

SENATE BILL NO. 45

INTRODUCED BY T. MCGILLVRAY

BY REQUEST OF THE SENATE SELECT COMMITTEE ON JUDICIAL OVERSIGHT AND REFORM

A BILL FOR AN ACT ENTITLED: "ESTABLISHING A MONTANA JUDICIAL PERFORMANCE EVALUATION SYSTEM; CREATING A JUDICIAL PERFORMANCE EVALUATION COMMISSION AND PROVIDING FOR DUTIES AND MEMBERS; ALLOCATING THE COMMISSION TO THE DEPARTMENT OF JUSTICE FOR ADMINISTRATIVE PURPOSES; REQUIRING THE COMMISSION TO PERFORM EVALUATIONS FOR DISTRICT COURT JUDGES AND SUPREME COURT JUSTICES; REQUIRING THE COMMISSION TO CONTRACT FOR A SURVEY; REQUIRING THE SECRETARY OF STATE TO PUBLISH A JUDICIAL EVALUATION INFORMATION PAMPHLET; PROVIDING THE COMMISSION AND THE SECRETARY OF STATE RULEMAKING AUTHORITY; PROVIDING RULEMAKING AUTHORITY; AND AMENDING SECTIONS 3-1-1124, 13-13-214, 13-27-401, AND 13-27-410, MCA."

WHEREAS, the Montana Legislature finds that it is necessary to provide a comprehensive evaluation system of judicial performance to provide Montana citizens with fair, responsible, and useful information about the judicial performance of supreme court justices and district court judges; and

WHEREAS, providing information to the people of Montana regarding the performance of judges and justices is a matter of public interest and statewide concern; and

WHEREAS, the information provided by a comprehensive evaluation system of judicial performance will provide judges and justices with useful information about their own performances; and

WHEREAS, the Montana Legislature has decided to establish an independent office on judicial performance evaluation with authority to implement an evaluation process and conduct and publicize evaluations.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Judicial performance evaluation commission -- appointment --

members -- rulemaking. (1) There is a judicial performance evaluation commission. The commission consists of 11 members as follows:

(a) three members appointed by the president of the senate, including one retired district court judge but no other member currently or formerly licensed to practice law in Montana;

(b) three members appointed by the speaker of the house of representatives, including only one member currently or formerly licensed to practice law in Montana;

(c) three members appointed by the governor, including only one member currently or formerly licensed to practice law in Montana; and

(d) two members appointed by the members of the supreme court, including only one member currently or formerly licensed to practice law in Montana.

(2) A person currently serving as a legislator or a judge may not be appointed to the commission.

(3) (a) A commission member appointed under subsection (1) serves a 4-year term.

(b) A member may not serve more than three consecutive terms.

(c) When a vacancy arises in the commission, the replacement must be appointed for the unexpired term by the same appointing authority that appointed the member whose departure created the vacancy.

(4) The commission shall elect a presiding officer from among its members.

(5) The commission shall provide recommendations to the legislature regarding the commission's budget and if the judicial performance evaluation program should be expanded to other courts.

(6) The commission may adopt rules to implement the provisions of [sections 4 through 8].

NEW SECTION. Section 2. Judicial performance evaluation commission -- salary and expenses

-- staff -- administrative attachment. (1) A judicial performance evaluation commission member may not receive compensation or benefits for the member's service. A commission member may receive per diem and travel expenses as provided in Title 2, chapter 18, part 5.

(2) The commission shall employ an executive director and may employ additional staff as necessary within budgetary constraints.

(3) The commission is allocated to the department of justice for administrative purposes only as

prescribed in 2-15-121, except that the provisions of 2-15-121(2)(d) do not apply.

NEW SECTION. Section 3. Definitions. As used in [sections 3 through 8], unless the context requires otherwise, the following definitions apply:

(1) "Bias" means prejudice ~~for or against a party or issue arising for reasons other than the facts of a case or the law governing a case. Bias in a judge may be inferred from comments, facial expressions, prior activity, distortion of the law to obtain a particular result, or a conflict of interest displayed by using epithets, slurs, demeaning nicknames, or threatening, intimidating, or hostile acts or body language that creates an appearance of bias or prejudice.~~

(2) "Commission" means the judicial performance evaluation commission established in [section 1].

