REPORT OF
THE JUDICIAL SELECTION, RETENTION
AND ACCOUNTABILITY STANDING COMMITTEE
OF THE
AMERICAN JUDICATURE SOCIETY – HAWAII CHAPTER:

THE ROLE OF THE HAWAII STATE BAR ASSOCIATION IN THE
JUDICIAL SELECTION AND RETENTION PROCESS

AND

PROPOSED CHANGES TO JUDICIAL SELECTION COMMISSION RULES
TABLE OF CONTENTS

Introduction ...................................................................................................................... 1

I. The Role of the Hawaii State Bar Association
   A. Synopsis of Recommendations ........................................................................... 1
   B. Background ........................................................................................................... 2
      1. The Judicial Selection Commission ................................................................. 2
      2. HSBA Board Practices ...................................................................................... 2
   C. Prior Recommendations and Criticisms .............................................................. 3
      1. Comments by AJS and Chief Justice Moon ................................................. 3
      2. 2010 Press Criticism ....................................................................................... 5
   D. Additional Information Concerning HSBA Rating Policies .............................. 7
      1. HSBA’s Policies for Evaluation of Judicial Nominees ................................. 7
      2. HSBA’s Policies Regarding Evaluations for Judicial Retention ............... 9
   E. AJS Committee Discussion ................................................................................... 11
   F. Conclusions and Recommendations ................................................................. 13

II. Proposed Changes to JSC Rules
   A. Synopsis of Conclusions ................................................................................... 16
   B. Conflict of Interest/Disqualification Matters .................................................... 16
   C. Fix the “Rule of Five” ....................................................................................... 20

Addendum: Recent HSBA Changes ........................................................................... 24

Appendix I: Means to Address HSBA Bylaw Concerns

Appendix II: Sample Amendments to JSC Rules
REPORT OF THE JUDICIAL SELECTION, RETENTION
AND ACCOUNTABILITY STANDING COMMITTEE OF THE
AMERICAN JUDICATURE SOCIETY - HAWAII CHAPTER

In early 2009, the Hawaii Chapter of the American Judicature Society ("AJS") announced the formation of the Judicial Selection, Retention and Accountability Standing Committee ("the Committee"). The Committee’s objectives were:

Reviewing, monitoring, and, if appropriate, making recommendations on matters relating to issues relating to merit selection generally, and particularly the process and procedures affecting the selection and retention of Hawaii judges, both state and federal. These matters include, but are not limited to, the Judicial Selection Commission, its Constitutional mandate, the Rules of the JSC and its work. The Committee will review alternatives to addressing the conclusions and recommendations of Chief Justice Moon in his annual report to the Chapter relating to the role of the HSBA as well as other organizations in the selection and retention process.

The members of the Committee are: Hawaii Circuit Judge (retired) Victoria S. Marks, Chair; William Atwater, Co-Chair; Federal District Judge Leslie Kobayashi; Colin Miwa; Federal District Judge Susan Oki Mollway; Frederick Rohlfing; and Gerald Sekiya.

The work of the Committee spanned more than a year. During that time the Committee met with a number of resource people, including: members of the Judicial Selection Commission -- Sheri Sakamoto, Susan Ichinose, Lloyd Yonenaka, James Bickerton, Shelton Jim On, Albert Kanno, Ralph Lafortaine and Frederick Okumura; President of the Hawaii State Bar Association ("HSBA"), Hugh Jones, Executive Director of the HSBA, Lyn Flanigan, and a member from HSBA’s Board of Directors, Steven Chow; Momi Cazimero, former Judicial Selection Commission member; State Senate President Colleen Hanabusa; State Senator Brian Taniguchi; and Malia Reddick, Ph.D., Director of Research & Programs, American Judicature Society. Various resource materials were also reviewed.

The Committee focused its attention on two main areas, the first being what is the most appropriate role of the HSBA in the judicial selection and retention process, and the second being what changes, if any, should be made to Judicial Selection Commission rules or processes to enhance the public’s trust and confidence in its actions.

I. THE ROLE OF THE HAWAII STATE BAR ASSOCIATION

A. Synopsis of Recommendations

The Committee reiterates prior recommendations of an AJS committee and of former Chief Justice Moon that the HSBA board terminate its practice of rating state
judicial appointees and instead submit the information it gathers, without judgment, to the requisite public officials or (in the case of retention) the Judicial Selection Commission.

The Committee’s complete recommendations are set forth in Part I. F. Those recommendations include comments about steps that should be taken if the HSBA board continues its current rating practices.

B. Background

1. The Judicial Selection Commission

Sections 3 and 4, Article VI, of the Hawaii Constitution establish the Judicial Selection Commission (“JSC”) and define its role in the appointment of judges. Section 3 requires JSC to present a list of nominees to the governor (for appointments to state circuit and appellate courts), or to the chief justice (for district courts). The governor or chief justice then appoints one of the nominees, subject to consent of the senate. If the senate rejects an appointment, the appointing authority makes another appointment subject to senate consent. Section 3 also requires that the JSC determine whether judges will be retained following completion of their initial terms.

Section 4 concerns the appointment and powers of the JSC. The JSC has nine members, and is required to operate in a wholly nonpartisan manner. Seven members are appointed by the governor, the senate president, the speaker of the house and the chief justice. Members of the bar elect two of their members in an election conducted by the Hawaii Supreme Court or its delegate. The Constitution states that no more than four members of the nine-member commission shall be licensed attorneys. (In other words, there is a constitutional requirement that non-lawyers constitute a majority of the JSC.) The Constitution also states that the JSC’s deliberations must be confidential.

Until 2003, the general practice of the appointing authorities was not to disclose names of any nominees except for an appointee. However, in March 2003, Chief Justice Moon and Governor Linda Lingle began disclosing the names of all nominees on the lists submitted to them by the JSC. Their news releases invited the public to comment about the individuals on the list of nominees before their selections were made. Once the governor or chief justice announces selections, the public can submit oral or written testimony to the senate committee that conducts confirmation hearings.

2. HSBA Board Practices


For many years the HSBA Board of Directors has submitted ratings and testimony to the Senate concerning individuals appointed to fill state judicial vacancies. Those recommendations have been framed as ratings that characterize the appointee as “qualified,” “not qualified” or (until 2008) “highly qualified.” These rating labels are the
same as those used by the American Bar Association’s Standing Committee on the 
Federal Judiciary, but the ABA follows different procedures.¹

Under the HSBA’s current procedures, the HSBA invites its members to submit 
comments about appointees. HSBA staff and a board subcommittee provide summaries 
of those comments to the HSBA board after redacting identifying information. The 
overall comment process is designed to preserve confidentiality and the identities of those 
making comments. Proponents of this practice state it prevents retaliation by appointees. 
They also state that these procedures are similar to practices of the JSC, which does not 
disclose the comments it receives. (Of course, the HSBA board is not subject to a 
constitutional provision requiring it to keep its deliberations confidential.)

The board also invites appointees to appear for interviews with the board. A 
board member provides them with oral summaries of adverse comments, but not the 
summaries or redacted comments provided to the board. The board then discusses each 
candidate and (under current practice) conducts a vote by secret ballot that results in a 
rating. Under current practice the board informs the senate of its rating, but does not 
provide reasons or any information obtained during its review. Nor does it provide any 
information concerning the number or proportion of votes cast by board members for and 
against the rating.

The HSBA board also solicits comments from bar members concerning judges 
who are participating in the JSC retention process, and board representatives may appear 
before the JSC to discuss the results.

C. Prior Recommendations and Criticisms

1. Comments by AJS and Chief Justice Moon

There have been longstanding concerns about HSBA judicial rating practices. 
Those concerns led to a prior report by an AJS special committee, and to extended 
remarks in two speeches by former Chief Justice Ronald Moon.

The November 2005 Report of the AJS Special Committee on the Judicial 
Selection System stated:

[T]he Committee recommends that the Hawaii State Bar 
Association cease its current practice of rating nominees (e.g. 
highly qualified; qualified; not qualified.)

* * *

The Hawaii State Bar Association is encouraged to submit all of 
the information it receives from its members regarding judicial

¹ See text accompanying notes 8 and 10. The HSBA also interviews and evaluates potential federal 
judges. These procedures are not discussed in this report, because federal appointments do not involve the 
JSC.
retention to the Judicial Selection Commission (e.g. the evaluations themselves, together with the analysis of the evaluations).

