

**REPORT OF THE AJS SPECIAL COMMITTEE ON JUDICIAL  
CAREERS AND SELECTIVITY, MARCH 2011**

**I. BACKGROUND**

In June 2010, the Hawai'i Chapter of the American Judicature Society impaneled a Special Committee on Judicial Careers and Selectivity to review the status of, and issues relating to, the recruitment and encouragement of the best qualified lawyers and judges (those seeking higher office) to apply for judicial office. The committee was composed of judges, attorneys and community leaders -- Judge Susan Mollway, Chief Judge Craig Nakamura, Judge Robert M. Browning, Judge Rom A. Trader, Judge Virginia Lea Crandall, Mark Rossi, Rosemary Fazio, Alfred M.K. Wong, Allen K. Hoe, John Yamano, Erika Lewis, Momi Cazimero, Janet A. Liang, Kathryn Matayoshi and Laurie Tochiki. Mark Rossi and Judge Crandall were appointed co-chairs of the Special Committee.

The Special Committee's charge included evaluating factors that may impact the quality and quantity of applicants for judicial positions, including addressing some of the well-known impediments to application, such as low compensation, facing what may be perceived as a daunting selection process, and the impact the job may have on one's personal and family life.

The Special Committee noted at the outset that overall interest in judicial appointment in Hawai'i remains high. According to statistics provided by the State Judicial Selection Commission ("JSC"), applications for judicial appointments have been on the rise since 2005. Likewise, the quality of those selected remains strong.

The Special Committee considered various factors potentially impacting the decision to seek judicial appointment and assessed possible measures that could be implemented to encourage interest in judicial opportunities. The Special Committee identified six factors that could influence a potential candidate's decision to move forward with the selection process: (1) the disparity in compensation, benefits, and retirement between judges, government employees, and private practitioners; (2) the perception that the selection process can be daunting; (3) the impact of a failed application upon future prospects; (4) the impact of the job on personal and family life; (5) the appointing authority's desire to select from a particular field; and (6) the impact of difficult and controversial judicial decisions on

one's personal and professional life. Those factors were then analyzed and ranked in order of perceived importance, and are discussed below.

## II. FINDINGS

### A. The Disparity in Compensation/Benefits/Retirement Between Judges, Government Employees, and Private Practitioners.

The Special Committee concluded that the disparity in compensation between government employees and private practitioners has a significant impact on the state judicial candidate pool. More applicants come from government than from private practice. This is a concern because the judiciary should be diverse, consisting of the best and brightest in practice.

The Special Committee acknowledges that the recent fiscal crisis has had a significant impact on the judicial, executive and legislative branches of government and this has resulted in layoffs, furloughs and salary reductions for many government employees. Judges received a five percent (5%) salary reduction on July 1, 2009.

Although Hawai'i's judicial salaries fall near the U.S. average, when adjusted by a cost-of-living index, they are by far the lowest in the U.S. According to the National Center for State Courts, as of June 30, 2009, the annual salary for a circuit judge of \$136,127 when adjusted for Hawai'i's cost-of-living was \$83,262. The second-lowest salary, that of Oregon, exceeded Hawai'i's by over \$16,000, and the average across the U.S. exceeded Hawai'i's by over \$47,000.

There is, of course, a public service component to serving as a judge which affects judicial salaries to some extent. Just as the Governor doesn't earn what the CEO of a private company earns, and the Attorney General doesn't earn what the managing partner of a 160-lawyer law firm earns, the Special Committee does not expect an exact equivalency between judges' salaries and those in the private sector. Judges perform a professional service that provides value to the community. It should go without saying that all qualified applicants have a strong dedication to public service. Nonetheless, judges should be paid what is fair and reasonable and at a level that will encourage private, as well as public, attorneys to apply for judicial positions.

The Special Committee acknowledges the constraints that difficult economic conditions impose on judicial compensation and notes that the

issue of what budget actions should be taken at present is not within the scope of its analysis.

