

## **Chapter 12 Judicial Performance Evaluation Commission Act**

### **Part 1 General Provisions**

#### **78A-12-101 Title.**

This chapter is known as the "Judicial Performance Evaluation Commission Act."

Enacted by Chapter 248, 2008 General Session

#### **78A-12-102 Definitions.**

As used in this chapter:

- (1) "Commission" means the Judicial Performance Evaluation Commission established by this chapter.
- (2) "Does not meet or exceed minimum performance standards" means that:
  - (a)
    - (i) a judge does not meet the certification standards under Section 78A-12-205; and
    - (ii) the presumption, described in Subsection 78A-12-203(4)(b)(ii), that the judge does not meet or exceed minimum performance standards is not overcome by substantial countervailing evidence; or
  - (b) a judge meets the certification standards under Section 78A-12-205, but the presumption, described in Subsection 78A-12-203(4)(b)(i), that the judge meets or exceeds minimum performance standards is overcome by substantial countervailing evidence.
- (3) Except as provided in Section 78A-12-207, "judge" means a state court judge or a state court justice who is subject to a retention election.
- (4) "Justice" means a judge who is a member of the Supreme Court.
- (5) "Justice court judge" means a judge appointed pursuant to Title 78A, Chapter 7, Justice Court.
- (6) "Meets or exceeds minimum performance standards" means that:
  - (a)
    - (i) a judge meets the certification standards under Section 78A-12-205; and
    - (ii) the presumption that the judge meets or exceeds minimum performance standards, described in Subsection 78A-12-203(4)(b)(i), is not overcome by substantial countervailing evidence; or
  - (b) a judge does not meet the certification standards under Section 78A-12-205, but the presumption described in Subsection 78A-12-203(4)(b)(ii), that the judge does not meet or exceed minimum performance standards, is overcome by substantial countervailing evidence.

Amended by Chapter 11, 2022 General Session

### **Part 2 Judicial Performance Evaluation**

#### **78A-12-201 Judicial Performance Evaluation Commission -- Creation -- Membership.**

- (1) There is created an independent commission called the Judicial Performance Evaluation Commission consisting of 13 members, as follows:

- (a) two members appointed by the president of the Senate, only one of whom may be a member of the Utah State Bar;
  - (b) two members appointed by the speaker of the House of Representatives, only one of whom may be a member of the Utah State Bar;
  - (c) four members appointed by the members of the Supreme Court, at least one of whom, but not more than two of whom, may be a member of the Utah State Bar;
  - (d) four members appointed by the governor, at least one of whom, but not more than two of whom, may be a member of the Utah State Bar; and
  - (e) the executive director of the Commission on Criminal and Juvenile Justice.
- (2)
- (a) The president of the Senate and the speaker of the House of Representatives shall confer when appointing members under Subsections (1)(a) and (b) to ensure that there is at least one member from among their four appointees who is a member of the Utah State Bar.
  - (b) Each of the appointing authorities may appoint no more than half of the appointing authority's members from the same political party.
  - (c) A sitting legislator or a sitting judge may not serve as a commission member.
- (3)
- (a) A member appointed under Subsection (1) shall be appointed for a four-year term.
  - (b) A member may serve no more than three consecutive terms.
- (4) At the time of appointment, the terms of commission members shall be staggered so that approximately half of commission members' terms expire every two years.
- (5) When a vacancy occurs in the membership for any reason, the replacement shall be appointed for the unexpired term by the same appointing authority that appointed the member creating the vacancy.
- (6)
- (a) Eight members of the commission constitute a quorum.
  - (b) The action of a majority of the quorum constitutes the action of the commission, except that the commission may not make a determination that a judge meets or exceeds minimum performance standards, or that a judge does not meet or exceed minimum performance standards, by a vote of less than six members.
  - (c) If, because of absences, the commission is unable to make a determination described in Subsection (6)(b) by at least six votes, the commission may meet a second time to make a determination.
  - (d) If a vote on the question of whether a judge meets or exceeds minimum performance standards or does not meet or exceed minimum performance standards ends in a tie or does not pass by at least six votes, the record shall reflect that the commission made no determination in relation to that judge.

