

Chapter 5

Evaluative Criteria



As part of the organizational meeting, commissioners will find it extremely helpful to articulate the evaluative criteria to be used in the selection process. The criteria needed for a particular judicial position depend partly on the role the judge will play. By examining the criteria that relate to the work of every judge, and considering additional criteria for different judicial roles, a commissioner will be able first to determine the qualities to be sought in a judicial nominee, and second to judge whether an applicant meets the criteria.

Before beginning the selection process, commissioners also should become familiar with the minimum legal qualifications for the judicial vacancy in question. Requirements relating to minimum and maximum age, citizenship, residency or a license to practice law often appear in state constitutions or statutes, and are not addressed here.

Establishing Criteria

The following examination of evaluative criteria is based on state constitutional and statutory requirements for judicial office, literature on judicial selection and the judicial process, literature on judicial performance evaluation, and the criteria currently used by judicial nominating commissions. Other sources for judicial evaluation include reports by the media, bar associations, and evaluation committees that assess judicial performance either for retention elections or reappointment, or for self-improvement.

Appendix B to this chapter contains suggested measures, in question form, for each criterion. Each question has been designed to highlight particular aspects of an applicant's background. By considering each of the questions, a commissioner should gain insight into whether any given applicant will make a good judge.

A judicial nominating commissioner will find it helpful to use a number of flexible, observable and verifiable criteria when screening, checking references for, and evaluating candidates for judicial office. Listed below are 16 suggested criteria for evaluating applicants for judicial office.¹

Core Evaluative Criteria

- Suitable age
- Good health
- Impartiality
- Integrity
- Judicial temperament
- Industry
- Professional skills
- Community contacts
- Social awareness

- Collegiality
- Writing ability
- Decisiveness
- Speaking ability

Other Desirable Skills

- Administrative ability
- Interpersonal skills
- Conversance with ADR techniques

Suitable age. A candidate for judicial office must meet the minimum and maximum ages set by constitution or statute.

Good health. The demands of judicial office require a high level of performance and, consequently, applicants should be physically and mentally healthy. However, the *Americans with Disabilities Act* limits health inquiries to whether an applicant can perform the *essential functions* of the position, with or without reasonable accommodation. For example, listed below are essential functions as given in the Delaware applicant questionnaire:

- The ability to analyze legal issues to reach reasoned legal judgments;
- The ability to evaluate the credibility of witnesses;
- The ability to make factual determinations from competing presentations;
- The ability to make decisions in a timely fashion;
- The ability to serve in a fair, impartial, and unbiased manner;
- The ability to communicate, orally and in writing, in an articulate and logical manner;
- The ability to demonstrate honesty, integrity, patience, open-mindedness, courtesy, tact, compassion, and humility in performing judicial functions;
- The ability to exercise control over court proceedings; and
- The ability to perform the above functions for a minimum of eight hours per day, five days per week (or such other times as Court may be in session), on a consistent basis.²

The Delaware questionnaire further defines *reasonable accommodation* as a change needed:

- To ensure equal opportunities in the candidate 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 enjoy equal benefits and privileges of employment with non-disabled judges.³

A Missouri applicant questionnaire addresses the health issue in the following manner:

Do you suffer from any health condition that would affect your ability to do legal research, to attend court anywhere in the state, to communicate clearly and effectively, both orally and in writing, or to expeditiously decide issues coming before the court? If yes, please explain.⁴

If a judge might be required to travel within a rural or far-flung judicial district to hold court in different counties, commissioners may wish to consider the following question suggested by a member of the advisory committee for this *Handbook* update:

Are you a licensed driver, and do you have the ability to drive up to 100 miles per day?

For analysis of ADA issues and guidance for judicial nominating commissions, see “Judicial Nominating Commissions and the ADA” in Appendix A.

Impartiality. This is a touchstone criterion, because public trust and confidence in the judiciary rest on the public’s belief that they will get a fair hearing in court. Therefore, a good judge should possess the ability to treat cases objectively regardless of the identity of the parties or the subject matter of the controversy. The judge will be required to consider the facts before the court neutrally and with an open mind. A judge will be asked to ignore personal predilections and, as Benjamin Cardozo said in 1921, “disengage himself so far as possible, of every influence that is personal or that comes from the particular situation which is presented to him, and base his judicial decision on elements of an objective nature.”⁵

An applicant who is an attorney must be able to make the transition from a trained advocate to an independent fact finder and evaluator. He or she must be capable of putting aside a tendency to pick sides and be able to analyze the facts of any given controversy objectively.

Finally, a judge should not only be impartial, but also should convey the impres-

sion of fairness to the parties to a controversy, to the attorneys and to other judges. Actors in that judge's court should feel confident that their pleadings will be afforded full, fair and independent consideration.

Integrity. This is another touchstone criterion. The responsibility of judges to make decisions that affect lives and fortunes requires the selection of men and women of unquestioned integrity. At a minimum, integrity means intellectual honesty, moral vigor and professional uprightness. It also requires a sense of honor, trustworthiness and absolute sincerity and reliability. A judge with integrity is unswervingly ethical. Ethical conduct by judges requires, at a minimum, commitment and adherence to the law, the Code of Judicial Conduct and the Code of Professional Responsibility. To emphasize the importance of integrity, and to alert potential candidates to the ethical standards to which judges must adhere, a number of nominating commissions, Nebraska and Utah, for example, send potential candidates a copy of their Code of Judicial Conduct along with the applicant questionnaire.

Judicial temperament. The judge's job includes contact with lawyers, members of the public and court employees and requires an inordinate amount of an elusive quality called judicial temperament. Judicial temperament encompasses a variety of noble qualities. One of these qualities is dignity. To be dignified a judge must possess "quiet, tactful ways, and calm yet firm assurance."⁶ A jurist with appropriate judicial temperament uses authority gracefully. Judicial temperament also requires sensitivity and understanding. An understanding judge is sensitive to the feelings of those before the court, recognizing that each and every case is important to the participants. Finally, a candidate is not temperamentally suited for the bench unless he or she possesses great patience. Patience is simply the ability to be even-tempered and to exercise restraint in trying situations.

