

**Report of the
AJS Special Committee on Judicial
Selection and Retention**

**American Judicature Society -
Hawaii Chapter**

February 28, 2003

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JUDICIAL SELECTION AND RETENTION
HAWAI'I CHAPTER OF AMERICAN JUDICATURE SOCIETY**

I. INTRODUCTION

On July 1, 2002, Chief Judge James S. Burns, Chair of the Hawai'i Chapter of the American Judicature Society (AJS) announced the formation of its Special Committee on Judicial Selection and Retention. The Special Committee was organized to review current and emerging issues relating to Hawai'i's merit selection and retention process.

The Committee was formed pursuant to a "Charter for Creation of Ad Hoc Committee," which began by noting that the AJS has been in the forefront of improving the administration of justice in the United States since 1913, and has been particularly involved in the development and nurturing of merit selection systems in the states. In Hawai'i, the AJS was instrumental in the creation of the state's merit selection system, including the Judicial Selection Commission itself and continues to provide training and guidance to the Commission and its Commissioners. In 1989 and 1993, the AJS convened citizens conferences to address then-current issues affecting the Commission and the selection and retention processes. Those conferences generated recommendations for improvements to the judicial selection and retention process, many of which were subsequently adopted.

The members appointed to this Committee by Chief Judge Burns are: Robert A. Alm, Chair; Judge Marcia J. Waldorf, Reporter; Judges: Gary W. B. Chang, Virginia L. Crandall, Reynaldo D. Grauly, Victoria S. Marks; Lawyer Members: Daniel Case, Bert Kobayashi, Jr., Margaret Masunaga, Gerald Sekiya; Non-Lawyer Members: Jo Kamae Byrne, Momi Cazimero, Leonard Hoshijo, Beverly Ann Deepe Keever, Kenneth Matsuura; Ex-Officio Member Lawrence S. Okinaga. (See Appendix A.)

The work of the Committee spanned eight months, during which time a number of written resource materials were collected and reviewed, and a number of resource people were identified and interviewed, including Ronald T. Y. Moon, Chief Justice of the Hawai'i Supreme Court; Benjamin J. Cayetano, Governor of the State of Hawai'i; Amy Agbayani, Chair of the Judicial Selection Commission; and Members of the current Judicial Selection Commission; David Fairbanks, James Koshiba, and Alfred Wong, former Commission Chairs; the present and incoming presidents of the Hawai'i State Bar Association; present and former state trial judges; and others.

The Committee first defined its purpose and scope. Consistent with local and national AJS history and standards, this was determined to be: To review procedures and practices with a goal to preserve and enhance Hawai'i merit selection process, and confidence in it by candidates, resource persons, and the citizenry at large.

The areas of inquiry were potentially so enormous that the Committee conducted much of its information gathering as a committee-of-the-whole (e.g., as many members as possible participated in the interviews of the sources identified in Section I above), but also conducted further more specific inquiry and discussion in subcommittees. The subcommittees then reported their findings and recommendations back to the Committee for consideration and final recommendation.

Even at the subcommittee level, it was not possible to undertake all subject matters falling into the sub-committee categories, which were (1) recusal, (2) retention, (3) judicial evaluation, and (4) public involvement and education.

The recommendations and analyses in these categories follows, with the caveat that the Committee is very well aware that they do not address all issues and concerns that are relevant within the scope of the state's merit selection and retention process.

II. THE PARADOX(ES) OF CONFIDENTIALITY: A WINDOW INTO THE PROCESS

In advance of looking at the specific issues, however, it is important to understand the constraint that the nearly complete confidentiality of the Judicial Selection Commission's (hereinafter "JSC") process represents.

What the current JSC Vice Chair has called the "paradox of confidentiality" is actually two paradoxes. As he noted, the judges get an entirely private review of their credentials and fitness, but must give up any due process rights they may have in exchange for that privacy. Most applicants and most judges have clearly supported this system, that paradox notwithstanding.

But there is also a second paradox that was especially impactful on this Committee's work. One of the reasons for the confidentiality of the process is the need to give resource persons (the preferred title for witnesses) the assurance that their information will be held in the strictest confidence. An example of what can go wrong when that confidentiality is breached was provided and, in that case, a New York judge retaliated against those who spoke against him. On the other hand, that same total confidentiality makes it essentially impossible to know what happened in specific cases when those cases

become controversial. There is, in effect, no way to either validate or criticize the way the JSC handled matters because there is no way to know how those matters were, in fact, handled.

And yet for all of these conflicts, no judge or commissioner (past or present) expressed any support for lifting the confidentiality requirement. And while there were some mixed views on the need for as complete a level of confidentiality as is currently in place, this Committee will not recommend any significant change in this area. One idea, for example, was to provide public notice of all JSC meetings even though the substance of each meeting would be confidential. The Committee believes that specific attention needs to be paid to increasing public confidence in the process as will be discussed in later sections.

We do, however, want to take advantage of the JSC's willingness to have their meeting with us to be a matter of public record and open a small window into the current selection commission process.

What follows is a set of observations about the current process:

- The JSC has two principal functions. It recommends lists of individuals for vacancies in the Judiciary to the Governor (for the Supreme Court, the Intermediate Court of Appeals, and the Circuit Court) or to the Chief Justice (for the District Courts). The appointing authorities must choose from that list. It also considers whether an incumbent judge seeking another term should be retained in office. On that decision, the JSC is the final authority.
- The basic starting point is the application submitted for appointment or retention. This information includes that received from the references (and the references of the references) named in the application.
- In the case of retention, the JSC publishes a notice in the newspaper soliciting comments on a specific judge's petition for retention.
- In the case of retention, there is also specific information sought by the JSC on the judge's track record. There were some comments about requests to judges from the JSC which came near to the deadline and were materials that were quite voluminous and/or hard to collect given the state of the Court record-keeping system. The Committee urges that the JSC be mindful of the concerns expressed and perhaps, when making new types of requests, has its staff member determine how readily available the information is to the judges.