Amended by Chapter 11, 2022 General Session

**78A-12-202 Salary and expenses -- Staff.**

- (1) A member may not receive compensation or benefits for the member's service, but may receive per diem and travel expenses in accordance with:
  - (a) Section 63A-3-106;
  - (b) Section 63A-3-107; and
  - (c) rules made by the Division of Finance pursuant to Sections 63A-3-106 and 63A-3-107.
- (2) The commission shall elect a chair from among its members.

- (3) The commission shall employ an executive director and may employ additional staff as necessary within budgetary constraints.
- (4) The commission shall be located in the Commission on Criminal and Juvenile Justice.

Amended by Chapter 286, 2010 General Session

**78A-12-203 Judicial performance evaluations.**

- (1) Beginning with the 2012 judicial retention elections, the commission shall prepare a performance evaluation for:
  - (a) each judge in the third and fifth year of the judge's term if the judge is not a justice of the Supreme Court; and
  - (b) each justice of the Utah Supreme Court in the third, seventh, and ninth year of the justice's term.
- (2) Except as provided in Subsection (3), the performance evaluation for a judge under Subsection (1) shall consider only the following information but shall give primary emphasis to the information that is gathered and relates to the performance of the judge during the period subsequent to the last judicial retention election of that judge or if the judge has not had a judicial retention election, during the period applicable to the first judicial retention election:
  - (a) the results of the judge's most recent judicial performance survey that is conducted by a third party in accordance with Section 78A-12-204;
  - (b) information concerning the judge's compliance with certification standards established in accordance with Section 78A-12-205;
  - (c) courtroom observation;
  - (d) the judge's judicial disciplinary record, if any;
  - (e) public comment solicited by the commission;
  - (f) information from an earlier judicial performance evaluation concerning the judge except that the commission shall give primary emphasis to information gathered subsequent to the last judicial retention election; and
  - (g) any other factor that the commission:
    - (i) considers relevant to evaluating the judge's performance for the purpose of a retention election; and
    - (ii) establishes by rule made in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act.
- (3) The commission shall, in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, make rules concerning the conduct of courtroom observation under Subsection (2), which shall include the following:
  - (a) an indication of who may perform the courtroom observation;
  - (b) a determination of whether the courtroom observation shall be made in person or may be made by electronic means; and
  - (c) a list of principles and standards used to evaluate the behavior observed.
- (4)
  - (a) As part of the evaluation conducted under this section, the commission shall do one of the following:
    - (i) determine, by a vote of at least six members, that the judge meets or exceeds minimum performance standards;
    - (ii) determine, by a vote of at least six members, that the judge does not meet or exceed minimum performance standards;

- (iii) determine, by a majority vote, that the information concerning the judge is insufficient to make a determination described in Subsection (4)(a)(i) or (ii); or
  - (iv) fail to make a determination described in Subsection (4)(a)(i), (ii), or (iii) by the number of votes required for one of those determinations.
- (b)
- (i) If a judge meets the certification standards established in accordance with Section 78A-12-205, there is a rebuttable presumption that the judge meets or exceeds minimum performance standards.
  - (ii) If a judge fails to meet the certification standards established in accordance with Section 78A-12-205, there is a rebuttable presumption that the judge does not meet or exceed minimum performance standards.
- (c) If the commission deviates from a presumption described in Subsection (4)(b), the commission shall provide a detailed explanation of the reason for that deviation in the commission's report under Section 78A-12-206.
- (d) If the commission makes the determination described in Subsection (4)(a)(iii) or fails to make a determination described in Subsection (4)(a)(i), (ii), or (iii) by the number of votes required for those determinations, the commission shall note that fact in the commission's report.
- (5)
- (a) The commission shall allow a judge who is the subject of a judicial performance retention evaluation, and who has not passed one or more of the certification standards on the retention evaluation, to appear and speak at any commission meeting during which the judge's judicial performance evaluation is considered.
  - (b) The commission may invite any judge to appear before the commission to discuss concerns about the judge's judicial performance.
  - (c)
    - (i) The commission may meet in a closed meeting to discuss a judge's judicial performance evaluation by complying with Title 52, Chapter 4, Open and Public Meetings Act.
    - (ii) The commission may meet in an electronic meeting by complying with Title 52, Chapter 4, Open and Public Meetings Act.
  - (d) Any record of an individual commissioner's vote under Subsection (4) is a protected record under Title 63G, Chapter 2, Government Records Access and Management Act.
  - (e)
    - (i) A member of the commission, including a member of the Utah State Bar, may not be disqualified from voting under Subsection (4) solely because the member appears before the judge as an attorney, a fact witness, or an expert, unless the member is a litigant in a case pending before the judge.
    - (ii) Notwithstanding Subsection (5)(e)(i), a member of the commission shall disclose any conflicts of interest with the judge being reviewed to the other members of the commission before the deliberation and vote under Subsection (4).
    - (iii) Information disclosed under this Subsection (5)(e) is a protected record under Title 63G, Chapter 2, Government Records Access and Management Act.
  - (f) The commission may only disclose the final commission vote described in Subsection (4).
- (6)
- (a) If the Utah Supreme Court issues a public sanction of a judge after the commission makes or fails to make a determination described in Subsection (4), but before the publication of the voter information pamphlet in accordance with Section 20A-7-702, the commission may elect to reconsider the commission's action.

