

# REPORT OF THE AJS SPECIAL COMMITTEE ON THE JUDICIAL SELECTION SYSTEM – NOVEMBER, 2005<sup>1</sup>

## I. BACKGROUND

On November 9, 2004, the American Judicature Society-Hawaii Chapter formed this Special Committee on the Judicial Selection System. The two appointed Co-Chairs of the Committee were Warren Luke and the Honorable Victoria Marks. Lawrence Foster was appointed as the Reporter. Attached as Appendices A and B are copies of the charge to the Committee and as well as the press release issued by AJS-Hawaii. Appendix C is a list of the members of the Committee. As evidenced by the list of members, the Committee represented a wide range of community representatives as well as representatives from all of the organizations involved in the judicial selection process.

The Committee was to address two main issues: (1) the current judicial selection process with particular reference to the role of the Hawaii State Bar Association and (2) a perception that the judicial retention process was gender biased.

The first meeting of the Committee took place on November 24, 2004 at which time the charge was officially presented and the Committee began its discussion of the issues involved. The Committee then met at least once a month for several months.

At the initial meetings, the Committee engaged in a preliminary discussion of the issues and then decided upon a series of meetings between the full Committee and interested parties to these issues including leadership of the Hawaii State Bar Association and the Judicial Selection Commission. Other interested parties such as the Judiciary and the Senate Judiciary Committee were represented on the Committee (as was the Hawaii State Bar Association and former members of the Judicial Selection Commission) and thus their input was also available to the Committee on an on-going basis.

## II. RECOMMENDATIONS / STATEMENTS

1. The committee believes in and supports the merit selection process. In addition, the committee believes that the process should be subject to ongoing review in order to improve upon, and thus maintain maximum public confidence in, the judicial selection process.

---

<sup>1</sup>A minority report, prepared by Douglas Crosier, is attached hereto.

## **Transparency**

2. The committee recommends that, where appropriate, the judicial selection process should be as open and transparent as possible.

The prior practice of withholding names from publication was intended to avoid the pressures on the Appointing Authority from public campaigns on behalf of or against candidates. In the period since the Appointing Authorities have been releasing the list of names, this concern has not materialized. Release of the names by the Appointing Authorities increases transparency because it gives the public a second opportunity to comment on nominees. In the past, the only opportunity for public comment was at the Senate confirmation hearing.

3. The committee recommends that the Appointing Authorities (the Chief Justice for District Court and Family District Court judges and the Governor for all other state court judges) publish the list of nominees as soon as they receive it from the Judicial Selection Commission. In recent years, first the Chief Justice and now the Governor release the list upon receipt. This release is voluntary and the Committee suggests that the release of the list be made mandatory so as to increase transparency and the ability of knowledgeable people to provide input. *Cf. Pray v. The Judicial Selection Commission*, 75 Haw. 333, 861 P2d 1355 (1993); Article VI, section 4 of the Hawaii Constitution (as amended and in force July 1, 2004); and Rule 2, Judicial Selection Commission Rules.

## **The role of the Hawaii State Bar Association**

4. The Hawaii State Bar Association is to be commended for its efforts to make its own commenting process on judicial retention more open and transparent among its members. Its work to increase the quality and quantity of information provided to the Appointing Authorities as they select the appointee and to the Judicial Selection Commission as they make their decision on retention is also to be commended.

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

In circumstances where there is little or no merit selection process (e.g. appointment of federal judges and in states where judges are elected), it makes sense for the ABA or local bar association to provide the role played by our Judicial Selection Commission - an objective screening of candidates for state court judgeships based on their competence. In

Hawaii, the rating of candidates by the Hawaii State Bar Association is at best duplicative and, at worst, potentially harmful to the public's confidence in the process. It is significant that the Judicial Selection Commission is not allowed to rank its list of nominees submitted to the Appointing Authorities so as to allow maximum discretion by the Appointing Authority and thus avoid undue influence by the Judicial Selection Commission. For the same reason, the Hawaii State Bar Association should refrain from rating candidates for state court judgeships.

5. The Hawaii State Bar Association is encouraged to submit all of the information it receives from its members regarding judicial retention to the Judicial Selection Commission (e.g. the evaluations themselves, together with the analysis of the evaluations).
6. 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).

### **Gender**

7. The committee discussed the issue of the Judicial Selection Commission being perceived as biased against women in the retention process. The committee found no clear evidence of such bias, other than the statistical evidence of recent retention decisions. We encourage the Judicial Selection Commission to be sensitive to the perception of bias held by many members of the community.

### **Education**

8. The committee recommends that the American Judicature Society - Hawaii Chapter work to educate the public about the judicial selection process. The education should point out the benefits of a merit selection process and the criteria used by the Judicial Selection Commission in recommending nominees to the Appointing Authorities

### **Citizens Conference**

9. The committee does not feel it is necessary to convene a Citizens Conference on Judicial Selection.

## **AJS SPECIAL COMMITTEE ON THE JUDICIAL SELECTION SYSTEM**

Throughout its history, the American Judicature Society ("AJS") has been in the forefront in dealing with issues relating to judicial selection. Founded in 1913, the Society pioneered merit selection since its early existence and continues to be active in reform efforts throughout the country.

AJS became particularly active in Hawaii in the late 1970's when it was invited to and did provide the primary advisory role in the development and adoption of Hawaii's merit selection system. The rules of the state's Judicial Selection Commission ("JSC") were largely adopted from AJS's model form. AJS has provided several training institutes for the Commission and has provided technical assistance for Hawaii's 1989 and 1993 Citizens Conferences on Judicial Selection and, last year, to AJS Hawaii Chapter's Special Committee on Judicial Selection and Retention.

