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Comments of the Task Force on Judicial Selection
of the New York County Lawyers' Association
on the
Proposed Rules of the New York State Commission on Judicial Nomination

These Comments were approved by the Board of Directors of the New York County Lawyers' Association at its regular meeting on September 14, 2009.

These Comments have been prepared by the Task Force on Judicial Selection ("Task Force") of the New York County Lawyers' Association ("NYCLA") in response to the issuance by the New York State Commission on Judicial Nomination ("Commission") of a set of Proposed Rules for the Commission ("Proposed Commission Rules").

BACKGROUND

Following the submission to Governor David Paterson by the Commission on Judicial Nomination of the names of seven candidates to fill the vacancy created by the retirement of Hon. Judith S. Kaye, the Governor voiced his disappointment that no woman and only one person of color were on the list forwarded to him and called for a review of the process. The Governor's Counsel, Peter Kiernan, met with representatives of the Commission and a variety of bar associations (including NYCLA), as well as other groups interested in the justice system, to seek suggestions about improving the selection process. The Legislature also held hearings regarding the process.

The Commission, under the leadership of the Hon. Judith S. Kaye, who had been appointed to the Commission following her retirement as Chief Judge, undertook an examination of the Commission Rules and in the summer issued the Proposed Commission Rules for comment.

EXECUTIVE SUMMARY

At the request of Ann Lesk, President of NYCLA, the Task Force reviewed the Proposed Commission Rules, as well as the constitutional, statutory and regulatory schemes that provide the framework for the Commission (Article 6, Section 2 of the New York State Constitution; Article 3-A of the Judiciary Law; and 22 NYCRR Part 7100). The Task Force does not recommend any alteration of the Constitutional provisions establishing the Commission or of the statutory scheme implementing the Constitutional provisions.

The Task Force supports the Commission's careful and full review of the existing regulatory scheme and believes that the proposed modifications clarify and strengthen the Commission's role in the judicial selection process and enhance public confidence in the fairness and transparency of the process. As is outlined below, the Task Force suggests that some provisions of the Proposed Commission Rules be expanded and also proposes that some additional provisions be considered.

Proposals Supported with Modifications

1. Diversity Considerations – Appointment to the Commission and Candidate Selection
Diversity definitions should be broadened to include community and practice diversity, along with traditional diversity categories. The section addressing appointments to the Commission by appointing authorities should contain a stronger statement regarding diversity and include a reference to diversity considerations when appointing authorities consider reappointments.
2. Telephonic Participation in Commission Meetings
Members of the Commission should be required to be present in person for quorum purposes when any changes in the Rules of the Commission are being considered.
3. Search Committees
The Proposed Commission Rules would permit the appointment of a Search Committee. Greater definition is needed of any such Search Committee's role and membership.
4. Two-Step Application Process
The Proposed Commission Rules provide for a two-step application process at the discretion of the Commission. The Task Force recommends that the two-step application process be mandated for all applicants.
5. Outreach – Judicial Departments
Proposed Commission Rule 7100.6(g) contemplates discretionary informational outreach efforts in each of the Judicial Departments prior to initial screening for a vacancy on the Court of Appeals. These outreach efforts may be undertaken either through subcommittees of the Commission or "other arrangement" as appointed by the chairperson. The Task Force suggests that the term "other arrangement" is vague and should be clarified.
6. Notice of a Vacancy on the Commission
Unless unanticipated, notice of a vacancy on the Commission should be provided to the appointing authority, the media and published on the Commission's website 60 days in advance of the vacancy rather than 30 days.

Other Comments

1. Voting Procedures
The weighted voting procedure presented in Appendix I to the Proposed Commission Rules is not well understood by either the bar or the community at large and appears to many to enable the skewing of outcomes. Despite the procedure's long history of use,

consideration should be given to either eliminating this complex process or clarifying how it works so that it is readily understood.

2. Staffing

To avoid any potential conflicts, staff members who are compensated should not be affiliated with the firm of any Commissioner.

3. Overlap with Other Judicial Selection Committees

The Task Force recognizes that the appointing authorities have full authority to make independent determinations as to their individual appointments to the Commission. Nonetheless, the Task Force urges that the Proposed Commission Rules contain a statement of principle urging the appointing authorities to take steps to avoid overlap of appointments from the same firm to the Commission and to any Judicial District Screening Committee, as well as the appointment of any individual to more than one Commission or Committee.

4. Annual Reports to the Public

The Proposed Commission Rules contain a provision regarding reports to the Governor following the conclusion of the meeting of the Commission at which the nomination procedure is concluded. Consistent with the statutory requirements of confidentiality, the Task Force suggests the Commission consider providing an Annual Report to the public.

5. Training

The Task Force suggests that there be an orientation process for newly appointed Commissioners, including training in the recruitment of candidates and candidate evaluation and interviewing, and that annual training sessions be considered.

6. Violations of Commission Rules

The Task Force suggests consideration be given to adding a statement in the Rules that a violation of the Rules by a staff member will be handled by the Commission and a violation of the Rules by a Commission member is addressed by the Public Officers Law.

