

ARIZONA JUDICIAL NOMINATING COMMISSIONER HANDBOOK

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INTRODUCTION

This handbook was developed to assist Arizona's judicial nominating commissions by providing a common background of information and by establishing guidelines for commission operations and applicant evaluation. Its goal is to enhance the efficiency of the nominating process by providing guidance on procedural issues and preserving the commissioners' time for thorough investigation and evaluation of applicants. It also seeks to assist potential applicants and the general public by articulating the minimum qualifications for judicial office and those qualities generally accepted as desirable in judicial nominees.

A number of topics basic to the role of judicial nominating commissioners are addressed. These range from how to assess the presence of qualities desirable in a judicial nominee to important ethical obligations on which public acceptance of the commissions' work depends.

There are two other documents that provide direction for the judicial nominating commissions: (1) the Arizona Constitution, Article 6, Sections 36, 37 and 41, and (2) the Uniform Rules of Procedure for the Commissions on Appellate and Trial Court Appointments. The constitutional provisions approved by Arizona voters to govern the commissions and the selection of judicial nominees are contained in the sections referenced in Article 6. The Constitution requires that the Supreme Court adopt rules of procedure for the judicial nominating commissions. The rules of procedure adopted by the Supreme Court represent requirements that all commissions and commissioners must follow as they proceed through the nomination process.

Throughout this handbook, where a Supreme Court rule applies to the activity being described, the rule is cited and the text is in bold italic print. The full texts of the applicable constitutional provisions and the Uniform Rules of Procedure adopted by the Supreme Court are contained in Appendices 1 and 2 to this handbook. Those aspects of the nomination process specifically addressed by the Constitution and/or the Uniform Rules of Procedure are mandatory requirements applicable to all commissions and all commissioners. The rest of the information provided in this handbook represents current and "best practice" guidelines based on the commissions' collective experience. The guidelines allow for some discretion on the part of the commissions and individual commissioners.

MERIT SELECTION OF JUDGES

The office of judge is unique in our society. A judge is a public servant holding an office of high public trust and so should answer to the public. However, the obligation of a judge is to resolve disputes impartially and base decisions solely upon the facts of the case and the law. A judge, therefore, should be insulated from public pressure.¹

The federal government and the states balance the competing interests of judicial accountability and judicial independence in a variety of ways. A federal judge, for example, is almost completely insulated from public pressure by serving a life term. There are two basic approaches to judicial selection and retention at the state level. Judges of many states face periodic partisan or nonpartisan elections which force them to act as politicians as well as jurists. Other states, including Arizona, have decided to choose many of their judges through a “merit selection” system.

Merit selection was developed as an alternative to the federal system and to state systems requiring that judges run in contested elections, both of which have been criticized as unduly politicizing the judiciary and undermining the integrity of the law. Merit selection plans have been in the process of development in many states since 1913 under the auspices of the American Judicature Society, a nonprofit, nonpartisan organization formed to improve the judicial selection process.

Arizona voters approved the "Modern Courts Amendment" in 1974. Among other changes, this constitutional amendment provided for merit selection of judges for Arizona's appellate courts and the Superior Court in the two most populous counties at the time, Maricopa and Pima. It also instituted nonpartisan, uncontested retention elections for judges appointed under the merit selection system.

Arizona's constitution was amended again in 1992 to increase public participation in the merit selection process by expanding the membership of the commissions, changing the method of selecting commission members, requiring that all meetings and voting be open to the public, and adding a judicial performance review system to provide information to voters before retention elections. The 1992 amendments also articulated the primary considerations in selecting judicial nominees: the commissions shall consider the diversity of the state's or county's population; however, “the primary consideration shall be merit.” The Constitution also instructs the Governor to consider the diversity of the state's or county's population in making appointments, however, “the primary consideration shall be merit.”

¹Manual of Procedures for Judicial Nominating Commissions, State of Utah Judicial Council, December 18, 1996

The merit selection process begins with the nomination of applicants to the Governor for selection to serve as a judge. A commission has 60 days from the effective date of a judicial vacancy to complete the nomination process. The steps of the nomination process include the:

- recruitment and application period
- commissioner review and investigation of the applications
- screening meeting to review applications and select applicants to be interviewed
- further investigation of applicants who will be interviewed
- public interviews of selected applicants
- selection of the nominees
- submission of nominees to the Governor

Vacancies on the Supreme Court and the Court of Appeals are filled by appointment by the Governor from a list of not less than three nominees for each vacancy submitted by the 16-member Commission on Appellate Court Appointments. Vacancies on the Superior Court in Coconino, Maricopa, Pima, and Pinal counties are filled by appointment by the Governor from a list of not less than three nominees for each vacancy as submitted by the 16-member Commission on Trial Court Appointments. Each of those counties has its own Commission on Trial Court Appointments. The Governor must appoint one of the nominees within 60 days of receiving the nominations or the appointment authority passes to the Chief Justice of the Arizona Supreme Court. The person appointed becomes a judge upon taking the oath of office.