That Special Committee had, after an extensive study and review, addressed then current issues relating to the commission process and made specific, thoughtful recommendations for improvement. Such recommendations, which were approved by the AJS Hawaii Chapter Board, and the accompanying reports, were distributed to the Commission, Judiciary, bar, state government leaders, and other interested parties. The work of the Committee and its report related largely to the internal process and rules of the Commission.

Recent developments, largely external to the work of the Commission and its internal processes, have caused the AJS Hawaii Chapter to believe that a broader review of the overall merit selection system and process, including but not limited to the role of the Commission and other organizations, is merited. Our merit selection system has generally worked well for Hawaii, and a review should confirm that or that certain modifications to that system may be appropriate.

One of the possible external relevant factors arising from a recent development would include the Hawaii's State Bar Association's ("HSBA") board's more recent active involvement in the process, particularly in its recommendations that certain judges be declared not qualified. Based on published reports, the rejection by the Senate of one nominee was based in part on some Senators' reliance in whole or in part on the HSBA board's recommendation.

The recommendations of the HSBA board have obviously had a significant impact on the process. Its impact has caused some to inquire about the goals, objectivity, and thoroughness of its process. Does the process set up by the HSBA or any other interested group conflict, counteract or supplement what the JSC does? What process is in place to reconcile the conflicting recommendations of the HSBA, neighbor island bar associations, any other interested groups and the Commission? Should the HSBA distinguish between comments by the trial attorneys and non-trial attorneys? Are more bar members submitting comments to the HSBA than to the JSC, and if so, why?

If an outside group, whether it be the bar association or any other interested group, has such an impact, what is the effect of such groups on the process for the future? Will it now attract other groups to become more active in the process?

Some say that the Senate's role in rejecting judicial appointments is part of the process and it exercises its rightful role in doing so. As compared to the U.S. Senate's role, which provides for "advice and consent," the Hawaii Constitution provides only for the "consent" of the Senate. What is the appropriate role for the Hawaii Senate? What weight should a Senate committee place on the recommendations of interested groups when the "investigative" and evaluative processes are so different?

Some would say that the HSBA's recommendation implies that the Commission did not adequately fulfill its constitutional responsibility in making sure that it only recommends qualified nominees. Should the Commission and its procedures be more sensitive to the comments of the bar or say other interested groups? Are there other considerations as to what the Commission is doing?

What about the judges? There are reports that some judges now believe that they have to carry on a campaign for retention, including the solicitation of many favorable comments to both the Commission and the HSBA board. There is a perception among some judges and lawyers that judges up for retention may need to be more attentive to Commission and HSBA board members, particularly those lawyers on either who practice before the judges.

Over the past few years far more women than men have been rejected for retention by the Commission. Some will say that most, if not all, of these rejections were justified, but others are not so sure and are concerned that women judges face a tougher fight for retention. Only two of the present Commission members are women.

The developments noted above are cited as examples that raise some troubling questions that the AJS Hawaii Chapter will address. The AJS Hawaii Chapter strongly believes that the merit system, despite its problems, is still the best system for Hawaii. In order to maintain that system, the Chapter believes that the system, including but not limited to external factors that affect the Commission, needs to be reviewed periodically to determine whether it is working just fine or if it needs some modification.

The AJS Hawaii Chapter has created a Special Committee to commence this review as set forth above. Through discussion and solicitation of various viewpoints, this Committee will collect, examine, and frame issues relating to the above and other issues that the Committee finds appropriate. The Committee may find that the system works just fine, in which case the Committee's work will be concluded. If, on the other hand, the Committee believes that some modifications may be in order, the Committee may make appropriate recommendations, including but not limited to the convening of a Citizen Conference.



Hawaii Chapter

American Judicature Society  
The Opperman Center  
2700 University Avenue  
Des Moines, IA 50311  
Tel: 515-271-2281  
Fax: 515-279-3090

James S. Burns  
Chair  
Momi Cazimero  
Vice Chair  
Katherine G. Leonard  
Secretary  
Hilary Benson Gangnes  
Assistant Secretary  
Richard Lim  
Treasurer  
Mark J. Bennett  
Director  
Margery S. Bronster  
Director  
Kevin S.C. Chang  
Director  
Richard R. Clifton  
Director  
Lawrence C. Foster  
Director  
Burnham H. Greeley  
Director  
James A. Kawachika  
Director  
Bert T. Kobayashi, Jr.  
Director  
Barry M. Kurren  
Director  
Ivan Lui-Kwan  
Director  
Lawrence S. Okinaga  
Director  
Robert S. Toyofuku  
Director  
Frances Q.F. Wong

**FOR IMMEDIATE RELEASE**

For further information call  
Chief Judge James S. Burns  
at 808-539-4750

Honolulu, Hawaii, November 9, 2004 — Chief Judge James S. Burns, Chair of the Hawaii Chapter of the American Judicature Society, announced today the formation of its special committee on the judicial selection system. Recent developments relating to Hawaii's merit selection and retention system, including but not limited to, the roles of interest groups, the State Senate, and the Judicial Selection Commission, as they relate to each other and to judicial independence, will be examined. The special committee will review whether Hawaii's merit selection system is working well - or not. If not, the convening of a Citizens Conference similar to the ones convened in 1989 and 1993 will be considered. The 1993 conference in particular resulted in significant reforms to that system whether by Constitutional amendment, legislation, or rule changes.

The significance and relevance of this review require the participation of major judicial leaders in our State, and they have responded. A list of committee members is included together with the charter of the special committee.