- (b) The commission shall invite the judge described in Subsection (6)(a) to appear before the commission during a closed meeting for the purpose of reconsidering the commission's action.
  - (c) The judge described in Subsection (6)(a) may provide a written statement, not to exceed 100 words, that shall be included in the judge's evaluation report.
  - (d) The commission shall include in the judge's evaluation report:
    - (i) the date of the reconsideration;
    - (ii) any change in the action of the commission; and
    - (iii) a brief statement explaining the reconsideration.
  - (e) The commission shall submit revisions to the judge's evaluation report to the lieutenant governor by no later than August 31 of a regular general election year for publication in the voter information pamphlet, and publish the revisions on the commission's website, and through any other means the commission considers appropriate and within budgetary constraints.
- (7)
- (a) The commission shall compile a midterm report of the commission's judicial performance evaluation of a judge.
  - (b) The midterm report of a judicial performance evaluation shall include information that the commission considers appropriate for purposes of judicial self-improvement.
  - (c) The report shall be provided to the evaluated judge, the presiding judge of the district in which the evaluated judge serves, and the Judicial Council. If the evaluated judge is the presiding judge, the midterm report shall be provided to the chair of the board of judges for the court level on which the evaluated judge serves.
  - (d)
    - (i) The commission may provide a partial midterm evaluation to a judge whose appointment date precludes the collection of complete midterm evaluation data.
    - (ii) For a newly appointed judge, a midterm evaluation is considered partial when the midterm evaluation is missing a respondent group, including attorneys, court staff, court room observers, or intercept survey respondents.
    - (iii) A judge who receives partial midterm evaluation data may receive a statement in acknowledgment of that fact on the judge's voter information pamphlet page.
    - (iv) On or before the beginning of the retention evaluation cycle, the commission shall inform the Judicial Council of the name of any judge who receives a partial midterm evaluation.
- (8) The commission shall identify a judge whose midterm evaluation:
- (a) fails to meet certification standards in accordance with Section 78A-12-205 or as established by rule; or
  - (b) otherwise demonstrates to the commission that the judge's performance would be of such concern if the performance occurred in a retention evaluation that the judge would be invited to appear before the commission in accordance with Subsection (5)(b).
- (9) The commission may make rules in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, as necessary to administer the evaluation required by this section.

Amended by Chapter 11, 2022 General Session

**78A-12-204 Judicial performance survey.**

- (1) A third party under contract to the commission shall conduct, on an ongoing basis during the judge's term in office, the judicial performance survey required by Section 78A-12-203 concerning a judge who is subject to a retention election.