~~(3) A "conflict of interest" arises when a judge has a financial, political, or other interest that arguably creates bias.~~

~~(4)~~(3) "Court administrator" means the position established in 3-1-701.

~~(5)~~(4) "Impartiality" means the ~~practice of making judicial decisions in accordance with the law, fairly, and without evidence of bias~~ absence of prejudice in favor of or against particular parties or classes of parties as well as the maintenance of an open mind when considering issues that may come before a judge.

(6) "Judge" means a district court judge or a supreme court justice.

(7) "Open-mindedness" means a willingness to:

- (a) consider opposing views and alternative solutions permitted by law for resolving cases;
- (b) remain open to persuasion despite a judge's existing views;
- (c) concede that there is an appearance of one's own bias; and
- (d) treat each case in accordance with the facts presented and the governing law.

NEW SECTION. Section 4. Judicial performance evaluations. (1) Beginning in 2026, the commission shall prepare:

- (a) a midterm performance evaluation for each district court judge during the third year of the judge's term;

(b) a preelection performance evaluation for each district court judge during the fifth year of the judge's term;

(c) a midterm performance evaluation for each justice of the Montana supreme court during the third year of the justice's term;

(d) a preelection performance evaluation for each supreme court justice during the seventh year of the justice's term; and

(e) a preelection performance evaluation for each judge appointed to a vacancy during the year prior to the last year of the judge's current term.

(2) The performance evaluation for a judge under subsection (1) may consider only the information listed in subsections (3) and (4). The performance evaluation must give primary emphasis to information gathered since the judge's election or appointment to the judge's current term in office.

(3) The information a performance evaluation must consider is as follows:

(a) the results of the judge's most recent judicial performance survey conducted in accordance with [section 5];

(b) information acquired by observation of the judge's conduct in the courtroom;

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

(d) public comment directed toward the commission whether solicited or unsolicited;

(e) information from any earlier judicial performance evaluation of the judge, except that the commission shall rely primarily on information gathered subsequent to the last judicial election; and

(f) any other factor the commission considers relevant to evaluating the judge's performance and previously authorized as a permissible factor by rule.

(4) The commission shall make rules governing the conduct of courtroom observation. The rules must specify:

(a) who may perform the courtroom observation;

(b) whether the courtroom observation must be performed in person or may be performed by electronic means; and

(c) the standards used to evaluate the behavior observed.

(5) The commission may invite a judge to appear before the commission to discuss the judge's

1 judicial performance. Information disclosed during this meeting is confidential.

2 (6) The commission may meet in a closed meeting to discuss a judge's judicial performance
3 evaluation by complying with Title 2, chapter 3, part 2.

4 (7) A judge may provide a written statement, not to exceed 200 words, that must be included in the
5 judge's performance evaluation report.

6
7 **NEW SECTION. Section 5. Judicial performance survey.** (1) A third party under contract with the
8 commission shall conduct a judicial performance survey. The third party may not be affiliated with a legal firm or
9 a legal professional.

10 (2) (a) Each judicial performance survey must survey respondents in each of the following
11 classifications:

12 (i) attorneys who have appeared before the judge as counsel either pro hac vice or while licensed
13 to practice law in Montana;

14 (ii) jurors who have served in one or more cases before the judge; and

15 (iii) court staff who have worked with the judge.

16 (b) Only a respondent under subsection (2)(a)(i) who is admitted to practice law in the state and in
17 good standing with the state bar of Montana may evaluate a judge's legal ability under subsection (7)(a).

18 (3) The commission may establish by rule additional classifications that the commission considers
19 helpful to voters.

20 (4) All survey responses are confidential, including added comments.

21 (5) If the commission provides information to a judge or the court administrator, it must do so in a
22 manner that protects the anonymity of survey respondents.

23 (6) A survey must be provided to a juror respondent no more than 30 days after the completion of
24 the case in which the juror served.

