

Senator Todd Weiler proposes the following substitute bill:

JUDICIAL PERFORMANCE EVALUATION COMMISSION

MODIFICATIONS

2017 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Todd Weiler

House Sponsor: Mike K. McKell

LONG TITLE

General Description:

This bill modifies provisions related to judicial performance.

Highlighted Provisions:

This bill:

- ▶ addresses appointments to the commission;
- ▶ requires a certain number of members to vote on recommendations to retain or not retain a judge;
- ▶ amends provisions related to judicial performance evaluations;
- ▶ addresses judicial performance surveys;
- ▶ amends provisions related to publication of judicial performance evaluations; and
- ▶ makes technical changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:



- 26 78A-12-201, as enacted by Laws of Utah 2008, Chapter 248
 - 27 78A-12-203, as last amended by Laws of Utah 2013, Chapter 209
 - 28 78A-12-204, as last amended by Laws of Utah 2011, Chapter 80
 - 29 78A-12-206, as last amended by Laws of Utah 2011, Chapter 80
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31 *Be it enacted by the Legislature of the state of Utah:*

32 Section 1. Section 78A-12-201 is amended to read:

33 **78A-12-201. Judicial Performance Evaluation Commission -- Creation --**
34 **Membership -- Salary -- Staff.**

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

37 (a) two members appointed by the president of the Senate, only one of whom may be a
38 member of the Utah State Bar;

39 (b) two members appointed by the speaker of the House of Representatives, only one
40 of whom may be a member of the Utah State Bar;

41 (c) four members appointed by the members of the Supreme Court, at least one of
42 whom, but not more than two of whom, may be a member of the Utah State Bar;

43 (d) four members appointed by the governor, at least one of whom, but not more than
44 two of whom, may be a member of the Utah State Bar; and

45 (e) the executive director of the Commission on Criminal and Juvenile Justice.

46 (2) (a) The president of the Senate and the speaker of the House of Representatives
47 shall confer when appointing members under Subsections (1)(a) and (b) to ensure that there is
48 at least one member from among their four appointees who is a member of the Utah State Bar.

49 (b) Each of the appointing authorities may appoint no more than half of the appointing
50 authority's members from the same political party.

51 (c) A sitting legislator or a sitting judge may not serve as a commission member.

52 (3) (a) A member appointed under Subsection (1) shall be appointed for a four-year
53 term.

54 (b) A member may serve no more than three consecutive terms.

55 (4) At the time of appointment, the terms of commission members shall be staggered
56 so that approximately half of commission members' terms expire every two years.

57 (5) When a vacancy occurs in the membership for any reason, the replacement shall be
58 appointed for the unexpired term using the same procedure used to appoint the member being
59 replaced.

60 (6) (a) Eight members of the commission constitute a quorum.

61 (b) The action of a majority of the quorum constitutes the action of the commission,
62 except that a decision of the commission to recommend that a judge be retained or not be
63 retained may not be made except by a vote of at least six members.

64 (c) If a vote on the question of whether to recommend a judge be retained or not be
65 retained ends in a tie or if a decision does not have six votes required by Subsection (6)(b), the
66 commission may make no recommendation concerning the judge's retention.

67 Section 2. Section **78A-12-203** is amended to read:

68 **78A-12-203. Judicial performance evaluations.**

69 (1) Beginning with the 2012 judicial retention elections, the commission shall prepare
70 a performance evaluation for:

71 (a) each judge in the third and fifth year of the judge's term if the judge is not a justice
72 of the Supreme Court; and

73 (b) each justice of the Supreme Court in the third, seventh, and ninth year of the
74 justice's term.

75 (2) Except as provided in Subsection (3), the performance evaluation for a judge under
76 Subsection (1) shall consider only the following information but shall give primary emphasis to
77 the information that is gathered and relates to the performance of the judge during the period
78 subsequent to the last judicial retention election of that judge or if the judge has not had a
79 judicial retention election, during the period applicable to the first judicial retention election:

80 (a) the results of the judge's most recent judicial performance survey that is conducted
81 by a third party in accordance with Section **78A-12-204**;

82 (b) information concerning the judge's compliance with minimum performance
83 standards established in accordance with Section **78A-12-205**;

84 (c) courtroom observation;

85 (d) the judge's judicial disciplinary record, if any;

86 (e) public comment solicited by the commission;

87 (f) information from an earlier judicial performance evaluation concerning the judge

88 except that the commission shall give primary emphasis to information gathered subsequent to
89 the last judicial retention election; and

90 (g) any other factor that the commission:

91 (i) considers relevant to evaluating the judge's performance for the purpose of a
92 retention election; and

93 (ii) establishes by rule.