- The lists of resource groups/persons used by the JSC may include the Chief Justice, the Administrative Director of the Judiciary, the Administrative Staff of the Courts, the Administrative Judge(s), Court Reporters, the Hawaii State Bar Association, the Prosecutor's Office, the Public Defenders, the ACLU, the Chiefs of Police, and private citizens, and industry. The JSC noted that the views of the Court staff are of particular importance to them.
- The views of a judge's colleagues (other than an administrative judge), are given very little weight. Since judges do not observe each other in Court, their contributions are felt to be less meaningful.
- JSC members do go to Court on occasion to observe the judge's conduct in a regular setting.
- The published notice does result in comments coming in directly to the JSC, especially from the general public in the case of Family Court Judges and District Court Judges.
- A quorum of the JSC is required to hear resource persons. Commissioners need not hear all resource persons testify in order to participate in the later discussion and determination on each case.
- The names of applicants are given to a number of resource persons for comment. With some past Commissions, though not with this one, the names of applicants are mixed with many non-applicants so that who is applying is not apparent.
- The results of the Judicial Evaluation process are the subject of later discussion but overall are used by the JSC. The issues for some Commissioners are the response rate and the quality of the sampling.
- Anonymous material is not used by the current Commission.
- There is some "campaigning" by supporters or opponents of certain candidates but the current JSC has an agreement that all such communications will be shared with all other Commissioners.
- The number of applicants for each position is currently sufficient to make good lists.
- Commissioners must be present to vote on applicants or retention. Proxy voting is not permitted.

- The judge involved is given an opportunity to appear before the JSC. There is, however, no requirement that the judge be confronted with any negative comments. There is also no current provision for a judge to request a subsequent meeting with the JSC to address any concerns which were raised.
- The meetings of the JSC are exempt from the Public Meeting Law (Chapter 92, Hawaii Revised Statutes ("HRS")) and from the Administrative Procedures Act (Chapter 91, HRS) as both exempt the Judicial Branch from the application of those chapters. See Sections 92-6(a)(1) and 91-1(1), HRS, respectively.
- Once the list is complete, two members of the JSC hand-deliver the list and the applications to the Governor or the Chief Justice. (See later discussion of Information to Appointing Authorities.) The list is not ranked in any way. The Commissioners do answer questions posed by the Governor or Chief Justice about the list.

Different Commissions have followed variations of the foregoing but overall these procedures and practices appear to be relatively consistent over time. The critical piece, input from the resource persons, as one current Commissioner noted, is very uneven.

A note on the overall retention record of the JSC process: From 1979 through 2002, of the 103 judges who have gone before the JSC for retention, 89 were retained, 9 were denied, and 5 withdrew their petitions.

III. THE ISSUES

A. ORIENTATION AND TRAINING

One area that the Committee felt very strongly about was the need to resume the AJS Training for Commissioners and to maintaining it on a regular basis.

The Committee believes that the training should be mandatory for all new Commissioners. Also, the appointing authorities and all existing Commissioners should be invited to attend.

AJS estimates the cost between \$2,500 and \$5,000. The Committee would strongly urge the Judiciary to support this training either through its existing budget or by seeking additional support for this expenditure.

The Committee, therefore, recommends that AJS training be required for all Commissioners, and that the appointing authorities for the JSC itself be invited as well. The training should be sponsored by either the Judiciary or the JSC and should commence in early 2003 to include the newly appointed Commissioners.

The Committee further recommends that there be a public component of that training process where interested individuals and groups can learn more about the merit selection process and how it functions.

B. THE JUDICIAL EVALUATION PROCESS

The issue of the relationship between the Judicial Evaluation Process and the Judicial Selection Commission was looked at by a subcommittee. The issues in the relationship are the number of evaluations submitted and the individuals whose views were sought.

The Judicial Evaluation Process is set forth in (Supreme Court) Rule 19, which provides for the ongoing evaluation of judges by the Chief Justice assisted by a panel of nine community leaders, attorneys, and retired judges. The primary information available to the panel is a set of evaluations sent out to attorneys who have appeared before the judge being reviewed during a specific period. Each judge is reviewed every two to three years.

Overall, the response rate on the Judicial Evaluation process has grown and statistically the sample is a good one. Recent statistics show the following:

- For the last ten circuit judges evaluated in 2002, the response rate was 32%. Historic response rates were 25%.
- The evaluation process involves taking a period of a judge's service, usually the previous year, and sending out 150 evaluation forms to the attorneys who most often appeared before the judge. The Judiciary's computer system is accessed by the administrative staff to determine those attorneys who have appeared before a given judge. First, those attorneys who have appeared before the judge more than ten times during that period are sent evaluation forms, then nine times, then eight times, and so on until 150 are sent.
- Again, looking at the last ten judges' evaluations; 38% came from those attorneys who appeared ten times or more in that period,

24% from those who had appeared six to ten times, 26% from those who had appeared three to five times and 12% from those who had appeared one to two times.

- There are areas where the response rate is weaker; family court, district court, and especially per diem judges.

The judicial evaluations are a key piece of information for the JSC by its own testimony. Anything that can be done both to increase the number of responses and the quality of the comment should be done.

In the course of discussion, the issue of whether the evaluation process should be turned over to either the JSC or to the Bar Association was discussed. The Committee's view is that as useful as the evaluations are at the time of retention or application for another judicial office, the evaluations are much more important as a coaching opportunity established by the Judiciary to help judges become better judges. The Rule 19 process should, therefore, remain a part of the Judiciary.

The Committee does, however, believe that the Bar Association can play a much more active role in encouraging responses to Rule 19 and urges that it use its Journal and other vehicles to increase participation.

The Committee also looked at sending the evaluation form to non-attorneys: jurors, witnesses, court reporters, parties to the case, etc. These are valuable sources of information and the Committee urges that some way to include their views be found.

The criteria used and the information sought in evaluations by such persons would be different but their participation could be very useful particularly in understanding how the public perceives the judge and that judge's administration of justice.

