensitivity matters. Thus far, she has not seen any indication of these problems. The Committee would argue that perhaps a balance is struck as a result of the comprehensive manner in which the evaluations are conducted and the training provided on gender and cultural sensitivity matters.

As to funding, the Colorado Commission on Judicial Performance is supported by a legislative budget. A portion of every traffic fine collected in the state is allocated to the Judicial Performance Evaluation Program. According to Ms. Howell, conducting the judicial evaluations every other year is a full time job.

### **RECOMMENDATIONS**

To ensure that the process used to evaluate the judges is constructive and as fair as possible to all the judges, and to preserve the value and integrity of judicial evaluations, the Committee recommends that the Bar Associations that conduct the evaluations consider the implementation of a formal judicial performance evaluation program similar to those in other non-partisan court plan states such as Colorado. To that end, an appropriate funding mechanism must be sought. Until such time, the Committee recommends the following changes to the current process for the evaluation of judges:

1. The survey questionnaires should be sent to a broader and more diverse group. In addition to lawyers and jurors, non-lawyers such as court personnel, probation officers, law enforcement personnel, litigants, and others who have direct contact with the judge should also be surveyed. These individuals could also provide valuable information regarding the judge's performance.
2. The criteria used to select the pool of lawyers should be modified so that lawyers with "personal knowledge" about the judge are actually surveyed. The lawyers who receive the survey questionnaires must be specific to the judge.
3. The lawyers who respond to the survey questionnaires should be required to verify the accuracy of their responses by signing a verification affirming that the person completing the evaluation meets the established criteria. When attorneys vote for The Missouri Bar Board of Governors there is a signature card enclosed with the ballot to verify their vote. Given the importance of the judicial evaluations, such verification is an added safeguard that poses no additional burden to implement.
4. Minimum thresholds for response rates and the number of respondents should be established before survey questionnaires are disseminated.
5. There is a need for educational awareness and heightened sensitivity about the existence of racial, ethnic and gender bias and the negative impact this has on women, in general, and women of color, in particular, in the justice system. An appropriate cautionary statement could also be included in the survey questionnaires.

## **CONCLUSION**

Recently, the Chief Justice of the Supreme Court of Missouri, Michael A. Wolff recommended that Missouri's judicial evaluation system be revised and suggested a "judicial evaluation system that is driven by non-lawyers as well as members of the bar; that is independent and is non-partisan; and that produces credible results made widely available to the voting public." We applaud Chief Justice Wolff for his foresight. The Missouri Bar, The Bar Association of Metropolitan St. Louis and the Kansas City Metropolitan Bar Association have responded and a committee is in place to study the judicial evaluation process. We hope that further cooperative efforts between our respective Bar Associations will result in a process that fosters individual judicial self-improvement, and is as fair as possible to all of the judges to ensure the value and integrity of the judicial evaluations.