

OHIO STATE BAR ASSOCIATION
&
ABA STANDING COMMITTEE ON JUDICIAL INDEPENDENCE

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATIONS

1 WHEREAS, the American Bar Association believes that elevating public trust and confidence in
2 the integrity and quality of the judiciary is vital to the promotion of the rule of law and to the
3 proper functioning of our Constitutional democracy; and
4

5 WHEREAS, the American Bar Association believes that programs of introductory judicial
6 education would enhance the credentials and qualifications of lawyers aspiring to judicial office
7 and have the potential to raise the stature of the judiciary in the public eye;
8

9 BE IT RESOLVED, That the American Bar Association urges state, local, and territorial bar
10 associations to adopt programs of introductory judicial education to assist lawyers with potential
11 career aspirations of service in the judiciary; and
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13 FURTHER RESOLVED, That the American Bar Association urges state, local, and territorial
14 bar associations to adopt programs of introductory judicial education as a credentialing factor in
15 identifying and evaluating suitable candidates for judicial office; and
16

17 FURTHER RESOLVED, That the American Bar Association urges the appointing authorities for
18 judicial office, and legislative bodies responsible for establishing qualifications for judicial
19 office, to consider the credentialing obtained by lawyers who have successfully completed a
20 program in introductory judicial education as a factor in establishing qualifications for judicial
21 office.

**ABA STANDING COMMITTEE ON JUDICIAL INDEPENDENCE
REPORT ON INTRODUCTORY JUDICIAL EDUCATION
May 30, 2008**

Introduction

The word “professionalism,” which has become commonplace in debates about the condition and future of the legal profession, may conjure different connotations to different people.¹ Putting such nuances aside, the word does denote a certain quality of conduct that is expected by members of the profession and by lay people alike. Applying the concept of professionalism not just to lawyers but to the judiciary as well seems entirely appropriate, particularly given the increasing frequency and severity of attacks on judges² and on judicial

^{1/} “Indeed, it seems clear that the word professionalism means different things to different people, and it is often used in different ways by the same people, sometimes at the same time and in the same context.” Barry Sullivan & Ellen S. Podgor, *Respect, Responsibility, and the Virtue of Introspection: An Essay on Professionalism in the Law School Environment*, 15 NOTRE DAME J.L. ETHICS & PUB. POL’Y 117, 120 (2002).

^{2/} The reference here is not to physical attacks, those these too have been escalating. See, e.g., Amanda Paulsson & Patrik Jonsson, *Judge Case Hits A Nerve in Courts*, CHRISTIAN SCI. MONITOR, Mar. 4, 2005, available at <http://www.cbsnewst.com/stories/2005/03/04/national/main678008.shtml> (last visited June 10, 2007); Rick Lyman, *Focus on Safety for Judges Outside the Courtroom*, N.Y. TIMES, Mar. 11, 2005, at A18; Shaila Dewan, *Terror in Atlanta: The Overview; Suspect Kills 3, Including Judge, at Atlanta Court*, N.Y. TIMES, Mar. 12, 2005, at A1; *Sniper Shoots Judge in Reno Courthouse*, CHICAGO TRIB., June 13, 2006, § 1, at 6. Rather, the reference is to the seemingly ubiquitous attacks on judicial independence – critiques of criminal sentences, such as Bill O’Reilly’s critiques of Vermont judges Edward Cashman and David Howard, see Bill O’Reilly, *Talking Points: No Justice in Vermont* (Jan. 16, 2007), available at <http://www.foxnews.com/story/0,2933,243904,00.html> (last visited June 10, 2007); critiques of orders suppressing evidence in criminal cases, such as the notorious 1996 Presidential campaign issue (and intimidating threats of impeachment) arising from such an order by Judge Harold Baer, see Don Van Natta, Jr., *Judges Defend a Colleague from Attacks*, N.Y. TIMES, Mar. 29, 1996, at B1; castigation of judicial consideration of foreign sources of law when interpreting the Constitution or federal statutes, see, e.g., H.R. Res. 568, 108th Cong., 2d Sess. (2004) (disapproving Supreme Court’s use of this technique in cases such as *Lawrence v. Texas*, 539 U.S. 558 (2003) and *Atkins v. Virginia*, 536 U.S. 304 (2002)); generic legislative dyspepsia over instances of “judicial activism,” see, e.g., *Judicial Activism: Defining the Problem and Its Impact, Hearings Before the Subcomm. on the Constitution, Federalism, and Property Rights, U.S. Senate Comm. on the Judiciary*, 105th Cong., 1st Sess. (June 11, 1997); Warren Richey, *Judicial Aftershocks from the Schiavo Case*, CHRISTIAN SCI. MONITOR (Apr. 4, 2005), available at <http://www.csmonitor.com/2005/0404/p02s01-usju.html> (last visited June 10, 2007);

