American Bar Association

ADOPTED BY THE HOUSE OF DELEGATES

February 2, 1998

Mental and Physical Disability Law (Report No. 114)

RESOLVED, That the American Bar Association recommends that when making character and fitness determinations of state and territorial judicial candidates, nominees, or appointees, any nominating or evaluating entity: 1) consider the privacy concerns of the candidates; 2) narrowly tailor questions concerning physical and mental disabilities or physical and mental health treatment in order to elicit information about current fitness to serve as a judge, with such reasonable modifications as may be required; and 3) take steps to ensure that the process does not have the effect of discouraging those who would seek judicial office from pursuing professional assistance when needed.

FURTHER RESOLVED, That fitness determinations may include specific, targeted questions about a state and territorial judicial candidate's behavior, conduct, or current impairment as it affects the ability to serve as a judge.
Introduction

Substantial progress has been made in jurisdictions throughout the United States to balance the privacy rights of applicants to the bar with the legitimate responsibilities of bar examiners to make character and fitness determinations for bar admission. The American Bar Association has played a significant role in promoting bar admission application inquiries that comply with the Americans with Disabilities Act (ADA) and protect privacy rights. In 1994, the ABA adopted policy that recommends that state bar examiners narrowly tailor questions concerning mental health and treatment to focus on an applicant’s current fitness to practice law.

Similar advancements have begun in the analogous context of judicial nominations and evaluations processes. This resolution is proposed to ensure that comparable progress is made regarding inquiries into the mental and physical health and treatment of judicial candidates.

The need for this proposed resolution is threefold. First, appointed or elected state judicial candidates routinely must complete applications or evaluation forms that include health questions neither bar applicants nor other licensees are required to answer. The practice of making broad inquiries into the mental health of judicial applicants that are not relevant to current abilities to serve was struck down in a 1995 federal district court decision in Florida, Doe v. Judicial Nominating Commission.1 Similar challenges are sure to follow in other jurisdictions. The Department of Justice concurs with the holding in Doe that the state judicial nominating and appointment process is covered by Title II of the ADA, which prohibits "policies that unnecessarily impose greater requirements or burdens on individuals with disabilities in the screening process than those imposed on others."2 Those entities that inform and influence the state judicial nominations and appointment process will be serving the legal profession admirably by voluntarily replacing overly broad mental and physical health questions, similar to those abrogated in the bar admission cases, without further challenges in the courts.

Second, unlike the bar admissions process where most of the overly broad questions concerned only mental health and treatment, in many jurisdictions judicial nominating and evaluating committees continue to use overly broad questions about physical health and treatment. Thus, this recommendation addresses inquiries of judicial candidates into both physical and mental health and treatment.

Third, the resolution further guarantees that the judicial nominations and evaluation process does

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2 Letter from Sheila Foran, Disability Rights Section, Civil Rights Division, U.S. Department of Justice, January 23, 1997 to both parties in the Doe case, citing 28 C.F.R. §§ 35.130(b)(6) and 35.130(b)(3)(i).
not have the effect of discouraging persons who would seek a state judicial office from pursuing professional assistance when needed.

**Background of the 1994 Resolution**

In 1994, the ABA adopted policy recommending that in making character and fitness determinations, state and territorial bar examiners should consider the privacy rights of bar admission applicants, narrowly tailor mental health and treatment questions to elicit information about current fitness to practice law, and take steps to ensure that those who would benefit from professional mental health treatment and counseling would not be discouraged from doing so.

The 1994 resolution was a carefully crafted document that reflected the differing points of view within the Association on how best to address overly broad inquiries into mental health and treatment of bar applicants. These differing perspectives were integrated into the 1994 resolution supported by its four co-sponsors: the ABA Commission on Mental and Physical Disability Law, the Section of Legal Education and Admissions to the Bar, the National Conference of Bar Examiners, and the Association of American Law Schools. The one notable dissent came from the Section of Individual Rights and Responsibilities which felt the resolution should have gone even further in restricting bar admissions inquiries.