Industry. The demands of rising caseloads and backlogged calendars have accentuated the importance of selecting industrious judges. If, in the past, it was ever valid to consider a judgeship a form of sinecure for lawyers who were ready to work less, that assumption is no longer valid today.⁷ The impact of caseload pressures on the core requirement of judicial industriousness applies with equal strength to both trial and appellate courts.

The quality of industry incorporates several types of work habits. Dedication is one aspect of industry and includes a willingness to devote sufficient, or even extra, time to complete tasks. Industry also demands diligence, involving steady and constant application to the task at hand.⁸ Punctuality is also required. A judge should be prompt and prepared. To retain public confidence in the administration of justice, a judge must be in the habit of opening court on time. Another aspect

of industry is decisiveness, which is of particular importance to trial judges, but also applies to appellate judges. To keep cases moving, a judge must be willing and able to reach decisions with confidence and without hesitation. Finally, an industrious judge is a good administrator, knowing how to manage time, prioritize tasks, and ensure that any judicial staff work at peak efficiency.

Professional skills. All judges are expected to be well-versed in fundamental legal areas. Even judges who are assigned to courts where they will hear only one type of case must be prepared to handle a variety of issues covering procedure, evidence and constitutional law, as well as the substantive areas of their court's jurisdiction.

Neither graduation from law school nor the fulfillment of a minimum requirement of years admitted to practice is sufficient to acquire the professional skills needed for judicial office. Both the length and type of legal experience should be taken into account. As a general rule, about five to seven years of litigation experience would indicate a familiarity with court procedures and legal subjects.

Sometimes commissioners tend to prize extensive litigation experience above other professional skills, to the possible detriment of applicants with experience in the administrative law, transactional, or alternative dispute resolution arenas. In discussing necessary skills for applicants for trial court judgeships, Utah notes the following:

Substantial trial experience as an attorney, a judge, or both is desirable. This includes the preparation and presentation of matters of proof in an adversarial setting for practicing attorney applicants, or the hearing, ruling and decision-making experience of a sitting-judge applicant. However, litigation experience should not be over-emphasized. The modern day trial judge must also be an able administrator and mediator.⁹

Legal analytic ability is equally valuable. Ideally, a judicial candidate should possess intelligence, a capacity for abstract thought and intellectual curiosity.

The quality of clarity of thought and expression...means lucidity in reasoning, a sense of order or arrangement. The model judge must know instinctively the difference between that which is important and that which is merely interesting. He must know well the material fallacies of reasoning and avoid them.¹⁰

Judges are often asked to become experts in different areas of the law with each assignment. Effective judges can adapt to a variety of assignments. Thus, a qualified judicial candidate must be able to achieve a level of expertise in one area and yet freely move into another when a new assignment creates such a demand.

Community contacts. Judges are in a position to enhance the public's view of the court. It is desirable for judges to act as a court liaison to the community. When judges publish articles, teach and participate in community activities, they benefit both the court and the public. In particular, participation in community activities can enable judges to be more sensitive to the problems and concerns of attorneys practicing before them as well as those of the parties to a dispute. In addition, the community is likely to become more sensitive to the pressures of the court and in turn more supportive of the needs of the court. Judges, in short, should maintain an awareness of their public role.

A judge should strive to make the court as visible to the public as is consistent with the privacy needed for meditative, studious, and deliberate decision making. The only business of a court is public business. Therefore, he should initiate and accept procedures which will make the court system and its judges accountable to the people for the public funds utilized and for the public power conferred upon the courts and judges.¹¹

Social awareness. "The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by," said Justice Cardozo in his lectures on *The Nature of the Judicial Process*.¹² Judicial decisions, even when they only attempt to resolve the rights of the immediate parties, must sometimes delve into the realm of social or public policy. Thus, it is useful for judges to have some familiarity with and sensitivity to the range of social issues which often confront the courts.

At the same time, however, judges must be aware of and sensitive to the uses and limitations of the law as a tool for correcting social problems. Assuredly, not every case requires changes in legal doctrine or a refashioning of principles to meet some perceived need of public policy. The law must have a degree of stability and predictability from past through future generations. Yet, a judge should have an interest in improving the law and its service to people. Improving the law will induce a willingness, when circumstances require, to permit changes in legal doctrine, bringing the law into conformity with changed social conditions and evolving concepts of social justice.

Collegiality. The collective decision-making aspect of an appellate judge's role requires loyalty to the appellate court. For example, appellate judges are engaged in an attempt to express the law. This common purpose demands loyalty to the court as both an institution and a collection of diverse individuals. Collegiality, therefore, requires appellate judges to understand and respect their colleagues' differing views. Personality disputes should be minimized and the art of compromise developed. As a part of the art of compromise, a judge must be capable of both giving and receiving criticism. As another judge noted in the dis-

cussion of “What Makes a Good Judge?”

A good appellate judge recognizes that he is part of a greater whole, which is itself part of a process. Thus, he cares about the quality of all decisions rendered by his court, not simply his own opinions. To that end, he is skilled in the art of compromise—he makes, and takes, suggestions, but he never compromises his principles. He reviews his colleagues’ opinions as carefully as he can and when, ultimately, he disagrees, he expresses that disagreement. He circulates all of his opinions, including his dissents, as promptly as possible, because he knows that there is no excuse for unnecessary judicial delay.¹³

However, the principles of courtesy, loyalty, respect and cooperation implicit in *collegiality* also apply to trial judges, who often work with judicial colleagues and sometimes with attorneys on court committees to develop procedures and programs to improve the administration of justice in a local court. And all judges who interact with professionals and members of the public in court and community collaborative efforts need to behave in a collegial way.