(continued)

conduct. While one would like to believe that political motives or fundamental differences in deeply-held philosophical or religious beliefs account for most such fusillades, a great many complaints are meritorious (with some potentially rising to the level of criminal misconduct³) and keep state judicial conduct commissions in business.⁴

Invoking professionalism with respect to the judiciary raises the question whether “judging” can be regarded as a separate profession from “lawyering.” Taking an essentially instrumentalist approach to defining what constitutes a profession, courts have identified certain salient characteristics, including, at a minimum, formal training, licensing standards, and enforceable ethics codes.⁵ As the New York Court of Appeals has observed:

A profession is not a business. It is distinguished by the requirements of extensive formal training and learning, admission to practice by a qualifying licensure, a code of ethics imposing standards qualitatively and extensively beyond those that prevail or are tolerated in the marketplace, a system for discipline of its members for violation of the code of ethics, a duty to subordinate financial reward to social responsibility, and, notably, an obligation on its members, even in non-professional matters, to conduct themselves as members of a learned, disciplined, and honorable profession.⁶

For their part, social scientists have also endeavored to identify the principal characteristics that distinguish professions from other occupations. These include:

^{2/}(continued) *Judicious Temperament: Retired Supreme Court Justice Sandra Day O’Connor Speaks Up Against Political Attacks on Courts*, HOUSTON CHRON., Mar. 17, 2006, at B18; and, from the lunatic fringe, “J.A.I.L. 4 Judges”, see Claire Cooper, *Bid to Punish Judges Has Eye on State*, SACRAMENTO BEE, Nov. 17, 2005, at A3.

^{3/} See, e.g., Ian Ayres, *The Twin Faces of Judicial Corruption: Extortion and Bribery*, 74 DENV. U. L. REV. 1231 (1997). Cf. Abraham Abramovsky & Jonathan I. Edelstein, *Prosecuting Judges for Ethical Violations: Are Criminal Sanctions Constitutional and Prudent, or Do They Constitute a Threat to Judicial Independence?*, 33 FORDHAM URB. L.J. 727 (2006).

^{4/} See, e.g., Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431 (2004).

^{5/} E.g., *Hosp. Comp. Sys., Inc. v. Staten Island Hospital*, 788 F. Supp. 1351, 1361 (D.N.J. 1992).

^{6/} *In re Estate of Freeman (Lincoln Rochester Trust Co. v. Freeman)*, 34 N.Y.2d 1,7, 355 N.Y.S.2d 336, 339, 311 N.E.2d 480 (1974).

- a substantial body of knowledge, essential to performing the tasks of the occupation and requiring mastery of abstract concepts and complex principles unfamiliar to the population at large;
- self-regulation by means of established and enforceable standards for ethical behavior of practitioners;
- self-regulation of the conditions and content of the work performed, providing a high level of individual autonomy;
- a culture emphasizing a strong and enduring level of dedication to the work;
- identification with the occupation by practitioners and a sharing of common interests and values;
- a motivational ideal of service to clients and the public: while a business chiefly seeks financial profit, a profession is mainly concerned with the ideal of service.⁷

“Judging,” it should be noted, encompasses all of these *except* formal training and learning beyond that and different from what is required for admission to the practice of law, *i.e.*, prior education or credentialing that is peculiar to the task of being a judge.