###

AJS SPECIAL COMMITTEE ON THE JUDICIAL SELECTION SYSTEM

**Warren Luke, Co-Chair**  
Chair and CEO  
Hawaii National Bank

**Victoria S. Marks, Co-Chair**  
Judge, First Circuit Court

**Mark J. Bennett , Esq.**  
Attorney General, State of Hawaii

**Bert T. Kobayashi , Jr., Esq.**  
Partner, Kobayashi Sugita & Goda  
AJS National Director

**Robin K. Campaniano**  
President and CEO  
AIG Hawaii Insurance Co., Inc.

**Ronald T.Y. Moon**  
Chief Justice, Supreme Court

**Momi Cazimero**  
AJS National Director

**Russel S. Nagata**  
Judge, District Court, First Circuit

**Douglas A. Crosier , Esq.**  
Hawaii State Bar Association  
representative  
Past President, HSBA

**Russell K. Okata**  
Executive Director  
Hawaii Government Employees Association

**Kenneth E. Enright**  
Judge, Family Court, First Circuit

**Jackie Parnell**  
President, Honolulu Chapter  
League of Women Voters of Hawai`i  
Co-Chair, Judicial Independence Project of the  
State League

**Lawrence C. Foster**  
Professor, University of Hawai`i  
William S. Richardson School of Law  
Immediate Past Dean

**Terry E. Thomason , Esq.**  
Partner, Alston Hunt Floyd & Ing  
General Counsel, Republican Party of Hawaii

**Colleen Hanabusa**  
Chair, Senate Judiciary Committee

**Robert S. Toyofuku , Esq.**  
President, Pacific Law Institute

**James Kawashima , Esq.**  
Partner, Kawashima Lorusso and Tom

**Corinne K.A. Watanabe**  
Associate Judge  
Intermediate Court of Appeals

**MINORITY REPORT  
SPECIAL COMMITTEE ON THE JUDICIAL SELECTION SYSTEM  
NOVEMBER, 2005**

**AMERICAN JUDICATURE SOCIETY-HAWAII CHAPTER**

**By Committee Members:**

**Douglas A. Crosier, Past President (2003)  
of the Hawaii State Bar Association**

**and**

**Jacqueline A. Parnell,  
League of Women Voters of Hawaii; and  
Co-Chair, Judicial Independence Project of the State League**

**November 21, 2005**



We disagree with and dissent from specific aspects of the majority's recommendations regarding the role of the Hawaii State Bar Association in the judicial selection process.

### **The Role of the Hawaii State Bar Association in Judicial Selection**

We disagree with the majority report recommendation that the Hawaii State Bar Association ("HSBA") cease its current practice of rating judicial nominees (e.g. highly qualified; qualified; not qualified).

Hawaii adopts a merit-based appointive system for judicial selection sometimes referred to as "merit selection" or "appointment based" in contrast to the majority of the other states that elect their judges. The objective evaluation of a judicial aspirant's qualifications is a key element of the appointment system. See *Standards on State Judicial Selection*, American Bar Association. Standing Committee on Judicial Independence (July 2000). The existence of credible, deliberative, non-partisan bodies in the selection process for the purpose of evaluating the qualifications of all judicial aspirants, regardless of whether that person is nominated through the appointment process, stands for election, or reaches the bench through the interim appointment process, serves to assure the public that those judicial aspirants have met a threshold set of qualifications. *Standards...*, at Executive Summary.

In many appointive jurisdictions, as is the situation in Hawaii, bar associations are responsible for evaluating judicial nominees and sitting judges subject to retention. *Standards...*, at 22. The evaluation often is in some form of bar evaluations or polls, the purpose of which is ultimately to inform the public.

The HSBA has a duty to the public and its constituency in meeting this responsibility. It has fulfilled its responsibility through its formal evaluation of the qualifications of first time judicial candidates and of sitting judges applying for retention.

For judicial nominees appointed by the Appointing Authority and awaiting senate confirmation, the HSBA formally informs the State Senate of its assessment of the qualifications of the judicial candidate. The assessment is in the form of a rating of the candidate. The HSBA's policy of evaluating the qualifications of persons suggested for appointment to judicial office in Hawaii dates back to 1989-1990 when it was adopted and institutionalized as one of the original enumerated articles of the then newly approved HSBA Constitution and Bylaws. See Appendix 1, *Article IX. Judicial and Executive Appointments*, Hawaii State Bar Association Constitution and Bylaws, as amended.

The HSBA's role of rating judicial nominees provides the public a considered collective and representative assessment of the merits of a judicial nominee. The HSBA rating process is the culmination of an exhaustive process that ensures obtaining broad based input from its members who are uniquely qualified to provide information. The information is received through an elaborate process which maintains the confidentiality of the attorneys to ensure as candid information as possible. This is followed by a critical review of the information that includes evaluating the information for validity and reliability. The HSBA rating process includes the consideration of this information along with materials submitted by the nominee to the Judicial Selection Commission. The process

then provides the nominee the opportunity of a personal interview and meeting with the HSBA Board of Directors. See Appendix 2, *HSBA Board Policy Manual, Section 1.8, Board Participation in Judicial and Executive Appointments* (current); *American Bar Association's Guidelines for Reviewing Qualifications of Candidates for State Judicial Office; Part A: Judicial Selection and Retention Criteria, Standards on State Judicial Selection*, American Bar Association Standing Committee on Judicial Independence (July 2000). As demonstrated, the rating process is a careful, deliberate, and a reliable one through which the HSBA reviews many sources statewide, critically reviews the information, and arrives at an informed assessment of the qualifications of the judicial nominee.