Writing ability. Since appellate judges spend a major part of their time writing opinions, it is crucial that they be able to produce lucid and understandable opinions. The organization of an opinion will persuade its readers through its logic and internal coherence. As one prominent professor noted:

The quality of a judge’s opinion has a good deal to do with whether he is a good judge. If his opinions are disorganized, or illiterate, or marred by fallacies of logic or lengthened by wordy irrelevance, he is not good at performing one of an appellate judge’s major jobs. Mere avoidance of these vices, though, does not alone make one a good judge. Quality in opinions and, by the same token, quality in that aspect of judicial performance, depends ultimately upon the soundness of reasoning and decision contained in the opinion.¹⁴

While the press of business often prohibits elaborate writing by trial judges, and they frequently don’t have either the support staff or time for polished writing, an argument can be made that the same clarity of thought and expression is also necessary in the opinions that trial judges do write. Most commissions require a writing sample from every applicant. The Alaska Judicial Council staff, for example, carefully analyzes each writing sample for correct grammar and syntax, logical organization, conciseness, active verbs, balanced presentation of arguments, lack of typographical errors (evidence of careful proofreading and attention to detail), legal research ability, etc. A staff memorandum outlining Alaska’s criteria for evaluating writing samples is in Appendix B, following the suggested measures for writing ability.

Decisiveness. A trial judge in particular must be capable of making quick decisions under pressure. Often a trial judge will be required to rule on objections as soon as they are raised. Motions, too, will require prompt decisions if cases are

to progress. A trial judge must be able to keep cases moving and be willing and able to reach decisions. He or she must be able to quickly assimilate law and facts and to respond to issues raised by counsel with confidence and without hesitation. The judge must be willing to make hard decisions and be able to rule with firmness.

An appellate judge also must act decisively to draft and circulate arguments in support of, or in dissent to, draft opinions in order to facilitate the appellate decision-making process.

Speaking ability. Trial judges must be capable of dealing with a wide range of actors in their courtroom. Not only must a trial judge respond to attorneys and their clients but they must also react to witnesses and be able to instruct jurors on the law. A trial judge in particular needs to be an effective oral communicator in order to be understood by those appearing before the bench as well as by visitors in the courtroom. More importantly, any defendant appearing before a judge without counsel must understand the judge's questions relating to issues such as whether the defendant is eligible for court appointed counsel. Finally, communication skills are essential for a close working relationship with a jury. The judge must give the jury an understanding of its role and instruct the jurors on the law using plain English.

An appellate judge needs to be able to frame clear and relevant questions during oral argument, and to articulate to colleagues his or her reasons for supporting or opposing the holding in a draft opinion.

Additional Criteria

Many judges have responsibilities apart from formal adjudication. Some fill special positions such as presiding or chief judges that require advanced supervisory skills. As an administrator, a judge should be able to delegate responsibility and use the time and talents of his or her staff wisely. In addition, a judge acting in a supervisory capacity will need certain interpersonal skills. Given case-processing time standards in many states and the need to meet deadlines in certain child-protection proceedings, for example, it appears that all judges, appellate and trial, need administrative and interpersonal skills. As the role of the trial judge has evolved, more of them are conducting settlement conferences, and trial judges should be at least conversant with various alternative dispute resolution mechanisms.

Administrative ability. A supervising judge, for example, will need to be a good organizer. Organizational skills include an ability to establish priorities, delegate

certain administrative responsibilities and use a staff wisely. Administrative ability includes keeping files and papers well-organized and keeping abreast of office activities.

Interpersonal skills. As a supervisor, a judge should also possess certain interpersonal skills. When supervising an administrative staff or other judges, a judge should have the ability to motivate others. A good supervisor should review the work of a staff and keep them informed of their level of performance. When overseeing other judges, a supervisory judge should be skilled at mediation. For example, when judges have differing views on court administration, the supervising judge may need to encourage compromise. These skills also apply to trial and appellate judges who are not supervisors. They also oversee the work of personal staff and give performance feedback, and as noted above, interact in many ways with their peers and with court administrative staff.

Conversance with alternative dispute resolution (ADR) techniques. As noted in the discussion of *professional skills* above, trial judges in particular need to be at least somewhat familiar with this concept, and preferably experienced in their jurisdiction's ADR procedures. Whether engaging the parties in settlement conferences or referring litigants to ADR, a judge needs to know how the various ADR techniques work and which are appropriate in specific situations.

A Consideration

Diversity. Although not a criterion, *diversity* is an explicit consideration in a number of jurisdictions. For example, Arizona's constitution says, "The commission shall consider the diversity of the state's population, however the primary consideration shall be merit."¹⁵ In its instructional packet to applicants, the Utah Judicial Council lists evaluative criteria and "other considerations for qualification," including "Diversity on the Bench," commenting as follows:

When deciding among applicants whose qualifications appear in all other respects to be equal, it is relevant to consider the background and experience of the applicants in relation to the current composition of the bench for which the appointment is being made. The idea is to promote a judiciary of sufficient diversity that it can most effectively serve the needs of the community.¹⁶

Ethical Considerations

When evaluating the candidates, commissioners will try to be as objective as possible. However, no matter how objective and impartial any commissioner may attempt to be, each individual brings some personal biases to the process.

Partiality can take many forms. For example, a commissioner who places a premium on many years of courtroom experience will exclude those with transferable skills from their work in administrative law or as transactional attorneys or practitioners who have done a considerable amount of arbitration or mediation. Commissioners should be aware of and sensitive to these issues.

On the one hand, different commissioner points of view are valuable and strengthen the group process. On the other hand, certain mindsets of the commission members may inhibit selection of the most qualified individuals. For example, a commissioner who holds a management position in a local industry should take care not to automatically view unfavorably an applicant who has devoted his or her career to representing trade unions. In the same vein an attorney commissioner with many years of trial experience should ensure that he or she does not act prejudicially toward an applicant who has fewer years' experience, or different, but relevant, experience.

Finally, evaluative criteria may be culturally restrictive. Evaluations that look toward the applicant's personal career advancement, for example, without regard to race or gender may inherently exclude women and minorities. Although a valid criterion, personal career advancement may be biased toward white males who probably have met with fewer obstacles in their career paths than have applicants from groups that have traditionally faced discrimination.

A related concern involves the legitimacy of adapting criteria to fit particular applicants. This is a question that each commission must address for itself. Since different applicants will exhibit varying strengths, commissions may have to decide which strengths they deem most valuable. For example, an applicant for an appellate court vacancy who has not been in a courtroom for 15 years, but has written extensively in various areas of the law, may be the best individual for that particular vacancy. If one criterion seems more important in an individual instance, the commissioners should discuss it among themselves. Once the commissioners' views are articulated, a better understanding of the criteria will develop and a reasoned, fair evaluation will result.