Since the ABA’s adoption of the bar admission resolution, however, all parties integral to the initial debate, including the Section of Individual Rights and Responsibilities, agree that the 1994 resolution has served its stated purpose well and, along with ADA-based litigation, moved numerous jurisdictions to substantially revise their mental health and treatment inquiries to address current fitness to practice law. In fact, the ABA resolution has been cited favorably in key court decisions in Texas, Virginia, and Florida, which have struck down overly broad questions.²

**Scope and Duration of Inquiries**

With the legal profession facing similar challenges regarding inquiries of a judicial candidate’s mental and physical health and treatment, this proposed resolution provides guidance on developing proper inquiries in the state judicial nominations process. It draws on language in the 1994 resolution, as well as on key cases and opinions. The four key elements are: (1) narrowly tailoring any inquiries that are made; (2) only eliciting information about current fitness to serve as a judge; (3) addressing both physical and mental health and treatment; and (4) ensuring that potential judicial candidates will not be deterred from seeking professional

assistance when needed.

A. Overly Broad Inquiries

1. "Narrowly Tailored"
The words "narrowly tailored" were chosen in the language of the recommendation to discourage the practice of asking questions of applicants that are both broad and general, what in constitutional terms might be viewed as unnecessarily intrusive or overly vague. In particular, questions of the type that ask whether an applicant has ever been treated or counseled for any mental illness, or whether the applicant has ever been institutionalized for treatment of such an illness, intrude too far. In striking down general inquiries on the Florida judicial application form into "any hospital confinement," "any form of mental illness," and "any form of emotional disorder or disturbance," the Doe court specifically found that such a question "vividly demonstrates the overinclusiveness" of the investigation, serving only to "force the disclosure of intimate, personal matters that have nothing to do with job performance.*

When defining the scope of inquiry, judicial nominating and evaluating entities should ask only those questions about health and treatment that are germane to the judicial candidate's current qualifications to serve as a judge, or what the Doe court stated is "clearly related to job performance." What is germane should be guided by the reasonable relationship between the inquiry and the defining characteristics of a judge.6 Such inquiries could include such

6 Doe, 906 F. Supp. at 1544.
7 Id. at 1544.
8 The Chicago Bar Association and the California Office of the Governor (which has authority over judicial application forms and forwards completed forms to the State Bar of California Commission on Judicial Nominees Evaluation) both recently voluntarily revised their disability-related questions asked of judicial candidates. The Chicago Bar Association form defines the abilities essential to the functions of a judge and what is meant by an "accommodation," and then focuses questions about mental or physical disabilities on the candidate's current abilities to perform these functions. Abilities are defined as "analyzing legal issues to reach legal judgments;" "evaluating the credibility of witnesses;" "making factual determinations from competing presentations;" "making decisions in a timely fashion;" "serving in a fair, impartial and unbiased manner;" "concentrating, reading and writing, in an articulate and logical manner;" "demonstrating honesty, integrity, patience, open-mindedness ...;" and "exercising control over court proceedings." Questions posed include whether the candidate currently possesses "the physical and mental ability to perform the essential functions of a judge, with or without reasonable accommodation;" "currently uses illegal drugs, or ... habitually uses illegal drugs on a recreational basis;" "frequently fails to take any lawful medications which enable [the candidate] to perform the essential functions of a judge;" "currently uses intoxicating liquor to such an extent that [his or her] ability to perform the essential functions of a judge is impaired;" "is a compulsive gambler." The Chicago Bar Association, Judicial Evaluation Committee, "Questionnaire for Judicial Candidates," Part H - Fitness. Similarly, the California judicial appointment application form asks applicants if they are "able, with or without reasonable accommodation, to perform the requirements of a judge," which includes "[f]requently receiving, analyzing and communicating on information for a total of 8 or more hours within a week day of reasonable duration; [p]reparing a courtroom clearly, reviewing all types of evidence, including exhibits; reviewing and processing substantial
matters as a history of trustworthiness, integrity, record of compliance with deadlines, and
other aspects of the individual’s background affecting fairness, neutrality, and other judicial
qualifications.