- (2)
  - (a) The judicial performance survey shall include as respondents a sample of each of the following groups as applicable:
    - (i) attorneys who have appeared before the judge as counsel;
    - (ii) jurors who have served in a case before the judge; and
    - (iii) court staff who have worked with the judge.
  - (b) Only a respondent under Subsection (2)(a)(i) who is admitted to practice law in the state and in good standing with the Utah State Bar may evaluate a judge's legal ability under Subsection (7)(a).
- (3) The commission may include an additional classification of respondents if the commission:
  - (a) considers a survey of that classification of respondents helpful to voters in determining whether to vote to retain a judge; and
  - (b) establishes the additional classification of respondents by rule.
- (4) All survey responses are confidential, including comments included with a survey response.
- (5) If the commission provides information to a judge or the Judicial Council, the commission shall provide the information in such a way as to protect the anonymity of a survey respondent.
- (6) A survey shall be provided to a potential survey respondent within 30 days of the day on which the case in which the person appears in the judge's court is closed, exclusive of any appeal, except for court staff and attorneys, who may be surveyed at any time during the survey period.
- (7) Survey categories shall include questions concerning a judge's:
  - (a) legal ability, including the following:
    - (i) demonstration of understanding of the substantive law and any relevant rules of procedure and evidence;
    - (ii) attentiveness to factual and legal issues before the court;
    - (iii) adherence to precedent and ability to clearly explain departures from precedent;
    - (iv) grasp of the practical impact on the parties of the judge's rulings, including the effect of delay and increased litigation expense;
    - (v) ability to write clear judicial opinions; and
    - (vi) ability to clearly explain the legal basis for judicial opinions;
  - (b) judicial temperament and integrity, including the following:
    - (i) demonstration of courtesy toward attorneys, court staff, and others in the judge's court;
    - (ii) maintenance of decorum in the courtroom;
    - (iii) demonstration of judicial demeanor and personal attributes that promote public trust and confidence in the judicial system;
    - (iv) preparedness for oral argument;
    - (v) avoidance of impropriety or the appearance of impropriety;
    - (vi) display of fairness and impartiality toward all parties; and
    - (vii) ability to clearly communicate, including the ability to explain the basis for written rulings, court procedures, and decisions; and
  - (c) administrative performance, including the following:
    - (i) management of workload;
    - (ii) sharing proportionally the workload within the court or district; and
    - (iii) issuance of opinions and orders without unnecessary delay.
- (8) If the commission determines that a certain survey question or category of questions is not appropriate for a respondent group, the commission may omit that question or category of questions from the survey provided to that respondent group.
- (9)

- (a) The survey shall allow respondents to indicate responses in a manner determined by the commission, which shall be:
  - (i) on a numerical scale from one to five; or
  - (ii) in the affirmative or negative, with an option to indicate the respondent's inability to respond in the affirmative or negative.
- (b)
  - (i) To supplement the responses to questions on either a numerical scale or in the affirmative or negative, the commission may allow respondents to provide written comments.
  - (ii) The executive director may not provide the commission a comment that would be prohibited in relation to taking an employment action under federal or state law.
- (10) The commission shall compile and make available to each judge that judge's survey results with each of the judge's judicial performance evaluations.
- (11) The commission may make rules in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, as necessary to administer the judicial performance survey.

Amended by Chapter 81, 2017 General Session

Amended by Chapter 374, 2017 General Session

**78A-12-205 Certification standards.**

- (1) The commission shall establish certification standards requiring that:
  - (a) the judge have no more than one public sanction issued by the Utah Supreme Court during the judge's current term; and
  - (b) the judge receive a minimum score on the judicial performance survey as follows:
    - (i) an average score of no less than 65% on each survey category as provided in Subsection 78A-12-204(7); and
    - (ii) if the commission includes a question on the survey that does not use the numerical scale, the commission shall establish the certification standard for all questions that do not use the numerical scale to be substantially equivalent to the standard required under Subsection (1)(b)(i).
- (2) The commission may establish an additional certification standard if the commission by at least two-thirds vote:
  - (a) determines that satisfaction of the standard is necessary to the satisfactory performance of the judge; and
  - (b) adopts the standard.
- (3) The commission may make rules in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, to establish a certification standard.

Amended by Chapter 11, 2022 General Session

**78A-12-206 Publication of the judicial performance evaluation -- Response by judge.**

- (1)
  - (a) The commission shall compile a retention report of the commission's judicial performance evaluation of a judge.
  - (b) The report of a judicial performance evaluation nearest the judge's next scheduled retention election shall be provided to the judge at least 45 days before the last day on which the judge may file a declaration of the judge's candidacy in the retention election.
  - (c) A report prepared in accordance with Subsection (1)(b) and information obtained in connection with the evaluation becomes a public record under Title 63G, Chapter 2,

Government Records Access and Management Act, on the day following the last day on which the judge who is the subject of the report may file a declaration of the judge's candidacy in the judge's scheduled retention election if the judge declares the judge's candidacy for the retention election.