25 (7) Surveys must include questions inquiring into the judge's:

26 (a) legal ability, including the following:

27 (i) understanding of the substantive law and rules of procedure and evidence;

28 (ii) attentiveness to factual and legal issues;

- 1 (iii) adherence to precedent and ability to justify clearly any departures from precedent;
- 2 (iv) appreciation of the practical impact on the parties of the judge's rulings, including rulings that
- 3 cause delay or increased litigation expense;
- 4 (v) clarity in writing; and
- 5 (vi) clarity in explaining the bases for judicial opinions;
- 6 (b) judicial conduct, including the following:
- 7 (i) courtesy toward attorneys, court staff, witnesses, and others interacting with the judge's court;
- 8 (ii) appropriate courtroom decorum;
- 9 (iii) demeanor and personal attributes that promote public trust and confidence in the judicial
- 10 system;
- 11 (iv) preparedness;
- 12 (v) avoidance of impropriety or the appearance of impropriety;
- 13 (vi) avoidance of bias and conflicts of interest;
- 14 (vii) fairness, open-mindedness, and impartiality;
- 15 (viii) ability to communicate clearly, including the ability to explain the basis for written rulings, court
- 16 procedures, and decisions; and
- 17 (ix) compliance with 2-2-121 and 2-2-122 and the applicable rules of judicial conduct;
- 18 (c) administrative performance, including the following:
- 19 (i) workload management;
- 20 (ii) sharing proportionally the workload within the court or district; and
- 21 (iii) issuance of opinions and orders without unnecessary delay; and
- 22 (d) fidelity to:
- 23 (i) the Montana constitution, including Article III, section 1; and
- 24 (ii) 1-2-101 and 1-2-102.
- 25 (8) If the commission determines that a survey question is not appropriate for a respondent
- 26 category, the commission may omit the question from the survey provided to that respondent group.
- 27 (9) (a) The survey must allow respondents to indicate responses either on a numerical scale from
- 28 one to five or in the affirmative or negative, with an option for an inability to respond in the affirmative or

1 negative.

2 (b) The commission may allow respondents to provide written comments other than those that
3 could, if used in a hiring process, trigger a violation of federal or state employment law.

4 (10) The commission shall compile and make available to each judge that judge's survey results.
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6 **NEW SECTION. Section 6. Midterm reports.** (1) The commission shall compile a midterm report for
7 each judge relying on that judge's midterm evaluation. The midterm report may also be based on further
8 information the commission considers useful for purposes of judicial evaluation or self-improvement.

9 (2) The commission shall provide the midterm report to the evaluated judge, the Montana supreme
10 court, and the court administrator.

11 (3) (a) The commission may publish a partial midterm report for a judge whose appointment date
12 precludes the collection of complete midterm evaluation data. For a newly appointed judge, a midterm report is
13 considered partial when the midterm evaluation is missing a respondent group.

14 (b) The commission's webpage must identify each judge receiving a partial midterm report.

15 (c) Prior to a partial midterm report, the commission shall inform the court administrator of judges
16 who will receive a partial report.
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18 **NEW SECTION. Section 7. Preelection reports.** (1) The commission shall compile a preelection
19 report for each judge relying on that judge's preelection evaluation. The preelection report may also be based
20 on further information the commission considers useful for purposes of judicial evaluation or self-improvement.

21 (2) The commission shall provide the preelection report to the evaluated judge, the Montana
22 supreme court, and the court administrator.

23 (3) (a) The commission may publish a partial preelection report for a judge whose appointment
24 date precludes the collection of complete preelection evaluation data. For a newly appointed judge, a
25 preelection report is considered partial when the preelection evaluation is missing a respondent group.

26 (b) The commission's webpage must identify each judge receiving a partial preelection report.

27 (4) Prior to a partial preelection report, the commission shall inform the court administrator of the
28 judges who will receive partial reports.

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2 **NEW SECTION. Section 8. Publication of judicial performance reports.** (1) (a) The commission
3 shall provide each judge with the judge's reports in a timely manner. If a report is based on a preelection
4 evaluation, it must be provided at least 45 days before the last day on which the judge may file a declaration of
5 the judge's candidacy in the next election.

6 (b) Each report, together with the information collected for the report, must remain confidential
7 unless the judge who is the subject of the report files a declaration of candidacy in the ensuing election. In that
8 event, the report and the information collected for it become public record on the day following the last day on
9 which the judge may file a declaration of candidacy.

