

[Excerpt from HSBA Board Policy Manual]

1.8 BOARD PARTICIPATION IN JUDICIAL AND EXECUTIVE APPOINTMENTS
[Bylaws, Article IX]

A. Evaluation and Recommendation [Board revised language 01/14/05]

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

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

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

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

1. Solicitation of Comments From HSBA Membership. Comments shall be solicited on judicial and executive appointments by the HSBA President via mass e-mail to HSBA members, including affiliated organizations requesting their assistance in encouraging their constituents to respond directly to the HSBA. The candidate's name and vita will be posted (with the candidate's permission) on the HSBA website. Comments received by e-mail to the HSBA President will be received through a special mailbox secured by a password. Members may also submit comments by correspondence, telephone, facsimile or e-mail to the HSBA President or any member of the HSBA Board. All comments received shall be referred to as "Comments" for purpose of this policy. To ensure confidentiality of those offering comments, all identifying information will be removed electronically, by the HSBA President or an administrative aide, or by the HSBA Board member who receives any comments. These Comments, with all identifying information removed, will then be sent to the three-member Subcommittee of HSBA Board members appointed by the President. The Subcommittee shall review the Comments and present an oral or written summary to the HSBA Board, along with the redacted Comments, prior to the Board's interview with the candidate. A candidate shall be advised of negative Comments considered by the HSBA Board as significant to the position, and given the opportunity to respond to them during the interview with the HSBA Board. A candidate shall not be provided with a copy of any Comments received by the HSBA Board. In addition, any person who submits a Comment that is deemed by the Subcommittee to be materially negative regarding the qualifications or suitability of any nominee may be invited to address the 3-member Review Subcommittee under 1.8.A.1.
2. HSBA Board Interview Of Candidates. The HSBA Board shall request that the candidate appear for a personal interview before the HSBA Board as soon as reasonably possible. If a personal appearance before the HSBA Board presents an undue hardship or, if for unforeseen

circumstances, the candidate is unable to appear in person, the HSBA Board may allow the candidate to be interviewed by telephone conference call. If, for whatever reason, a candidate cannot or will not agree to be interviewed by the HSBA Board, nonetheless the HSBA Board shall vote on the qualifications of the candidate based on the information available to the HSBA Board.

Prior to the interview of the candidate, the President or his/her designee shall remind board members that all communication and all discussions are confidential.

3. **Destruction of Comments from HSBA Membership.** All material and identifying information received in any form by the HSBA President or any HSBA Board member regarding a candidate shall be destroyed by every recipient immediately after the Board has taken a position on the candidate's qualifications.

C. **Conflicts of Interest**

1. **Disclosure**

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

2. **Recusal**

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

actual conflict or the appearance that a conflict may exist, the Board may vote to recuse that person from the vote.

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

- **Integrity and Diligence** - A candidate should be of undisputed integrity. This includes the candidate's character and general reputation in the legal community as well as his or her diligence.
- **Legal Knowledge and Ability** - A candidate should possess a high degree of knowledge of established legal principles and procedures and have a high degree of ability to interpret and apply them to specific factual situations.
- **Professional Experience** - Substantial courtroom and trial experience as a lawyer or judge is important for candidates to the trial and appellate courts. Significant evidence of distinguished accomplishments in the field of law can compensate for a candidate's lack of substantial courtroom experience.
- **Judicial Temperament** - A candidate should possess a judicial temperament which includes intelligence, common sense, compassion, decisiveness, firmness, humility, temperance, open-mindedness and impartiality, patience, tact, understanding, freedom from bias, and commitment to equal justice under the law.
- **Financial Responsibility** - A candidate should be financially responsible.
- **Public Service** - A candidate should possess a history of civic activities and public service, whether that experience be in the private or public sector.
- **Health** - a candidate should be in good physical and mental health.

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

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

1. qualified - candidate meets the HSBA standards with respect to legal knowledge and ability, integrity and diligence, professional experience and competence and judicial temperament. The HSBA further believes that the candidate has shown to be financially responsible, and has a commitment to public service and will be able to perform satisfactorily all of the duties and responsibilities required by the office under consideration;
2. not qualified - candidate does not meet the HSBA criteria with regard to professional competence, judicial temperament or integrity.

[Board adopted form of position on 12/7/92; added highly qualified category on 12/15/94; added definitions of positions (ratings) on 4/12/95; added descriptions for rating categories on 3/20/03; deleted highly qualified category on 6/26/08 (effective 1/1/09); revised definition of positions (ratings) on 1/9/09.]

F. **Board Voting Procedures**

1. Before deliberations, the President or his/her designee will discuss the disclosure of conflict by board members and will review the criteria for judicial qualifications and rating categories.
2. Each director shall cast a written ballot on the question of whether any nominee is qualified or unqualified. Directors participating by teleconference, videoconference, or other electronic means may transmit their vote electronically. All ballots received will be counted by the Secretary and the Executive Director who will certify the results of the balloting. Under Article V, Section 2(b) of the HSBA Constitution, the President is a voting member of the Board, therefore the President shall vote, abstain or recuse himself or herself, as may any other director, and his/her vote shall be counted only in the event of a tie. Ballots shall be retained until such time as the nominee is confirmed or not confirmed by the Senate and then destroyed.

[Board approved participation at board meetings by electronic means on 6/26/08.]

G. **Guidelines for Commenting regarding Judicial and Executive Appointments and Judicial Retention** [Board adopted 10/10/03]

Judicial selection and retention and executive appointments are critical

functions to ensure that our system of justice is an independent and vibrant branch of government. The Hawaii State Bar Association provides valuable input to those processes.

To assist the HSBA Board in formulating its opinions, the HSBA Board has implemented a procedure by which it solicits confidential input from its members.

The Board also recognizes that from time to time, individual HSBA officers and directors are asked to comment on particular candidates for judicial selection and retention and executive appointments.

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

1. **Judicial and Executive Appointments.** Since HSBA Board deliberations regarding the rating of judicial candidates and executive appointments take place in executive session, officers and/or directors may reveal only the position of the board (e.g. qualified or not qualified) and not the substance of any discussion or the vote of any individual director.
2. **Judicial and Executive Retention and Evaluation.** The Board does not take a formal position regarding judicial and executive retention and judicial evaluation. Rather, the HSBA has established a forum for members to provide confidential comments to the HSBA president regarding retention and has established a confidential written evaluation procedure (see Chapter 1.9, Bar-Sponsored Judicial Evaluation). As a result, no officer or director shall disclose any specific confidential comments regarding the retention or evaluation of a judge. If, however, the president has received more than 30 comments regarding a neighbor island judge and 100 comments regarding an Oahu judge and at least 34% of those comments establish a general theme regarding the judge's performance, the president may, in the president's sole discretion, disclose the theme of said comments to the requesting media or state that the general theme of comments were forwarded to the Judicial Selection Commission. This policy is not intended to encourage or discourage the president from making personal comments.

No officer or director may disclose any information regarding the contents of the confidential written evaluations. If the HSBA President has been involved in the review or tabulation of responses to the HSBA

evaluation responses, the President may not comment regarding the general theme of comments regarding a judge under consideration for judicial retention. To do so, would result in an appearance of breaching confidentiality of the HSBA judicial evaluation process. An officer or director however, if requested, may comment that the tabulated results of the written evaluations were forwarded to the Chief Justice of the Hawaii Supreme Court, the Judicial Selection Commission and the individual candidates reviewed.

3. **Personal Opinions and Comments.** An officer or director may give his or her own personal view on any judicial selection or retention or executive appointment as long as the officer or director states that the opinions and comments are his or her own personal views and not that of the HSBA board or its membership.