Finally, the Committee believes that appellate judges could provide useful input on trial court judges and should be included in the evaluation process.

C. THE RECUSAL PROCESS

The issue of Commissioners recusing themselves from appearances before judges who are seeking retention is complicated by three factors: (1) attorneys with active trial practices (and, therefore, knowledgeable about judges) are likely to be among the best Commissioners even though the potential for recusal situations is as a result quite high; (2) when

Commissioners recuse themselves, the overall voting number is reduced making the achievement of five votes necessary for retention or appointment potentially more difficult; and (3) the involvement of attorney members of the JSC in specific cases may stretch over a number of years going from a time when recusal was not an issue until it, in fact, becomes one. Forcing them to recuse such cases, may well not be in the best interests of anyone involved.

The current JSC is looking to repeal the existing provision in order to take care of the problems that occur with reducing the voting number of Commissioners. Recusal will then be handled on a case-by-case basis after disclosure.

From the point-of-view of the Committee, we would urge that the current JSC not repeal the current rule which is very straightforward and easy to follow.

The Committee attempted to look elsewhere for possible answers. In discussions with the AJS, the issue of recusal is a nationwide one to which no state has found a better answer.

The Committee, in the end, looked at two major grounds for recusal. The first, which is contemplated by the Rules, is where a Commissioner has a matter before a judge up for retention. Recusal from the JSC consideration of that judge's retention must take place in that context and the Committee recommends that provision remain in place. If the Commissioner wants to be involved in the retention consideration, the consequence is that the Commissioners must then remove themselves from the case before the judge. In some cases, this places the Commissioner in a very difficult position; to remove themselves from a pending case perhaps to the detriment of their client's interest or to recuse themselves from the retention process. The Committee does, therefore, additionally recommend that the Judiciary give serious consideration to having the judges consider recusing themselves instead in such cases. This is especially worth consideration when the recusal of a JSC Commissioner from the case pending before that judge could significantly harm the case involved.

The second type of recusal 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-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 those relating to disqualification, bias and the appearance of impropriety.

The Committee also believes that consideration needs to be given to providing a venue for complaints about the conduct of specific commissioners. There is no place, at this point, to take those complaints other than the JSC itself. One possible place is the Judicial Conduct Commission, which currently hears complaints involving judicial conduct.

D. PUBLIC PARTICIPATION

As discussed earlier, the JSC's process is confidential. And, while there was some discussion of possible ways to increase public participation (e.g. publishing notice of the JSC meetings even though their content would largely be closed), the Committee does not favor changing the current process.

The Committee does believe that the public needs and deserves a much deeper understanding of the process. The Committee strongly recommends that the Judiciary undertake an ongoing education program for the public about the judicial selection process including but not limited to the following: a printed informational piece, information incorporated into any judicial website, a speakers bureau of current and former commissioners and others willing to talk to community groups about the process and perhaps even a video which showed what the process is like in practice.

The Committee also recommends that the notice of petitions for retention, in particular, be given as much prominence as possible. While understanding that there are budgetary considerations, the Committee urges the Judiciary to publish its notices in the news sections rather than the legal notice sections, in papers of major circulation, and, in the case of the neighbor island judges, in the newspapers of those jurisdictions. The goal is to ensure that the notice is as highly visible as possible not just that publication is accomplished for the record.

And as noted above, the Committee urges that JSC training sessions be accompanied by public sessions where interested persons can receive information about the process. When the public knows little or nothing about a process, suspicion about what goes on can grow. In the merit selection process, confidentiality is crucial. The primary goal is to protect merit selection. Merit selection can only be preserved through public confidence. Public confidence requires full disclosure of the process and the need for confidentiality as an inherent part of merit selection. Often times, confidentiality is viewed as secrecy. In preserving merit selection, it is therefore, critical that the public have a clear understanding of the thorough process utilized by the JSC in nominating judges. Printed brochures and websites can also provide this information to the public. Understanding the process can heighten the need for confidentiality in merit selection.

E. THE RETENTION CRITERIA

The Committee reviewed the current rule which applies to retention:

Rule 10. EVALUATION OF APPLICANTS AND PETITIONERS

A. The Commission shall consider each applicant's and petitioner's background, professional skills, and character, and may give consideration to the following qualities:

- (1) integrity and moral courage;
- (2) legal ability and experience;
- (3) intelligence and wisdom;
- (4) compassion and fairness;
- (5) diligence and decisiveness;
- (6) judicial temperament; and
- (7) such other qualities that the Commission deems appropriate.

In addition, the Committee looked at possible alternatives such as the much more detailed standards used in Connecticut. It is the Committee's view that the current criteria are sufficient.

The Committee has two process comments which it would like to note. First, criteria (7) gives the JSC an opportunity to bring in other qualities. One area the Committee believes would be appropriate here, if nowhere else, is the service that judges render at higher judicial levels by temporary assignment, as well as service

as an administrative judge. These experiences are particularly important in the case of judges applying for higher positions.

Second, in the actual application of the criteria, the Committee believes that all criteria should apply in all cases. Whether the "may" (when precedes the words "give consideration to the following qualities") should be changed to "shall" in the language of the Rule, or whether that is, in fact, how the rule is implemented, the key is the consistent application of the criteria to all judges seeking retention.

F. PRESUMPTION

Under current rules and procedures, the individual applying for judicial office must acknowledge the following on the first page of the application form:

Do you understand and acknowledge that the selection of an applicant for judicial office does not create any inference, presumption, entitlement, or expediency of retention at the expiration of the term of such judicial office; that a petitioner for retention does not have a property or liberty interest in judicial office protected by due process; and that a judicial office has no legitimate claim of entitlement to preferential consideration of a petition for retention by virtue of incumbency?

During its discussions with the current Commission, one current Commissioner stated his view that a rebuttable presumption of retention in effect exists already, at least in his mind. Others interviewed either believed that such a presumption already existed (even though unstated) or should be in place. There were, however, also others who did not share this view including many of the current Commissioners.

For the reasons stated below, the Committee believes that a rebuttable presumption of competence and capability is appropriate.