COMMENTS

Proposals Supported with Modifications

1. Diversity – Appointment to the Commission and Candidate Selection

The Preamble to the Proposed Commission Rules clearly states that the Commission seeks to implement its mission to seek out and nominate well-qualified candidates from the “diverse community of lawyers” in New York. The Proposed Commission Rules also refer to the need for diversity in Commission membership in Proposed Rule 7100.3 and explicitly with regard to applicants and nominees in Proposed Rule 7100.8(e). We fully endorse the development by the Commission of a preamble to the Proposed Commission Rules and the inclusion of references to diversity in it and in Proposed Rules 7100.3 and 7100.8(e).

However, the Task Force urges the Commission to further expand the references to diversity to include not only the traditional diversity categories (race, gender, religion, ethnicity, sexual orientation, disability and age) but also, along with geography, which is currently included in the diversity definitions in Proposed Rule 7100.8(e), community and practice diversity.

Further, we suggest that there should be a cross-reference to the expanded definition in Proposed Rule 7100.3. We recognize that under the provisions of Section 62 of Article 3A of the New York State Constitution, each of the appointing authorities (the Governor, the Chief Judge, the four Legislative leaders) makes an independent determination as to his/her appointments, but we believe that a cross-reference in Proposed Rule 7100.3 to an expanded diversity definition would place even greater emphasis on the role the appointing authorities can and must play in giving appropriate weight to diversity in making appointments and reappointments to the Commission.

While the Task Force would not favor the imposition of term limits on Commission members, which would require statutory amendment, we suggest that Proposed Rule 7100.3 should be expanded to make it clear that diversity issues should be reviewed by appointing authorities when considering reappointments to the Commission.

2. Telephonic Participation in Commission Meetings

The Task Force supports the use of electronic means of communication but believes that along with consideration of candidates and selection of nominees, any change in the text of the Rules should require attendance in person for quorum purposes.

3. Search Committees

The Task Force supports the concept of the discretionary use of search committees to aid in the effort to seek out well-qualified candidates but believes that the role and membership of any such search committee should be more fully articulated.

4. Two-Step Application Process

The Proposed Commission Rules permit a two-step application process at the option of the Commission. The Task Force supports the availability of a two-step process as a potential means of encouraging applicants who might otherwise be discouraged or intimidated by the length of and details required by the longer application. However, the Task Force believes that all candidates should be required to participate in the two-step application process, with the Commission reviewing the shorter applications and making an initial determination about whom they will interview. Only those who will be interviewed should be required to complete the longer application in advance of any interview.

5. Outreach – Judicial Departments

Outreach efforts are critical to increasing the applicant pool and the Commission proposal to conduct informational outreach efforts in each of the Judicial Departments is to be applauded. We suggest that the term “other arrangement” used as an alternative to the use of subcommittees to conduct these informational outreach efforts should be clarified. Does it mean through the involvement of local organized bar groups or other groups interested in the justice system or is some “other arrangement” contemplated?

6. Notice of a Vacancy on the Commission

The Task Force suggests that when a vacancy on the Commission can be anticipated, the 30-day notice period contemplated by the Proposed Commission Rules is too short. A longer notice period of at least 60 days is more likely to produce a response that gives the appointing authority time to consider potential candidates for the vacancy and fill the vacancy in a timely fashion.

Other Comments

1. Voting Procedures

Appendix I to the Proposed Commission Rules contains the weighted voting procedures that we understand have been used by the Commission for many years. As was stated in the Executive Summary to these Comments, in the Task Force's view (and we understand that this view is shared by others who have reviewed the Proposed Commission Rules), these voting procedures are not well understood by the bar or the public and are believed by many to be susceptible to manipulation. While the Task Force has had the benefit of an explanation provided by one of its members who had attended a meeting with Commission staff in which the interplay of the weighted voting procedure and the eight affirmative votes requirement was discussed, the Task Force believes the process is too complex. The Task Force recommends that the weighted voting procedure be abandoned or, in the alternative, clarified by providing an explanation that is readily understood either in the Appendix or on the website.

2. Staffing

It is the Task Force's understanding that all staff members are compensated, which is entirely appropriate. However, the Task Force suggests that no firm or members or persons affiliated with a firm that has a member of the firm or an affiliate of the firm serving as a Commissioner should provide compensated staff for the Commission.

3. Overlap with Other Judicial Selection Committees

There is no question that full independent authority to make appointments to the Commission lies with each appointing authority. The Task Force recommends that a statement of principle urging the appointing authorities to take steps to avoid overlap of appointment, both as to firms and individuals, to the Judicial Commission and to Judicial District Screening Committees would encourage a more diverse group of appointees and aid in improving public perception of a more open process.

4. Annual Reports to the Public

The Task Force suggests that the Commission consider issuing an Annual Report about the work of the Commission and furnishing this report to the public by including it on the Commission's website. The Annual Report need not be elaborate. Its purpose would be to encourage public confidence in the Commission.

5. Training

Providing training to the Commissioners would ensure that all Commissioners, lawyers and non-lawyers alike, are more fully equipped to undertake the important work of

recruiting, evaluating, screening and nominating candidates for New York State's highest court.

6. Violations of Commission Rules

The Task Force recommends that the Proposed Commission Rules contain a statement that a violation of the rules by staff will be handled by the Commissioners and that a violation by a member of the Commission will be addressed under the terms of the Public Officers Law.

The Task Force wants to again express its strong support for the Proposed Commission Rules and hopes that its comments will prove helpful in further strengthening and clarifying the Commission proposals.

Task Force on Judicial Selection Co-Chairs
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