10 (2) The report must include:

11 (a) a summary of the results of the judicial performance survey and tabulations of the responses to
12 each question;

13 (b) information concerning any public discipline that a judge has received and is not subject to
14 restrictions on disclosure under Title 3, chapter 1, part 11;

15 (c) a narrative describing the judge's performance with, at the option of the commission, an overall
16 score on a numerical scale from one to five;

17 (d) at the option of the judge evaluated, a written statement not to exceed 200 words submitted by
18 the judge within 15 days of receiving a copy of the report; and

19 (e) any other information the commission considers necessary to include in the report, including
20 reliably reported improprieties in the judge's conduct of the judge's office.

21 (3) The report may refer to information from a judge's earlier judicial performance report only if
22 necessary to provide context for the current reporting period.

23 (4) The commission shall make each report publicly available on the internet and may make
24 reports publicly available by other means consistent with budgetary constraints.

25 (5) The commission shall provide a summary of the preelection report for each judge running at
26 the ensuing election to the secretary of state for publication in a judicial evaluation information pamphlet as
27 provided in [section 10].

28 (6) The commission shall provide the court administrator with each report that becomes public

1 record.

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3 **Section 9.** Section 3-1-1124, MCA, is amended to read:

4 **"3-1-1124. Disclosure for judicial selection -- appointment or assignment -- judicial**

5 **performance evaluation.** (1) If in connection with the selection or appointment of a judge, any state or federal
6 agency seeks information or written materials from the commission concerning that judge, information must be
7 divulged in accordance with procedures prescribed by the commission, including reasonable notice to the judge
8 affected.

9 (2) If in connection with the assignment of a retired judge to judicial duties, any appropriate
10 authority seeks information or written materials from the commission about that judge, information must be
11 divulged in accordance with procedures prescribed by the commission, including reasonable notice to the judge
12 affected.

13 (3) If in connection to the conduct of a judicial performance evaluation required by [section 4], the
14 judicial performance evaluation commission established in [section 1] seeks information or written materials
15 from the judicial standards commission about that judge, information must be divulged in accordance with the
16 procedures described by the judicial standards commission, including reasonable notice to the judge affected."

17

18 **Section 10.** Section 13-13-214, MCA, is amended to read:

19 **"13-13-214. Mailing absentee ballot to elector -- delivery to person other than elector.** (1) (a)

20 Except as provided in 13-13-213 and in subsection (1)(c) of this section, the election administrator shall mail,
21 postage prepaid, to each legally registered elector and provisionally registered elector from whom the election
22 administrator has received a valid absentee ballot application under 13-13-211 and 13-13-212 whatever official
23 ballots are necessary in a manner that conforms to postal regulations to require the return rather than
24 forwarding of ballots.

25 (b) The election administrator shall mail the ballots in a manner that conforms to the deadlines
26 established for ballot availability in 13-13-205.

27 (c) The election administrator may deliver a ballot in person to an individual other than the elector
28 if:

(i) the elector has designated the individual, either by a signed letter or by making the designation on the application form in a manner prescribed by the secretary of state or pursuant to 13-1-116;

(ii) the individual taking delivery of the ballot on behalf of the elector verifies, by signature, receipt of the ballot;

(iii) the election administrator believes that the individual receiving the ballot is the designated person; and

(iv) the designated person has not previously picked up ballots for four other electors.

(2) The election administrator shall enclose with the ballots:

(a) a secrecy envelope, free of any marks that would identify the voter; and

(b) a signature envelope for the return of the ballot. The signature envelope must be self-addressed by the election administrator and an affirmation in the form prescribed by the secretary of state must be printed on the back of the signature envelope.

(3) The election administrator shall ensure that the ballots provided to an absentee elector are marked as provided in 13-13-116 and shall remove the stubs from the ballots, keeping the stubs in numerical order with the application for absentee ballots, if applicable, or in a precinct envelope or container for that purpose.