The argument for such a presumption is as follows: experience is a valuable element of the review of a judge, somewhat akin to determining whether an attorney is offered a partnership in a law firm; attorneys who become judges give up the potential for more lucrative private practice careers; the goal of the process should be the continuing service of experienced judges; and judges have no right or ability to appeal the outcome of the retention process. The presumption created would be

"rebuttable", that is it could be overcome by evidence of that judge's conduct to the contrary.

The argument against such a presumption is as follows: the Hawaii law on judicial retention already favors retention because there is no consideration of alternative names in Hawaii when the judge's retention is considered; there is already a sense that the process favors the incumbent, and a true merit-based system should contain no presumptions of any kind. In addition, it was suggested that a presumption might conflict with the Constitution provisions on judicial term limits if there is any sense that there is a right to anything beyond the appointed term.

On balance, the Committee believes that a rebuttable presumption is in order. From the origin of this merit selection system at the 1978 Constitutional Convention, the goal has been to create a career as a judge for those who pass the intense initial screening and who conduct themselves appropriately during their term as a judge. They have no tenure. They should, however, have some legitimate sense that if they perform their duties acceptably, that they will be retained. A rebuttable presumption provides that sense.

G. WITHDRAWAL

One of the issues that was discussed at length by the JSC was what to do in the event a judge wishes to withdraw his or her name from consideration. This may occur under a variety of circumstances, one of which is when the JSC is not going to retain a judge and gives that judge the opportunity to withdraw his or her petition prior to formal rejection.

In the early days of the JSC, there were a number of rejections of petitions for retention. Over time, however, the JSC began to evolve a system of giving the judge the withdrawal opportunity. And while the Rules provide for an opportunity to withdraw prior to the entry of an order on retention, the practice has been subject to at least two concerns. First, there is the question of whether notifying the judge in this manner might violate the confidentiality provisions. And second, there is no provision to take a "straw poll" on retention and, if the vote is a formal one, doesn't the remaining procedure take over automatically?

The Committee recommends that a specific provision on withdrawal be added to make the process clear. The JSC has indicated publicly that they will be adopting such a rule and may withhold adoption in order to look at this recommendation.

The Committee's suggested rule changes affect two provisions in Rule 12. These two sections would be changed as follows with new material underlined and material to be deleted bracketed:

Rule 12. RETENTION OF PETITIONER

A. When a judge or justice petitions the commission pursuant to Section 3 of Article VI of the Constitution of the State of Hawaii 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 provide the petitioner with an opportunity to withdraw the petition within five days if it is determined that the petition will not be granted.

...

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 review 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[.], the commission shall notify the petitioner that retention will be denied unless the petitioner withdraws the petition within five days. If the petition is not withdrawn in five days, the commission shall issue an order denying the petition to be retained in office. In either event, the Commission should make best efforts to provide the petitioner with sufficient time to file for retirement.

These changes accomplish the following: they make clear that there is a withdrawal opportunity that works in conjunction with the operation of the confidentiality provisions, that a formal vote can be taken, and that the withdrawal opportunity is an option. The Committee understands that the last aspect of this proposal may make it controversial as there could be cases where the JSC wants

to publicly deny retention for some special reason. On balance, however, withdrawal is a humane and respectful approach to someone who has given many years of service and such an approach should be built into the system.

H. INFORMATION TO APPOINTING AUTHORITIES

One issue that arose during the course of discussions was the question of what material is forwarded to the appointing authority along with the list of names. It turns out that the only information provided are the application forms of the nominees for the particular office. The appointing authority does not get the remainder of the file, including all the information provided by the resource persons because the material was gathered under the mantle of confidentiality and neither the Governor nor the Chief Justice is included in that provision of confidentiality.

Stated another way, the appointing authorities are neither obligated to maintain the confidentiality nor are they legally protected from efforts to get at that information. Sharing the file with the appointing authorities under those circumstances would not be proper.

The provision of confidentiality finds its base in Article VI, Section 4 of the State Constitution and extends only to the JSC. The Committee urges that the issue of extending the confidentiality provisions to the appointing authorities should be considered if there is a Constitutional Convention or if Article VI is otherwise amended.

One final note. The extension of confidentiality and the sharing of information is particularly important if the appointing authority does not share the list publicly prior to making his or her choice. That was the case with Governor Benjamin Cayetano. If, on the other hand, the list is publicized while being considered, as is the case with Chief Justice Ronald Moon, there is at least some opportunity for interested persons to share their comments with the Chief Justice.

I. THE RULE OF FIVE

At a number of points in our discussions, the consequences of needing five votes to take action (either to include a name on the list or to retain a judge) were noted. Inevitably, the issue that emerges is why does it take five votes rather than a majority of those members able to vote on any particular matter, discounting vacancies, and those recused on any particular matter.

The operative language from Article VI, Section 4, of the State Constitution is as follows:

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

Whether that language encompasses the situations of vacancies and recusals is at least an open question.

The Committee understands that getting substantial concurrence of the JSC is an important aspect of its structure. Where, however, the JSC voting membership has been reduced in a specific case, the Rule of Five gives a lot of power to a small number of Commissioners who can essentially control the result with a small minority. The Committee questions whether this is what was contemplated.

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.

J. THE PERCEPTION OF POLITICIZATION

The Committee received some concern that the JSC process was becoming more "politicized". While it was not entirely clear what those concerned meant, it seemed that there was some sense that the JSC was subject to outside pressure.

The Committee found no evidence to support that concern. And while there were concerns expressed about certain recent JSC actions, in fact, there seems very little evidence that politics is playing any real role in the deliberations of the Commission at this time.

K. JSC STAFFING AND SUPPORT

The Committee looked into the matter of support for the activities of the JSC. The basic level of support is a full-time staff member included within the Judiciary's Budget and a sum to pay expenses. That amount was \$75,000 this year and will be \$80-85,000 for the coming year. The major expense item is for advertising, which currently runs at \$25,000 annually.