The foregoing array of formal characteristics – particularly the educational requirements, licensing requirements, and ethical code -- engenders a degree of trust and dependency that create the fiduciary obligations said to be owed by professionals to their clients and, to a degree, the public as well.⁸ In the case of judges, that duty translates into obligations of fidelity to the law, integrity, fairness, impartiality, and adherence to a quasi-Aristotelian notion that like cases will be treated alike. Whether judicial selection is made by election or appointment, “there is an implied covenant with the people that the judges selected will be persons who have demonstrated by well-defined and well-recognized qualifications their fitness for judicial office” -- a covenant that includes “find[ing] persons . . . qualified by learning, experience and temperament, to decide the cases that come before them impartially and in accordance with the law.”⁹

^{7/} See RONALD M. PAVALKO, *SOCIOLOGY OF OCCUPATIONS AND PROFESSIONS* 19-33 (2d ed. 1988). Omitted from this enumeration, because it is not germane to the topic of this essay, is a darker, corollary characteristic of a profession – that of being a cartel, able to monopolize the provision of a particular type of service. See RICHARD L. ABEL, *AMERICAN LAWYERS* 17-30 (1986).

^{8/} See Richard A. Glaser & Leslee M. Lewis, *Redefining the Professional: The Policies and Unregulated Development of Consultant Malpractice Liability*, 72 U. DET. MERCY. L. REV. 563, 573-80 (1995).

^{9/} James J. Alfini and Jarrett Gable, *The Role of the Organized Bar in State Judicial Selection Reform: The Year 2000 Standards*, 106 DICKINSON L. R. 683, 701 (2002).

The Study Group and its Report

The vast majority of people serving in the judiciary have no special credentials for the judicial role other than a law school education, bar passage, and some amount of experience in the practice of law. In recent years, suggestions have been made for a special curriculum for individuals aspiring to judicial office. Under the aegis of the American Bar Association's Standing Committee on Judicial Independence ("SCJI" or the "Committee"),¹⁰ a Study Group on Pre-Judicial Education¹¹ (the "Study Group")¹² was empaneled in 2001 and in 2003 issued a brief but interesting report.¹³ The idea of IJE is that some sort of formal preparation, while neither (or at least not necessarily) an absolute prerequisite for judicial office nor a guarantee of selection, will result in a cadre of potential jurists who have exhibited the interest and the commitment to acquire an extra educational credential that potentially could make them better qualified for the judiciary than the majority of other lawyers.

As part of this effort, it was necessary for the Study Group to address the issue whether the effectiveness and perception of legitimacy of judicial selection might be enhanced through the establishment of a program of advance judicial education. This involved consideration of the form this education might take, how the availability of this education might affect the pool of potential judges, how this education might assist those responsible for the selection of judges, and the potential impact of this education on the overall functioning of our system of justice.

^{10/} SCJI has taken a leadership role in promoting public trust and confidence in the judiciary as well as in the justice system more generally, including such recent efforts as the DVD video program *Protecting Our Rights, Protecting Our Courts*, the pro-judicial independence pamphlets *Countering the Critics*, *Countering the Critics II*, and *Rapid Response to Unjust and Unfair Criticism of Judges*, and (in cooperation with the ABA Judicial Division) the Least Understood Branch project. Other significant Committee projects have included influential reports on public financing of judicial campaigns and on judicial compensation, as well as sponsorship of revisions to the Model Code of Judicial Conduct.

^{11/} To avoid potentially unpleasant confusion between pre-judicial and prejudicial, a possibility identified by one of the white papers to the 2007 Symposium discussed below (see Fisher, *infra* note 24, at 3-4), the term used henceforth herein will be "Introductory Judicial Education" or its acronym "IJE."

^{12/} The Study Group comprised trial and appellate judges, lawyers, judicial and adult educators, bar association executives and legal academics.

^{13/} See, e.g., AM. BAR ASS'N, STANDING COMMITTEE ON JUDICIAL INDEPENDENCE, REPORT OF THE STUDY GROUP ON PRE-JUDICIAL EDUCATION (Feb. 12, 2005) [hereinafter "STUDY GROUP REPORT"].