94 (3) The commission shall make rules concerning the conduct of courtroom observation
95 under Subsection (2), which shall include the following:

96 (a) an indication of who may perform the courtroom observation;

97 (b) a determination of whether the courtroom observation shall be made in person or
98 may be made by electronic means; and

99 (c) a list of principles and standards used to evaluate the behavior observed.

100 (4) (a) As part of the evaluation conducted under this section, the commission shall
101 determine whether to recommend that the voters retain the judge.

102 (b) (i) If a judge meets the minimum performance standards established in accordance
103 with Section 78A-12-205, there is a rebuttable presumption that the commission will
104 recommend the voters retain the judge.

105 (ii) If a judge fails to meet the minimum performance standards established in
106 accordance with Section 78A-12-205, there is a rebuttable presumption that the commission
107 will recommend the voters not retain the judge.

108 (c) The commission may elect to make no recommendation on whether the voters
109 should retain a judge if the commission determines that the information concerning the judge is
110 insufficient to make a recommendation.

111 (d) (i) If the commission deviates from a presumption for or against recommending the
112 voters retain a judge or elects to make no recommendation on whether the voters should retain
113 a judge, the commission shall provide a detailed explanation of the reason for that deviation or
114 election in the commission's report under Section 78A-12-206.

115 (ii) If the commission makes no recommendation because of a tie vote, the commission
116 shall note that fact in the commission's report.

117 (5) (a) The commission shall allow a judge who is the subject of a judicial performance
118 retention evaluation and who has not passed one or more of the minimum performance

119 standards on the midterm evaluation or on the retention evaluation to appear and speak at any
120 commission meeting, except a closed meeting, during which the judge's judicial performance
121 evaluation is considered.

122 (b) The commission may invite any judge to appear before the commission to discuss
123 concerns about the judge's judicial performance.

124 (c) The commission may meet in a closed meeting to discuss a judge's judicial
125 performance evaluation by complying with Title 52, Chapter 4, Open and Public Meetings Act.

126 (d) Any record of an individual commissioner's vote on whether or not to recommend
127 that the voters retain a judge is a protected record under Title 63G, Chapter 2, Government
128 Records Access and Management Act.

129 (e) (i) A member of the commission, including a member of the Utah State Bar, may
130 not be disqualified from voting on whether to recommend that the voters retain a judge solely
131 because the member appears before the judge as an attorney, a fact witness, or an expert, so
132 long as the member is not a litigant in a case pending before the judge.

133 (ii) Notwithstanding Subsection (5)(e)(i), a member of the commission shall disclose
134 any conflicts of interest with the judge being reviewed to the other members of the commission
135 before the deliberation and vote of whether to recommend that a judge be retained or not be
136 retained.

137 (iii) Information disclosed under this Subsection (5)(e) is a protected record under Title
138 63G, Chapter 2, Government Records Access and Management Act.

139 ~~(e)~~ (f) The commission may only disclose the final commission vote on whether or
140 not to recommend that the voters retain a judge.

141 (6) (a) The commission shall compile a midterm report of its judicial performance
142 evaluation of a judge.

143 (b) The midterm report of a judicial performance evaluation shall include information
144 that the commission considers appropriate for purposes of judicial self-improvement.

145 (c) The report shall be provided to the evaluated judge ~~and~~, the presiding judge of the
146 district in which the evaluated judge serves, and the Judicial Council. If the evaluated judge is
147 the presiding judge, the midterm report shall be provided to the chair of the board of judges for
148 the court level on which the evaluated judge serves.

149 (d) (i) The commission may provide a partial midterm evaluation to a judge whose

150 appointment date precludes the collection of complete midterm evaluation data.

151 (ii) For a newly appointed judge, a midterm evaluation is considered partial when the
152 midterm evaluation is missing a complete respondent group, including attorneys, court staff,
153 court room observers, or intercept survey respondents.

154 (iii) A judge who receives partial midterm evaluation data may receive a statement in
155 acknowledgment of that fact on the judge's voter information pamphlet page.