The Hawaii State Bar Association is encouraged to submit all of the information it receives from its members regarding nominees to the Appointing Authorities (e.g. the comments in response to an e-mail solicitation together with the context of the solicitation).

On December 4, 2008 Chief Justice Ronald Moon spoke to the Hawaii Chapter of the American Judicature Society. He said:

[B]y labeling an appointed candidate as “highly qualified,” “qualified,” or “not qualified,” the HSBA board essentially elevates itself above the commission, which – as pointed out by the special committee – has a constitutional duty to nominate only qualified candidates. The bar’s assessment of a candidate as “not qualified” is a direct affront to the integrity of the JSC.

* * *

Given the constitutional mandate to nominate only qualified candidates for judgeships the HSBA Board’s rating simply amounts to “second-guessing” the JSC. Doing so, not only serves to undermine the process, but – as pointed out by the special committee – is potentially harmful to the public’s confidence in that process.

The Chief Justice urged the AJS to:

[C]onvince the HSBA Board to abandon its rating of judicial appointees and encourage it, instead, -- as did the special committee’s majority -- to submit the information it gathers from its members (without judgment) to the Appointing Authorities (in the case of judicial vacancies) and to the JSC (in the case of judicial retentions).

These recommendations and remarks reflect several concerns. One major concern is that when the HSBA board publicly labels a nominee as “not qualified,” that rating and description undercut the public body that is charged by the Hawaii Constitution with evaluating judicial candidates and with nominating qualified individuals for selection by the appointing authority. In addition, there has been longstanding concern that relying on confidential information may be unfair to nominees, and permit unfounded or irresponsible statements to impact public decisions. The board’s recent rating procedures raise additional concerns because the board currently does not provide information about the reasons for its recommendations or even how the board voted.
2. 2010 Press Criticism

In a speech at the December 3, 2009 annual meeting of the Hawaii Chapter of AJS, Chief Justice Moon predicted public criticism of the HSBA’s rating process. He said:

As I indicated in my remarks, some government officials have already questioned the HSBA’s rating process, and I submit, it is only a matter of time before the public will do the same. My fear is that when the public throws up its hands and says enough is enough, our merit-based selection system will become a thing of the past.

In early August 2010, the Senate Committee on Judiciary and Government Operations (the “Senate Judiciary Committee”) commenced confirmation hearings for a total of eight appointees, all of whom had been selected by the governor or chief justice from alphabetized lists provided by the JSC.

Shortly before hearings began, the HSBA board notified the Senate Judiciary Committee that six of the appointees were “qualified” but that two of them (including a nominee for chief justice) were “not qualified.”

The Board’s written statements did not explain the basis for the non-qualified ratings. When the HSBA board president appeared before the Senate Judiciary Committee, he declined to give any reasons for the conclusions, or to discuss any information the board had received. The HSBA did not reveal the number of votes cast for or against the “not qualified” ratings, and did not reveal how any of the board members had voted. The bar’s president also said that the board had voted by secret ballot, so he did not know what had caused individual board members to vote as they did. The bar president attributed these procedures to a privacy rationale and an effort to avoid retaliation.

It is unclear how much influence the HSBA board’s “not qualified” ratings had on the Senate -- one judge was confirmed, and the other was not. However, throughout the legislative deliberations, the HSBA board was heavily criticized in the press for failure to explain its adverse ratings.²

---

² For example, the HSBA board chose not to explain why its conclusions were different from those of a previous HSBA board, and from the views of some former HSBA presidents, who presumably understood the bar’s rating criteria. During the 2010 confirmation hearing, one of the nominees designated “not qualified” received endorsements from seven former HSBA presidents [Luna, McCorriston, Broder, Carson, Kavachika, Lee and Sia]. In January 2008, the same nominee had received a “qualified” HSBA rating. In 2010, two former board members submitted written testimony stating they participated in the HSBA board’s 2008 confidential evaluation that concluded the nominee was “qualified,” and they reiterated that view.
The criticism included an August 6 column by Star-Advertiser political columnist Richard Borecca, who discussed Chief Justice Moon’s 2008 speech. Borecca said:

... [N]ow the state Senate is faced with voting on the confirmation of two judges who the bar association said were “not qualified.” Why are they not qualified? The bar association won’t say. Who said they were not qualified? The bar won’t say. How many lawyers said the two were unqualified? Ditto.

* * *

If one wanted to weaken public confidence, a few hours of watching the state Senate go about its business should be enough for anyone to question the entire democratic process.

The bar association worried, according to an article in last year’s bar journal, that comments had to be secret to “avoid real or perceived retaliation by the appointee.”

The bar association does have a face-to-face interview with the judicial candidates and it is a wonder that the attorneys don’t at least wear masks and disguise their voices to keep the potential judges from knowing who are being mean to them.

* * *

Moon told lawyers back in 2008 to “convince the HSBA (bar association) to abandon its rating of judicial appointees and encourage its . . .” members to send information it gathers to the governor.”

Good advice. Even though Moon will retire next month, the bar should still consider this proposal.3

During the first half of August, numerous other news stories critical of the HSBA board process were published, posted on line or broadcast.4

---

3 “Moon was right about the bar’s role in picking judges,” Honolulu Star-Advertiser, August 6, 2010.
4 See, for example: “Hawaii State Bar: Leonard, To’otoo’o unqualified,” Hawaii News Now – KGMB and KHNL, August 2, 2010 (“The Hawaii State Bar Association (HSBA) is trying to block two judges with one word - ‘unqualified’ . . . . But the group won’t explain why.”); “Hawaii Bar Association’s Secrecy Under Fire,” Honolulu Civil Beat, August 4, 2010 (“Katherine Leonard is the one who’s seeking to become the state’s top judge, but on Tuesday it seemed that the Hawaii State Bar Association was under as much scrutiny as the nominee. That the association’s 20-member board found Leonard ‘unqualified’ without providing any explanation has raised as many questions as her nomination itself. Its process is now on trial. Why so last-minute? Why no vote results? And why no rationale?”); “Confirm Leonard nominations,” Honolulu Star-Advertiser, August 5, 2010 (“The Bar Association has refused to give its reason for disagreeing with the [judicial selection] commission’s evaluation . . . except to say that its 20-member board of directors has a list of national guidelines for judicial qualifications. Hugh Jones, president of the lawyers club, said the votes on ratings of candidates are secret, as are the reasons – unlike the
In response, the bar’s president published an August 15 statement to members that said: “Although the board welcomes constructive suggestions about existing policies, the negative media coverage was unwarranted.”

D. Additional Information Concerning HSBA Rating Policies

This section sets forth more detailed information concerning HSBA rating policies.

1. HSBA’s Policies for Evaluation of Judicial Nominees

Article IX of HSBA’s Constitution and Bylaws provides:

**Judicial and Executive Appointments.** The Board of Directors may recommend persons for appointments to federal and state judicial office in Hawaii or the positions of Hawaii State Attorney General and Hawaii U.S. Attorney. The Board shall evaluate the qualifications of persons appointed to judicial office in Hawaii or the positions of Hawaii State Attorney General or Hawaii U.S. Attorney, and inform the confirming authority of such recommendations and evaluations.

**COMMITTEE COMMENT:** Reference to cooperation with the appointing authority and the ABA was deleted in view of the present role of the Judicial Selection Commission on the state level and the historical lack of involvement of the ABA.