As the Study Group observed:

What we envision is not the displacement of existing selection mechanisms, but rather their enhancement by making available to potential judges educational programs designed to produce judicial candidates who are better prepared for the role and who can make a more informed decision regarding whether a judicial career is appropriate for them. Education of this sort would prove useful to those responsible for judicial selection--whether an electorate or an appointive authority--by providing a significant piece of information regarding the interest level and aptitude of the candidates. The candidates themselves would benefit from attaining a better appreciation of the judicial role. Changes in the nature of law practice and the judicial role over the past several decades have rendered the gap between the two activities increasingly large. Lawyers are less able to appreciate all of what being a judge entails, and the skills learned in practice are less directly applicable to a judicial role that now includes a substantial managerial component. Because of this, we believe that [IJE] programs would also appeal to practitioners who do not intend to become judges, but who could benefit from knowing more about judicial roles and responsibilities. . . .

While we do not believe that [IJE] stands as a cure for all the problems of judicial selection, we believe that it can alleviate many of them. For example, candidates who have undergone [IJE] will be less likely to engage in unethical or otherwise inappropriate campaign conduct. More generally, as already suggested, they are likely to be better candidates both because their education will make them better judges and because their decision to seek a judgeship will be more informed. In addition, just as education has traditionally served as a gateway to opportunity in American society, so can [IJE] open judicial careers to those who might otherwise been [*sic*] excluded from pursuing them based on, for instance, a lack of political involvement. In sum, [IJE] presents the possibility of creating a larger pool of better-prepared potential judges.

. . . . We also identify potential negative effects of [IJE], including its possible negative impacts on the pool of potential judges, which might vary depending on the format. To the extent that [IJE] involves significant costs, career interruption, or geographic relocation, some otherwise suitable candidates are likely to be discouraged from pursuing judgeships. In addition, there is some reason for concern regarding whether these effects would fall more heavily on women and those in public service or other less

remunerative practice areas. These effects are, of course, speculative, but nonetheless deserve ongoing attention as the concept of [IJE] moves forward.¹⁴

After examining a variety of resources and programs, the Study Group concluded that “[IJE] presents a viable and valuable avenue for improving both appointive and elective systems of judicial selection.”¹⁵ Acknowledging that the concept was “largely uncharted territory,” the Study Group suggested certain additional preliminary steps that might be (but have not, to date, been) taken. These include compiling “data regarding the specific sorts of information that would be most valuable to those considering a judicial career,”¹⁶ developing data on “the typical background of those who become state court judges,”¹⁷ and experimenting with pilot programs.¹⁸

^{14/} *Id.* at 4-5.

^{15/} *Id.* at 30.

^{16/} *Id.* “Both new and experienced judges should be systematically surveyed regarding what they wish they had known at the outset of their judicial careers. The practicing bar might likewise be surveyed concerning the perceived strengths and deficiencies of both new and experienced judges. In addition, because making the programs useful to practitioners as well as aspiring judges will be critical to their success, attention must be paid to the bar’s views of what its members would find most useful and interesting.” *Id.*

^{17/} *Id.* at 30-31. “Such data would provide an additional window into the experiential gaps of the judiciary, and thereby suggest areas of curricular emphasis that might not be apparent from other studies. In addition, the data might reveal that there are categories of lawyers who are relatively under-represented in the judiciary, and perhaps suggest ways in which education might be shaped to make them more likely to consider becoming a judge.” *Id.*

^{18/} *Id.* at 31. “Given the novelty of [IJE], it will be critical to begin by taking small steps. We believe that an appropriate jurisdiction should be identified for the implementation of a pilot program, the initial design of which should be such as to permit flexibility to adapt in light of early results. More generally, we believe that broad experimentation will be necessary to determine what is workable and useful, and that such experimentation should be fostered and encouraged. From there, work can begin to develop generalized standards, and perhaps the formation of an institute devoted solely to [IJE].” *Id.*

Questions Raised in the Aftermath of the Study Group's Report

The concept of Introductory Judicial Education is not only unobjectionable but, in the Committee's judgment, may well deserve enthusiastic support from the organized bar, which has an interest in maximizing the chances that the most highly qualified individuals will ascend to the bench.¹⁹ The devil is in the details, however, and, in the aftermath of the Study Group's Report, several details needed filling in. What, for example, would be the intended scope of IJE? Would it be a relatively short, seminar-like program, lasting a week or less? Would it be a formal, degree program requiring a year of full-time study in residence, much like a typical LL.M. curriculum? What sorts of subjects would comprise an IJE curriculum?