156 (iv) On or before the beginning of the retention evaluation cycle, the commission shall
157 inform the Judicial Council of the name of any judge who receives a partial midterm
158 evaluation.

159 (7) The commission shall identify a judge whose midterm evaluation:

160 (a) fails to meet minimum performance standards in accordance with Section
161 78A-12-205 or as established by rule; or

162 (b) otherwise demonstrates to the commission that the judge's performance would be of
163 such concern if the performance occurred in a retention evaluation that the judge would be
164 invited to appear before the commission in accordance with Subsection (5)(b).

165 ~~[(7)]~~ (8) The commission may make rules in accordance with Title 63G, Chapter 3,
166 Utah Administrative Rulemaking Act, as necessary to administer the evaluation required by
167 this section.

168 Section 3. Section **78A-12-204** is amended to read:

169 **78A-12-204. Judicial performance survey.**

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

173 (2) (a) The judicial performance survey shall include as respondents a sample of each
174 of the following groups as applicable:

175 ~~[(a)]~~ (i) attorneys who have appeared before the judge as counsel;

176 ~~[(b)]~~ (ii) jurors who have served in a case before the judge; and

177 ~~[(c)]~~ (iii) court staff who have worked with the judge.

178 (b) Only a respondent under Subsection (2)(a)(i) who is admitted to practice law in the
179 state and in good standing with the Utah State Bar may evaluate a judge's legal ability under
180 Subsection (7)(a).

181 (3) The commission may include an additional classification of respondents if the
182 commission:

183 (a) considers a survey of that classification of respondents helpful to voters in
184 determining whether to vote to retain a judge; and

185 (b) establishes the additional classification of respondents by rule.

186 (4) All survey responses are anonymous, including comments included with a survey
187 response.

188 (5) If the commission provides any information to a judge or the Judicial Council, the
189 information shall be provided in such a way as to protect the confidentiality of a survey
190 respondent.

191 (6) A survey shall be provided to a potential survey respondent within 30 days of the
192 day on which the case in which the person appears in the judge's court is closed, exclusive of
193 any appeal, except for court staff and attorneys, who may be surveyed at any time during the
194 survey period.

195 (7) Survey categories shall include questions concerning a judge's:

196 (a) legal ability, including the following:

197 (i) demonstration of understanding of the substantive law and any relevant rules of
198 procedure and evidence;

199 (ii) attentiveness to factual and legal issues before the court;

200 (iii) adherence to precedent and ability to clearly explain departures from precedent;

201 (iv) grasp of the practical impact on the parties of the judge's rulings, including the
202 effect of delay and increased litigation expense;

203 (v) ability to write clear judicial opinions; and

204 (vi) ability to clearly explain the legal basis for judicial opinions;

205 (b) judicial temperament and integrity, including the following:

206 (i) demonstration of courtesy toward attorneys, court staff, and others in the judge's
207 court;

208 (ii) maintenance of decorum in the courtroom;

209 (iii) demonstration of judicial demeanor and personal attributes that promote public
210 trust and confidence in the judicial system;

211 (iv) preparedness for oral argument;

212 (v) avoidance of impropriety or the appearance of impropriety;
213 (vi) display of fairness and impartiality toward all parties; and
214 (vii) ability to clearly communicate, including the ability to explain the basis for
215 written rulings, court procedures, and decisions; and

216 (c) administrative performance, including the following:

217 (i) management of workload;

218 (ii) sharing proportionally the workload within the court or district; and

219 (iii) issuance of opinions and orders without unnecessary delay.

220 (8) If the commission determines that a certain survey question or category of
221 questions is not appropriate for a respondent group, the commission may omit that question or
222 category of questions from the survey provided to that respondent group.

223 (9) (a) The survey shall allow respondents to indicate responses in a manner
224 determined by the commission, which shall be:

225 (i) on a numerical scale from one to five, with one representing inadequate
226 performance and five representing outstanding performance; or

227 (ii) in the affirmative or negative, with an option to indicate the respondent's inability
228 to respond in the affirmative or negative.

229 (b) (i) To supplement the responses to questions on either a numerical scale or in the
230 affirmative or negative, the commission may allow respondents to provide written comments.

231 (ii) The executive director may not provide the commission a comment that would be
232 prohibited in relation to taking an employment action under federal or state law.

233 (10) The commission shall compile and make available to each judge that judge's
234 survey results with each of the judge's judicial performance evaluations.