The Board shall take all such steps as it deems advisable to ascertain the qualifications of persons who are nominated for judicial appointment. The Board may arrange for the presentation of evidence and witnesses before any confirming authority considering an appointment if it deems such course to be in the public interest.

openness in evaluation of nominees for the federal bench."); “State bar needs to explain basis for judicial evaluations,” Honolulu Star-Advertiser, August 8, 2010 (“In the Hawaii evaluation process, the public is not given the reason for a “not qualified” evaluation at any point. That does not serve the public interest, particularly when it comes to the community-crucial post of chief justice. . . . The result was a Senate debate based on conjecture and innuendo . . . . The Hawaii State Bar Association needs to follow the ABA practice of making public the reasons for “not qualified” evaluations of judicial nominees once confirmation hearings begin.”); “New pick, same judicial evaluation,” Honolulu Star-Advertiser, August 15, 2010 (“It’s usually when the HSBA rates a candidate ‘unqualified’ that its process comes under fire, and with the stakes at the highest with the chief justice nominee, the lawyers’ association came under unprecedented criticism, including from past bar presidents who supported [the] nomination. . . . The focus was on the secrecy surrounding the HSBA’s evaluation and its policy of not disclosing the reasons for the vote by the 20-member board of directors.”).
HSBA’s procedure for soliciting comments regarding judicial nominees is found in the HSBA’s Board Policy Manual at Section 1.8.B.1. The procedure is that the HSBA president solicits comments through a mass e-mail to HSBA members. Members can also submit comments by e-mail correspondence, telephone or facsimile. All identifying information is removed electronically by the HSBA president, an administrative aide or board member, and then sent to a three-member subcommittee made up of members appointed by the HSBA president. This sub-committee is to act as a neutral fact finding body. It reviews the comments received and then presents an oral or written summary to the HSBA board, along with the redacted comments, prior to the judicial nominee’s interview with the HSBA board. The nominee is advised of any negative comments and allowed to respond during the interview. However, the nominee is not permitted to be provided with a copy of any comments received by the HSBA board. The nominee is interviewed by the entire HSBA board, and in this respect the HSBA procedure provides a broader forum than the ABA procedure, where only one or two investigators appointed by the committee’s chair interview a judicial nominee.

In a meeting with this Committee, HSBA’s representatives stated that the justification and purpose for HSBA’s evaluation of judicial nominees was primarily that HSBA Constitution and Bylaws mandate such evaluation, and that HSBA plays a vital role in soliciting relevant information from the public that cannot be accomplished by the JSC because its evaluation is constrained by having to keep the identities of the judicial applicants confidential.

HSBA’s representatives responded to the concerns regarding the anonymous nature of the comments by stating that their members fear attribution and retribution, and that without anonymity, HSBA believes that its members would not freely comment on judicial nominees. Further, HSBA’s subcommittee members point out to the board those comments that are generalized and do not provide any specific reasons for the criticism or praise.

Criteria for judicial qualification ratings are found in the HSBA’s Board Policy Manual at Section 1.8.D. The criteria are integrity and diligence, legal knowledge and ability, professional experience, judicial temperament, financial responsibility, public service and health.

Ratings for judicial nominees are defined in the HSBA’s Board Policy Manual at Section 1.8.E and are “qualified” (defined as meeting HSBA’s standards for legal knowledge and ability, integrity and diligence, professional experience and competence, and judicial temperament, financial responsibility, commitment to public service and ability to perform the duties of the office satisfactorily), and “not qualified” (defined as not meeting the HSBA criteria with regard to professional competence, judicial temperament or integrity). There was previously an additional rating of “highly qualified” but this rating was deleted as of June 26, 2008. A concern had been raised that the category of “highly qualified” was not well-defined and resulted in an uneven application of criteria to receive that rating. Elimination of this category is commended.
There is no requirement for unanimity as to the rating. The rating is made based on a majority vote of the requisite quorum. Nor is there any provision to provide information with a rating concerning the board’s votes, such as the majority vote’s rating and minority vote’s rating, if any. For instance, in a case where the HSBA board’s voting is close, as in the case of a tie vote requiring that the HSBA president’s vote be counted to break the tie, a rating reflecting such a close vote would be relevant (and perhaps even important) information.

2. HSBA’s Policies Regarding Evaluations for Judicial Retention

The HSBA Constitution and Bylaws is silent about HSBA involvement in judicial retention decisions. Rather, HSBA’s retention practices appear to stem from the HSBA Board Policy Manual, which provides, in pertinent part, as follows:

**Judicial and Executive Retention and Evaluation.** The Board does not take a formal position regarding judicial and executive retention and judicial evaluation. Rather, the HSBA has established a forum for members to provide confidential comments to the HSBA president regarding retention and has established a confidential written evaluation procedure (see Chapter 1.9, Bar-Sponsored Judicial Evaluation). As a result, no officer or director shall disclose any specific confidential comments regarding the retention or evaluation of a judge. If, however, the president has received more than 30 comments regarding a neighbor island judge and 100 comments regarding an Oahu judge and at least 34% of those comments establish a general theme regarding the judge’s performance, the president may, in the president’s sole discretion, disclose the theme of said comments to the requesting media or state that the general theme of comments were forwarded to the Judicial Selection Commission. This policy is not intended to encourage or discourage the president from making personal comments.

No officer or director may disclose any information regarding the contents of the confidential written evaluations. If the HSBA President has been involved in the review or tabulation of responses to the HSBA evaluation responses, the President may not comment regarding the general theme of comments regarding a judge under consideration for judicial retention. To do so, would result in an appearance of breaching confidentiality of the HSBA judicial evaluation process. An officer or director however, if requested, may comment that the tabulated results of the written evaluations were forwarded to the Chief Justice of the Hawaii
Supreme Court, the Judicial Selection Commission and the individual candidates reviewed.  

This portion of the Policy Manual says that although the board does not take “formal” positions regarding judicial retention, it does provide a forum for members to provide confidential comments regarding retention. In practice, the retention forum is an automated email poll that invites attorneys who have experience with a judge to rate that judge on a numeric scale in seven categories. The form does not require attorneys to explain their numerical ratings, but the form includes space to add optional written comments.

The last paragraph above implies (but does not require) that the tabulated results from these forms will be forwarded to the chief justice, the JSC and the candidate. The first paragraph prohibits HSBA officers from disclosing any specific confidential comments regarding retention or evaluation. However, if specified criteria are met, the president has discretion to “disclose the theme of said comments to the requesting media” or state that the “general theme” of those comments was forwarded to the JSC. Under the HSBA criteria, in the case of neighbor island judges as few as 11 out of 31 comments can establish a “general theme of the judge’s performance”, in which case the HSBA president has the sole discretion to decide to make a statement to the “requesting media” about the “general theme.” Presumably, this means that the HSBA president can decide to release a press statement about HSBA’s evaluation of a neighbor island judge’s performance based on as few as 11 comments.

There are several troubling aspects of this portion of the Board Policy Manual (which the board is free to revise). First, this text is confusing and does not provide clear guidance for officers trying to determine what information may or may not be provided to the JSC and/or to “requesting media.” Second, the HSBA evaluation process is out of step with the basic premise of Hawaii’s judicial selection system. The constitutional retention process is designed to base judicial retention decisions on informed evaluations of judges rather than plebiscites. Yet the HSBA procedure amounts to conducting a poll among self-selected attorneys, and reporting the results of that poll to the JSC. Third, giving HSBA officers discretion to ascertain and convey the “general theme” of attorney responses may result in a defacto rating process, even though the Policy Manual says the board does not take formal positions on retention. Moreover, the president is allowed to characterize information as a “theme” as long as the officer determines it is present in a minority (34%) of comments received from a group that may be quite small (e.g., 31 responses).

---

3 HSBA Board Policy Manual, Guidelines for Commenting regarding Judicial and Executive Appointments and Judicial Retention, Section G.2.

6 It is unclear why the threshold requirement for the number of comments about neighbor island judges is so low in comparison to that required for judges who serve on Oahu before the HSBA President can release a statement, particularly in light of the relative ease with which any HSBA member may provide comments via e-mail or fax.
Finally, if these board guidelines are actually followed in practice, they could have the ironic effect of impeding the flow of significant retention information to the JSC. Although HSBA retention procedures allow members to supplement their numerical grades with written comments, the guidelines literally prohibit HSBA officers and directors from disclosing “any specific confidential comments” regarding retention of a judge. Instead, the HSBA officers are allowed to communicate the “general theme” of comments to the JSC and/or requesting media. Fortunately, there is usually no need to depend on the HSBA process to convey important retention comments to the JSC. Because the JSC is constitutionally required to maintain the confidentiality of its deliberations, attorneys with material but sensitive information should be able to express those comments directly to the JSC without the types of concerns that could exist when presenting similar information at a public hearing conducted by the Senate Judiciary Committee. There could be occasional cases in which an attorney has sensitive and significant comments, but the attorney believes the JSC will not safeguard their confidentiality. If that occurs, a better approach would be for HSBA personnel to make appropriate redactions to the sensitive remarks and send the redacted result to the JSC, rather than lumping that information with other responses characterized as a “general theme.”