Research in the health field and clinical experience demonstrate that neither diagnosis nor the
fact of having undergone treatment support any inferences about a person’s ability to carry out
professional responsibilities or to act with integrity, competence, or honor. In striking down
overly broad questions on mental health, the Doe court specifically noted language in the Clark
case based on the testimony of mental health professionals: “while certain severe or emotional
disorders may pose a direct threat to public safety, the Board has made no individualized finding
that obtaining evidence of mental health counseling or treatment is effective in guarding against
this threat.”

Moreover, the finding in Doe emphasized that there is “no evidence of correlation between
obtaining mental counseling and employment dysfunction.” Inquiries are improper where they
“force the disclosure of information which is not necessary to protect the public safety and ...
where they have no reasonable relationship to job performance, but imposes a burden on
individuals with disabilities by requiring them to make public disclosure of irrelevant present,
past and perceived disabilities.”

For instance, the Arizona Judicial Nominating Commission recently adopted behavior-based questions
similar to those previously cleared by the Department of Justice for its bar application, with slight modifications
made to obtain necessary information for a judicial application. The application is divided into eight sections:
personal information (Section A), e.g., residency and race/ethnicity; educational background (Section B), e.g.,
Factors considered relevant during law school; professional background and experience (Section C), e.g.,
explanations for periods of professional inactivity or unemployment; business and financial information (Section
D), e.g., failure to file tax returns, violation of child or spousal payment orders; conduct and ethics (Section E), e.g.,
refusal to submit to drug tests; professional and public service (Section F), e.g., registering to vote. Under Health
(Section G), there is but one question, “are you physically and mentally able to perform the essential duties of a
judge in the court for which you are applying?” Judicial Nominating Commission, Arizona Supreme Court,
“Application For Nomination To Judicial Office,” question no. 61. Questions revised by the Florida Judicial
Nominating Commission in the aftermath of Doe pose a similar inquiry: “Do you currently have a physical or
mental impairment which in any way limits your ability to perform your duties as a member of
the judiciary in a competent and professional manner?” (Question no. 12a.) Other questions more specifically refer
to treatment, diagnosis, hospitalizations, as well as substance abuse (see supra, n. 18 and n. 20).

7 Id. at 1544 (citing from Clark, 880 F. Supp. at 446).
8 Id. at 1544.
9 Doe, 906 F. Supp. at 1545.
What the evidence does show is that past behavior, as distinct from a past history of treatment or counseling, is the best indicator of a candidate’s present ability to function and work. Questions of a “behavioral” or “characterological” nature are distinct from broad mental health inquiries in that they elicit information about a person’s character from evidence of past behavior, e.g., work history, military service, academic achievement, school or vocational training, disciplinary proceedings in previous school or employment venues. Past behavior in this context, then, is a legitimate subject of inquiry by judicial nominating or evaluating entities precisely because it focuses on relevant factors that may be associated with the disability, rather than assuming that a person’s status as a person with a disability will forecast future behavior. Aberrant, inconsistent, or questionable past behavior may have a connection to contemporaneous mental health diagnosis, treatment or counseling, to a physical disability, or to factors unrelated to any disability.

2. “Current Fitness”

The second key aspect of the proposed resolution is the limitation of inquiries to the candidate’s “current fitness.” While this concept certainly overlaps with the idea of “narrowly tailoring” health inquiries, it stresses the need to view a candidate’s behavior in the present tense. The question is not whether candidates may have had a condition that once made them unfit to serve, but rather whether they have a condition that makes them unfit to serve today or in the foreseeable future. Hence, questions that ask whether a candidate has ever been treated or counseled for a health condition are inappropriate. In addition, questions that “are not subject to reasonable time limitations,” such as those addressing substantial periods of time such as five or ten years or more, are also inherently

11 Clark, 880 F. Supp. at 435 (citing the testimony of Dr. Howard V. Zanana, Director of the Law and Psychiatric Division and Professor of Clinical Psychology at the Yale University School of Medicine).