The Committee has no real reason to believe that additional support is necessary but believes that it is essential that there be funds available for annual training from AJS and for publishing the notices with the

prominence discussed in the Public Participation Section, above. If the current funding is insufficient to support both items, we urge the Judiciary to provide additional funding.

L. MYTHS ON APPLICANT NUMBER AND QUALITY

One of the persistent myths about the JSC process is that there are not enough qualified applicants to make up the lists which are sent to the Governor and the Chief Justice. This argument has been used to, among other things, argue for sending smaller lists to those appointing judges.

Based on our discussion with the Commissioners, current and past, this is overwhelmingly not the case. The JSC believes that every candidate sent forward is specifically qualified for the position. The JSC is, in fact, proud of the quality of its lists.

M. BREACHES OF CONFIDENTIALITY

As discussed above, one of the foundations of the JSC process is confidentiality. Everyone involved stresses the absolute need for confidentiality particularly for those who appear in front of the Commission.

It was, therefore, very distressful to have material come to the attention of the Committee suggesting that a current member of the JSC revealed the name(s) of persons who opposed reappointment of a particular judge. The circumstances of that incident are more complex than appeared at first blush and there may well have been no breach at all, but it is still an area where Commissioners should go out of their way to ensure that there is not even a perception of confidentiality breaches. For example, the fact that a resource person has told others that he or she appeared before the JSC does not relieve JSC members of their responsibility to hold those names in confidence. The audience for the JSC member who discusses resource persons may not know that the testimony is essentially public record and, instead, simply hears a JSC member discussing material which should be confidential and as a result loses confidence in the integrity of the process.

N. JSC APPOINTING AUTHORITY CHANGES

The Committee received a number of suggestions about changes to the appointing authorities for the JSC itself. Most involved taking away the Senate President's appointment (on the theory that the appointment conflicts with the Senate's advice and consent role) or one of the Governor's appointments (presumably because of the theoretically political nature of such appointments).

The suggestions of who should get the appointment, if it was taken away, ranged from giving the Bar Association an additional seat for a neighbor island attorney, to giving it to a public interest group such as the League of Women Voters.

Overall, the Committee did not believe there was any substantial reason to make changes and does not recommend any changes though the reasoning behind some of the suggestions is intriguing. For example, the suggestion that the Bar Association get a third member was based on the strong sense that the attorneys on the panel have substantial influence on the results, that there can only be four attorneys on the JSC, and that given that situation, as many of the attorney members as possible should be selected by the widest possible group, the Bar Association. One variant of that is to require that the new Commissioner practice on the neighbor islands though all attorneys statewide would be allowed to vote on the names.

O. APPEALS

There was some discussion of whether to allow for appeals of the retention process to some body. The real question is what recourse does a judge have if he or she feels that they have received less than fair treatment by the JSC. The answer is that there is none and the Committee does not favor creating one. The current process has operated effectively and does not require a structural change as appeal would involve.

There is, however, one aspect of the "appeals" question that the Committee does believe deserves attention. The Committee believes strongly that judges who are up for retention should be confronted at least with the basic charges against them and be given an opportunity to meet with the JSC another time if they believe they need to in order to respond to issues raised. While there may be an argument that judges should be able to handle anything tossed their way, the Committee believes that the purpose of the JSC is to create the fullest possible

picture of the judge's service and that is not necessarily gathered by surprise.

IV. HARD CASES MADE BAD LAW

Many of us heard the maxim during our law school days to the effect that "hard cases make bad law." The point was that controversial cases usually have their own individual dynamics and are rarely a good basis for making law or policy.

There is no question that this Committee was formed in part to respond to events in 2002 that generated concern in the Judiciary and in some segments of the Bar.

It was not the purpose of the Committee to reexamine specific cases and especially not to render judgment on the actions of the JSC in specific cases. The Committee would, however, note that the material that came to our attention does not support any finding that the JSC behaved without support for its position or unreasonably.

V. CONCLUSIONS AND RECOMMENDATIONS

First and foremost, this Committee strongly supports the principles of merit selection and the functioning of the Judicial Selection Commission. There are no major problems evident here and there is no reason to contemplate a major overhaul of this process.

We do, however, believe that like any process, it can always be improved and that in any event it, like all institutions, needs periodic review. We appreciate all the cooperation we've received, from the JSC, from the appointing authorities, from the State Bar Association, from a number of interested parties, and most of all from AJS. Allen Ashman of the AJS staff has been uniformly helpful and accommodating and has aided our task immeasurably.

To summarize, this Committee makes the following specific recommendations:

1. The JSC is requested to re-initiate training by the AJS for new Commissioners and for the public immediately. The training should be supported financially by the Judiciary.
2. The Hawaii State Bar Association is specifically requested to urge its members to actively participate in the Rule 19 Judicial Evaluation process.

3. The Judiciary, and specifically the Rule 19 Committee, is urged to develop ways to include non-attorney observers, court reporters, jurors, witnesses, and others, as well as (in appropriate cases) appellate court judges in the evaluation process.
4. 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.
5. The Judiciary is requested to initiate an ongoing education program on the JSC process including printed material, a speakers bureau and a video. The Judiciary is also strongly urged to expand its website, which could then be used by the JSC to inform the public of its processes and actions.
6. The JSC is urged to change its retention criteria rule to make it mandatory that the seven criteria be applied in each case.
7. The JSC is urged to create a rebuttable presumption of competence and capability in the consideration of petitions for judicial retention.
8. The JSC is urged to adopt a rule specifically allowing for withdrawal in any case where a judge will not be retained and that such action take place in time to allow for the processing of retirement papers, if applicable.
9. Any future Constitutional Convention or Citizens Conference is urged to consider extending the confidentiality mandate/protection to the appointing authorities in order to allow the full record to be shown to those authorities.
10. 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.
11. The Judiciary is requested to provide the budgetary support necessary to support the AJS training program on an annual basis, to make possible the prominent placement of newspaper notices of JSC actions (i.e. in the news sections as opposed to the legal notice section) in both a major daily paper and a neighbor island paper, if appropriate, and to create an education program on the JSC process.