235 (11) The commission may make rules in accordance with Title 63G, Chapter 3, Utah
236 Administrative Rulemaking Act, as necessary to administer the judicial performance survey.

237 Section 4. Section **78A-12-206** is amended to read:

238 **78A-12-206. Publication of the judicial performance evaluation -- Response by**
239 **judge.**

240 (1) (a) The commission shall compile a retention report of its judicial performance
241 evaluation of a judge.

242 (b) The report of a judicial performance evaluation nearest the judge's next scheduled

243 retention election shall be provided to the judge at least 45 days before the last day on which
244 the judge may file a declaration of the judge's candidacy in the retention election.

245 (c) A report prepared in accordance with Subsection (1)(b) and information obtained in
246 connection with the evaluation becomes a public record under Title 63G, Chapter 2,
247 Government Records Access and Management Act, on the day following the last day on which
248 the judge who is the subject of the report may file a declaration of the judge's candidacy in the
249 judge's scheduled retention election if the judge declares the judge's candidacy for the retention
250 election.

251 (d) Information collected and a report that is not public under Subsection (1)(c) is a
252 protected record under Title 63G, Chapter 2, Government Records Access and Management
253 Act.

254 (2) Within 15 days of receiving a copy of the commission's report under Subsection
255 (1)(b):

256 (a) a judge who is the subject of an unfavorable retention recommendation under this
257 section may:

258 (i) provide a written response to the commission about the report; and

259 (ii) request an interview with the commission for the purpose of addressing the report;
260 and

261 (b) a judge who is the subject of a favorable retention recommendation under this
262 section may provide a written response to the commission about the commission's report.

263 (3) (a) After receiving a response from a judge in any form allowed by Subsection (2),
264 the commission may meet and reconsider its decision to recommend the judge not be retained.

265 (b) If the commission does not change its decision to recommend the judge not be
266 retained, the judge may provide a written statement, not to exceed 100 words, that shall be
267 included in the commission's report.

268 (4) The retention report of a judicial performance evaluation shall include:

269 (a) the results of the judicial performance survey, in both raw and summary form;

270 (b) information concerning the judge's compliance with the minimum performance
271 standards, including stating how many of the minimum performance standards the judge met;

272 (c) information concerning any public discipline that a judge has received that is not
273 subject to restrictions on disclosure under Title 78A, Chapter 11, Judicial Conduct

274 Commission;

275 (d) a narrative concerning the judge's performance;

276 (e) the commission's recommendation concerning whether the judge should be
277 retained, or the statement required of the commission if it declines to make a recommendation;

278 (f) the number of votes for and against the commission's recommendation; and

279 (g) any other information the commission considers [~~appropriate~~] necessary to include
280 in the report to explain the performance standards and the recommendation made.

281 (5) (a) The commission may not include in its retention report specific information
282 concerning an earlier judicial performance evaluation.

283 (b) The commission may refer to information from an earlier judicial performance
284 evaluation concerning the judge in the commission's report only if [~~the reference is in general~~
285 ~~terms~~] necessary to explain performance in the current reporting period and giving primary
286 emphasis to the information gathered during the current reporting period.

287 (6) The retention report of the commission's judicial performance evaluation shall be
288 made publicly available on an Internet website.

289 (7) [~~The~~] In addition to publishing the report on the commission's Internet website, the
290 commission may also make the report of the judicial performance evaluation immediately
291 preceding the judge's retention election publicly available through [~~other means within~~
292 budgetary constraints] the regular process conducted by the lieutenant governor for the
293 dissemination of voter information referred to in Subsection (8).

294 (8) The commission shall provide a summary of the judicial performance evaluation
295 for each judge to the lieutenant governor for publication in the voter information pamphlet in
296 the manner required by Title 20A, Chapter 7, Issues Submitted to the Voters.

297 [~~(9) The commission may also provide any information collected during the course of a~~
298 ~~judge's judicial performance evaluation immediately preceding the judge's retention election to~~
299 ~~the public to the extent that information is not otherwise subject to restrictions on disclosure.]~~

300 [~~(10)~~] (9) The commission shall provide the Judicial Council with:

301 (a) the judicial performance survey results for each judge; and

302 (b) a copy of the retention report of each judicial performance evaluation.

303 [~~(11)~~] (10) The Judicial Council shall provide information obtained concerning a judge
304 under Subsection [~~(10)~~] (9) to the subject judge's presiding judge, if any.