12 Id. at 435 fn. 7.


14 The behavioral approach questions revised in Florida’s judicial application process do not assume that mental health diagnosis, treatment, or counseling was the contributing factor in an applicant’s past behavior that indicates a legitimate concern bearing on current fitness, e.g., “... have you ever been declared legally incompetent or have you or your property been placed under any guardianship, conservatorship or committee?” (Question no. 13); “... have you ever been formally reprimanded, demoted, disciplined, cautioned, placed on probation, suspended or terminated by an employer?” (Question no. 14); “Have any of your current or former coworkers, subordinates, supervisors, customers or clients ever filed a formal complaint or accusation of misconduct against you with any regulatory or investigatory agency, or with your employer?” (Question no. 17).
suspect and have been struck down as not being necessarily relevant to current fitness.\textsuperscript{15}

What is considered a "current" condition affecting a person's "current" abilities is subject to a reasonableness standard. "Current" generally means having occurred within a reasonable amount of time. For instance, in the context of the ADA's definition of "current illegal use of drugs," current means what has "occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem."\textsuperscript{16}

A more difficult situation involves evaluating the appropriateness of questions that ask about serious health related problems that have occurred in the recent past. Certain conditions that no longer are present or have been treated successfully may be so serious and create such a risk of inappropriate judicial behavior or judicial incompetence that they deserve to be further scrutinized with the proviso that the candidate be given full opportunity to refute such an implication.\textsuperscript{17} There should be inquiry into "only those serious mental illnesses that experts have indicated are likely to affect present fitness" to undertake judicial functions and be limited to a "specified time frame."\textsuperscript{18}

What time period may properly be targeted in questions related to alcohol consumption, as well as legal or illegal drug use, is directly related to what is considered to be the "ongoing" impact of the behavior in question.\textsuperscript{19} With respect to other physical and mental

\textsuperscript{15} Doe, 906 F. Supp. at 1545.


\textsuperscript{17} Doe, 906 F. Supp. at 1544 (citing favorably from Texas Applicants, 1994 WL 776993 at 776999). The Doe court noted that the Texas Applicants' "guidelines should assist the [Florida] PJC in adopting appropriate inquiries," noting that bar applicants affirmatively indicating a serious mental illness are not automatically denied a license to practice law, but are given the opportunity in an ensuing investigation to indicate present fitness.

\textsuperscript{18} Revised questions in Florida, which the DOJ reviewed and agreed did not violate the ADA, include "During the last 10 years have you been hospitalized or have you consulted a professional or have you received treatment or a diagnosis from a professional for any of the following: kleptomania, pathological or compulsive gambling, pedophilia, exhibitionism or voyeurism?" (Question no. 11a) (The applicant is then asked to provide the names of professionals or hospitals, and to describe treatment or diagnosis.) It is significant to note that these diagnoses are not protected under the ADA. See infra, n.21.

\textsuperscript{19} In Florida and Arizona, judicial applicants will now be asked whether only in the past year they have suffered an employment consequence because of alleged consumption of alcohol, prescription drugs or illegal use of drugs (Fla., question no. 15; Ariz., question no. 47), whether in the last 10 years they unlawfully used controlled substances, narcotics drugs or dangerous drugs as defined by Federal and State laws (Fla., question no. 14; Ariz., question no. 46), and whether they ever refused to submit a drug or alcohol test (Fla., question no. 18; Ariz., question no. 50). In Florida, applicants will be asked whether they currently are addicted to or dependent upon the use of narcotics, drugs, or intoxicating beverages (Question no. 19).
health conditions "that experts have indicated are likely to affect present fitness," the ongoing impact may be considerably less than that of substance abuse, which has a high relapse rate. Generally, once a person is cured or has received successful treatment for a mental or physical illness there is no reason to assume automatically that the person will have an ongoing problem. In order to predetermine which conditions may have a significant "ongoing impact" and to what extent, each condition should be assessed individually, and listed conditions that have an ongoing impact should be addressed in specific questions.20

B. Inquiries into both Physical and Mental Health
The third key element in this proposed resolution is the inclusion of physical along with mental health and treatment inquiries. The judicial nominations and evaluation process, unlike the bar application process, asks physical health related questions. Under the ADA, questions based on physical or mental health or treatment are equally inappropriate when they are overly broad or unrelated to current fitness.