The Special Committee noted that judges are unable to advocate for themselves. Thus, state judges require a strong advocate to ensure they are compensated fairly, whether it is the Chief Justice, the AJS or an independent peer panel that can objectively assess and implement the appropriate compensation structure.

In the case of federal judgeships, the Special Committee concluded that retirement and compensation likely does not dissuade as many private practitioners from applying. Although a private practitioner may receive less in yearly salary by becoming a federal judge, the retirement package is attractive. And while the retirement “Rule of 80”<sup>1</sup> can pose a problem if one becomes an Article III judge at an advanced age, the Special Committee determined that it does not pose a significant obstacle to most applicants.

#### B. Impact of Daunting Public Judicial Selection Process

The perception that nominees for state court positions must weather a daunting confirmation process may be a significant factor in discouraging potential judicial applicants. The Special Committee found:

- Relatively little attention is paid to those nominees who “sail through,” while disproportionate attention may be paid to those who have difficulty. Many people do not realize that most confirmations are relatively painless. On the other hand, the risk is very high. Lawyers with active practices not only suffer potential personal embarrassment after an unsuccessful bid, but also may suffer professionally, when their clients and partners learn they have applied for a judgeship. In that sense, getting on the shortlist is not necessarily a good thing, unless one is both selected and confirmed. The JSC may be able to help by explaining the process and pinpointing to applicants where problems may lie.

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<sup>1</sup> Under the “Rule of 80,” an Article III judge (*i.e.*, a federal judge who is appointed for a term of good behavior under Article III, section one of the United States Constitution, and not a federal judge who is appointed for a term of years) who reaches age 65 and whose age and years of service as an Article III judge total at least 80, is entitled to full retirement benefits or to assume senior status.

- The Special Committee discussed the Hawai'i State Bar Association's ("HSBA's") role in the selection process. The HSBA interviews candidates and requests copies of the applications provided to the JSC, yet it does not coordinate with the JSC in the evaluation process. Instead, the HSBA makes its own confidential evaluation in a compressed timeframe. The HSBA evaluation may have a profound effect on the confirmation process. The Special Committee did not make recommendations on that issue, as it was addressed in the November 2005 Report of the AJS Special Committee on the Judicial Selection System, and will be revisited in a forthcoming report by the AJS Standing Committee on Judicial Selection, Retention and Accountability.
- The Special Committee concluded that the JSC may be able to assist judicial applicants and potential applicants in two ways. First, it may be helpful if the JSC assigned one member to answer general questions about the application forms, to clarify what information is sought. This may help applicants navigate between the JSC's and HSBA's questions, which do not exactly parallel one another and may give rise to apparent inconsistencies. Second, the JSC may consider asking more questions via interview, and fewer questions through the written application form, although the Special Committee also acknowledged that timing considerations may make this proposition impractical for the JSC.

The perception that nominees must weather a daunting confirmation process may be a significant factor in discouraging potential applicants, although federal and state applicants may face different factors. Applicants for federal judicial positions may have less concern about making necessary disclosures about themselves than state judicial applicants. With respect to personal information such as medical and financial data, federal judicial applicants provide such information to FBI agents and out-of-state representatives from different federal offices. By contrast, state judicial applicants must disclose personal information to bodies that include known colleagues and peers, a more sensitive prospect. With respect to evaluations of professional qualifications, federal judicial applicants may have their professional qualifications evaluated by the Hawaii State Bar Association through the same process used for state judicial appointments. However, a

federal applicant's more influential evaluation of professional qualifications is typically the American Bar Association rating. Until recently, the ABA rating of a federal applicant followed a review conducted by an out-of-state ABA member. This may have worked sometimes to the benefit, sometimes to the detriment of particular applicants, but in general it probably was seen by both the applicant and the bar as detached and therefore objective. Recently, ABA reviews of federal judicial applicants have been conducted by a member of the Hawaii bar, who then reports to an ABA committee. That means that recent federal applicants have probably viewed the ABA rating process as less detached, even if remaining objective, careful and trustworthy.

