

Perspectives

Inspiring Trust and Confidence In Our System of Justice

by Randall Roth,
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Many consider Hawaii's judicial selection system a model one. The Chief Justice appoints district and family court judges while the Governor appoints all other judges, including those to the Supreme Court. The appointing party is restricted to a list of 4 to 6 names that is prepared by a Judicial Selection Commission. Sometimes the list is made public by the appointing party, sometimes it is not. The Governor's appointments must be confirmed by the Senate.

The HSBA participates in the selection process by electing two members of the Judicial Selection Commission. Currently, they are David Fairbanks and James Kawashima.

The bar also participates by rating appointed individuals "highly qualified," "qualified," or "unqualified," at the time of their initial appointments. The determination is made by a majority of the HSBA's 19-member Board of Directors. In all cases, the rating is made public. Only one appointed individual has ever been rated "unqualified" by the HSBA, though several others narrowly avoided it.

Newly appointed judges enjoy a form of tenure for a period of time (6 years for district and family court judges; 10 years for others). At the end of this period, judges can be removed or retained by the Judicial Selection Commission.

Only trial judges are formally evaluated. This confidential process is overseen by a Rule 19 Committee which consists of the Administrative Director of the Courts, plus 3 judges, 6 lawyers and 3 non-lawyers, all appointed by the Chief Justice. Only the Chief Justice has access to the evaluation results, though he must share information with the Judicial Selection Commission, at their request.

When first established, the Commission inspired confidence. That changed as people noted the number of politically connected individuals who managed to get onto lists and appointed. The single most damaging factor, however, has been a perception that decisions of the Commission have been linked to the

selection of Bishop Estate trustees. The circumstantial evidence of such a connection seems overwhelming.

For example, appointed members of the Judicial Selection Commission are handpicked by the Speaker of the House, President of the Senate and Chief Justice of the Supreme Court. Bishop Estate trustees in recent years have included a Speaker of the House, President of the Senate and Chief Justice of the Supreme Court.

The last trustee selected by the justices chaired the Commission at a time when some of those justices were them-

selves appointed. The law firm of another former chairman has received roughly \$15 million in fees from the Bishop Estate since his tenure on the Commission.

These and other revelations have left many members of the public skeptical, even cynical, about the work of the Commission, not to

mention the judiciary. Such perceptions present a challenge to an organization like ours whose mission includes inspiring trust and confidence in our system of justice.

As HSBA president, I would like to be able to effectively defend judges who are unfairly criticized on the basis of a single decision and to assure the public that our judiciary is top notch. Unfortunately, the HSBA currently has no data on which to evaluate judges. Any public statement about the aptitude or ability of judges currently would have to be based solely on anecdotal evidence. We have it within our power to change that.

The HSBA's Judicial Administration Committee has recommended the development of a judicial evaluation program in which bar-wide survey results could be used by HSBA leadership when speaking publicly about judges, and that regularly would be made public, in one form or another. This last component presumably would be in a form similar to our current system of rating new appointees.

Already, this proposal has generated spirited debate. Opponents argue that it would harm judicial independence, but



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this assumes the worst about our judges. It also ignores the fact that each judge's rating would be based on a large number of evaluations. The incentive would be to impress every lawyer, not just a select few.

Critics also contend that a significant number of lawyers would evaluate judges unfairly. But this assumes the worst about lawyers and ignores actual experience.

The vast majority of our judges reportedly are getting excellent ratings from lawyers on Rule 19 evaluations now. There is no reason to think they would not do equally well on an HSBA evaluation form.

Knowing ahead of time that survey results would be made public, the few judges who might be perceived by the bar as "unqualified" would have a strong incentive to make positive changes, or leave the bench.

The suggestion that a program like this would just whet the public's appetite for more participation — that it would lead to judicial elections — is way off base. The opposite is true. Keeping people in the dark and telling them to "just trust us," works only so long in a democracy.

Many supporters of the Judicial Administration Committee's proposal do not think judges should be chosen or retained on the basis of a political election, as currently is done in a majority of states. A concern is that Hawaii's appointment system someday will be tossed out completely in favor of judicial elections, if the issue of public confidence in the judiciary is not addressed squarely and effectively.

Judge Samuel King contends that the Judicial Selection Commission has simply hidden from public view an inherently political process and that this breeds cynicism. He has long argued for complete elimination of the Commission and development of "a good system for getting rid of bad judges."

Less extreme measures include reducing the number of names on each list and changing the way Commission members are selected so that body is no longer controlled by political appointees.

The only specific proposal made by the Judicial Administration Committee, however, and the only possible change

mentioned above that could be implemented unilaterally by the HSBA, simply calls for a bar-sponsored judicial evaluation program. This proposal recently was tabled to provide ample time and opportunity for reasoned discourse.

The Committee's proposal and reasoning will be detailed in the December *Bar Journal* and then critiqued by James Kawachika and Alan Van Etten in the January issue. The report of a recently formed judicial-evaluation committee of the American Judicature Society (Hawaii Chapter) will be included or summarized.

Chief Justice Ronald Moon, along with Judicial Selection Commission members Max Sword, and David Fairbanks, will discuss "Everything You Wanted to Know About the Judicial Selection Process, But Were Afraid to Ask" on Friday, December 3, as part of the Bar Convention.

I firmly believe that parties on all sides of this issue want a judiciary that is not only excellent, but also perceived as excellent by the public. If enough HSBA members get involved, collective wisdom will emerge.