Apart from the Study Group Report, very little literature of substance existed on the subject of judicial education²⁰ generally and even less on IJE. Indeed, the latter consisted of only two offerings, one by a former Director of the ABA's Judicial Division²¹ and the other by a judge of the Louisiana Court of Appeal, Third Circuit.²² Recognizing that some might regard the promotion of IJE as advocating an approach to judicial selection akin to the civil law methodology of selecting judges, which presents the judiciary as a career path chosen early in a very different jurisprudential setting,²³ the Committee decided in favor of further deliberation. Rather than rush into the business of promoting the concepts underlying IJE, SCJI deferred developing a policy proposal for the ABA House of Delegates until such time, if any, as a broader consensus on the subject could be reached. Instead, the Committee organized a symposium to ascertain whether IJE as a concept might be appealing to those constituencies -- including judges, lawyers, judicial educators, legal educators, judicial ethicists, judicial administrators, and bar associations -- that would most likely be affected by implementation of an educational credential as part of the judicial selection process.

^{19/} Problems with judicial selection appeared to the Study Group to be "most acute" at the state level, so its inquiry was limited to IJE for aspirants to state judiciaries. *Id.* at 6. Even conceding the correctness of the protasis, it seems sensible to assume that if IJE is worthwhile, it will be equally useful to aspirants for both state and federal judicial office.

^{20/} *I.e.*, continuing education for those who have *already* ascended to the bench.

^{21/} Luke Bierman, *Beyond Merit Selection*, 29 FORDHAM URB. L.J. 851 (2002).

^{22/} Marc T. Amy, *Judiciary School: A Proposal for a Pre-Judicial LL.M. Degree*, 52 J. LEGAL EDUC. 130 (2002). This article is an adaptation of Judge Amy's thesis for the degree of LL.M. in Judicial Process at the University of Virginia School of Law.

^{23/} This issue was specifically addressed at the 2007 Symposium described below and in one of the white papers prepared therefor.

The Symposium

The Symposium was convened last year at the Ohio State University Moritz College of Law in Columbus, Ohio. Those represented at the Symposium included judicial conferences of the ABA Judicial Division, the ABA Center for Continuing Legal Education, the National Center for State Courts, the Association of American Law Schools, the American Judicature Society, the National Judicial College, the Conference of State Court Administrators, the Association of Judicial Disciplinary Counsel, the National Association of State Judicial Educators, the National Conference of Bar Presidents and the National Conference of Bar Executives. In addition, the Chief Justice of Ohio and state legislators from Ohio participated.

Two new white papers were prepared especially for the Symposium by Professor Keith R. Fisher²⁴ of the Michigan State University College of Law and Associate Dean Joseph R. Stulberg²⁵ of the Ohio State University Moritz College of Law. These papers, in conjunction Judge Amy's aforementioned article²⁶ and the Study Group report,²⁷ were intended to offer the participants some background in the concepts underlying IJE.

Professor Fisher's paper focused initially on whether there was a sufficiently strong case to be made for IJE. He found that it could be justified neither by the experience of civil law jurisdictions²⁸ nor by the social, cultural, political, economic and demographic changes -- including purported changes in the role of the trial judge -- put forth by some commentators as requiring wholesale changes to the administration of justice. He found ample justification for IJE, however, in the increasingly well-documented distrust and lack of faith on the part of the

^{24/} Keith R. Fisher, *An Essay on Education for Aspiring Judges* (White Paper, Symposium on Pre-Judicial *Education*, Ohio State University Moritz College of Law, 2007). Professor Fisher is currently the liaison to the Committee from the ABA Business Law Section.

^{25/} Joseph B. Stulberg, *Education for Aspiring Trial Court Judges: The Craft of Judging* (White Paper, Symposium on Pre-Judicial *Education*, Ohio State University Moritz College of Law, 2007).

^{26/} Amy, *supra* note 22.

^{27/} STUDY GROUP REPORT, *supra* note 13.