Despite the acknowledgment by the ABA of the important role of and input from bar associations in actively participating in the evaluations of judicial candidates and sitting judges, the majority concludes and recommends that the HSBA cease its practice of evaluating and rating judicial nominees. The majority's recommendation is not supported by any known research, study, report, empirical data, or accepted national standards such as those set forth by the ABA on this matter. Furthermore, the majority's report is almost wholly devoid of any factual bases in reaching its recommendation.

Instead, in support of its recommendation, the majority asserts an underlying conclusion that the rating of judicial nominees by the HSBA is at "best duplicative [sic] and, at worst, potentially harmful to the public's confidence in the process." See Majority Report at 2. Again, the majority fails to provide any research or study that supports this conclusion. In doing so the majority fails to

address the unique position of the HSBA that allows the HSBA to obtain information about a judicial nominee that the Judicial Selection Commission is not able to obtain due to the restrictions of secrecy placed upon it by law.

The Judicial Selection Commission (“JSC”) does not inform the public of the identities of individuals it reviews for placement on the list of finalists it sends to the Appointing Authority (Governor or Chief Justice). Because its work is secret by law, it is impossible for the JSC to obtain information on the qualifications of the judicial applicant from as broad a base of sources as can be obtained by the HSBA. The HSBA is able to and does receive comments from attorneys statewide following the appointment of the nominee by the Appointing Authority. Additionally, the JSC is limited in obtaining information because it self selects its sources or individuals for information. In contrast, the HSBA’s process obtains information from all of its members. The dichotomy between the HSBA and JSC’s processes of obtaining information on the qualifications of the nominee can hardly be viewed as duplicitous. If anything, the HSBA’s participation complements and adds to the compilation of information upon which to evaluate the qualifications of a judicial nominee.

The majority report asserts that the HSBA ratings of a judicial nominee’s qualifications is “at worst, potentially harmful to the public’s confidence in the process.” See Majority Report at 2. The majority report does not explain why and how the HSBA ratings may cause this result.

The public is entitled to a judicial selection process that is open and one that encourages discourse and discussion of a judicial nominee’s fitness to be

confirmed for judgeship. Such a process furthers public confidence in the judicial selection process. An open process often involves presentation of differing and sometimes opposing information, facts and opinions, regarding the qualifications of the judicial nominee. In the HSBA's fifteen years of evaluating and publicly commenting on 91 judicial nominations since 1990 to the present, there have been three occasions in which the HSBA disagreed with the JSC and the Appointing Authority on their selection of the judicial nominee. On those occasions, the HSBA either did not support senate confirmation of the judicial nominee and/or rated the judicial nominee as "not qualified" for judgeship. Observers of the judicial selection process within and outside of the legal community may view such disagreements of opinion between the HSBA and the JSC/Appointing Authority as indicative of a selection process that is subject to a system of checks and balances, and not one that is characterized as "rubber stamping." The HSBA's rating system is a visible example to the public of an "open" selection process in which there is a free exchange of information and opinions. Consequently, the HSBA's involvement has the effect of instilling greater public confidence in the judicial selection process rather than potentially harming it as the majority has concluded.

In summary, the majority's recommendation would tend to diminish rather than increase the extent and quality of open discourse and dialogue on the merits of a judicial nominee. A selection process that is perceived as minimizing opposing or different information and opinions, as the majority report recommends, would tend to undermine public confidence in the selection

process and the Judiciary. It would further insulate a selection process that is already perceived by some in the community as secretive and political. That is precisely the effect the majority's recommendation would have on the selection process. Such a recommendation will not serve the public's interest in achieving the most qualified judicial appointment based on merit. This we cannot support.

**Hawaii State Bar Association's Information on Judicial Nominees and Judges Applying for Retention.**

We concur with the majority's recommendation that the Hawaii State Bar Association continue its work in providing information on judicial nominees to the Appointing Authority and to the Judicial Selection Commission regarding judges applying for retention.

We disagree with and dissent from the majority's recommendation that the HSBA provide and disclose to the Appointing Authorities and the Judicial Selection Commission the actual text of information that the HSBA receives confidentially and directly from its attorney members (e.g. the evaluations themselves, comments in response to an email solicitation). The majority's recommendation would substantially deter attorneys from participating in the selection process and would tend to minimize the amount of relevant information upon which retention is based.

**Transparency**

We concur with the majority's recommendation that the Appointing Authorities (the Governor and Chief Justice) publish the list of judicial nominees as soon they receive it from the Judicial Selection Commission.

## **Gender**

We concur with the majority's recommendation that the Judicial Selection Commission be sensitive to the perception of bias held by many members of the community.

However, we further recommend that more study and review of this matter be done in the immediate future to adequately and properly address the perception of prejudice against women and bias in favor of men in the retention process.

