

# Why The HSBA Continues To Rate JUDICIAL & EXECUTIVE APPOINTMENTS

by Steven J.T. Chow

Recently Chief Justice Ronald Moon called for the Hawaii State Bar Association ("HSBA") to stop rating judicial appointments and presenting a recommendation on behalf of the HSBA to the confirming Senate. (See Chief Justice Moon's presentation to the Annual Meeting of the American Judicature Society on December 4, 2008 at [http://www.state.hi.us/jud/pdf/CJ\\_AJS\\_Speech.pdf](http://www.state.hi.us/jud/pdf/CJ_AJS_Speech.pdf).)

## **Background On The HSBA's Rating Of Judicial Appointments.**

When the Hawaii bar was unified in 1989, those entrusted to develop the mission, purpose and scope of the HSBA saw fit to write into its Constitution and By-Laws that the HSBA Board of Directors ("Board") "shall evaluate the qualifications of persons appointed to judicial office in Hawaii or the positions of Hawaii State Attorney General or the Hawaii U.S. Attorney, and inform the confirming authority of such recommendations and evaluations." Article IX of the Constitution and By-Laws.

## **HSBA's Procedure For Gathering Comments From Its Membership.**

The procedures and criteria utilized in this process have been re-evaluated and amended over the years.

In 2003, the Board implemented a procedure which it believed would encourage substantive and forthright comments from the HSBA membership to be included in the Board's evaluation of the appointee's written credentials, interviews with references and an interview with the appointee.

In adopting this procedure to solicit comments, the Board sought to balance the need for substantive and forthright comments by the HSBA membership with the need for fairness to the appointee. Of utmost concern from the membership's viewpoint was the need to maintain the confidentiality of the comments to

avoid real or perceived retaliation by the appointee. From the appointee's side, the Board recognized that an appointee must be protected against comments which contained bias, prejudice, speculation and rumor, which would be difficult to substantiate or rebut without more information.

In addition to balancing these two interests, the Board also had to develop a procedure which could be quickly implemented and utilized given the time limitation often set by the appointment process.

## **Solicitation Of E-Mail Comments From the HSBA Membership**

The Board's current procedure includes soliciting comments from the HSBA membership via mass email.

Responses are sent to a secured e-mail box on the HSBA's computer server. To insure confidentiality, the names are redacted from the e-mail responses before they are shared with the Board. This addresses the "retaliation" concern of the membership. However, the original e-mails, with the name of the sender, are kept in the HSBA's secured e-mail box in case follow-up with the sender is necessary. All email responses are destroyed at the conclusion of the Board's work.

The Board also encourages members to comment by other means to the Board directly or any Board member, by telephone, email, fax or letter.

## **HSBA Board Review, Interview And Rating Of An Appointee**

As soon as an appointee's name is released, the HSBA President appoints a panel of three Board members who summarize the e-mail comments about the appointee, interview references identified by the appointee and others, review other comments submitted by the HSBA membership or outside sources, and then present summaries of this review to the entire Board. This three-person panel is usually made up of Board members from different specialties (e.g. criminal, civil, family law, etc.), so that each can view the com-

ments and appointee from the perspective of his or her particular specialty.

The three-member panel summarizes and presents its findings to the entire Board. The Board members are also provided copies of all written comments, including emails (but without identifying the sender), the appointee's JSC application and a HSBA questionnaire completed by the appointee.

The appointee is then interviewed by the Board. However, in fairness to the appointee, before the interview the appointee is advised by the HSBA President of any "negative" comments, issues or concerns and given the opportunity to prepare a response. The disclosure of negative comments issues or concerns is done without disclosing the name or sources of the comments to protect the confidentiality of the name or sources.

While the HSBA Board recognized the difficulty it faced in trying to filter out what are valid and legitimate concerns as opposed to rumor, innuendo and speculation, the Board felt it was capable of using common sense, logic and reasoning to discern what comments were to be considered "negative" for discussion with the candidate and what were unreliable and unsubstantiated and should not be raised. The "negative" comments had to have some relationship to the criteria by which the Board would be evaluating the appointee.

The Board recognized that when an email or other source raised an issue of a serious nature which would weigh heavily against the appointee, it should be substantiated. In such situations, the HSBA President, or his/her designee, reviews the original email, contacts the sender, and encourages him or her to come forward and provide further information or evidence to substantiate the comment. If the comment cannot be substantiated, the Board would disregard the comment.

To protect the confidentiality of the members submitting email comments and because even with names omitted, some-

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times it may be possible to identify senders from the substance of the comments, these comments are not provided to the appointee. After the appointee is interviewed, the Board meets in Executive Session to discuss the interview and all information gathered about the appointee. The Board then rates the appointee as according to standards then in place. For the last several years, the Board utilized ratings and definitions from the American Bar Association ("ABA") Guidelines for Reviewing Qualifications of Candidates for State Judicial Office and the ABA Standing Committee of Federal Judiciary: highly qualified, qualified or not qualified. As part of its ongoing review of these policies, the Board decided that starting in 2009, it would utilize a two-tier rating scale; finding an appointee qualified or not qualified.

#### Why Does The HSBA Continue To Rate Judicial And Executive Appointments?

The most obvious reason is because the Board is mandated by its Constitution and By-Laws to do so. Further, members consistently express support of this procedure and the Board has consistently voted to continue it. Who better to comment on the qualifications of one of its members than the HSBA members who know and work with the appointee? The Judicial Selection Commission's procedures do not elicit potentially negative feedback on candidates as they are restricted by confidentiality surrounding their applicants. In addition, the Governor or Chief Justice, in making their selection, may not be provided negative information which the commenter, due to real or perceived retaliation, would provide to the HSBA. We continue to believe that the HSBA's position is an important part of the appointment process which is carefully and rationally developed with the input of members and the reasoned decision of the Board.

*Steven J.T. Chow is currently a director on the HSBA board of directors. He worked on the subcommittee, which developed the procedures for the rating of judicial appointees.*



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