^{28/} Professor Fisher's examination of this question took as a representative sampling of sophisticated legal and judicial systems three jurisdictions, Germany, France, and Japan. He concluded that nothing in their judicial cultures (including their modes of training prospective judges) exhibited any hint of superiority over the U.S. experience and hence that no argument could be made for supplanting the latter with a civil law approach. "To the extent that a specialized program of study is designed to create a cadre of judges -- a specialized judicial class, if you will -- it is anathema to our legal system. Add to that the youth and inexperience of those eligible for career judicial positions, and one finds foreign law programs to be poor role models for adoption of [IJE] in the United States." Fisher, *supra* note 24, at 14.

general public, and in particular among minority communities, in the fairness and impartiality of our courts -- matters that strike at the heart of the judiciary as an institution of government.

Fisher identified several behavioral elements that judges should emphasize in order to promote positive public perception, and enhance the legitimacy, of the judiciary, such as “(i) judges treating those who come before them with dignity and respect; (ii) full and fair opportunities for litigants to present their cases; and (iii) neutral decision-making by fair, honest, and impartial judges -- in short, both actual and perceived substantive and procedural fairness.”²⁹ Taking these public integrity issues as a point of departure, Fisher concluded that “there is certainly a case to be made for educating judges to conduct the business of the courts in a manner that not only lives up in fact to the ideals that lend legitimacy to the judiciary and judicial decisions but also dispels any significant public perceptions (or misperceptions, as the case may be) of biased or unequal justice.”³⁰

Consistent with this conception, Professor Fisher suggested that an IJE curriculum that could contribute to the educational credential consistent with the purposes identified might include training in such topics as judicial demeanor (including the treatment of court staff, attorneys, litigants, and others); interpreting body language; listening skills; jury selection; efficient use of law clerks and staff attorneys; techniques of docket management; basic techniques of managing people with large personalities (including, but not limited to, lawyers) in the courtroom and in chambers conferences; balancing the needs of judicial office with pre-existing friendships in the bar, family obligations, and memberships in religious, professional, civic, and community organizations; judicial ethics; judicial independence versus judicial restraint; financial planning (*i.e.*, how to “afford” to be a judge); public perceptions and the importance of judicial decorum; dealing with threats to personal safety and security and that of court personnel and loved ones; determining when recusal is advisable, even where it is not mandatory; and balancing First Amendment rights against the needs of judicial discretion in public speaking, relations with news media, responding to public criticism of decisions, and election campaigning.³¹ Under such an approach, Professor Fisher observed, IJE might “improve the overall quality of the pool of people seeking election or appointment to the bench.”³²

Associate Dean Stulberg’s paper explored two aspects of judging. First, he focused on the administrative aspects of the judicial function in what has become known as “managerial judging” and concluded that there are many aspects to this portion of the judicial role that would benefit from IJE. For example, he suggested that a variety of curricula and pedagogies such as the psychology of judging, communications theory, family counseling, and team teaching would

^{29/} *Id.* at 19-20 (citations omitted).

^{30/} *Id.* at 20.

^{31/} *Id.* at 24-25.

^{32/} *Id.* at 26.

fulfill the aspects of managerial judging that far exceed the substantive law topics that are covered in law school. Offering these topics to judicial aspirants would be “a thoughtful response to the ‘administrative perspective,’ presuming consensus on the claim that there are theories, skills, insights, and practices distinctive to the judging role that are not necessarily effectively ‘absorbed’ or ‘learned’ in the conventional route to becoming a judge – *i.e.*[,] practicing law.”³³

Second, Stulberg drew on a Carnegie Foundation study of the legal profession³⁴ to review the manner by which people become lawyers and are “transformed” in the process and develop a “framework ... that is distinctive to, and constitutive of, thinking and acting as a lawyer.”³⁵ This “signature pedagogy” provides “a primary means by which a student becomes acculturated to the enterprise.”³⁶ Using this approach, he posed the question whether there is such a “signature pedagogy” for becoming a judge. Answering in the negative, Stulberg considered whether it is “important for there to be a shared culture among those who discharge the judicial role and, if so, need it be developed before becoming a judge?”³⁷ In answering the latter questions affirmatively, he then reviewed the processes and practices of labor arbitrators and civil case mediators to conclude that shared visions of impartiality are essential to all these enterprises and serve to reinforce particular skills and promote confidence and integrity to the process. From these perspectives, he concluded that while “there is an intellectual and practical skill set distinctive to the trial judge’s role[,] ... there is nothing comparable for those who would like to explore or prepare for that role.”³⁸ In short, IJE can provide a professional perspective to the craft of judging that will promote confidence in the justice system.