E.  AJC Committee Discussion

In making the following recommendations, this Committee has carefully considered the rationales advanced by the HSBA board. The strongest rationale for HSBA’s involvement in the judicial selection process is that, unlike the JSC, the HSBA is able to solicit comments after an appointee has been announced. Some attorneys are indeed likely to have pertinent information about judicial appointees that could be of use to the governor, chief justice or senate. The JSC cannot solicit such comments because it does not disclose names of individuals under consideration. For that reason, it is potentially useful for the board to gather information from its members and furnish it to the governor, chief justice and senate.7

That said, the HSBA’s confidentiality practices remain troubling. As no one should understand better than lawyers, candidates for judicial office should be given fair access to adverse comments and a fair opportunity to respond. Further, it is debatable whether unattributed information is trustworthy, or is likely to be given much weight by the appointing authorities or the senate.

Other rationales for current HSBA ratings practices are problematic at best. This Committee understands and respects that the HSBA board has a good faith desire to assist state officials in selecting excellent judges. However, the fact remains that the Hawaii Constitution assigns the function of identifying qualified nominees to the JSC, not the Hawaii State Bar Association. Hence the HSBA board’s current rating process is

7 Of course this is not attorneys’ only avenue for comment. Like other citizens, they can submit written or oral testimony to the senate, or (since 2003) submit comments to the governor or chief justice during the interval after they release the list of JSC nominees and before they make their selections.
vulnerable to the criticism that it is second-guessing the acts of the JSC, as noted by Chief Justice Moon.

The HSBA’s rating practice also turns a blind eye to a public policy expressed in the Constitution. The Constitution gives members of the bar an opportunity to participate in the JSC by requiring that two of the JSC’s nine members be elected by members of the bar. However, the Constitution also states explicitly that licensed attorneys may not comprise more than four members of the nine member commission. The HSBA’s practice of rating nominees selected by the JSC disregards that structure, and essentially asserts the HSBA board is entitled to a second bite of the apple after HSBA members have placed two attorneys on the JSC.

We respectfully submit that the HSBA’s efforts to explain its confidentiality practices by analogy to the JSC or to ABA committees are misplaced. The JSC operates in a confidential fashion because that is an express requirement of the Constitution. The bar association does so for its own reasons. It follows processes that enable members of the bar to submit adverse comments in secret, and then allows board members to cast votes that are kept secret from HSBA members and the public, even though those votes are intended to have public consequences.

For a similar reason, most HSBA analogies to ABA processes are unpersuasive. The ABA committee operates in the federal environment, which has no constitutionally mandated Judicial Selection Commission. Therefore, adverse ABA ratings do not place ABA committees in the position of presenting themselves as authorities better able to evaluate judicial nominees than the body designated by the Constitution. Further, ABA practices are different in many details. One key practice is that the ABA evaluation committee provides written explanations of any “not qualified” ratings in the event the nominee is given a confirmation hearing by the Senate Judiciary Committee. In addition, if the initial review leads to a tentative rating of “not qualified,” the ABA committee requires a second investigation, and both investigations must be submitted to the ABA committee before it votes. Also, the ABA uses a specialized committee for this purpose and the ABA prohibits ABA officers or directors from serving on those committees.8

Another rationale advanced by the HSBA is that the board is required by HSBA bylaws to participate in recommendations or evaluations of judges. In actuality, as briefly discussed in Appendix I, the bylaws are ambiguous and could be interpreted by the board so as to avoid encroaching on functions assigned by the Constitution by the JSC. Alternatively, bylaws can be changed. Appendix I discusses various means of modifying the bylaws by action of the membership, the board, or (because the HSBA is an integrated bar) by the supreme court.

More basically, because the HSBA is an integrated bar, the HSBA’s bylaws and practices are subordinate to the Constitution and statutes of the State of Hawaii. This

---

means, at the extreme, that if HSBA bylaw provisions are inconsistent with the Constitution they are invalid under Rule 17. But without reaching that issue, we urge the HSBA board to afford full respect to the judicial selection process established by the Constitution, and to take pains to avoid any actions that might undercut public confidence in that process.

F. Conclusions and Recommendations

Based on the foregoing, this Committee recommends that:

1. The HSBA board should cease its current practice of rating nominees and provide the information it gathers from its members (without judgment) to the appointing or confirming authority (for judicial vacancies), or to the JSC (for judicial retentions). This is the same recommendation made in the previous AJS Committee report and by Chief Justice Moon in his 2008 and 2009 speeches to the Hawaii Chapter of AJS.

2. The HSBA board should cease its current practice of evaluating candidates for judicial retention. That process duplicates work done by the Rule 19 Committee of the Hawaii Supreme Court. Moreover, there appears to be no rationale for HSBA involvement, because the JSC invites comment on judges seeking retention, and the JSC has stringent confidentiality practices. Moreover, any effort to discern “general themes” from a poll of HSBA members is likely to be tantamount to a rating, and under the board’s guidelines, those “themes” can be discerned by one individual based on a minority of the comments submitted to the HSBA. Further, the HSBA polling and tabulation process is unlikely to provide meaningful information to the JSC, and the process is not consistent with our system’s basic premise that judicial retention decisions should not be made by ballot.

For these reasons we encourage the HSBA board to rethink its role in the judicial retention process. The HSBA’s most useful role would be to encourage members to provide oral testimony or detailed written comments on a confidential basis, either directly to the JSC or to the HSBA, so that the HSBA could collate such comments and turn them over to the confirming authority. For extraordinary situations, the board could offer to assist members in constructing or redacting comments so as to provide useful factual information to the JSC without revealing the identity of the attorney. In any case, if the HSBA board continues to participate in the JSC retention process, it should furnish the information it obtains to the JSC, with as little editing, redaction or summarization as possible.

3. This Committee – which includes four members who have personally participated in HSBA interviews – believes those interviews can elicit valuable input for the confirmation process. So long as the board terminates its current practice of rating potential judges, this Committee encourages the board to continue such interviews and encourages potential judges to participate. Factual information developed during those interviews can obviously assist the confirming authority. In addition, board members may form impressions during the interview process that could assist the decision makers. Accordingly, we hope the HSBA board will permit its members to submit individual
comments either directly to the confirming authority or to the HSBA, so that the HSBA may collate such comments and turn them over to a confirming authority, just as it does when individual HSBA members comment if they so choose.

This Committee also encourages individual board members to share their own views with the Senate Judiciary Committee, including views based on their participation in board interviews, so long as they make clear that they are presenting individual views and observations, and not the collective conclusions of 20 HSBA board members.

4. When the HSBA conducts interviews with nominees, it should provide the nominees with copies of the same summaries and comments the HSBA board receives. These comments are summarized and redacted for the HSBA board and copies of the redacted comments are provided to board members as a basis for judicial qualification decisions. There is no apparent reason for the HSBA policy forbidding a judicial nominee from being provided with a copy of these materials.

5. In providing information to the approving or confirming authorities, the HSBA board should include data reasonably needed to provide context for that information. For example, when providing information about attorneys’ comments, the board should specify:

- the number of bar members who submitted comments;
- the approximate number of those comments supporting or opposing a nominee; and
- insofar as possible, the specific content of those comments.

This Committee firmly believes that the HSBA’s rating practices should be terminated. Nonetheless, if the HSBA board persists in its practice of rating nominees, this Committee recommends the following:

A. First, the HSBA board should clarify its vote. Ideally, it should state the exact number of directors present and the number of affirmative votes, negative votes and abstentions. (Information about votes present and cast can be critical to understanding action by any board. For example, a unanimous vote by a 20-member board should carry far more weight than a 6-5 vote at a meeting attended by a bare quorum of 11 directors.)

Alternatively, the board could state the number of directors voting, and state that the vote was unanimous, or a substantial majority voted for the rating, or a simple majority narrowly prevailed on the rating. This approach is similar to that used by the American Bar Association committees in rating potential federal judges.  

9 This Committee also encourages the Board to reconsider its practice of casting votes in secret and withholding board members’ votes from the HSBA membership and the public, since those practices mean
B. Second, the HSBA board should provide a detailed written explanation of any negative rating. This parallels the practice of the American Bar Association Standing Committee on the Federal Judiciary. Its procedures provide:

In instances where a nominee has been rated “Not Qualified” by the Committee and a hearing on the nomination is scheduled by the Senate Judiciary Committee at which the Committee is asked to testify, a written statement is prepared and submitted to the Senate Judiciary Committee explaining the reasons for the Committee’s rating.\(^\text{10}\)

This step is even more important in Hawaii, since the Hawaii Constitution entrusts screening of judicial candidates to the JSC, not the bar. In that environment, negative ratings by an HSBA board amount to disagreements with the JSC’s decisions that deserve clear public explanation.