C. Counseling and Treatment
Judicial nominating and evaluating entities could and should take affirmative steps to counteract the undesirable chilling effect that asking broad mental health questions may exert on potential applicants. Such inquiries not only yield information of questionable value from judicial candidates, but discourage those contemplating a judicial career from seeking treatment or counseling out of fear that it may adversely affect their professional ambitions. This was a key consideration in drafting the recommendation on bar admissions inquiries and is equally important for state judicial candidates.

Legal Bases for the Recommendation

20 Permissible questions of a "behavioral" or "characterological" nature that specify time periods can provide further examples of what is "ongoing." Questions with no time frame specified, i.e., "have you ever," include: in Florida and Arizona, formal complaints or accusations of misconduct by coworkers, supervisors, customers or clients (Fla., question no. 17; Ariz., question no. 49). Questions with a 10 year time frame include: in Florida, particular conditions that interfered with ability to work in a competent and professional manner, e.g., hyperactivity, spending money profusely with extreme poor judgment, extreme loss of appetite, issuing checks without sufficient funds, defaulting on a loan, frequent mood swings, and uncontrollable tiredness (Question no. 11b); memory loss or impaired judgement (Question no. 20); eviction proceedings; legally incompetency, guardianships, or conservatorships (Question no. 13); and, in Arizona, whether the applicant has registered to vote and voted in general elections (Question no. 51B). Questions with a five year time frame include: in Florida and Arizona, any employment reprimand, demotion, discipline, probation, suspension or termination (Fla., question no. 16; Ariz., question no. 50). Questions with a one year time frame include: in Florida and Arizona, failure to meet court imposed deadline or order. or lack of business compliance (Fla., question no. 19; Ariz., question no. 13); and in Arizona, whether the applicant has suffered memory loss of impaired judgment (Question no. 52; note in Florida the same inquiry has a 10-year time frame).
The legal basis for this recommendation is rooted in Title II of the Americans with Disabilities Act (ADA), as well as privacy rights under the United States Constitution. The ADA protects individuals with a mental or physical disability, a history of mental or physical disability, or who are regarded as having such a disability. Most pertinently, Title II of the ADA prohibits discrimination by state and local government entities: "No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."

The Doe court held that a judicial candidate who was challenging questions in the nominating or evaluating process had legal standing under ADA Title II. The Doe court found, and the Justice Department also has indicated, that the Judicial Nominating Commission was a "public entity," and thus, covered by ADA Title II. In the words of DOJ:

State organizations or entities responsible for screening applicants for possible appointment to positions in the judiciary would fall within Title II's definition of "public entity(ies)," and may not discriminate on the basis of disability in conducting these activities. See 42 U.S.C. § 12131(1)(B). The regulations under Title II prohibit policies that unnecessarily impose greater requirements or burdens on individuals with disabilities in the screening process than those imposed on others. See 28 C.F.R. §§ 35.130(b)(6) and 35.150(b)(3)(i). Specifically, the regulations state the public entities may not impose or apply eligibility criteria that screen out or tend to screen out individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be "necessary" for the provision of the service, program, or activity being offered. 28 C.F.R. §

21 42 U.S.C. § 12102(2). Note that the ADA explicitly does not cover certain conditions, such as: current illegal drug use, id. § 12210; transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, id., § 12211(b)(1); compulsive gambling, kleptomania, or pyromania, id., § 12211(b)(2); and psychoactive substance use disorders resulting from current illegal use of drugs, id., § 12211(b)(3).

22 In addition to the Doe case and the Department of Justice conclusions noted, some state officials, for example, those in California have made a legal determination that judges are not "state employees" and therefore are not covered under Title I of the ADA, the employment discrimination provisions of the statute. See Letter from John G. Davies, Judicial Appointments Secretary, CA Governor's Office, March 28, 1996.