# **APPENDIX 1**



**(Excerpt from the Hawaii State Bar Association Constitution and Bylaws)**

**Article IX. 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.

# **APPENDIX 2**

(Excerpt from the Hawaii State Bar Association Policy Manual)

**1.8 BOARD PARTICIPATION IN JUDICIAL AND EXECUTIVE APPOINTMENTS**

**A. Evaluation and Recommendation**

In order to assist the HSBA Board in its evaluation of federal, state and executive appointments in Hawaii, the following procedures shall be followed:

1. Appointment of Review Sub-Committee. Prior to the beginning of his or her term as President, the HSBA President-Elect shall appoint a fact finding committee to assist the Board in evaluating all judicial and executive appointments that are made during that President's term in office. The committee shall consist of six (6) elected HSBA Board members. For each neighbor island judgeship, the neighbor island board member for that district is added to the committee ad hoc if not already on the committee. The chairperson for the committee shall be selected by the President-Elect. The committee members shall not be candidates for judicial or executive office and, where possible, consist of a diverse cross-section of the legal practice areas within the Bar. All members must agree to strict confidentiality and non-disclosure of its work product prior to their appointment to the committee.
2. Purpose and Mission. The committee shall be a neutral fact finding body charged with gathering information pertinent to the nomination of a judicial or executive appointment and making a neutral presentation of such information to the HSBA Board for its evaluation and recommendation.
3. Presentation To The HSBA Board. The committee or its designee shall present its findings at a time and place designated by the HSBA Board. Written material and comments received by the committee shall be provided to the HSBA Board for its review. The committee's presentation shall be made before the HSBA Board in executive session and all disclosures shall remain confidential. The committee shall make a neutral presentation of the information regarding a nominee and shall not take a position on a nominee to the HSBA Board. Immediately following its presentation to the HSBA Board of the committee's findings, all materials, notes and documents utilized by the committee shall be collected by the HSBA Executive Director for destruction.

4. Disclosure of Information To The Appointee. Prior to its presentation to the HSBA Board, the chair of the committee shall advise the HSBA President, or his or her designee, of negative information received during the committee's investigation and that will be presented to the HSBA Board. Without revealing the source(s), the President, or his or her designee, shall disclose the general themes and nature of the information to the appointee as far in advance of the HSBA interview with the candidate as is reasonably possible.

**B. Board Procedures for Judicial and Executive Appointments** [Board adopted 10/15/92; replaced with new language 3/20/03; further revised 1/14/05; revised procedures 01/14/05]

1. Solicitation of Comments From HSBA Membership. Comments shall be solicited from the HSBA Membership by the HSBA President via mass e-mail on judicial and executive appointments. Comments received by e-mail to the HSBA President will be received through a special mailbox secured by a password. Members may also submit comments by correspondence, telephone, facsimile or e-mail to the HSBA President or any member of the HSBA Board. To ensure confidentiality of those offering comments, all identifying information will be removed electronically, by the HSBA President or an administrative aide, or by the HSBA Board member who receives any comments. These comments, with all identifying information removed, will then be sent to the six-member Subcommittee of HSBA Board members appointed by the President. The Subcommittee shall review the comments and present an oral or written summary to the HSBA Board, along with the redacted comments, prior to the Board's interview with the candidate. A candidate shall be advised of negative comments considered by the HSBA Board as significant to the position, and given the opportunity to respond to them during the interview with the HSBA Board. A candidate shall not be provided with a copy of any comments received by the HSBA Board.
2. HSBA Board Interview Of Candidates. The HSBA Board shall request that the candidate appear for a personal interview before the HSBA Board as soon as reasonably possible. If a personal appearance before the HSBA Board presents an undue hardship or, if for unforeseen circumstances, the candidate is unable to appear in person, the HSBA Board may allow the candidate to be interviewed by telephone conference call. If, for whatever reason, a candidate cannot or will not agree to be interviewed by the HSBA Board, nonetheless the HSBA Board shall vote on the qualifications of the candidate based on the information available to the HSBA Board.
3. Destruction of Comments from HSBA Membership. All material and identifying information received in any form by the HSBA President or any HSBA Board member regarding a candidate shall be destroyed by every recipient immediately after the Board has taken a position on the candidate's qualifications.

## C. Conflicts of Interest

### 1. Disclosure

- a. Relationship - Board members must disclose any past or present relationship with the nominee, regardless of whether they feel it would affect their ability to vote fairly on the nominee.
- b. Self-Interest - Board members who applied for the same position as the nominee under consideration must disclose that fact. If a Board member is uncomfortable about disclosing such information, he/she may tender a general recusal from the vote.
- c. Other Bias - Board members must disclose any other bias for or against a nominee which would affect their ability to vote fairly on the nominee. If a Board member is uncomfortable about disclosing the specific cause or nature of the bias, he/she may tender a general recusal from the vote.

### 2. Recusal

- a. By Self - if a Board member feels that he/she cannot vote fairly on the nominee because of a past or present relationship with the nominee, or for any other reason, that member can recuse him/herself from the vote.
- b. By Board Request - if after disclosing a relationship or bias against the nominee, the Board member does not recuse him/herself, and the Board feels that the person should be recused either because of an actual conflict or the appearance that a conflict may exist, the Board may vote to recuse that person from the vote.

D. **Criteria for Judicial Qualification Ratings** - The HSBA Board has established criteria for determining the qualifications of judicial and executive appointments based upon the ABA Standing Committee on Federal Judiciary and the ABA Guidelines for Reviewing Qualifications of Candidates for State Judicial Office. The HSBA Board shall consider the following criteria when voting on the qualifications of a judicial or executive appointment:

- **Integrity and Diligence** - A candidate should be of undisputed integrity. This includes the candidate's character and general reputation in the legal community as well as his or her diligence.
- **Legal Knowledge and Ability** - A candidate should possess a high degree of knowledge of established legal principles and procedures and have a high degree of ability to interpret and apply them to specific factual situations.