Each of these forms of partiality plays a part in every candidate evaluation. Commissioners should be aware of their own points of view, those of fellow commission members, and those inherent in the evaluative criteria they use. By maintaining an awareness of prejudices, commissions will be able to avoid biased results.

Conclusion

By adopting concisely defined criteria for judicial selection, a nominating commission will be equipped to effectively screen and evaluate candidates for judicial office. When these criteria and suggested measures for evaluation have been adopted in advance, many of the frustrations and apprehensions of commissioners will be eliminated. Commissioners equipped with a solid idea of what they should look for in any given applicant will be secure in their final recommendations to the appointing authority. A commission that has defined its standards for evaluating judicial candidates will gain confidence that it has chosen those best qualified to hold judicial office.

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- 1 In the earlier (1985) version of this *Handbook*, the criteria were grouped according to the judicial role, with *writing ability*, for example, listed as a criterion particularly applicable to appellate judges, and *judicial temperament* as especially applicable to trial judges. We have eliminated those distinctions, leaving it up to each commission to weigh each criterion as it applies to a particular applicant for a particular vacancy at a particular time and place.
 - 2 [Delaware] Questionnaire for Nominees for Judicial Office, page 5.
 - 3 *Id.*
 - 4 Application to the Appellate Judicial Commission for Judge, Missouri Court of Appeals, Eastern District, Question 15.
 - 5 B. Cardozo, *The Nature of the Judicial Process* 121 (1921) (The Storrs Lectures at Yale University).
 - 6 B. Sheintag, *The Personality of the Judge* 42 (1974) (Benjamin N. Cardozo Lectures, Association of the Bar of the City of New York).
 - 7 E. Devitt, "Ten Commandments for the New Judge," 47 A.B.A.J. 1175, 1176 (1961); reprinted in 65 A.B.A.J. 574, 575 (1979).
 - 8 American Bar Association, *Guidelines for Judicial Selection* (1981).
 - 9 "Application for Judicial Office—Instructions to the applicant and summary of the nomination process" 9 (Utah Judicial Council, undated).
 - 10 R. Aldisert, "What Makes a Good Judge?," 14 *IJA Rep.* 1, 2 (Spring 1982).
 - 11 N. Heffernan, "What Makes a Good Judge?," 14 *IJA Rep.* 4,8 (Spring 1982).
 - 12 Cardozo, *supra* note 5, at 168.
 - 13 S. Roberts, "What Makes a Good Judge?," 14 *IJA Rep.* 4, 8 (Spring 1982).
 - 14 R. Leflar, "What Makes a Good Judge?," 14 *IJA Rep.* 4, 9 (Spring 1982).
 - 15 AZ Const. Art.6, Sec. 36.
 - 16 Application for Judicial Office, Instructions for the applicant and summary of the nomination process 10 (Utah Judicial Council: undated).

APPENDIX TO CHAPTER 5

A. Judicial Nominating Commissions and the ADA

B. Suggested Measures for Evaluation

A. Judicial Nominating Commissions and the ADA

What Is the ADA?

In 1990, Congress passed the Americans with Disabilities Act (ADA) to establish “a comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”¹ Title I of the ADA prohibits employment discrimination because of disability in job application procedures, hiring, advancement, discharge, compensation, training, and other terms, conditions and privileges of employment.² The ADA also guarantees the provision of public services and reasonable accommodations for the disabled.³ So strong was Congress’s commitment to the legislation that in addition to relying on its Commerce Clause powers, it expressly used the 14th Amendment to abrogate the states’ immunity from suit under the ADA.⁴ Therefore, as generally enacted, the ADA applies to state actors, local actors, private employees, public entities and private businesses.⁵

The ADA covers qualified individuals with a recognized disability.⁶ This is an area of the statute under constant evolution in the case law, and commissions should monitor ongoing developments. Presently, a person is considered to have a disability under the ADA only when they have a physical or mental disability that substantially impairs one or more major life activities.⁷ The individual must either have a record of such impairment or must be regarded as having the impairment.⁸ An impairment that is covered under the ADA must prevent the individual from performing a major life activity that the average person in the general population can perform, or must significantly restrict an individual as to the conditions, manner and duration under which that individual can perform the particular major life activity.⁹

As a qualified individual, an applicant must be qualified to perform the essential functions of the job with or without reasonable accommodation.¹⁰ Reasonable accommodations under the ADA include, but are not limited to, making existing facilities accessible to and usable by individuals with disabilities.¹¹ Restructuring, part-time work, modified work schedules, reassignment to a vacant position, and modification of equipment may be required, or at least considered, under the ADA, so long as providing these accommodations does not cause an “undue hardship on the operation of the business.”¹²

If a person has an obvious disability, questions about his or her daily functions are not permitted unless they are tailored to inquire whether the applicant can perform a particular job with or without reasonable assistance.

The Necessity Exception

In its regulations, the Department of Justice (DOJ) has included a necessity exception to the ADA for employers.¹³ While the regulation still prohibits the creation of eligibility criteria that screen out, or tend to screen out, disabled individuals, the DOJ will allow an eligibility criterion that can be shown to be necessary for the provision of the service, program, or activity being offered.¹⁴

When questions of public safety arise in a particular form of employment, an eligibility criterion may involve a consideration of whether an applicant poses a direct threat to the health and safety of others.¹⁵ However, such a determination may not be based on stereotypes and broad generalizations about individuals with disabilities, but rather on reasonable judgment and specific requirements for the position.¹⁶ In many instances, such as nominations for the judiciary, along with medical and legal licensing, the “necessity exception” comes into play.¹⁷ Therefore, a narrow and targeted inquiry into the health of judicial applicants is appropriate and necessary when it is designed to protect the integrity of the judiciary and the public it serves.¹⁸ Each nominating commission should be familiar with their own state statutes and regulations, and how the ADA applies to judicial selection.