24 906 F. Supp. at 1531.

25 Id. at 1540.

Thus, judicial nominations and evaluation questions must be carefully crafted so that they
are not discriminatory.

Furthermore, the determination of whether a judicial candidate is "qualified" also entails
consideration of whether any reasonable modification or auxiliary aids are needed to enable
the person to serve as a judge. Under ADA Title II, a "qualified individual with a disability" means "an individual with a disability who, with or without reasonable modification to rules, polices, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for ...
participation in programs or activities provided by a public entity."^ In the judicial
context, modification may mean a change needed to ensure that the candidate has an equal
opportunity in the evaluation process, to enable a qualified individual with a disability to
perform the essential functions of a judge, and to enable a disabled judge to have equal
benefits and privileges of employment.29

Independent of the ADA, constitutional privacy rights also form a legal basis for this
recommendation. Courts generally agree that a person has a right to privacy, but the extent
of the right must be considered in the legal context in which it is being asserted.30 Thus,
where individual privacy interests are asserted on behalf of a judicial candidate, the
government's interest in obtaining the information must be balanced against the individual's
interest in its nondisclosure. The less useful the information is to attaining even a legitimate
governmental purpose, the more likely the question posed violates the Constitution. In
addition, if judicial candidates reveal sensitive health-related information on the application
or evaluation form, that information may not necessarily be protected from public scrutiny.
For example, the Florida Constitution states, "Except for deliberations of the judicial
nominating commissions, the proceedings of the commissions and their records shall be
open to the Public."31 Thus, there is effectively no privacy protection for state judicial
candidates under Florida law.

27 Id


29 See, e.g., The Chicago Bar Association, Part II Fitness section of new Questionnaire for Judicial
Candidates (Feb. 1997); cf supra, n. 6.

30 See G. Edson, "Mental Health Status Inquiries on Bar Applications: Overbroad and Intrusive," 43 U.

31 Fla. Const. art. V, § 11(6)
Finally, even if the state governmental pursuit is legitimate, the inquiring body must proceed in ways that least intrude upon the individual's liberty and other constitutional rights. In other words, the least intrusive alternative principle requires questions to be as narrowly tailored as possible to achieve the stated objective. This is what the proposed resolution recommends.

Respectfully submitted,

The Honorable Richard S. Brown
Chair, Commission on Mental and Physical Disability Law

Muriel Morisey,
Chair, Section of Individual Rights and Responsibilities

The Honorable Richard L. Fruin, Jr.,
Chair, Judicial Division.

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12 By "The Board would be derelict in its duty if it did not investigate the mental health of prospective lawyers. It has made every effort to do so in the least intrusive, least discriminatory manner possible." Texas Applicants, 1994 WL 776693 at 776699 (cited in Doe, 906 F. Supp. at 1544).
1. **Summary of Recommendation.**

The recommendation urges that any nominating or evaluating entity, in making character and fitness determinations of state judicial candidates, nominees, and appointees, consider the privacy interests of the candidates, narrowly tailor questions concerning physical and mental disabilities and health treatment, and take steps to ensure that the evaluation process does not have the effect of discouraging those who would seek judicial office from pursuing professional assistance when needed.

2. **Approval by Submitting Entities.**

- Commission on Mental and Physical Disability Law -- April 1997 and October 1997 (revision).
- Section of Individual Rights and Responsibilities -- June 1997 and October 1997 (revision).
- Judicial Division -- August 1997.

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

A recommendation on an analogous evaluating process was passed by the ABA House of Delegates in August 1994. That recommendation concerned the state bar admission process, urging state bar examiners to consider privacy concerns of bar applicants, narrowly tailor questions about mental health and treatment to elicit information about current
fitness to practice law, and take steps to ensure that their practices do not discourage those who would benefit from professional help from seeking it.

The present recommendation was submitted to the House in August 1997 as originally drafted to cover both federal and state judicial evaluations, and it was on the Board of Governors consent calendar at that time, but the sponsoring entities withdrew the recommendation prior to House consideration in order to have an opportunity to consult with the Section of Litigation and the Standing Committee on Federal Judiciary to address their concerns.