12. The JSC is urged, as a matter of practice, to permit judges in retention proceedings to be as directly as possible confronted with material which argues against their retention and be given an opportunity for a follow-up session if they request one.

Again, the Committee believes strongly that the current process is an excellent one and views these proposals as simply making it even better.

APPENDIXES

1. The Constitution of the State of Hawaii, Article VI
2. Chapter 91, Section 91-1(1), Hawaii Revised Statutes
3. Chapter 92, Section 92-6(a)(1), Hawaii Revised Statutes
4. Rules of the Supreme Court, Rule 19. Judicial Performance Program
5. Judicial Selection Commission Rules

**THE CONSTITUTION OF THE
STATE OF HAWAII**

**As Amended and In Force
January 1, 1979**

**[Article VI]
As Amended and In Force January 1, 2000**

**THE CONSTITUTION OF THE STATE OF HAWAII,
as amended and in force January 1, 1979**

**[ARTICLE VI]
As amended and in force January 1, 2000**

APPOINTMENT OF JUSTICES AND JUDGES.

SECTION 3. The governor shall, with the consent of the senate, fill a vacancy in the office of the chief justice, supreme court, intermediate appellate court and circuit courts, by appointing a person from a list of not less than six nominees for the vacancy, presented to the governor by the judicial selection commission.

If the governor fails to make any appointment within thirty days of presentation, or within ten days of the senate's rejection of any previous appointment, the appointment shall be made by the judicial selection commission from the list with the consent of the senate. If the senate fails to reject any appointment within thirty days thereof, it shall be deemed to have given its consent to such appointment. If the senate shall reject any appointment, the governor shall make another appointment from the list within ten days thereof. The same appointment and consent procedure shall be followed until a valid appointment has been made, or failing this, the commission shall make the appointment from the list, without senate consent.

The chief justice shall fill a vacancy in the district courts by appointing a person from a list of not less than six nominees for the vacancy presented by the judicial selection commission. If the chief justice fails to make the appointment within thirty days of presentation, the appointment shall be made by the judicial selection commission from the list. The chief justice shall appoint per diem district court judges as provided by law.

QUALIFICATIONS FOR APPOINTMENT.

Justices and judges shall be residents and citizens of the State and of the United States, and licensed to practice law by the supreme court. A justice of the supreme court, a judge of the intermediate appellate court and a judge of the circuit court shall have been so licensed for a period of not less than ten years preceding nomination. A judge of the district court shall have been so licensed for a period of not less than five years preceding nomination.

No justice or judge shall, during the term of office, engage in the practice of law, or run for or hold any other office or position of profit under the United States, the State or its political subdivisions.

TENURE; COMPENSATION; RETIREMENT.

The term of office of justices and judges of the supreme court, intermediate appellate court and circuit courts shall be ten years. Judges of the district courts shall hold office for the periods as provided by law. At least six months prior to the expiration of a justice's or judge's term of office, every justice and judge shall petition the judicial selection commission to be retained in office or shall inform the commission of an intention to retire. If the judicial selection commission determines that the justice or judge should be retained in office, the commission shall renew the term of office of such justice or judge for the period provided by this section or by law.

JUDICIAL SELECTION COMMISSION.

SECTION 4. There shall be a judicial selection commission that shall consist of nine members. The governor shall appoint three members to the commission. No more than one of the three members shall be a licensed attorney. The president of the senate and the speaker of the house of representatives shall each respectively appoint one member to the commission. The chief justice of the supreme court shall appoint two members to the commission. No more than one of the two members shall be a licensed attorney. Members in good standing of the bar of the State shall elect two of their number to the commission in an election conducted by the supreme court or its delegate. No more than four members of the commission shall be licensed attorneys.

The commission shall be selected and shall operate in a wholly non-partisan manner. After the initial formation of the commission, elections and appointments to the commission shall be for staggered terms of six years each. No member of the commission shall serve for more than one full six-year term on the commission.

Each member of the judicial selection commission shall be a resident of the State and a citizen of the United States. No member shall run for or hold any other elected office under the United States, the State or its political subdivisions. No member shall take an active part in political management or in political campaigns. No member shall be eligible for appointment to judicial office of the State so long as the person is a member of the judicial commission and for a period of three years thereafter.

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

The judicial selection commission shall select one of its members to serve as chair. The commission shall promulgate rules which shall have the force and effect of law. The deliberations of the commission shall be confidential.

The legislature shall provide for the staff and operating expenses of the judicial selection commission in a separate budget. No member of the judicial selection commission shall receive

any compensation for commission services, but shall be allowed necessary expenses for travel, board and lodging incurred in the performance of commission duties.

The judicial selection commission shall be attached to the judiciary branch of the state government for purposes of administration. [Add Const Con 1978 and election Nov 7, 1978]

CHAPTER 91

**SECTION 91-1(1),
HAWAII REVISED STATUTES**

§91-1 Definitions. For the purpose of this chapter:

- (1) "Agency" means each state or county board, commission, department, or officer authorized by law to make rules or to adjudicate contested cases, except those in the legislative or judicial branches.
- (2) "Persons" includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies.
- (3) "Party" means each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any court or agency proceeding.
- (4) "Rule" means each agency statement of general or particular applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency. The term does not include regulations concerning only the internal management of an agency and not affecting private rights of or procedures available to the public, nor does the term include declaratory rulings issued pursuant to section 91-8, nor intra-agency memoranda.
- (5) "Contested case" means a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing.
- (6) "Agency hearing" refers only to such hearing held by an agency immediately prior to a judicial review of a contested case as provided in section 91-14. [L 1961, c 103, §1; Supp. §6C-1; HRS §91-1]

CHAPTER 92

**SECTION 92-6(a)(1),
HAWAII REVISED STATUTES**

§92-6 Judicial branch, quasi-judicial boards and investigatory functions; applicability. (a) This part shall not apply:

- (1) To the judicial branch.
- (2) To adjudicatory functions exercised by a board and governed by sections 91-8 and 91-9, or authorized by other sections of the Hawaii Revised Statutes. In the application of this subsection, boards exercising adjudicatory functions include, but are not limited to, the following:
 - (A) Hawaii labor relations board, chapters 89 and 377;
 - (B) Labor and industrial relations appeals board, chapter 371;
 - (C) Hawaii paroling authority, chapter 353;
 - (D) Civil service commission, chapter 26;
 - (E) Board of trustees, employees' retirement system of the State of Hawaii, chapter 88;
 - (F) Criminal injuries compensation commission, chapter 351; and
 - (G) State ethics commission, chapter 84.