One drawback for federal Article III nominees is that in comparison to the state process, federal Article III applicants have fewer avenues through which to influence the selection process. Another drawback is the long nomination and confirmation process, which can sometimes result in reluctance by the nominee's partners and clients to assign cases to the nominee.

The appointment process for magistrate judges is not public, and likely is not perceived to be daunting. This may be one reason why the recent magistrate judge vacancy yielded a large applicant turnout.

C. Impact of a Failed Application on One's Future Career Opportunities

Applying for a state judgeship and *not* being selected could have a significant impact on the number of qualified applicants seeking appointment to the bench. Once listed as a potential nominee, everyone, including the nominee's clients and partners, knows that the nominee may have long-term objectives that the nominee may prefer to keep private. Disclosure of the list may thus have a chilling effect on applications. On the other hand, transparency and openness in government are important public policy goals that may override that concern. In addition, there is value in the public's knowing who the Judicial Selection Commission has chosen to be on a list of nominees and the nominees considered by an appointing authority in making his or her selection for a judicial position.

D. Impact of Being a Judge on One's Professional and Family Life

The Special Committee noted that there could be a disconnect between the perception and reality of the impact of being a judge on one's professional and family life. Applicants may not fully understand the effect until they are actually appointed, and as a result, this factor may have little effect on the volume and quality of judicial applications.

Nonetheless, the Special Committee discussed at length two aspects of this factor: (1) security; and (2) social isolation. With respect to security, the Special Committee determined that undertaking precautionary measures, such as de-listing telephone numbers and addresses, may be prudent. To the extent that required financial disclosures reveal such information, it was recommended that the information not be disclosed. In addition, one committee member cautioned that in the internet era there is a new anonymity that lends itself to increasingly malicious attacks. This could in the future have a negative effect on judicial applications.

With respect to social isolation, the Special Committee discussed the stress associated with judgeship, including "compassion fatigue," and the extent to which judges and their families are provided support. New judges receive mentors, and judges have their own informal support system consisting primarily of contact with other judges, which varies from court to court.

E. The Appointing Authority's Desire to Select From a Particular Field

The perception that the appointing authority desires nominees from a particular field may be a significant factor in discouraging potential judicial applicants. However, the Special Committee determined that although that perception may alter the pool of candidates, perceptions change with time. For example, where a "prosecutor bias" may exist in one decade, a political change may negate that bias a decade later. Thus, while it is important to recognize the impact of this factor, it is not something that will likely change. At the same time, a merit-based judicial selection process can help to ensure that the appointing authority is required to select from a list of qualified applicants.

A secondary issue that arose in Special Committee meetings was state court bench assignments. The Chief Justice requires flexibility in bench

assignments, and as such, judges must be prepared to be assigned to any one of three calendars -- family, civil, or criminal. This, however, has posed a challenge for the JSC in that many applicants want more certainty, at least in their initial assignment. Some Special Committee members noted that there is a gulf between family practitioners on one hand, and civil/criminal practitioners on the other, and at least some reluctance to cross over. Thus, the flexibility in calendar assignments may reduce the applicant pool. The Special Committee did not reach a consensus on whether, or how, this issue should be addressed.

F. Impact of Difficult and Controversial Judicial Decisions on a Judge's Personal and Professional Life

The Special Committee concluded that the impact of difficult or controversial decision-making should not be considered an obstacle to judicial applicants. A good judge must have the ability to make decisions. Thus, to the extent that the impact of making difficult or controversial decisions poses an obstacle to potential applicants, that obstacle is a desirable one.

### III. CONCLUSION

The Special Committee concluded that the existing judicial selection process can attract good, competent, and experienced lawyers. However, certain enhancements, as noted above, can improve the system. The Special Committee determined that the most effective "recruiting" tool lies with a dependable, competitive compensation/benefit program. Such an approach is key, not only in encouraging highly skilled attorneys to seek judicial appointments, but also in retaining a diverse, experienced bench.