The *Doe* and *Garrett* Cases

In 1995, a U. S. District Court in Florida held in *Doe v. Judicial Nominating Commission*¹⁹ that the Tenth Amendment to the U.S. Constitution was no barrier to applying the ADA to a state’s judicial selection process, given that Congress abrogated the sovereignty of the state through the 14th Amendment.²⁰ It was further established in *Doe* that a judicial nominating commission met the full definition of a public entity that derived its power from the state under the ADA, and was susceptible to suit.²¹ The ADA defines a “public entity” as “any department, agency or other instrumentality of a state or local government.”²² The plaintiff in this case successfully enjoined a Florida Judicial Nominating Commission (Commission) from making a “general and over-inclusive” inquiry into the general state of his physical and mental health.²³ The questions put forth by the Commission included a broad-based inquiry:

- What is the present state of your health?
- Do you have any impairment of eyesight, hearing, or other debilitating handicap or disease? If so, please describe.
- Have you had any hospital confinement or serious physical illness during the past five years? If yes, please give details and identify your attending physi-

cian(s), the name(s) of any hospital(s) or other institution(s) to which you have been admitted if any and the date(s) of hospitalization(s).

- Have you ever been treated for or suffered from mental illness? If so, please give details including names and addresses of attending physicians, psychologists, and/or hospitals, or other facilities involved including dates of treatment or confinement.²⁴

Among other things, the Commission also asserted that this broad inquiry to determine the mental and physical capability of an applicant was necessary in order to determine whether an applicant would be able to carry out the required judicial functions.²⁵ The Commission sought justification for their inquiry under the DOJ “necessity exception” to the ADA.²⁶ The court acknowledged that judges are vested with extraordinary power and that they make weighty decisions that affect the lives of all our citizens.²⁷ The court also stated that commissions are faced with the daunting task of recommending persons who will serve as judges and must make public safety a primary focus in their selection process.²⁸

As the gate-keepers of the appointive route to the bench, the commission’s task is to invite the best to apply, to scrutinize the applicants and then to nominate only the most qualified for the governor’s consideration.²⁹

The court went on to state that because protecting the public is a paramount goal during judicial selection, therefore the necessity exception is applicable.³⁰ Nevertheless, the court held that the questions put forth by the Commission asking about *any* illness an applicant may have experienced were still over-inclusive.³¹ According to the court, the questions did not center on current health requirements that are a necessity for a member of the judiciary.³² The court reasoned that the Commission went beyond the boundaries of the necessity exception because its questions were not part of a narrowly drawn criterion determined by necessary job requirements, but instead were overly broad.³³ The court in *Doe* was reluctant to come up with a “perfect question” for the Commission to ask and acknowledged the difficulties that face commissions in this particular area.³⁴

The court did offer guidance that questions that ask about *any* physical impairment, hospitalization, past treatment for any past form of mental illness or emotional disorder without regard to present ability to do the job could violate the ADA.³⁵ The court acknowledged, however, that in the process of choosing our judiciary, an inquiry into substance abuse and the *current* mental condition of the applicant is justified under concerns for public safety.³⁶

Garrett. It should be noted that the recent United States Supreme Court decision in *University of Alabama v. Garrett* has seriously called into question the effect the ADA currently has on state entities, including judicial nominating commissions.³⁷ In *Garrett*, the plaintiff sued a state university for money damages asserting that she was discriminated against in a manner prohibited by the ADA.³⁸ The Court held that Congress did not properly abrogate the States' 11th Amendment immunity from suit.³⁹

The court acknowledged that Congress did uncover some evidence of state discrimination against the disabled. However, the Court stated that this evidence fell far short of a strong enough pattern to justify the taking of state immunity under the 11th Amendment.⁴⁰

For this and other reasons, the Court concluded that an individual may not bring suit seeking money damages against a state under the ADA.⁴¹ However, judicial nominating commissions should note that this case did not explicitly state whether suits seeking injunctions could be brought against the states.⁴² Commissions should remember that it may still be possible that suits seeking to enjoin state entities from violating the ADA will survive the Court's holding in *Garrett*.⁴³

Suggestions for Judicial Nominating Commissions

- Commissioners should familiarize themselves with the provisions of the *Americans with Disabilities Act* and the two cases cited here, and, because this is a fluid area of the law, keep current with emerging case law.
- Job descriptions for judicial offices should be developed that specify the essential intellectual and physical requirements of the position.
- Commissioners should also look to their own state's laws and regulations for guidance on crafting narrowly tailored questions about applicants' health for use in applicant questionnaires. Questions must not be broad based or over-inclusive, and should always include references to job requirements.⁴⁴

The research for this essay and a major portion of the writing was done by Mary Ann Braun, who at the time of writing was a second-year student at Loyola University Chicago School of Law.

1 77 *Chi-Kent L. Rev.* 879

2 42 U.S.C. Sec. 12112(a)

3 *Id.*

4 42 U.S.C. Sec. 12202 (1995)

5 42 U.S.C. Sec. 12111(5)
6 77 *Chi-Kent L. Rev.* 879
7 42 U.S.C. Sec. 12102(2)
8 43 U.S.C. Sec. 12102(2)(A)-(C)
9 *Id.*
10 42 U.S.C. Sec. 12111(8)
11 *Id.*
12 42 U.S.C. Sec. 12112(b)(5)(A)
13 Sec. 35.130(b)(8)
14 *Id.*
15 *Id.*
16 *Id.*
17 *Id.*
18 *Doe v. Judicial Nominating Commission*, 906 F.Supp. 1534 (1995).
19 *Id.*
20 U.S.C.A. Const. Amends. 10, 14.
21 *Id.*
22 42 U.S.C. Sec. 12131
23 *Doe v. Judicial Nominating Commission*, 906 F.Supp 1534, 1539 (1995).
24 *Id.* At 1537.
25 *Id.* At 1540
26 *Id.*
27 *Id.*
28 *Id.*
29 *Id.* At 1541
30 *Id.*
31 *Id.*
32 *Id.*
33 *Id.*
34 *Id.* At 1544
35 *Id.*
36 *Id.*
37 *University of Alabama v. Garrett*, 531 U.S. 356 (2001)
38 *Id.* at 363
39 *Id.* at 374
40 *Id.*

41 Id.

42 Id. At 374

43 Id.

44 For example, the *Application to the Appellate Judicial Commission for Judge, Missouri Court of Appeals, Eastern District*, asks, "Do you suffer from any health condition that would affect your ability to do legal research, to attend court anywhere in the state, to communicate clearly and effectively, both orally and in writing, or to expeditiously decide issues coming before the court? If yes, please explain."