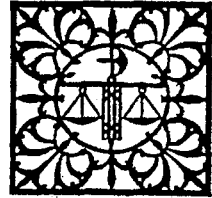
- **Professional Experience** - Substantial courtroom and trial experience as a lawyer or judge is important for candidates to the trial and appellate courts. Significant evidence of distinguished accomplishments in the field of law can compensate for a candidate's lack of substantial courtroom experience.
- **Judicial Temperament** - A candidate should possess a judicial temperament which includes intelligence, common sense, compassion, decisiveness, firmness, humility, temperance, open-mindedness and impartiality, patience, tact, understanding, freedom from bias, and commitment to equal justice under the law.
- **Financial Responsibility** - A candidate should be financially responsible.
- **Public Service** - A candidate should possess a history of civic activities and public service, whether that experience be in the private or public sector.
- **Health** - a candidate should be in good physical and mental health.

A resume/questionnaire form may be used to elicit the following information in a standardized format: competence, experience, legal knowledge and ability, and financial responsibility. Other criteria such as integrity, diligence, and judicial temperament, may be obtained through other sources such as former employers and colleagues of the nominee.

**E. Position on Qualifications and Rating Categories** - when appropriate, the HSBA Board shall take a position on judicial and executive appointments in the following manner:

1. highly qualified - candidate must be at the top of the legal profession in his or her legal community, have outstanding legal ability and diligence, breadth of experience, the highest reputation for integrity and either demonstrated, or exhibited the capacity for, judicial temperament, and has met or exceeded all other criteria established by the Board;
2. qualified - candidate meets the HSBA standards with respect to integrity, professional competence and judicial temperament and that the HSBA believes that the candidate will be able to perform satisfactorily all of the duties and responsibilities required by the office under consideration;
3. not qualified - candidate does not meet one or more of the HSBA criteria with regard to professional competence, judicial temperament or integrity.

[Board adopted form of position on 12/7/92; added descriptions for rating categories on 3/20/03; added highly qualified category on 12/15/94; added definitions of positions (ratings) on 4/12/95.]



**American Bar Association's Guidelines  
for Reviewing Qualifications of  
Candidates for State Judicial Office**

The following are the American Bar Association's Guidelines for Reviewing Qualifications of Candidates for State Judicial Office (Judicial Administration Division Lawyers' Conference 1987, Staff: Steven Goldspiel, Chicago, Ill.) which offer some criteria for determining fitness for office:

## **Introduction**

These guidelines are intended for use by bar association committees and Judicial Nominating Commissions which are evaluating candidates for state and local judicial office. It is assumed that the evaluators desire to recommend to the electorate or to the appointing authority the candidates who are most qualified by virtue of merit.

The function of these guidelines is to present minimum criteria for appointment; the more rigorous the criteria the better the quality of the judiciary.

### **1. Integrity**

**A candidate should be of undisputed integrity.**

The integrity of the judge is, in the final analysis, the keystone of the judicial system; for it is integrity which enables a judge to disregard personalities and partisan political influences and enables him or her to base decisions solely on the facts, and the law applicable to those facts. It is, therefore, imperative that a judicial candidate's integrity and character with regard to honesty and truthfulness be above reproach. An individual with the integrity necessary to qualify must be one who is able, among other things, to speak the truth without exaggeration, admit responsibility for mistakes and put aside self-aggrandizement. Other elements demonstrating integrity are intellectual honesty, fairness, impartiality, ability to disregard prejudices, obedience to the law and moral courage.

A candidate's past personal and professional conduct should demonstrate consistent adherence to high ethical standards. The evaluator should make inquiry of judges before whom the candidate has appeared and among other members of the bar as to whether or not a candidate's representations can be relied upon. A candidate's disciplinary record, if any, should be considered.

Hence, a candidate should waive any privilege of confidentiality, so that the appropriate disciplinary body may make available to the evaluator the record of disciplinary sanctions imposed and the existence of serious pending grievances. The reputation of the candidate for truthfulness and fair dealing in extra-legal contexts should also be considered. Inquiry into a candidate's prejudices that tend to disable or demean others is relevant. However, since no human being is completely free of bias, the important consideration is that of whether or not the candidate can recognize his or her own biases and set them aside.

### **2. Legal Knowledge and Ability**

**A candidate should possess a high degree of knowledge of established legal principles and procedures and have a high degree of ability to interpret and apply them to specific factual situations.**

Legal knowledge may be defined as familiarity with established legal principles and evidentiary and procedural rules. Legal ability is the intellectual capacity to interpret and apply established legal principles to specific factual situations and to communicate, both orally and in writing, the reasoning leading to the legal conclusion. Legal ability connotes also certain kinds of behavior by the judge such as the ability to reach concise decisions rapidly once he or she is apprised of sufficient facts, the ability to respond to issues in a reasonably unequivocal manner and to quickly grasp the essence of questions presented.

Legal knowledge and ability are not static qualities, but are acquired and enhanced by experience and



the continual learning process involved in keeping abreast of changing concepts through education and study. While a candidate should possess a high level of legal knowledge, and while a ready knowledge of rules of evidence is of importance to judges who will try contested cases, a candidate should not normally be expected to possess expertise in any particular substantive field. More important is the demonstration of an attitude reflective of willingness to learn the new skills and knowledge which will from time to time become essential to a judge's performance and of a willingness to improve judicial procedure and administration.

A review of a candidate's academic record, participation in continuing legal education forums, legal briefs, and other writings and reputation among judges and professional colleagues who have had first-hand dealings with the candidate will be helpful in evaluating knowledge and ability.

### **3. Professional Experience**

**A candidate should be a licensed, experienced lawyer.**

A candidate should be admitted to practice law in the jurisdiction. The length of time that a lawyer has practiced is a valid criterion in screening candidates for judgeships. Such professional experience should be long enough to provide a basis for the evaluation of the candidate's demonstrated performance and long enough to ensure that the candidate has had substantial exposure to legal problems and the judicial process.