C. Third, the recommendation in paragraph 5 on the preceding page is especially important if HSBA issues ratings. Accordingly, if the HSBA board provides ratings to the Senate Judiciary Committee, it should provide with those ratings whatever data is reasonably needed to provide context for the board’s conclusions, including the number of attorneys who submitted comments, the approximate number of comments supporting and opposing a nominee, and insofar as possible the nature of those comments.

D. Fourth, the board should make it clear to the appointing authority and the public that any conclusions or opinions expressed are those of the current board and not necessarily those of the HSBA membership. The HSBA board is a volunteer board that works hard to advance the interests of its members. However, as illustrated last August, board members’ views on individual appointees may be different from those of other HSBA members, and even different from those of former officers and directors of the HSBA. All licensed attorneys in the state are required by court rule to belong to the HSBA and pay dues. As in any large organization, HSBA members have widely differing levels of participation in HSBA activities. A substantial majority do not participate in board elections; according to an announcement at the 2010 bar convention, approximately 32.7% of HSBA members cast ballots in the most recent HSBA election. Accordingly, if the HSBA board publishes ratings or expresses other conclusions, it should make plain in its public statements that it does not purport to speak for anyone except the current members of the board.

E. Finally, the HSBA board is commended for deleting “highly qualified” from its rating categories, and should not reinstate that concept.

---

II. PROPOSED CHANGES TO JSC RULES

A. Synopsis of Conclusions

The Committee recommends that the JSC modify its rules in two respects. First, the JSC should modify its conflict of interest rules to align them more closely with the disclosure and disqualification principles we apply to our judges, and to give petitioners and applicants a clear opportunity to inform the JSC of possible conflicts or bias issues. Second, we urge the JSC to fix its “Rule of Five,” which creates unfair voting procedures by requiring decisions to be made by five of the nine JSC members, even if one or more of those members is disqualified, abstains, or is simply absent from the meeting.

Neither of these changes requires any dramatic modifications to JSC approaches, but both of them are important steps to ensure that the JSC is perceived as acting fairly and impartially.

Appendix II includes sample rule changes to accomplish these objectives.

B. Conflict of Interest/Disqualification Matters

The JSC’s rules include four paragraphs of conflict of interest provisions. They include these requirements:

- Rule 3A requires commissioners to exercise diligence in becoming aware of conflicts, and in disclosing any conflicts to the JSC.

- If a commissioner knows of any personal, business, or legal relationship as a party or attorney which the commissioner had with the applicant or petitioner, the commissioner must report those matters. The JSC then is required to decide “the extent to which” the commissioner will participate in JSC proceedings.

- Rule 3B states that a commissioner is not allowed to participate in a retention proceeding if the commissioner has a substantive matter pending before that judge.

- Rule 3D requires a commissioner to consider each applicant in an impartial, objective manner, and prohibits a commissioner from discriminating on the basis of bias or prejudice based on race, religion, sex, national origin, gender, marital status, sexual orientation or political affiliation.

There has been consistent criticism that these rules need to be revised in order to help ensure that the JSC will operate in a fair and unbiased manner.

The key criticisms are the following:
• Each commissioner is required to disclose potential conflicts to the JSC, and the JSC is allowed to decide “the extent to which” an affected commissioner may participate in the proceedings. However, the rule contains no guidance concerning the factors the JSC should apply in deciding whether to permit a commissioner to participate.

• The rules do not offer any opportunity for an applicant or petitioner to report facts to the JSC that might bear on conflicts or a commissioner’s impartiality.

• The rules state a commissioner shall not participate in a retention proceeding if the commissioner has a substantive matter pending before that judge. However, they do not require disqualification of a commissioner who has a substantive matter pending before a judge who is applying for appointment to another court.

• Although Rule 3D requires commissioners to act impartially, nothing in the rule states bias or prejudice is a basis for disqualification, or requires commissioners to report potential bias/impartiality issues.

The copy of the JSC rules attached as Appendix II sets out suggested changes intended to help address each of these concerns.

The changes to Rule 3A add language to permit an applicant or petitioner to provide information about his or her relationship with a commissioner that may create conflict of interest or other concerns. Also, the existing text requires a commissioner to disclose only personal, business or legal relationships with the applicant or petitioner. The present rule does not require commissioners to disclose other factors that could bear on a commissioner’s impartiality, even though Rule 3D plainly requires that commissioners act impartially and objectively. Accordingly, the Committee proposes that Rule 3A be broadened to require commissioners, and permit applicants or petitioners, to inform the JSC of any other factor that might reasonably raise questions concerning a commissioner’s impartiality. For example, a commissioner who entertained strong pre-existing biases about an applicant or petitioner would be expected to inform the JSC about those factors, so it could decide whether it was appropriate for the commissioner to participate in the proceedings. That step would help achieve the impartiality objective of Rule 3D.

The changes to Rule 3B take two steps. Rule 3B already states clearly that a commissioner shall not participate in a retention proceeding that involves a judge or justice before whom the commissioner has a substantive matter pending. The first change simply extends that principle to judges or justices who are applying for new appointments, rather than seeking retention.

The second change provides a non-exclusive list of standards to be applied by the JSC in evaluating a commissioner’s impartiality. The change precludes a commissioner from participation if either the commissioner or the JSC concludes the commissioner’s
impartiality might reasonably be questioned due to: personal bias or prejudice for or against the petitioner or applicant; material personal or economic relationships with the petitioner or applicant or a member of his or her family; or any other circumstances deemed relevant by the JSC. These factors are abbreviated versions of considerations used by Rule 2.11 of the Code of Judicial Conduct, which the Committee believes are just as applicable to affairs of the JSC as to our judicial process.\(^{11}\) We believe the judicial disqualification process provides a good model because it satisfies basic expectations of fairness. It requires decision makers to consider the possibility that they may have a conflict or bias. Further, it both permits affected parties to raise disqualification issues if they wish to, and legitimizes that step.

These proposals are based on the premise that a commissioner should not participate in a proceeding if that commissioner’s impartiality might reasonably be questioned. That standard is consistent with rules that govern judicial disqualification, and also with basic ethics concepts applicable to attorneys, which obligate them to take steps to avoid the appearance of impropriety as well as actual conflicts of interest.

When the JSC considers these proposals, we hope it will take into account the fact that these suggestions echo prior concerns voiced by the Hawaii Chapter of the American Judicature Society and by a Chief Justice of the Hawaii Supreme Court.

In a report dated February 28, 2003, an AJS Special Committee on Judicial Selection and Retention addressed a series of topics involving the JSC. Part C of that report dealt with the recusal process. Recommendation 4 stated:

The JSC is urged to strengthen its current rules on Commissioners’ conduct and provide a venue for complaints about the conduct of a specific commissioner such as the Commission on Judicial Conduct.

Elsewhere the 2003 Special Committee noted that one type of recusal:

\[ \ldots \text{is that required when a Commissioner is biased in such a way as to prevent that Commissioner from fairly hearing a matter before the JSC. This type of recusal was discussed because of a perception that, in at least one recent case, a Commissioner may have so aggressively announced his opposition to a candidate that it raised questions of bias and predisposition. The Committee cannot know what was or is in the minds of Commissioners but urges the JSC to be vigilant with its own members about their pre-} \]

\(^{11}\) The suggested changes were meant to express principles rather than rules. They are therefore less detailed than those in the Code of Judicial Conduct, and do not include definitions. However, if the JSC adopts these suggestions or similar rules, it might well decide to add definitions of key terms, either in the rules themselves or by reference to the Code of Judicial Conduct.
existing views of judges and their willingness to remain unbiased until all the facts are presented.

The Committee does believe that the JSC should review the current provisions relating to the standards under which JSC members operate. Specifically, the Committee suggests looking at the Judicial Code of Conduct as a set of standards which may provide some useful guidance, especially to those relating to disqualification, bias and the appearance of impropriety.

