

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

FEBRUARY 16, 2009

RECOMMENDATION

RESOLVED, That the American Bar Association urges state, local, and territorial bar associations, and the highest court of each state to establish, for those who have an interest in serving in the judiciary, a voluntary pre-selection/election program designed to provide individuals with a better appreciation of the role of the judiciary and to assist them in making a more informed decision regarding whether to pursue a judicial career.

REPORT

The vast majority of people serving in the judiciary have no special training 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 (informational educational program) for individuals aspiring to judicial office. Under the aegis of the American Bar Association's Standing Committee on Judicial Independence ("SCJI" or the "Committee"),¹ a Study Group on Pre-Judicial Education² (the "Study Group")³ was empaneled in 2001 and in 2003 issued a brief but interesting report.⁴ The idea of IJE ("Introductory Judicial Education") is that some form of voluntary pre-selection/election program designed to provide individuals with a better appreciation of the role of the judiciary and to assist them in making a more informed decision as to whether a judicial career is appropriate and would give aspirants a better understanding of the job they might someday seek.

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 introductory 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.

^{1/} 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.

^{2/} 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 10, at 3-4), the term used henceforth herein will be "Introductory Judicial Education" or its acronym "IJE."

^{3/} The Study Group comprised trial and appellate judges, lawyers, judicial and adult educators, bar association executives and legal academics.

^{4/} 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. 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.

. . . 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.⁵

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. 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?

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

Apart from the Study Group Report, very little literature of substance existed on the subject of judicial education⁶ generally and even less on IJE. Indeed, the latter consisted of only two offerings, one by a former Director of the ABA's Judicial Division⁷ and the other by a judge of the Louisiana Court of Appeal, Third Circuit.⁸ 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,⁹ 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 factor as part of the judicial selection process.

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. Fisher,¹⁰ then of the Michigan State University College of Law, and Associate Dean Joseph

^{6/} *I.e.*, continuing education for those who have *already* ascended to the bench.

^{7/} Luke Bierman, *Beyond Merit Selection*, 29 FORDHAM URB. L.J. 851 (2002).

^{8/} 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.

^{9/} This issue was specifically addressed at the 2007 Symposium described below and in one of the white papers prepared therefor.

^{10/} 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.

R. Stulberg¹¹ of the Ohio State University Moritz College of Law. These papers, in conjunction with Judge Amy's aforementioned article¹² and the Study Group report,¹³ 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 jurisdictions¹⁴ 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 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."¹⁵ 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."¹⁶

^{11/} 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).

^{12/} Amy, *supra* note 8.

^{13/} STUDY GROUP REPORT, *supra* note 4.

^{14/} 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 10, at 14.

^{15/} *Id.* at 19-20 (citations omitted).

^{16/} *Id.* at 20.

Consistent with this conception, Professor Fisher suggested that an IJE curriculum that could provide the requisite skill set consistent with the purposes identified above 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.¹⁷ 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.”¹⁸

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 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.”

Second, Stulberg drew on a Carnegie Foundation study of the legal profession¹⁹ 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.”²⁰ This “signature pedagogy” provides “a primary means by which a student becomes

^{17/} *Id.* at 24-25.

^{18/} *Id.* at 26.

^{19/} W. SULLIVAN, A. COLBY, J. WEGNER, L. BOND, & L. SCHULMAN, *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007).

^{20/} Stulberg, *supra* note 11, at 10.

acculturated to the enterprise.”²¹ 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?”²² 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.” 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 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.²³ Legislators and others from Ohio indicated that the motivation for incorporating IJE into the selection process was to create an additional factor 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

^{21/} *Id.* at 11 (citation omitted).

^{22/} *Id.*

^{23/} 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.

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,²⁴ having Ohio (or any other state)²⁵ serve as a laboratory to assess the IJE concept in practice²⁶ would be very important, especially in the absence of the kind of empirical studies mentioned by the Study Group.

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 an appreciation of 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.

While the committee, after conferring and receiving input from all potentially affected entities of the ABA (largely the conferences making up the Judicial Division), is unwilling at this time to recommend an extensive program that would include all of the consensus points reached at the Symposium, it 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 educating individuals with a better appreciation of the role of the judiciary and to assist them in making an informed decision as to whether a judicial career may be appropriate. It comes down to a very simple question – shouldn't a person know something about the job they are seeking, especially one that impacts the lives of our citizens? The Committee further believes that in developing and implementing IJE programs, consideration should be given to

^{24/} 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).

^{25/} As of this writing (May 2008), no IJE legislation has yet been enacted in Ohio.

^{26/} 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”).

accessibility and affordability of programs so as not to exclude women, minorities or others who might feel excluded from participating. The Committee also wants to emphasize that participation on IJE programs should not be considered as giving rise to credentialing and/or certification of participants.

In sum, the Committee believes that the additional knowledge 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.

William K. Weisenberg
Chair
Standing Committee on Judicial Independence
February 2009

GENERAL INFORMATION FORM**Submitting Entity: ABA Standing Committee on Judicial Independence****Submitted By: William K. Weisenberg, 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.

2. Approval by the Submitting Entity

The ABA Standing Committee on Judicial Independence approved the recommendation on October 18, 2008.

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

This recommendation and report were submitted to the HOD in August 2008 and subsequently withdrawn. They have been substantially revised by a working group.

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 is not in conflict with current policies relating to post-judicial education.

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

N/A

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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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; and that adopting such a program would assist in elevating public trust and confidence in the judiciary.
- (b) The Recommendation proposes to address the issue of how to best assist lawyers with judicial career aspirations and at the same time addresses the issue of how we can increase the trust in confidence of the public in our judiciary.
- (c) The proposed policy, if adopted by state, local and territorial bar associations, will enhance the knowledge of lawyers aspiring to judicial service and thus raise the stature of the judiciary in the public eye and insure they are fully aware of the ethical and career demands of a judicial position.
- (d) At this point in time, no organized opposition is known.