The Symposium also considered possible curricular issues in addition to those suggested by Professors Fisher and Stulberg. Hon. William B. Dressel, President of the National Judicial College, indicated that educating judges, and potential judges, presented particular educational objectives ranging from ethics, professionalism, managerial judging, self evaluation, job security, and public criticism, to name just a few and apart from the substantive requirements of judicial decision making. He agreed that judging was sufficiently different from lawyering that it should be considered a different profession with a different set of professional parameters, ranging from preparation to socialization to acculturation. Judge Dressel offered an overview of a curriculum designed to be used for judicial aspirants, covering a wide array of the topics that judges in the modern era would be called upon to use as a professional distinct from the practicing bar. The collaboration of many in the educational process, including *inter alia* law

^{33/} Stulberg, *supra* note 25, at 9-10.

^{34/} W. SULLIVAN, A. COLBY, J. WEGNER, L. BOND, & L. SCHULMAN, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007).

^{35/} Stulberg, *supra* note 25, at 10.

^{36/} *Id.* at 11 (citation omitted).

^{37/} *Id.*

^{38/} *Id.* at 18.

schools, bar associations, and judicial educators, he argued, would be essential to the development of an acceptable IJE program. He suggested that a voluntary program was preferable to a mandatory one, because the former would demonstrate motivation on the part of the aspirant, avoid concerns about competition with the civil law system of judicial selection, and ensure openness for the process.

The Symposium also heard about efforts in Ohio, where the Chief Justice had already offered a legislative proposal that would incorporate a mandatory system of IJE into the judicial selection process.³⁹ Legislators and others from Ohio indicated that the motivation for incorporating IJE into the selection process was to create an additional credential that would aid the selectors in assessing the qualifications and commitment of judicial aspirants while simultaneously providing additional training and preparation for those who might be interested in (though not yet necessarily committed to) serving on the bench. The Ohio presenters indicated that they definitely viewed judging as a distinct profession, the training for which would improve the pool of aspirants, enhance the legitimacy of the judiciary among the electorate, and provide an ability to connect the craft of judging with public perceptions of the judiciary. Those in attendance agreed that, as with public financing of judicial campaigns in North Carolina,⁴⁰ having Ohio (or any other state)⁴¹ serve as a laboratory to assess the IJE concept in practice⁴² would be very important, especially in the absence of the kind of empirical studies mentioned by the Study Group.

A view shared by many of the Symposium participants is that IJE is perhaps another “take” on merit selection⁴³: an effort to maximize the chances that judicial selection, by any process, will result in a judiciary composed of competent individuals who are not only philosophically attuned to the imperatives of fairness and impartiality (both in appearance and in fact) but capable of performing at a higher level of competence and efficiency as a result of

^{39/} By the time the Symposium was held, proposals similar to the one put forward by the Ohio Chief Justice had also been introduced in the Ohio legislature.

^{40/} See North Carolina General Assembly, Senate Bill 1054, *available at* <http://www.ncga.state.nc.us/gascripts/BillLookUp/BillLookUp.pl?Session=2001&BillID=S1054> (last visited May 12, 2008); Doug Bend, *North Carolina’s Public Financing of Judicial Campaigns: A Preliminary Analysis*, 18 GEO. J. LEGAL ETHICS 597 (2005). See also ABA STANDING COMM. ON JUDICIAL INDEPENDENCE, PUBLIC FINANCING OF JUDICIAL CAMPAIGNS: REPORT OF THE COMMISSION ON PUBLIC FINANCING OF JUDICIAL CAMPAIGNS (2002), *available at* <http://www.abanet.org/judind/pdf/commissionreport4-03.pdf> (last visited May 12, 2008).

^{41/} As of this writing (May 2008), no IJE legislation has yet been enacted in Ohio.

^{42/} Cf. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (noting with approval states serving as laboratories for trying “novel social and economic experiments without risk to the rest of the country”).