Chief Justice Moon referred to some of these issues in his December 4, 2008 speech to the Hawaii Chapter of AJS. He stated:

The commission rules provide that “every commissioner shall avoid conflicts of interest, in the performance of commission duties” that is, “any personal, business, or legal relationship as a party or attorney which the commissioner had with the applicant or petitioner.” But, nowhere in the rules is a commissioner required to recuse for bias or prejudice. . . . However, based on my own experience and the experiences of other judges who have confided in me, there is a concern that—in some instances—a commissioner should have been disqualified or voluntarily recused himself of herself from participating in the retention proceeding. These concerns become especially acute where anecdotal experiences indicate that the commissioner—either prior to or during the commissioner’s term—has made particular statements or has acted in a certain manner to seriously call into question the commissioner’s ability to be fair and impartial in objectively assessing the candidate’s ability to be a good judge. The point I wish to make here is two-fold: One—the rules do not provide for a process that would allow a judge to file a request or motion, calling for a particular commissioner to be disqualified from considering his or her petition for retention. Such a procedure is provided for in our court rules, where a party or an attorney may move to disqualify a judge . . . . And two—the commissioners are essentially “judging the judges.” As such, shouldn’t they be held to the same high standards of ethical conduct which are imposed on judges and subject to review by an entity like the judicial conduct commission? I think the answer is obvious.

Additionally, I do not believe the above concerns are unique to judges seeking retention. I suspect that practicing attorneys, seeking judicial office, would have similar concerns if they found themselves in a commission interview sitting across the table from a commissioner with whom they had some negative past history. Like judges seeking retention, attorney-applicants also have no
recourse as the rules provide no process by which to challenge a commissioner’s suspected bias or prejudice.

C. Fix the “Rule of Five”

The Hawaii Constitution states that the JSC shall consist of nine members. It also states:

No act of the judicial selection commission shall be valid except by the concurrence of the majority of its voting members.

The JSC’s rules unfortunately drop the constitutional concept of “voting members.” Rule 6D states: “The Commission shall act by a majority vote of all commissioners in all actions.” That approach is compounded by a rule stating that a quorum for commission business is five commissioners.

These rules create illogical and potentially unfair results. These rules mean that disqualification, recusal, abstention or the simple absence of a commissioner has the same effect as a vote against the petitioner or applicant. Hence, an individual’s opportunity for retention or nomination can depend on how many commissioners attend the meeting - - if four commissioners are absent, a petitioner or applicant must achieve unanimous approval of all five of the attendees to be successful. Even worse, if a commissioner is disqualified due to personal relationships, bias or other factors, these rules effectively nullify the disqualification or recusal of a commissioner. The “Rule of Five” converts disqualification into the practical equivalent of a negative vote by the disqualified member.

These results are not logical, fair or required by the Constitution. The Constitution refers to “voting members,” and it is easy enough to give that phrase its plain meaning: “voting members” means those members who cast a vote. If that definition is used, all that would be necessary under the Constitution is for an applicant or petitioner to receive a majority of votes cast by commissioners. 12

---

12 Two basic rules of statutory construction are that statutes should ordinarily be given their plain meaning, and that all text of a statute should be given effect. Since the JSC has no NON-voting members, the plain meaning of “voting members” would appear to be those who cast votes. Similarly, interpreting “majority of its voting members” to mean “majority of its members” effectively reads “voting” out of the text. Further, the Hawaii Constitution and various statutes are quite explicit when the objective is to require a majority to be based on all members of a body. For example, Article III, Section 17 of the Constitution (last approved in 1978, the same year the JSC section was added to the Constitution) deals with how to calculate the number of votes needed to override a veto. It says an override requires “a two-thirds vote of all members to which each house is entitled”. [Emphasis added.] Similarly, Sec. 92-15, Hawaii Revised Statutes, says that if a law or ordinance does not specify the number of members necessary to take action, “all the members to which the board or commission is entitled shall be necessary” to take action. [Emphasis added; it is quite unlikely that this statute affects the JSC provision because the latter is a constitutional provision and it affirmatively states the number of members required to take action.] In other words, if the drafters of the JSC provision meant to say that JSC action required the concurrence of “all
This is a simple correction needed to achieve a common sense result. The Committee has attached sample corrective language. The necessary changes appear in Rules 6D, 11C and 12E.

The first change to Rule 6D replaces the existing statement that the JSC shall act by majority vote of all commissioners on all actions. The revision first tracks the operative text of the Constitution, stating that no action shall be taken by the JSC except by “concurrence of the majority of its voting members.” It then states that “majority of its voting members” means a majority of those commissioners who cast affirmative or negative votes on that matter during a meeting at which a quorum is present. To avoid any doubt, the suggested text adds that voting members do not include members who are present at a meeting, but who do not vote due to abstention, disqualification, recusal or other factors.

The suggested changes also include an optional phrase that permits the JSC to act by unanimous written consent of all commissioners then in office, and optional text stating that the minimum number of votes required to take action is concurrence of at least three voting members — in other words a majority of the five-commissioner quorum.

Rule 11C includes the same concept in the context of selecting judicial nominees. It replaces text that formerly required that each nominee be “selected by majority vote of nine commissioners” with a statement that each nominee must be “selected by a majority of the JSC’s voting members, as provided in Rule 6D.”

Other parts of the draft changes point out that the JSC should address how to apply the concept of a “majority of voting members” to nomination proceedings if it continues to use a process in which each voting commissioner submits a ballot with six names. The basic question is whether a commissioner who is disqualified as to one nominee should be permitted to cast votes for the others.\(^\text{13}\)

members” they would have said that.

This Committee recognizes there could be questions about the JSC’s authority to adopt the suggested rule changes. If so, we believe the starting point is the constitutional language stating the JSC “shall adopt rules which shall have the force and effect of law.” Another key resource is the Hawaii Supreme Court’s decision in *Pray vs. Judicial Selection Commission*, 875 Haw. 333, 861 P.2d 723 (1993), in which the Supreme Court evaluated the constitutionality of JSC rules and whether they precluded the governor or chief justice from releasing lists of judicial nominees. Among other things, the *Pray* decision addresses the standard of review when evaluating the constitutionality of a rule adopted under the JSC’s constitutional authority. The decision also cites and applies the general rule that if words used in a constitutional provision are clear and unambiguous they are to be construed as they are written, and the rule that in construing constitutional provisions words are presumed to be used in the natural sense, unless the context furnishes some ground to qualify them. All of these principles have a significant bearing on construction of the term “voting members” in Article VI, Section 4 of the Constitution.

\(^{13}\) This potential issue exists because current Rule 11C says members are to vote for four to six qualified nominees, and calls for successive ballots until the required number is chosen. The suggested approach may create some issues about what constitutes a “majority of voting members” when each voting commissioner submits a ballot, but one or more commissioners is disqualified. However, we believe the
Finally, there is a brief edit to Rule 12E needed to conform it to revised Rule 6D.

We hope the Commission will modify the “Rule of Five” for both selection and retention decisions. However, we believe such changes are especially important in the judicial retention process, both because of the mechanics of that process and its potential effects on individuals and the judiciary. Retention decisions involve sitting judges, whose duties leave them more exposed to JSC recusal issues than initial applicants. Unlike selection decisions, retention votes require an up or down vote on one individual at a time. Unless a majority votes in favor of retention, an experienced judge is terminated. This Committee submits that decisions of that importance to the judiciary and to individual judges should result from the actual exercise of commissioners’ voting power, and that those decisions should not be affected by absences, disqualifications or abstentions that amount to non-votes.

As with the other proposed changes, these corrections to the “Rule of Five” echo prior comments. The basic change to the “Rule of Five” is the same approach recommended by the AJS Special Committee report published in 2003, which discussed the “Rule of Five” in Part I. It noted:

Inevitably, the issue that emerges is why does it take five votes rather than a majority of those members able to vote on a particular matter, discounting vacancies, and those recused on any particular matter.

* * *

The Committee, therefore, recommends that the JSC consider amending its Rules to provide that the “majority of its voting members” (emphasis added, and note that the Constitution does not simply say members) be defined as those members able to act on a particular matter.

Recommendation 10 of the Report stated:

The JSC is urged to provide by rule that the majority requirement is of voting members and that “voting members” is defined as all Commissioners who can vote on a specific matter taking into account vacancies and recusals. As a variation, this could be applied only to retention votes as it is there where the power of a minority to block action is of most concern.