It is desirable for a candidate to have had substantial trial experience. This is particularly true for a candidate for the trial bench. Trial experience includes the preparation and presentation of matters of proof and legal argument in an adversary setting. The extent and variety of an candidate's experience as a litigator should be considered in light of the nature of the judicial vacancy that is being filled. Although substantial trial experience is desirable, other types of legal experience should also be carefully considered. An analysis of the work performed by the modern trial bench indicates that, in addition to adjudication, many judges perform substantial duties involving administration, discovery, mediation and public relations. A private practitioner who has developed a large clientele, a successful law teach and writer or a successful corporate, government or public interest attorney all may have experience which will contribute to successful judicial performance. Outstanding persons with such experience should not be deemed unqualified solely because of lack of trial experience. The important consideration is the depth and breadth of the professional experience and the competence with which it has been performed, rather than the candidate's particular type of professional experience.

For a candidate for the appellate bench, professional experience involving scholarly research and the development and expression of legal concepts is especially desirable.

### **4. Judicial Temperament**

**A candidate should possess a judicial temperament, which includes common sense, compassion, decisiveness, firmness, humility, open-mindedness, patience, tact and understanding.**

Judicial temperament is universally regarded as a valid and important criterion in the evaluation of a candidate. There are several indicia of judicial temperament which, while premised upon subjective judgment, are sufficiently understood by lawyers and non-lawyers alike to afford workable guidelines for the evaluator.

Among the qualities which comprise judicial temperament are patience, open-mindedness, courtesy, tact, firmness, understanding, compassion and humility. Because the judicial temperament requires an ability to deal with counsel, jurors, witnesses and parties calmly and courteously, and the willingness to hear and consider the views of all sides. It requires the ability to be even-tempered, yet firm; open-minded, yet willing and able to reach a decision; confident, yet not egocentric. Because of the range of topics and issues with

which a judge may be required to deal, judicial temperament requires a willingness and ability to assimilate data outside the judge's own experience. It requires, moreover, an even disposition, buttressed by a keen sense of justice which creates an intellectual serenity in the approach to complex decisions, and forbearance under provocation. Judicial temperament also implies a mature sense of proportion; reverence for the law, but appreciation that the role of law is not static and unchanging; understanding of the judge's important role in the judicial process, yet recognition that the administration of justice and the rights of the parties transcend the judge's personal desires. Judicial temperament is typified by recognition that there must be compassion as the judge deals with matters put before him or her.

Factors which indicate a lack of judicial temperament are also identifiable and understandable. Judicial temperament thus implies an absence of arrogance, impatience, pomposity, loquacity, irascibility, arbitrariness or tyranny. Judicial temperament is a quality which is not easily identifiable, but which does not wholly evade discovery. Its absence can usually be fairly ascertained.

Wide-ranging interviews should be undertaken to provide insight into the temperament of a judicial candidate.

## **5. Diligence**

**A candidate should be diligent and punctual.**

Diligence is defined as a constant and earnest effort to accomplish that which has been undertaken. While diligence is not necessarily the same as industriousness, it does imply the elements of constancy, attentiveness, perseverance, painstakingness and assiduousness. It does imply the possession of good work habits and the ability to set priorities in relation to the importance of the tasks to be accomplished.

Punctuality should be recognized as a complement of diligence. A candidate should be known to meet procedural deadlines in trial work and to keep appointments and commitments. A candidate should be known to respect the time of other lawyers, clients, and judges.

## **6. Health**

**A candidate should be in good physical and mental health.**

Good health embraces a condition of being sound in body and mind and with relative freedom from physical disease or pain. This is one criterion which may be capable of objective consideration. Any history of a past disabling condition or suggestion of a current disabling condition should require further inquiry as to the degree of impairment. Physical handicaps and diseases which do not prevent a person from fully performing judicial duties should not be a cause for rejection of a candidate. However, any serious condition must be considered carefully as to the possible effect it would have on the candidate's ability to perform the duties of a judge. Thus, it is proper for the evaluator to require a candidate to provide a physician's written report of a recent thorough medical examination.

Good health includes the absence of erratic or bizarre behavior which would significantly affect the candidate's functioning as a fair and impartial judge. Addiction to alcohol or other drugs is of such an insidious nature that the evaluator should affirmatively determine that a candidate does not presently suffer from any such disability.

The ability to handle stress effectively is a component of good mental health. A candidate should have developed the ability to refresh himself or herself occasionally with non-work-related activities and recreations. A candidate should have a positive perception of his or her own self-worth, in order to be able to withstand the psychological pressures inherent in the task of judging.

The evaluator should give consideration to the age of a candidate as it bears upon the health and upon the number of years of service that the candidate may be able to perform.

## **7. Financial Responsibility**

**A candidate should be financially responsible.**

The demonstrated financial responsibility of a candidate is one of the factors to be considered in predicting the candidate's ability to serve properly. Whether there have been any unsatisfied judgments or bankruptcy proceedings against a candidate and whether the candidate has promptly and properly filed all required tax returns are pertinent to financial responsibility. Financial responsibility demonstrates self-discipline and the ability to withstand pressures that might compromise independence and impartiality.

## **8. Public Service**

**Consideration should be given to a candidate's previous public service activities.**

Participation in public service and pro bono activities adds another dimension to the qualifications of the candidates. The degree of participation in such activities may indicate social consciousness and consideration for others. The degree to which bar association work provides an insight into the qualifications of the candidate varies in each individual. Significant and effective bar association work may be seen as a favorable qualification.