B. Suggested Measures for Evaluation*

- Suitable Age
- Good Health
- Impartiality
- Integrity
- Judicial Temperament
- Industry
- Professional Skills
- Community Contacts
- Social Awareness
- Collegiality
- Writing Ability
- Decisiveness
- Speaking Ability
- Administrative Ability
- Interpersonal Skills
- Conversance with ADR Techniques

* The following measures are questions commissioners should ask themselves about each candidate. These measures should be kept in mind when screening and investigating an applicant, interviewing references, designing questionnaires and interview questions, and, of course, during the final selection of nominees. Commissioners may want to discuss whether any of the questions under each criterion should be posed to references and to the applicant during the interview.

Suitable Age

Answers to the following questions should be helpful in evaluating whether or not an individual meets the legal age requirements for judicial selection.

1. How old is the individual?
2. What, if any, minimum or maximum age limitations are listed in the state's constitution and statutes for this judicial office?

Good Health

1. Can this person perform the essential functions of the position, with or without accommodation? For discussion of this criterion, see pages 71-72 of this chapter and Appendix A, "Judicial Nominating Commissions and the ADA."

Impartiality

In determining whether someone is or can be impartial as a judge, it may be helpful to seek answers to the following questions. Since there are many imponderables involved in judging the ability to be impartial, a number of questions are suggested.

1. Can this person listen to the arguments of all parties before making up his/her mind completely on the determination of legal issues?
2. Is this person willing to limit activities and relationships that will tend to interfere with his/her usefulness as a judge?
3. Does this person possess the equanimity to avoid undue influence on his/her decisions through flattery or adverse comments and criticism?
4. Is it likely this person will be influenced by demands of particular groups or organizations or desire for personal popularity or notoriety?
5. Can this person set aside party preference and be free from political ties which may bias his/her decisions?
6. Will this person's rulings be free from racial bias? Religious bias? Ethnic bias? Gender bias? Bias based on social status of the parties? Bias based on the economic status of the parties?

7. Will this person be free from predisposition in criminal cases? In suits for money damages? In domestic relations cases? In class action suits? For or against corporate defendants?
8. Will this person show favoritism for or against any attorneys?
9. Is this person able to refuse presents or favors from lawyers or litigants?

Integrity

It is possible to suggest a number of questions whose answers could be useful in determining whether a person has integrity. However, it should be understood that integrity is an intensely personal quality and often its presence or absence is not easily discerned by others. Therefore, these questions are offered as guidelines only, with the caveat that many may be difficult to answer.

1. Does this person have a reputation for cutting corners?
2. Does this person have a reputation for refusing to deal openly and fairly with opposing counsel or other attorneys?
3. Has this person been found by a court to file misleading documents or papers?
4. Have any complaints been filed against this person with any disciplinary body? If so, what was the nature of those complaints? Have any of those complaints resulted in discipline or sanctions? If this person has been disciplined, how long ago did the discipline proceeding take place?
5. Does this person pay his/her debts and discharge his/her obligations promptly?
6. Has this person ever been held in contempt for deliberately misquoting the law?
7. Does this person have a reputation for misrepresenting facts or evidence?
8. Has this person ever been charged with any violation of any law? What was the result?
9. Has this person been involved as plaintiff or defendant in any legal proceedings involving moral turpitude, dishonesty, or unethical conduct on the part of this person?

10. Has this person regularly filed federal (and where applicable state and local) income tax returns?
11. Has this person made any false or misleading representations on his/her applicant questionnaire?
12. What is this person's reputation in the community for integrity and respect for the law?

Judicial Temperament

Since judicial temperament is, in reality, a broad category consisting of a number of personal traits, a variety of questions can be used to determine how well a person rates with respect to this quality.

1. Is he/she a good listener?
2. Does this person have a reputation for losing his/her temper?
3. Is this person consistently courteous in his/her dealings with others, including subordinates?
4. Has this person ever been held in contempt of court? If so, what were the circumstances?
5. Does this person often speak in an intimidating manner?
6. Is this person tactful and diplomatic?
7. Does this person put others at ease?
8. Has this person been flexible in dealing with different people in different situations?
9. Does this person get along with partners?
10. Does this person treat subordinates with respect?
11. Does this person exercise tolerance and self-restraint?

Additional questions for applicants presently sitting on the bench:

12. Does this person pay attention to the arguments of counsel and testimony of witnesses?

13. Does this person avoid sensationalism in court?
14. Does this person have a reputation for being coercive in conducting court?
For issuing more contempt citations than would be expected?
15. Was this person ever rebuked by an appellate court for lack of judicial temperament?

The previously cited Utah Application for Judicial Office (see fn. 9 *supra* at p. 80) contains the following comment about judicial temperament:

Factors which indicate a lack of judicial temperament are...identifiable and understandable. Judicial temperament thus implies an absence of arrogance, impatience, pomposity, irascibility, arbitrariness or tyranny. Judicial temperament is a quality which is not easily identifiable, but which does not wholly evade discovery. Its absence can usually be fairly ascertained.

Industry

Answers to the following questions should be helpful in determining whether or not the individual being evaluated is industrious.

1. Is this person an earnest worker?
2. Is this person willing to devote time beyond the normal length of a working day to get his/her job done?
3. What have this person's working hours been like in the past? Would they be likely to change?
4. To what extent does this person balance doing his/her own work with delegating to others?
5. Does this individual insure steady progress on assignments given to him/her?
6. Does this individual have a reputation for completing assignments on time?
7. Is this individual usually well prepared?
8. Is this individual usually thorough in his/her work?
9. Does this individual have a habit of keeping appointments and arriving on time?