Similarly, the Chief Justice said in his 2008 speech:

JSC can readily find solutions. For example, it might prohibit a commissioner from participating in all voting if he is disqualified as to any of the applicants. Another approach is to modify the voting process if a commissioner is disqualified. In that case, the commissioners could vote on each applicant separately, casting a yes or no vote for each candidate. Decisions could then be based on the percentage of “yes” votes received by each applicant.
It appears undisputed that, in order for a judge to be retained, for example, he or she must receive a “thumbs up” from at least five commissioners. Because the rules provide that the commission may act as long as there is a quorum, I have heard some people describe the judge’s retention-vote as a “luck of the draw.” Consider a judge facing a panel of nine commissioners: that judge must convince 5 of the 9 (or 55% of the panel) that he or she deserves to be retained. Now, consider a judge facing a panel of five: that judge must convince all five (or 100% of the panel) in order to be retained. Clearly, a judge’s chances for retention diminish with each commissioner who does not attend a meeting where a retention vote will be taken. In other words, the more commissioners that are present to vote, the better the odds for retention. Those who shared this observation believe the quorum and voting rules do not create a level playing field for all applicants for judicial office in the “nomination arena” or all judges seeking a new term in the “retention arena,” suggesting that the only way to level the playing field is to require that all nine commissioners participate in the voting process, at least with regard to the list of nominees and retention decisions. I make no judgments one way or the other regarding the observations and opinions that were shared with me except to say that this is another area of concern that warrants further review.

For all these reasons, the Committee urges the JSC to modify the “Rule of Five” to level the playing field.
ADDENDUM: RECENT HSBA CHANGES

After the Committee drafted the Report to which this Addendum is appended, the HSBA announced in January 2011 that it had amended its policies to allow for more disclosure of the basis for its ratings of judicial nominees.

Among the HSBA policies examined by the HSBA, the following language in Section 1.8.G.1 of the HSBA Board Policy Manual was revised as indicated (strike-throughs of old language; new language underscored):

G. **Guidelines for Commenting regarding Judicial and Executive Appointments and Judicial Retention**

* * *

In order to assure that HSBA members can feel confident that comments given to HSBA officers and directors regarding judicial selection and retention and executive appointments remain confidential, while at the same time respecting each individual HSBA officer's and director's right to comment at large regarding judicial selection and retention and executive appointments, the following guidelines are provided:

1. **Judicial and Executive Appointments.** Since HSBA Board deliberations regarding the rating of judicial candidates—nominees and executive appointments take place in executive session, officers and/or directors may only reveal only—the position of the board (e.g. qualified or not qualified) and not the substance or specifics of any discussion or the vote of any individual director, or the breakdown of the Board's vote. The HSBA President or his/her designee may present a prepared statement by the Board on the rating of the nominee and the President or his/her designee shall appear before the confirming authority to answer any questions but only as to the HSBA policy and procedures for its rating and not as to specific reasons or basis for the Board's rating of the nominee.

* * *

Under the revised policy, the HSBA president or a designee may present a prepared statement by the Board of the HSBA on the rating and shall appear before the confirming authority to answer questions. Apparently, general information may be disclosed. For instance, the Board president may be authorized to disclose that a nominee
who has been deemed by the Board as “unqualified” – did not meet the HSBA’s criteria, such as judicial temperament or the newly-added criterion that “a nominee should possess the necessary ability to fulfill the responsibilities and duties that are required of the position for which the nominee has been selected.”

However, these and other changes in the disclosure policies relating to the rating of judicial nominees are still problematic for the reasons discussed in the Report. For instance, the policy was also revised to add that the Board shall not disclose the specifics of any discussion regarding a nominee, such as the specific reasons or basis for the Board’s “unqualified” rating of a nominee. Nor may the breakdown of the Board’s vote be disclosed. In addition, still left unchanged is the limited amount of information provided to the nominee, in the case where a nominee receives negative comments.

Similarly, with regard to the HSBA disclosure policies relating to retention in Section 1.8.G.2 of the Policy Manual, the president still retains the discretion to disclose, or not disclose, the “theme” of comments received from members regarding the judge’s performance “to the requesting media.” These provisions remain of concern for the reasons already discussed in the Report.
Appendix I
Means to Address HSBA Bylaw Concerns

As discussed in the body of the Report, former Chief Justice Moon and a prior
AJS committee have urged the HSBA board to cease its practice of rating nominees, and
instead to submit whatever information it has to the appointing or confirming authority.

This Committee reiterates that recommendation.

HSBA representatives have stated that the HBSA board is required to provide
recommendations by the HSBA constitution and bylaws. The following tools are
available to address possible bylaw concerns:

1. Reevaluation of the HSBA Bylaws.

   The portion of the HSBA bylaws concerning judicial evaluation is brief
   and somewhat ambiguous. However, that language does not compel the
   conclusion that the HSBA is required to make any recommendations to the
   confirming authorities. If the board took a fresh look at the existing
   bylaws it might well conclude they do not require the HSBA board to
   continue its practice of labeling judicial nominees as “qualified” or “not
   qualified.”

   The first sentence of Article IX of the HSBA bylaws says: “The board of
directors . . . may recommend persons for appointments . . . to . . . state
judicial . . . office.” This sentence is permissive, not mandatory. It
clearly does not compel the board to make recommendations.

   The second sentence is different. It deals not with recommendations but
   with “evaluations.” That sentence says “the board shall evaluate the
   qualifications of persons appointed to judicial office in Hawaii . . . and
   inform the confirming authority of such recommendations and
evaluations.”

   Article IX appears to require the board to evaluate qualifications, and
   inform the confirming authority of such evaluations, but does not require
   the board to make recommendations of any sort. It seems entirely
   plausible to interpret this language in a manner consistent with Chief
   Justice Moon’s suggestion that the HSBA board limit itself to providing
   pertinent information to the confirming authority without purporting to
draw any conclusions, by secret ballot or otherwise.

   (It should also be noted that nothing in the bylaws compels confidentiality,
or voting by board members in secret, or destroying emails and other
records relating to the board’s actions. Those approaches are the result of
internal policies the board should be able to change, if it chooses to do so.)
2. **Amendment of the HSBA Bylaws.**

One obvious way to address any concern created by the HSBA bylaws is to delete or appropriately amend Article XI to eliminate potential conflicts with the Hawaii Constitution and the ISC’s duties. Under Article XI of the HSBA bylaws, amendments may be made with approval from two thirds of the members who vote on the matter.

Rule 17(f) of the Hawaii Supreme Court Rules provides an alternate means for amending the HSBA bylaws. As discussed below, Rule 17(f) addresses the powers of the bar’s board of directors. Rule 17(f) states clearly that the board has authority to amend and repeal the bar’s bylaws, so long as such bylaws “are not inconsistent with law.” Hence, under Rule 17(f), the board has authority to quickly correct Article IX without requiring a member vote.

3. **Judicial Action Concerning Existing Practices.**

The HSBA is an “integrated” bar, meaning that all lawyers licensed to practice in Hawaii are required by the Supreme Court Rules to join the HSBA and to pay dues set by the HSBA board. As an integrated bar, the HSBA’s role and activities are governed by rules of the Supreme Court. Rule 17(f) addresses the powers and responsibilities the bar’s board of directors. It states: “The Board shall at all times direct its power to the advancement of the art of jurisprudence and the improvement of the administration of justice, and shall have the authority to adopt, alter, amend and repeal bylaws and to adopt new bylaws containing provisions for the regulation and management of the affairs of the State Bar not inconsistent with law.” [Emphasis added.] Rule 17(g) sets forth procedures to be followed if the Supreme Court amends or adopts rules of court that affect the bar or its authority, functions or duties.

The Supreme Court may share former Chief Justice Moon’s view that the HSBA’s judicial recommendation practices are at odds with the Hawaii Constitution. If so, Rule 17 offers at least two avenues to address those practices. First, the court could determine that the HSBA’s current bylaw and related practices amount to the HSBA board appointing itself to evaluate qualifications of judicial nominees, and that the bylaw and board’s practices are fatally inconsistent with Article VI, Sections 3 and 4, of the Hawaii Constitution.

In *Pray v. Judicial Selection Commission*, 75 Haw. 333 (1993), the Hawaii Supreme Court said: “[N]owhere does the Hawaii Constitution confer power or impose a duty upon the senate to select ‘the best candidate for judicial office.’ Opening Brief at 14-15. *Rather, the Hawaii Constitution*
confers that power and duty squarely upon the JSC and the appointing authorities. Haw. Const. art. VI, §§ 3 and 4.” [Emphasis added.]

Similarly, the Hawaii Constitution assigns no role in the judicial selection process to the Hawaii State Bar, except to give licensed attorneys the right to elect two members of the Judicial Selection Commission. (Moreover, Article VI, Section 4 states that the Judicial Selection Commission shall include no more than four attorneys among its nine members. Under these circumstances, the HSBA recommendation practices appear to be a “second bite of the apple” that is inconsistent with the constitutional design.)