^{43/} For some background on merit selection, see Norman Krivosha, *In Celebration of the 50th Anniversary of Merit Selection*, 74 JUDICATURE 128 (1990).

having received specialized training in the college of judicial arts and sciences. IJE is not, however, a panacea for the ills of judicial selection, nor can it be: As with the choice of judicial selection by election or by appointment, judicial selection with or without IJE can never be entirely insulated from partisan politics.⁴⁴

After the foregoing presentations at the Symposium, the participants, with the benefit of their broad collective experience from several perspectives on the judicial selection process, reached consensus on several substantive points: (1) judging is a distinct discipline of the legal profession that required unique knowledge, skills and abilities; (2) it would be preferable that, before assuming a judicial position, judicial aspirants have by experience or training qualifications that exceed admission and practice requirements; (3) the concept of IJE offers valuable opportunities to bridge the debate over whether election or appointment is preferable as means to select judges; and (4) differences between the roles and responsibilities of trial and appellate judges make it very important that implementation of any IJE curriculum accommodate all levels of the judiciary.

After due deliberation, the Committee believes that IJE represents an innovative approach to bridging some of the most intractable and controversial issues in the centuries-old debate over judicial selection. The Recommendation to the House of Delegates, to which this Report is attached, is submitted for consideration not as an alternative to traditional modes of judicial selection but as a potential means of enhancing the selection process by improving the credentials of the pool of individuals who aspire to judicial office. The Committee believes that the additional knowledge and credentialing to be gained from an appropriate program of Introductory Judicial Education can burnish the stature of the judiciary and elevate the level of public trust and confidence that our judicial system rightfully deserves.

Gary J. Leppla
President
Ohio State Bar Association
August 2008

^{44/} Cf. LAWRENCE BAUM, AMERICAN COURTS: PROCESS AND POLICY 128-130 (3d ed. 1994) (observing that merit selection does not eliminate political considerations from the process).

EXECUTIVE SUMMARY

- (a) The Recommendations urge state, local and territorial bar associations to adopt programs of introductory legal education to assist lawyers with potential career aspirations of service in the judiciary; that such programs can be utilized as a credentialing factor in identifying and evaluating suitable candidates for judicial office whether through appointment or election; and that adopting such a program would assist in elevating public trust and confidence in the judiciary.
- (b) The Recommendation proposes the addition of a credentialing factor to judicial selection to enhance the judicial selection process.
- (c) The proposed policy, if adopted by state, local and territorial bar associations, will enhance the credentials and qualifications of lawyers aspiring to judicial service and thus raise the stature of the judiciary in the public eye.
- (d) At this point in time, no organized opposition is known.

GENERAL INFORMATION FORM

Submitting Entity: Ohio State Bar Association

Submitted By: Kathleen B. Burke, Chair

1. Summary of Recommendation

That the American Bar Association urges adoption of programs of judicial education to assist lawyers who aspire to judicial service, and to urge appointing and legislative authorities to adopt preparatory judicial education as a criteria and credentialing factor for judicial selection.

2. Approval by the Submitting Entity

The Ohio State Bar Association approved and adopted as its own the Recommendation and Report of the ABA Standing Committee on Judicial Independence on Introductory Judicial Education (dated and approved by that Committee May 30, 2008) on June 4, 2008.. .

3. Has this or a similar recommendation been submitted to the House or the Board previously?

No

4. What existing Association policies are relevant to this recommendation and how Would they be affected by their adoption?

The ABA has a number of policies pertaining to judicial selection including merit selection for judges, public financing of judicial elections and qualification commissions to assist in the selection process. Introductory judicial education would add a potential credentialing factor to be considered in addition to those presently set for in standards for judicial selection.

5. What urgency exists that requires action at this meeting of the House?

The adoption of these recommendations will prompt state and territorial bar associations and state and territorial legislative bodies to begin consideration of their adoption.

6. Status of Legislation

The Ohio general Assembly is currently considering legislation (House Bill 173) that would provide for preparatory judicial education as a factor in judicial selection.

7. Cost to the Association (Both direct and indirect costs)

N/A

8. Disclosure of Interest (If applicable)

N/A

9. Referrals

ABA Judicial Division
ABA Section on Legal Education
ABA Section on Criminal Justice
ABA Section on Litigation
National Center for State Courts

10. Contact Person (Prior to the meeting)

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11. Contact Person (Who will present the report to the House)

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