Additional questions for applicants presently sitting on the bench:

10. Does this person begin court promptly?
11. Does this person issue timely rulings and judgments?

Professional Skills

The following questions should provide insight into a candidate's professional skills. Commissioners may wish to select some of these questions to ask of references. If the commission conducts a survey of bar members about applicants' qualifications for a judgeship, some of the questions about legal skills might be added to the survey

1. Before which courts is this person admitted to practice law? What were the dates of this person's admission to these courts?
2. Before which administrative bodies is this person admitted to practice? What were the dates of this person's admission to such bodies?
3. Is this person actively engaged in the practice of law?
4. If this person is not now actively engaged in the practice of law, was he/she ever so engaged? For how long and during what period of time?
5. What has been the general nature of this person's legal practice? Has he/she specialized in any areas? What are the areas of specialization?
6. Has this person regularly appeared in court as part of his/her legal practice? If so, how many cases has this person tried to conclusion as a trial lawyer? Generally, what types of cases were they?
7. Has this person had extensive practice experience, especially in case resolution/problem solving? (A large number of civil cases resolve before trial, but it still takes skill and finesse to close them.)
8. How many appeals has this person argued? Generally, what were some of the issues on appeal?
9. How many cases has this person handled before administrative agencies? What did some of the proceedings involve?
10. How extensively has this person been involved in depositions, motions, and other activities related to discovery?

11. Has this person published any legal books or articles?
12. Has this person ever taught any law school courses? What were they?
13. Has this person ever taught any continuing legal education courses? What were they?
14. Has this person ever clerked for a judge?
15. Does this person show an understanding of legal issues in writings and arguments?
16. Does this person possess a general working knowledge of the substantive law in the fields which are likely to be encountered on the bench?
17. Is this person well versed in the procedural and evidentiary law of the jurisdiction?
18. Is this person generally familiar with current legal trends and new developments in statutory and case law?
19. Has this person attended any continuing legal education courses or seminars in the past five years? What were the subjects? How many hours of course work did he/she complete?
20. To what extent has this person demonstrated an ability to learn a new area of the law?

Additional questions for applicants presently sitting on the bench or serving as a master, administrative hearing officer or arbitrator:

21. Are this person's decisions well reasoned and well thought out?
22. Does this person show an understanding of legal issues in rulings and decisions?
23. Does this person ask relevant, perceptive questions about matters before him or her?

Community Contacts

The strictures of the Code of Judicial Conduct may make it somewhat difficult to evaluate an individual's ability to limit outside activities while still maintaining community contacts that are beneficial to the court and the community. The following questions may be useful to help indicate whether the person has the interest, desire and ability to engage in limited but appropriate community activities.

1. Has this individual ever spent any time as a lecturer or teacher in a law school? In any other institution? How much time?
2. Is this individual willing to serve as a lecturer or teacher in a law school in the future? In another educational institution?
3. Has this individual participated as an instructor in any continuing legal education courses?
4. Is this individual willing to devote some time to serving as an instructor of continuing legal education courses?
5. Has this individual ever participated as a guest lecturer at any law schools?
6. Does this individual belong to any bar associations or professional organizations? Which ones?
7. Is this individual active in any committee work for any bar associations or professional organizations?
8. Is this individual willing to spend some time speaking to bar associations or professional organizations?
9. Is this individual involved in any sports-related, civic, cultural or charitable activities? What are they? What is the extent of his/her involvement?
10. As a sitting judge or attorney, has this individual participated in any bench-bar or court-community collaboration committee work or projects? If so, what are they and what is the extent of the applicant's involvement?
11. What are this individual's hobbies or outside interests?

Social Awareness

Social awareness is perhaps the most difficult quality of all to quantify. Although it is possible to evaluate an individual's background and actions, social awareness is almost closer to a jurisprudential philosophy than a personality trait. Therefore, the following questions are suggested only as guidelines. In forming a judgment, these suggestions should not be considered as conclusive proof or evidence of a candidate's social awareness.

1. Does this person appear to have a strong sense of social and moral responsibility?
2. Has this person ever engaged in any pro bono legal work? What was it?
3. Has this person exhibited any knowledge or perspective and understanding about legal history and philosophy?

Collegiality

Collegiality is a difficult quality to measure. While it may not easily be observed in the workstyles of lawyers or trial judges who are candidates for the appellate bench, like judicial temperament it should be discernible. When an applicant does not work well with others, the lack of collegiality is probably conspicuous by its absence. Thus, many of the questions that may be useful in helping to measure collegiality focus as much on personal lifestyle as on the way an individual has conducted his or her professional career. Nevertheless the ability to function smoothly in a collegial setting is an essential quality for appellate and trial judges, and the following questions may be useful in judging its presence or absence. See also the suggested measures under *Judicial Temperament*.

1. Is this person a good listener?
2. Does this person respect the opinions of those with whom he or she disagrees?
3. Does this person tend to monopolize conversations?
4. Can this person be persuaded to change his/her mind?
5. Does this person respond well to criticism? Can this person constructively criticize others?
6. Is this person perceived as unreasonably rigid in his/her views?

7. Does this person indicate loyalty to his/her current or former employer?
8. How does this person perceive his/her fellow workers and subordinates? How do his/her fellow workers and subordinates perceive him/her?

Writing Ability

Writing ability is a necessary skill for both trial and appellate judges. Like most skills, when honed by frequent use and practice, it tends to improve over time. Thus, there should be ample evidence of the writing ability of a judge or judicial candidate.

In evaluating writing ability, the following questions should prove useful.

1. Can this person claim sole or primary authorship of any briefs? How many? Are they clear and understandable? Are the arguments cogent and well reasoned? [See the next two pages for the criteria Alaska Judicial Council staff use to assess writing samples.]
2. Can this person claim sole or primary authorship of any law review articles? How many? Are they clear and understandable?
3. Can this person claim sole or primary authorship of any continuing legal education or bar journal articles? How many? Are they clear and understandable?
4. Has this person done any nonlegal writing? What has he/she written? Is it clear and understandable?
5. Does this person indicate a good command of English grammar?
6. Does this person's writing indicate a logical sense of organization?
7. Can this person meet writing deadlines?

Additional question for applicants presently sitting on the bench:

8. Has this person written any judicial opinions? How many? Are they clear and understandable? Is the reasoning logical and understandable?