Notwithstanding the constitutional provisions, and the clear statement in Pray as to the Judicial Selection Commission’s power and duties under the Constitution, the HSBA board’s current practices appear to inject the board into a process in which the Constitution gives it no role. Hence the Hawaii Supreme Court might conclude that by rating individuals already designated as qualified by the Judicial Selection Commission, the HSBA board was elevating itself above the Constitution and therefore its actions and the related HSBA bylaw are invalid because they are “inconsistent with law” under Rule 17(f).

Alternatively, if the court wished to do so, it could accomplish change by utilizing Supreme Court Rule 17(g). That provision could be used by the Supreme Court to establish rules prohibiting the HSBA board from rating judicial nominees or from purporting to speak on behalf of its membership as to the qualifications of any nominee for judicial office, all in the interest of affording appropriate respect to, and furthering the purposes of, the constitutional provisions providing for the Judicial Selection Commission.

Rule 17(g) provides a detailed road map of how such rules are adopted. Among other things, Rule 17(g) requires that all members of the bar be given an opportunity to submit their views and arguments regarding a proposed rule change affecting the bar, and requires that such views and arguments be considered before the rule is adopted. Rule 17(g) also states that if the members of the bar are polled, and the rule change is opposed by a majority of the bar’s members (not a majority of those who cast votes), the change shall not be implemented except by unanimous action by the Supreme Court.

Caveat: Rule 17(g) procedures may be viewed as an inappropriate way to address perceived conflicts between the bar’s activities and constitutional provisions concerning the JSC. That’s because addressing these issues through Rule 17(g) might appear to subject a mandate of the Hawaii Constitution to a referendum by members of the bar.
Appendix II
Sample Amendments to JSC Rules

Rule 5. CODE OF CONDUCT FOR COMMISSION MEMBERS.

* * * * *

SECTION THREE: CONFLICT OF INTEREST

A. Every commissioner shall avoid conflicts of interest, in the performance of commission duties. Every commissioner is required to exercise diligence in becoming aware of conflicts of interest, and disclosing any conflicts to the Judicial Selection Commission. If a commissioner, applicant or petitioner knows of any personal, business, or legal relationship as a party or attorney which the commissioner had with the applicant or petitioner, or any other factor that might reasonably raise questions concerning the commissioner’s impartiality as to an applicant or petitioner, the commissioner shall, and an applicant or petitioner may, must report this fact to the commission. The commission shall then decide the extent to which the involved commissioner shall participate in the proceedings concerning said applicant or petitioner. In the event that a commissioner does not vote, the fact that a commissioner did not vote may be announced publicly. The commission may disclose its decision on this issue.

B. No commissioner shall participate in any retention proceeding regarding a judge or justice who has a petition for retention or an application for appointment pending before the commission pursuant to Rule 42.4(f) (1) that commissioner has a substantive matter pending before that judge or justice, or (2) the commissioner, or the commission in its discretion, concludes that the commissioner’s impartiality might reasonably be questioned due to factors indicating personal bias or prejudice for or against the petitioner or applicant; material personal or economic relationships with the petitioner or applicant, or a member of his or her family; or any other circumstances deemed relevant by the commission. [Comment: The additional factors are based on parts of Rule 2.11 of the Code of Judicial Conduct.]

C. No commissioner shall take an active part in political management or in political campaigns.

D. A commissioner shall consider each applicant and petitioner for a judicial office in an impartial, objective manner. No commissioner shall discriminate on the basis of nor manifest, by words or conduct, bias or prejudice based on race, religion, sex, national origin, gender, marital status, sexual orientation or political affiliation in the conduct of the business of the commission.

Rule 6. COMMISSION MEETINGS.

A. Meetings of the commission may be called by the chairperson or a majority of the members by written notice to the other members specifying the time and place of meeting. Such notice shall be mailed or sent at least seven days before the time specified, except that a meeting may be held on shorter notice if the notice specifies that the meeting will be an emergency meeting. Notice of meeting may be waived by any commissioner either before or after the meeting takes place; and attendance at a meeting by any member shall constitute a waiver of notice by such member unless he or she shall, at or promptly after the beginning of such meeting, object to the holding of the meeting on the ground of lack of, or insufficiency of, notice.
B. Meetings of the commission may be held without notice at any time or place whenever the meeting is one as to which notice is waived by all members or whenever the commission at a previous meeting shall have designated the time and place for such a meeting.

C. The chairperson shall call at least one meeting each year for the principal purpose of reviewing and/or amending commission rules and operating procedures and briefing new commissioners on the rules and operating procedures.

D. A quorum for the commission shall be five commissioners [OR: shall be a majority of commissioners then in office]. The commission shall act by majority vote of all commissioners in all actions. No action shall be taken by the commission except by: (a) unanimous written consent of all commissioners then in office; or (b) concurrence of a majority of its voting members [Optional: (provided that every action of the commission shall require the concurrence of at least three voting members)]. “Majority of its voting members” means a majority of those commissioners who cast affirmative or negative votes on a matter during a meeting at which a quorum is present. For example, “voting members” does not include members who are present at a meeting but do not vote due to abstention, disqualification, recusal or other factors.

* * * *

Rule 11. SELECTION OF NOMINEES.

A. Oral or written reports on the investigations and interviews conducted pursuant to Rule 9 shall be made to the commission. Thereafter, the chairperson shall open the meeting to a discussion of each applicant's qualifications for judicial office.

B. When the commission has completed its evaluation of applications for a judicial office, it shall meet for the purpose of selecting not less than four, and not more than six nominees for a vacancy in the office of chief justice, supreme court, intermediate appellate court and circuit courts. The commission shall select not less than six nominees for a vacancy in the district courts.

C. The commission members shall vote by secret ballot. Each member shall vote to select the number of qualified nominees for any given judicial office vacancy required under Rule 11B. In the event that the initial ballot produces less than the stipulated number of nominees, voting shall continue for the remaining nominee positions; provided, however, that each nominee must have been selected by a majority vote of nine commissioners selected by a majority of the commission's voting members, as provided in Rule 6D. An applicant's name may be included on more than one list of nominees for different judicial office vacancies. The names of the nominees selected by the commission shall be transmitted pursuant to Rule 13.

Rule 12. RETENTION OF PETITIONERS.

A. When a judge or justice petitions the commission pursuant to Section 3 of Article VI of the Constitution of the State of Hawai‘i to be retained in office, the commission shall promptly upon receipt of such petition commence an investigation into qualifications of the petitioner for continued judicial office. Every petitioner shall complete forms prescribed by the commission. The petitioner, by giving notice to the commission, may withdraw the petition for retention before the issuance of an order by the commission under Rule 12F. The commission shall publicize the fact that the judge or justice has petitioned for retention in such manner as it deems appropriate to
the need that all persons who might have an interest in the subject matter be given an opportunity to submit their views.

B. At any meeting of the commission held for the purpose of considering a petition filed pursuant to this rule, the chairperson or acting chairperson may administer oaths and affirmations to any person testifying at such meeting.

C. The commission may compel by subpoena the attendance of witnesses by hearings under this rule and the production of pertinent books, papers and documents. Writs of subpoena shall be signed by the chair or acting chair and attested to by the secretary or acting secretary. The circuit court of any circuit in which a subpoena is served or in which the attendance is required may, upon proper application, enforce the attendance and testimony of any witness and the production of any documents so subpoenaed. Subpoena and witness fees and mileage shall be the same as in civil cases in the circuit courts.

D. The commission shall interview the petitioner and may hold hearings which, at the discretion of the commission, may be either opened or closed to the public and which interested parties may testify before the commission.

E. The commission shall make a determination that the petitioner should or should not be retained in office, and the commission shall attempt to make its decision within thirty days prior to the expiration of the petitioner's then current term of office. Voting by the commissioners on the question of the granting or denial of the petition shall be by secret ballot. The term of a petitioner may not be extended except by a concurrence of a majority vote of the commissioners commission's voting members, as provided by Rule 6D.

F. The commission shall issue an order upon making a determination that the petitioner should or should not be retained in office. The order shall renew the term of office of the petitioner for the period provided by law if the determination is that the petitioner should be retained in office. The order shall state that the petition has been denied if the determination is that the petitioner should not be retained in office.