(b) Notwithstanding provisions in this section to the contrary, this part shall apply to require open deliberation of the adjudicatory functions of the land use commission. [L 1975, c 166, pt of §1; am L 1976, c 92, §8; am L 1985, c 251, §11]

**RULES OF THE SUPREME COURT
STATE OF HAWAII**

**RULE 19. JUDICIAL PERFORMANCE
PROGRAM**

**As Amended April 16, 1984
Effective June 1, 1984**

With Further Amendments as Noted

19.1. Purposes of Judicial Performance Program.

The courts, the public and the legal profession have a vital interest in a responsive and respected judiciary. In its supervisory role and pursuant to its power over the court system and judges, the supreme court has determined that the periodic evaluation of a judge's performance is a reliable method to promote judicial excellence and competence. Accordingly, the supreme court hereby establishes the Judicial Performance Program (herein called "program"). The purposes of the program are:

(a) Improving individual judges' performance by providing information to the Chief Justice concerning their performance;

(b) Providing a potential source of information for application and retention decisions by the Judicial Selection Commission of the State of Hawai'i;

(c) Facilitating the Chief justice's effective assignment and use of judges within the judiciary;

(d) Improving the design and content of judicial education programs; and

(e) Assisting the Chief Justice in discharging his or her responsibilities to administer the judiciary.

(Amended June 14, 1996, effective June 14, 1996.)

19.2 Jurisdiction. All full-time, part-time and specially appointed justices and judges (herein called "judges") are subject to the exclusive evaluation processes of the supreme court and the special committee to be appointed by the Chief Justice to implement and administer the program.

However, nothing in this rule shall be construed to attempt to limit or infringe upon the proper proceedings or authority of the Commission on Judicial [Discipline] Conduct or the Judicial Selection Commission.

DATED: Honolulu, Hawai'i, June 19, 2002.

19.3. Special Committee to Implement and Administer the Program.

The Chief Justice shall appoint a special committee to implement and administer the program according to such procedures deemed necessary by the committee and approved by the supreme court. The committee shall consist of thirteen members—three non-lawyers, the administrative director of the judiciary, six members of the bar of the supreme court, and three judges. The Chief Justice shall designate the chair and vice-chair of the committee and the length of terms of all committee members.

The committee shall have the following powers and duties:

- (a) To promulgate, subject to the supreme court's approval, the procedures to be followed by the committee in implementing and administering the program;
- (b) To conduct periodic evaluation of performance of judges by use of appropriate evaluation procedures approved by the supreme court; and
- (c) To take any other action reasonably related to the committee's powers and duties.

The administrative director of the judiciary shall provide staff and other assistance to the committee to enable the committee to fulfill its duties under this rule. The chair of the committee may appoint subcommittees (comprised only of committee members) as may be appropriate.

The committee shall act only with the concurrence of seven of its members. Members shall receive no compensation for their services but may be reimbursed for their traveling and other expenses incidental to the performance of their duties.

19.4. Judicial Performance Evaluation Criteria.

The committee shall develop, implement and administer the program to ensure that judges are evaluated according to the following criteria:

- (a) Legal ability;
- (b) Judicial management skills;
- (c) Comportment; and
- (d) Any other criteria established by the committee and approved by the supreme court.

19.5. Confidentiality.

(a) **Respondent Confidentiality.** The program shall be implemented and administered so that the identity of any person responding to the evaluation process is kept confidential from all judges. Further, the identity of persons responding to the evaluation process shall be privileged from discovery in any lawsuit, and shall not be available to any tribunal, board, agency, governmental entity, or person.

(b) **Confidentiality of Information and Data.** All information, questionnaires, notes, memoranda, data, and/or reports obtained, used, or prepared in the implementation and administration of the program shall be privileged from discovery in any lawsuit, and shall not be made available to any tribunal, board, agency, governmental entity, or person, other than the Chief Justice. Except as otherwise provided herein, the Chief Justice shall have the sole discretion and authority to determine how the above information can be used to fulfill the purposes of the program.

The committee members, and all persons who implement, administer, or tabulate data for the program shall be immune from subpoena with regard to their involvement in the program.

(c) **Furnishing of Information and Data to the Judicial Selection Commission.** The Chief Justice shall provide such information and data concerning the performance of a judge to the Judicial Selection Commission as the Commission may request in writing. All information and data furnished the Commission pursuant to this provision shall remain confidential.

(d) **Furnishing of Summary to the Evaluated Judge.** The Chief Justice shall in a manner consistent with the requirements of paragraph (a) of this section relating to respondent confidentiality, furnish the judge evaluated a summary of the judge's performance as determined by the evaluation process established by this rule.

(Amended June 14, 1996, effective June 14, 1996.)

19.6. Immunity.

All documents and information obtained by or submitted to the committee or to the Chief Justice and all results of judicial evaluations are absolutely privileged and no lawsuit predicated thereon may be brought. Members of the committee and staff shall be immune from suit and liability for any conduct in the course of their duties.

19.7. Effective Date.

These rules shall take effect on January 1, 1991, and shall continue in effect until further order of the court. At the end of the first two years of operation of the program, the committee shall make appropriate recommendations to the court concerning any necessary modifications, amendments or alterations of the program.

(Added November 27, 1990, effective January 1, 1991; amended August 9, 1991, effective August 9, 1991.)