MEMORANDUM

TO: Judicial Council Members
FROM: Teri Carns
DATE: May 2, 1997
RE: Writing Sample Criteria

The Judicial Council asks that each applicant for a judicial position submit a sample of his or her writing for evaluation as part of the merit selection process. Until 1984, the writing samples were sent directly to the Council with no staff review. As part of a series of changes in the application and investigation process begun in 1981, and continued in 1984 and 1985, the Council decided to have staff review and briefly summarize each writing sample. The review was not intended to cover substantive areas, but to focus on the applicant's ability to communicate in clear and correct English.

Criteria used to evaluate the writing samples include:

- Correct grammar, including use of complete sentences, correct verb tenses, and accurate punctuation;
- Correct syntax, including structure of sentences, and use of words and phrases within sentences;
- Organization of the sample, including use of a logical outline or sequence of ideas;

- Conciseness of expression, including lack of repetition of phrases and ideas;
- Use of language to improve the readability of the sample, including use of active verb tenses, use of synonyms (as appropriate), use of less-common words and phrases or use of metaphors and similes to add interest or express an idea more accurately;
- Comprehensiveness of the writer's view of the subject, particularly emphasizing whether the presentation of the arguments seems balanced and objective rather than shrill and one-sided;
- Use of historical and other types of background information to give a larger context to the arguments made;

Another criterion is the appropriateness of the writing sample as an example of the applicant's ability to handle judicial writing duties. Are the facts stated? Are they stated understandably? Does the sample demonstrate any legal research ability, or does it rely primarily on transcripts, textbooks, or other such sources? Is the sample too short?

Proofing is important for two reasons. First, it indicates something about the care and pride a person takes in the work submitted. Second, it reflects the person's attention to detail and awareness of correct grammar and use of language. More than a few typos in a sample suggests that the person not only was not paying attention when they sent the sample to wherever it was going, it suggests that the person was not paying much attention to the judicial selection process. Alternatively, it suggests that the applicant does not value written work greatly, which would be a troubling characteristic in someone who wanted to be a judge.

The scale used for evaluating writing samples is somewhat similar to that used in the Bar survey. I have used five ratings: "below acceptable (1)," "minimally acceptable (2)," "average (3)," "good (4)," and "excellent(5)."

I would further define these terms along the following lines. "Below acceptable (1)" means that I could not see someone who was disorganized and/or inaccurate functioning well as a judge. "Minimally acceptable (2)" means that I have seen judges producing this kind of work, but that it is at best mediocre writing. "Average (3)" means that the writing is just that — average — or put in different terms, sufficient for the task but not especially good. "Good (4)" means the quality of writing that I believe we should expect of judges. "Excellent (5)" means writing that is outstanding in clarity, smoothness, persuasiveness, and balance.

Decisiveness

A judge's ability to be decisive is one of the harder qualities to test. Some find the judicial decision making role to be very compatible with their personalities; others may not. The following questions may be helpful in indicating the presence or absence of decisiveness.

1. Can this person make up his/her mind?
2. Does this person have the conviction to stand by his/her decisions?
3. Can this person be firm in conducting proceedings? (Especially for trial judges, hearing officers, and arbitrators.)

Additional questions for applicants presently sitting on the bench:

4. Is this person able to keep the caseload moving?
5. Is this person firm in conducting court proceedings?

Speaking Ability

The practice of law is a career that requires the ability to communicate well orally. Whether a lawyer tries cases, argues appeals, serves as an administrative hearing officer, mediator or arbitrator or negotiates corporate deals, he/she must be able to inform, question, or persuade others through his/her speaking skills. Thus the lawyer's entire career should help provide clues about his/her oral communications skills. In addition, the following questions may indicate how effectively the applicant communicates through speaking.

1. If the individual was invited for an interview, did he/she give convincing well-spoken responses to questions? Could he/she explain legal concepts clearly to any nonlawyers involved in evaluation?
2. Has this person taught any classes? How was he/she received?
3. Has this person given any speeches? How were they received?
4. What is this person's reputation for effective speaking among his/her colleagues?
5. What is this person's reputation for effective speaking among judges he/she has appeared before?

6. Does this candidate have a fluency with and command of the English language in his/her speaking?
7. Has this person demonstrated talent in communicating technical and complex legal matters to clients?

Administrative Ability

Judges at all levels of court need administrative skills, which can be demonstrated in a variety of ways. The following questions may be helpful in indicating whether an individual has administrative ability.

1. Does this person approach problems in a logical and well-organized manner?
2. Does this person manage his/her time effectively?
3. Has this person shown an ability to delegate assignments? Is he/she a good judge of what to delegate? Is he/she a good judge of the people to whom assignments should be delegated?
4. Can this person keep his/her files and papers well-organized? Can he/she locate documents when he/she needs them?

Additional questions for applicants presently sitting on the bench:

5. Does this person make appropriate use of time in a courtroom?
6. Can this person move his/her docket effectively?

Interpersonal Skills

While *collegiality* refers to a judge's interactions with peers, *interpersonal skills* are needed in a judge's relations with those whom he or she supervises, court administrative staff, and legal professionals and members of the public with whom the judge works on bench-bar committees or community outreach efforts. The following questions may indicate whether an individual possesses necessary interpersonal skills.

1. Is this person an effective supervisor? Does this person train his/her staff? Does this person review the work of his/her staff? Does this person keep his/her staff informed about its level of performance?

2. Does this person appear able to motivate others?
3. Has this person taken responsibility for errors and oversights committed by the staff he/she supervises?
4. Is this person skilled at mediation? Can he/she persuade people to compromise?
5. Has this person acted in a supervisory or leadership capacity within a law firm, administrative agency, or civic, charitable, cultural or sports-related group?
6. Has this person demonstrated leadership ability when chairing any legal, civic, charitable, cultural or sports-related committees?
7. Has this person had to mediate contending demands when in a leadership position?

Conversance with ADR Techniques

With jurisdictions adopting alternatives to adjudication and the increasing role of the judge in negotiating settlements, an applicant should at least be familiar with the basics of a variety of ADR mechanisms. The following questions may help nominating commissioners determine this.

1. Which alternative dispute resolution techniques are currently used in the court for which you are applying?
2. What has been the extent of your experience in the following:
 - Settlement negotiations
 - Mediation
 - Arbitration
 - Other
3. Describe any formal training you have had in ADR techniques.
4. Have you taught any courses in ADR techniques?