(4) Instructions for voting must be enclosed with the ballots. Instructions for primary elections must include disposal instructions for unvoted ballots. The instructions must include information concerning the type or types of writing instruments that may be used to mark the absentee ballot. The instructions must include information regarding use of the secrecy envelope and use of the signature envelope. The election administrator shall include a:

(a) voter information pamphlet with the instructions if:

~~(a)~~ a statewide ballot issue appears on the ballot mailed to the elector; and

~~(b)~~ the elector requests a voter information pamphlet; and

(b) judicial evaluation information pamphlet with the instructions if an incumbent judge, as defined in [section 3], running in a judicial election or retention election appears on the ballot mailed to the elector and the elector requests a judicial evaluation information pamphlet."

Section 11. Section 13-27-401, MCA, is amended to read:

"13-27-401. Voter information pamphlet pamphlets -- rulemaking. (1) The secretary of state shall prepare for printing a voter information pamphlet containing information relevant to the election, including but not limited to the following information for each statewide ballot issue to be voted on at an election, as applicable:

- (a) ballot title, fiscal statement if applicable, and complete text of the issue;
- (b) the form in which the issue will appear on the ballot;
- (c) arguments advocating approval and rejection of the issue; and
- (d) rebuttal arguments.

(2) The secretary of state shall prepare for printing a judicial evaluation information pamphlet containing for each incumbent judge running in a judicial election or retention election a summary of the judge's most recent judicial performance evaluation. The pamphlet must also contain the commission's internet address.

(2)(3) ~~The pamphlet~~ pamphlets must also contain a notice advising the recipient as to where additional copies of the ~~pamphlet~~ pamphlets may be obtained.

(3)(4) Whenever more than one statewide ballot issue is to be voted on at a single election, the secretary of state may publish a single pamphlet described in subsection (1) for all of the statewide ballot issues. The secretary of state may arrange the information in the order that seems most appropriate, but the information for all statewide ballot issues in the pamphlet must be presented in the same order.

(4)(5) The secretary of state may prescribe by rule the format and manner of submission of the arguments concerning the statewide ballot issue and judicial performance evaluations.

(6) For the purposes of this section, "judge" has the meaning provided in [section 3]."

Section 12. Section 13-27-410, MCA, is amended to read:

"13-27-410. Printing and distribution of voter information pamphlet pamphlets. (1) At least 110 days before the election, the secretary of state shall arrange with the department of administration by requisition for the printing and delivery of a voter information pamphlet for all statewide ballot issues and a judicial evaluation information pamphlet. The requisition must include a delivery list providing for shipment of

1 the required number of pamphlets to each county and to the secretary of state.

2 (2) The secretary of state shall estimate the number of copies necessary to furnish one copy to
3 each voter in each county, except that two or more voters with the same mailing address and the same last
4 name may be counted as one voter. The secretary of state shall provide for an extra supply of the pamphlets in
5 determining the number of voter pamphlets to be ordered in the requisition.

6 (3) The department of administration shall call for bids and contract with the lowest bidder for the
7 printing and delivery of the voter information pamphlet and judicial evaluation information pamphlet. The
8 contract must require completion of printing and shipment, as specified on the delivery list, of the voter
9 information pamphlets and judicial evaluation information pamphlets by not later than 45 days before the
10 election at which the statewide ballot issues and judges will be voted on by the people.

11 (4) The county official responsible for voter registration in each county shall mail one copy of the
12 voter information pamphlet and one copy of the judicial evaluation information pamphlet to each registered
13 voter in the county who is on the active voter list, except that two or more voters with the same mailing address
14 and the same last name may be counted as one voter. The mailing label may include an address line that
15 addresses the voter or the current resident. The mailing must take place no later than 30 days before the
16 election.

17 (5) Ten copies of the voter information pamphlet and ten copies of the judicial evaluation
18 information pamphlet must be available at each precinct for use by any voter wishing to read the explanatory
19 information and complete text before voting on the statewide ballot issues or judges."

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21 NEW SECTION. Section 13. Codification instruction. (1) [Sections 1 and 2] are intended to be
22 codified as an integral part of Title 2, chapter 15, part 20, and the provisions of Title 2, chapter 15, part 20,
23 apply to [sections 1 and 2].

24 (2) [Sections 3 through 8] are intended to be codified as a new part in Title 3, chapter 1, and the
25 provisions of Title 3, chapter 1, apply to [sections 3 through 8].

26 - END -