**JUDICIAL SELECTION COMMISSION
STATE OF HAWAII
RULES**

**Adopted April 23, 1979
With Amendments as of July, 1995**

JUDICIAL SELECTION COMMISSION

STATE OF HAWAII

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**JUDICIAL SELECTION COMMISSION
STATE OF HAWAII
RULES**

PREAMBLE

Judicial selection commissioners hold positions of public trust and shall conduct themselves in a manner which reflects credit upon the judicial selection process.

Rule 1. COMMISSION CHAIR.

The chair of the commission shall adhere to the Rules for the Judicial Selection Commission and shall preside at any meeting of the commission at which he or she is present.

Rule 2. COMMISSION VICE-CHAIR.

In the event that the chair is an attorney, the vice-chair shall be a lay member of the commission. If the chair is not an attorney, the vice-chair shall be an attorney. The vice-chair shall serve in the absence of the chair.

Rule 3. COMMISSION SECRETARY.

The commission shall choose one of its members as secretary. It shall be the duty of the secretary to prepare and keep minutes of meetings, as directed by the commission. In the secretary's absence, the commission shall choose a member to be acting secretary. The duties may be delegated to a staff member.

Rule 4. TERMS OF OFFICE.

The terms of office of the chair, vice-chair, and secretary shall be for two years.

Rule 5. CODE OF CONDUCT FOR COMMISSION MEMBERS.

SECTION ONE: ABUSE OF POSITION

A. No commissioner shall use or attempt to use his or her official position to secure privileges or exemptions for the commissioner or others.

B. No commissioner shall attempt, solicit, or agree to accept any gift, favor or anything of value based upon any understanding, either explicit or implicit, that the official actions, decisions or judgment of any commissioner would be influenced thereby. Nothing in this section shall prohibit a commissioner from accepting a public award presented in recognition of public service.

C. No commissioner shall request or accept any fee or compensation, on commission related matters.

D. Each commissioner shall use the resources, property and funds under the commissioner's official control judiciously and solely in accordance with prescribed statutory and regulatory procedures.

E. Each commissioner shall immediately report to the Judicial Selection Commission any attempt to induce him or her to violate any of the standards set out above.

SECTION TWO: CONFIDENTIALITY

A. Under the Constitution of the State of Hawaii, the commission's proceedings must be confidential. Therefore, all commission records, proceedings, and business, including the names of all proposed nominees and the names of nominees forwarded to the appointing authority, shall be confidential and may not be discussed outside commission meetings, except among commission members, or as made necessary by Rule 9 or Rule 12, or pursuant to Rule 13.

B. No commissioner shall engage in ex parte communications on matters relating to commission proceedings, except as provided in these rules.

C. All communications between commissioners, between a commissioner and an applicant or petitioner, or between a commissioner and any other person or organization with respect to the judicial qualifications of an applicant or petitioner shall be kept confidential and discussed only among commission members. A commissioner, or ex-commissioner shall not disclose confidential information, except as provided in these rules.

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 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 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 pending before the commission pursuant to Rule 12 if that commissioner has a substantive matter pending before that judge or justice.

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 chair 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 chair shall call at least one meeting every two years to review and consider amending or revising commission rules and operating procedures and to brief new commissioners on the rules and operating procedures.

D. A quorum for the commission shall be five commissioners. The commission shall act by majority vote of nine commissioners in all actions.

Rule 7. RECRUITMENT OF APPLICANTS, NOTICE.

A. Commissioners may actively seek out and encourage qualified individuals to apply for judicial office. Commissioners should always keep in mind that often persons with the highest qualifications will not actively seek judicial appointment.

B. Upon notification or knowledge that a vacancy has occurred or will occur, the chair shall inform the other members of the commission of the vacancy. The commission shall publicize a vacancy.

Rule 8. APPLICATIONS AND PRELIMINARY SCREENING OF APPLICANTS.

A. Applicants who meet the constitutional qualifications for appointment shall receive and respond to forms of applications as prescribed by the commission.

B. The commission may after it receives the applications eliminate from further consideration those applicants whom it evaluates to be unqualified for judicial office. A list of the remaining applicants may be prepared and the commission may gather additional information on each applicant as it deems appropriate.

C. The chair may designate one or more commissioners to review the qualifications of the applicants whose names appear on the list of remaining applicants prepared pursuant to Rule 8B. The designated commissioner or commissioners shall prepare a list recommending the names of

applicants whom the commission should interview, the names of applicants who should not be further considered by the commission, and the names of applicants the commission should further consider for judicial office.

Rule 9. INTERVIEWS AND INVESTIGATIONS.

The commission may interview applicants and petitioners and conduct investigations into their backgrounds and qualifications. The chair may designate one or more commissioners to interview and investigate applicants and petitioners. Using the commission's form of application or petition, or as the case may be, as a starting point, the designees may obtain as much information on the applicant or petitioner as possible from available sources. The commission may retain such services as it deems necessary and appropriate to conduct investigations.

Rule 10. EVALUATION OF APPLICANTS AND PETITIONERS.

A. The commission shall consider each applicant's and petitioner's background, professional skills, and character, and may give consideration to the following qualities:

- (1) integrity and moral courage
- (2) legal ability and experience
- (3) intelligence and wisdom
- (4) compassion and fairness
- (5) diligence and decisiveness
- (6) judicial temperament
- (7) such other qualities that the commission deems appropriate.

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 chair 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 six nominees for a vacant judicial office.

C. The commission members shall vote by secret ballot. Each member shall vote to select six qualified nominees for any given judicial office vacancy unless otherwise provided by the commission. 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. 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 Hawaii 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 chair or acting chair 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 majority vote of the commissioners 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.

Rule 13. TRANSMITTAL TO THE APPOINTING AUTHORITY.

A. The names of the nominees, listed in alphabetical order, shall be hand-delivered to the appointing authority.

B. No other information shall be forwarded to the appointing authority, except that the commission may submit to the appointing authority a factual summary of the nominees' background based on material provided by the nominees, and the commission may consult with the appointing authority on request.