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

This recommendation is consistent with the previously passed policy regarding state bar admission processes. It also is consonant with Goal IX on opportunities for minorities in the profession and the Association's continuing support of efforts to make the legal profession fully open and accessible to persons with disabilities, while recognizing the duty to the public and the profession to recommend only qualified persons for the judiciary.

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

The policy adopted by the ABA concerning the state bar admission process played a key role in abrogating overly broad questions mental health questions on state bar questionnaires. Similar challenges to state judicial candidate evaluation processes have begun and a consistent approach is needed in this situation as well. A statement of the relative rights and needs of judicial candidates, as well as developments made as a result of litigation and cooperative discussion, will guide responsible commissions and authorities to better address the role of a candidate's mental and physical health and treatment in the judicial evaluation process.


Not applicable.

7. Cost to the Association.

Adoption of this recommendation would have no financial impact on the Association.


Not applicable.
9. Referrals.

The present recommendation is an effort initiated by the Commission on Mental and Physical Disability Law arising out of the interest of its members in response to recent litigation. The Commission originally submitted a draft of the recommendation covering both federal and state judicial evaluation processes to the Judicial Administration Division and Section of Individual Rights and Responsibilities in the summer of 1996. The Section of Individual Rights and Responsibilities agreed to cosponsor the recommendation in June 1997. After the Judicial Administration Division's 1996 reorganization to the Judicial Division, the recommendation and report were revised to incorporate the Division's perspectives and in August 1997 the Judicial Division agreed to cosponsor the recommendation.

Prior to the 1997 Annual Meeting, the Commission on Mental and Physical Disability Law circulated the recommendation and report to the following entities: the Sections of Administrative Law and Regulatory Practice, Criminal Justice, Dispute Resolution, Family Law, General Practice, Solo and Small Firm, Health Law, Real Property, Probate and Trust Law, State and Local Government Law, and Tort and Insurance Practice; the Government and Public Sector Lawyers, Senior Lawyers, and Young Lawyers Divisions; the Standing Committees on Legal Aid and Indigent Defendants, Professionalism, and Public Education; the Commission on Public Understanding About the Law; the Consortium on Legal Services and the Public; the Coalition for Justice; and the National Association of Women Judges.

At the 1997 Annual Meeting, representatives of the Section of Litigation and the Standing Committee on Federal Judiciary expressed concern that the recommendation as drafted could adversely affect the Association's role in the federal judicial nomination process. The proponents withdrew the recommendation in order to have an opportunity to consult with these parties and to address their concerns. As a result of subsequent discussions, the proponents agreed to limit the scope of the recommendation to state judicial evaluation processes, and the Section of Litigation agreed not to oppose the revised recommendation.

Because the recommendation's scope had changed since the summer, in the fall of 1997 the Commission on Mental and Physical Disability Law again circulated the recommendation and report to all of the entities listed above that had previously received the earlier version prior to the 1997 Annual Meeting, and it also circulated the recommendation and report to the following additional entities: the Sections of Antitrust Law, Business Law, Intellectual Property Law, Labor and Employment Law, Natural Resources, Energy, and Environmental Law, and Public Utility, Communications, and Transportation Law; the Law Student...
Division; the Commissions on Lawyers Assistance Programs, Opportunities for Minorities in the Profession, Separation of Powers and Judicial Independence, and Women in the Profession; the Standing Committees on Lawyer Competence, Professional Discipline, and Substance Abuse; the Hispanic National Bar Association; the National Asian Pacific American Bar Association; the National Association of Attorneys General; the National Association of Bar Executives; the National Association of Women Lawyers; the National Lesbian and Gay Law Association; and the National Bar Association, Inc.

10. Contact Persons.

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11. Contact Persons who will present the report to the House.

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12. **Contact person regarding amendments to this recommendation.**  
(Are there any known proposed amendments at this time? If so, please provide the name, address, telephone, fax, and ABA/nct number of the person to contact below.)

There are no known proposed amendments at this time.