The rich diversity of backgrounds of American judges is one of the strengths of the American judiciary, and a candidate's non-legal experience must be considered together with the candidate's legal experience. Experience which provides an awareness of and a sensitivity to people and their problems may be just as helpful in a decision making process as a knowledge of the law. There is, then, no one career path to the judiciary. A broad, non-legal academic background, supported by varied and extensive non-academic achievements are important parts of a candidate's qualification. Examples of achievements are important parts of a candidate's qualifications. Examples of such non-legal experience are involvement in community affairs and participation in political activities, including election to public office. The most desirable candidate will have a broad life experiences.

There should be no issue-oriented litmus test for selection of a candidate. No candidate should be precluded from consideration because of his or her opinions or activities in regard to controversial public issues. No candidate should be excluded from consideration because of race, creed, sex or marital status.

While interviews of candidates may touch on a wide range of subjects in order to test a candidate's breadth of interests and thoughtfulness, the candidate should not be required to indicate how he or she would decide particular issues that may arise on litigated cases. However, a candidate's judicial philosophy and ideas concerning the role of the judicial system in our scheme of government are relevant subjects of inquiry.

# **Standards on State Judicial Selection**

**Report of the  
ABA Standing Committee on Judicial Independence  
Commission on State Judicial Selection Standards**

**July 2000**

---

The Standards on State Judicial Selection were approved by the American Bar Association House of Delegates in July 2000.

The commentary contained herein does not necessarily represent the official position of the ABA. Only the text of the black-letter standards has been formally approved by the ABA House of Delegates as official policy. The commentary, although unofficial, serves as a useful explanation of the black-letter standards.

American Bar Association  
750 North Lake Shore Drive  
Chicago, Illinois 60611

**Part A: Judicial Selection and Retention Criteria.**

**Standard A.1: Selection Criteria.** Judicial selection criteria should include, but not necessarily be limited to:

(i) **Experience.** A candidate for judicial office should be a member of the Bar of the highest court of a state for at least 10 years and have been engaged in the practice or teaching of law, public interest law, or service in the judicial system.

(ii) **Integrity.** The candidate should be of high moral character and enjoy a general reputation in the community for honesty, industry and diligence.

(iii) **Professional Competence.** Professional competence includes intellectual capacity, professional and personal judgment, writing and analytical ability, knowledge of the law and breadth of professional experience, including courtroom and trial experience. Candidates for appellate judgeships should further demonstrate scholarly writing and academic talent, and the ability to write to develop a coherent body of law.

(iv) **Judicial Temperament.** Judicial temperament includes a commitment to equal justice under law, freedom from bias, ability to decide issues according to law, courtesy and civility, open-mindedness and compassion.

(v) **Service to the Law and Contribution to the Effective Administration of Justice.** Service to the law and contribution to the effective administration of justice includes professionalism and a commitment to improving the availability of providing justice to all those within the jurisdiction.

**Standard A.2: Retention Criteria.** In addition to the criteria set forth in Standard A.1, in evaluating the judicial performance of a judge standing for retention election, the following should be considered:

- preparation, attentiveness and control over judicial proceedings;
- judicial management skills;
- courtesy to litigants, counsel and court personnel;
- public disciplinary sanctions; and
- quality of judicial opinions.

*Commentary*

Literature on judicial selection is replete with lists of criteria that should be considered in selecting a qualified judiciary. Although the selecting authority may feel pressured to emphasize certain selection criteria over others when making a particular appointment, the selecting authority should endeavor to consider a broad range of criteria when making an appointment. Depending on the nature of the judgeship, additional consideration may be desirable. For example, courtroom or trial experience may be especially pertinent for judgeships at the trial level, while superior writing skills may be considered for appellate judgeships. Additionally, the appellate record of a judge might be considered. Studies of bar polling practices and the use of

judicial nominating commissions have revealed a broad range of criteria. Lists of judicial selection criteria from a variety of sources are attached as an appendix.

Disclosure of selection criteria is essential. Although this standard prescribes no particular method for disclosure, the appointing authority should implement a disclosure format that is reasonably consistent, regularized, fair, and informative. Disclosure of selection criteria familiarizes the citizenry with the judicial selection procedure, and thus diminishes the perception of personal or political bias in the selection of judges. Additionally, disclosure of selection criteria encourages qualified candidates to seek judicial office by informing them of the qualities sought in a qualified judge.

Rules and procedures established by those responsible for assessing the qualifications of judicial candidates may require a waiver of confidentiality regarding disciplinary and legal proceedings concerning the judicial candidate. Moreover, participation in continuing legal education programs may be relevant when assessing judicial candidates, and should therefore be considered. Furthermore, a candidate's experiences with regard to volunteering time for the improvement of the legal system or the bettering of his or her community are also relevant. Finally, when assessing the qualifications of a sitting judge, a candidate's experiences with managing a caseload should be examined.

#### *References*

Patricia Garcia, *Roadmaps: Judicial Selection* (AMERICAN BAR ASSOCIATION, 1998).

American Bar Association Standing Committee on the Federal Judiciary, *Standards Related to Federal Judges*.

Thomas E. Baker, *The Good Judge* (TWENTIETH CENTURY FUND, 1989).

Evan Haynes, *The Selection and Tenure of Judges* (National Conference of Judicial Councils, 1944).

Bernard L. Shientag, *The Personality of the Judge* (VAIL-HALLOU PRESS, New York, 1944).

Henry T. Lummus, *The Trial Judge* (FOUNDATION PRESS INC., Chicago, 1937).