- (d) Information collected and a report that is not public under Subsection (1)(c) is a protected record under Title 63G, Chapter 2, Government Records Access and Management Act.
- (2) Within 15 days of receiving a copy of the commission's report under Subsection (1)(b):
  - (a) a judge who is the subject of an unfavorable action under Subsection 78A-12-203(4) may:
    - (i) provide a written response to the commission about the report; and
    - (ii) request an interview with the commission for the purpose of addressing the report; and
  - (b) a judge who is the subject of a favorable action under Subsection 78A-12-203(4) may provide a written response to the commission about the commission's report.
- (3)
  - (a) After receiving a response from a judge in any form allowed by Subsection (2), the commission may meet and reconsider the commission's action.
  - (b) If the commission does not change the commission's action, the judge may provide a written statement, not to exceed 100 words, that shall be included in the commission's report.
- (4) The retention report of a judicial performance evaluation shall include:
  - (a) the results of the judicial performance survey, in both raw and summary form;
  - (b) information concerning the judge's compliance with the certification standards, including stating how many of the certification standards the judge met;
  - (c) information concerning any public discipline that a judge has received that is not subject to restrictions on disclosure under Title 78A, Chapter 11, Judicial Conduct Commission;
  - (d) a narrative concerning the judge's performance;
  - (e) the commission's determination under Subsection 78A-12-203(4);
  - (f) the number of votes for and against a determination described in Subsection 78A-12-203(4); and
  - (g) any other information the commission considers necessary to include in the report to explain the certification standards and the determination or lack of a determination made.
- (5)
  - (a) The commission may not include in the commission's retention report specific information concerning an earlier judicial performance evaluation.
  - (b) The commission may refer to information from an earlier judicial performance evaluation concerning the judge in the commission's report only if necessary to explain performance in the current reporting period and giving primary emphasis to the information gathered during the current reporting period.
- (6) The retention report of the commission's judicial performance evaluation shall be made publicly available on an Internet website.
- (7) The commission may make the report of the judicial performance evaluation immediately preceding the judge's retention election publicly available through other means within budgetary constraints.
- (8) The commission shall provide a summary of the judicial performance evaluation for each judge to the lieutenant governor for publication in the voter information pamphlet in the manner required by Title 20A, Chapter 7, Issues Submitted to the Voters.
- (9) The commission shall provide the Judicial Council with:
  - (a) the judicial performance survey results for each judge; and
  - (b) a copy of the retention report of each judicial performance evaluation.



- (10) The Judicial Council shall provide information obtained concerning a judge under Subsection (9) to the subject judge's presiding judge, if any.

Amended by Chapter 11, 2022 General Session

**78A-12-207 Evaluation of justice court judges.**

- (1) The Judicial Performance Evaluation Commission shall:
- (a) conduct a performance evaluation for each justice court judge in the third and fifth year of the justice court judge's term;
  - (b) classify each justice court judge into one of the following three categories:
    - (i) full evaluation;
    - (ii) midlevel evaluation; or
    - (iii) basic evaluation; and
  - (c) establish evaluation criteria for each of the three categories.
- (2) A full evaluation justice court judge shall be subject to the requirements of this chapter.
- (3) A midlevel evaluation justice court judge shall be governed by this chapter, except as provided below:
- (a) the commission shall administer an intercept survey periodically outside the courtroom of the evaluated justice court judge in lieu of the survey specified in Section 78A-12-204; and
  - (b) courtroom observation may not be conducted for midlevel evaluation justice court judges.
- (4) A basic evaluation justice court judge shall be governed by this chapter, except as provided below:
- (a) basic evaluation justice court judges shall comply with minimum performance standards for judicial education, judicial conduct, cases under advisement, and any other standards the commission may promulgate by administrative rule; and
  - (b) courtroom observation and surveys may not be conducted for basic evaluation justice court judges.

Amended by Chapter 81, 2017 General Session