The new judge assumes the duties of the bench for two years before facing the first unopposed retention election. In the retention election, the voters are asked whether the judge should be retained in office. Thereafter, the term of office for an appellate court judge is six years and for a Superior Court judge, four years. At the end of each term of office the judge faces another retention election.

The 1992 constitutional amendment added a new level of public participation in the merit selection system by directing that the Supreme Court adopt a process for evaluating judicial performance and providing evaluation reports to voters before each retention election. The Supreme Court chose to appoint a Commission on Judicial Performance Review to oversee the evaluation process. The commission is composed of up to 34 members, the majority of whom must be members of the public who are not lawyers or judges, and no more than six of the non-public members may be judges. The Commission on Judicial Performance Review surveys people who have contact with judges – litigants, witnesses, jurors, court staff, attorneys and other judges – and determines whether each judge standing for retention election "meets" or "does not meet" judicial performance standards. Voters can use that information to help them make an informed decision about whether a judge should be retained in office.

COMPOSITION OF THE COMMISSIONS

Arizona's judicial nominating commissions are established by the Arizona Constitution, which also defines their composition. The Commission on Appellate Court Appointments serves the Supreme Court and both divisions of the Court of Appeals. The Commissions on Trial Court Appointments serve the Superior Court in Coconino, Maricopa, Pima, and Pinal counties. Each of those counties has its own commission.

Each nominating commission has 16 members – 10 public members, five attorney members and the Chief Justice of the Arizona Supreme Court, who chairs the commission. All commission members except the Chief Justice are appointed by the Governor, subject to Senate confirmation, and serve a four-year term, unless they are appointed to fill the unexpired portion of a former member's term. All commissioners are full voting members, including the Chief Justice. All members participate in commission discussions and debate, including the interviews of applicants. No person other than the Chief Justice may serve at the same time as a member of more than one commission. Another justice of the Supreme Court may be appointed by the Supreme Court to serve in place of the Chief Justice as chair of a commission. No commissioner may hold any governmental office, elective or appointive, for profit. The Administrative Office of the Courts provides staff support for all four commissions.

The commissions consist of public and attorney members to ensure the participation of interested civic and community leaders apart from the legal community. Attorney commission members have an obvious interest in the selection of quality judges apart from their status as citizens. Public commission members serve an important role in the nominating process by representing the interests of the community at large.²

The public members of the commissions must have resided in Arizona for at least five years before their appointment and cannot be judges, retired judges or attorneys. No more than five of the public members may be members of the same political party.

The attorney members of the commissions must have lived in Arizona and been admitted to practice law in Arizona for at least five years before their appointment. No more than three of the attorney members may be members of the same political party. Attorney members are recommended for appointment by the Board of Governors of the State Bar of Arizona. They are ineligible for appointment to any judicial office of the state until one year after the attorney ceases to be a commission member.

²Manual of Procedures for Judicial Nominating Commissions, State of Utah Judicial Council, December 18, 1996

Public members of the Commission on Appellate Court Appointments are sought and recommended by a nine-member nominating committee appointed by the Governor. No more than two public members of the commission may be residents of any one county. The Governor's nominating committee must be politically balanced and reflect the diversity of the state's population, and its members may not be attorneys or hold any governmental office, elective or appointive, for profit.

Public members of the Commissions on Trial Court Appointments are sought and recommended by seven-member nominating committees established in each county supervisorial district. No more than two of the public members of each commission may live in the same supervisorial district. The two public members appointed to the commission from each supervisorial district may not be members of the same political party. The county supervisors' nominating committees must be politically balanced and reflect the diversity of the district's population, and its members may not be attorneys or hold any governmental office, elective or appointive, for profit.

Commissioners are not paid for their work but they may receive reimbursement for travel expenses incurred to attend meetings in accordance with state travel policies.

COMMISSIONER CONDUCT

Impartiality, Disclosure and Disqualification. A high standard for commissioner impartiality is crucial to maintaining public confidence in the nominating process. Commissioners who have a business, professional or personal relationship to one or more of the applicants must disclose that relationship and disqualify themselves from voting when it is required or appropriate to do so.

A Commissioner shall consider each applicant for a judicial office in an impartial, objective manner. [Rule 3.a.]

A Commissioner shall disclose to the Commission any relationship with an applicant (business, financial, personal, fiduciary, or attorney-client). [Rule 3.b.]

A Commissioner is disqualified from voting or otherwise participating in the nominating process so long as a member of the Commissioner's family (spouse, child, parent, sibling, in-law, aunt, uncle, nephew, niece, grandparent, grandchild, first cousin or step-relative in any of these relationships) is an applicant under consideration for nomination. A Commissioner is disqualified from voting on an applicant who currently works in the same company, firm or organization as the Commissioner. A Commissioner shall disqualify himself or herself in any proceeding in which the Commissioner's impartiality about an applicant might reasonably be questioned. If a Commissioner's impartiality is called into question

by any Commissioner, the Chair will call for a vote on the matter. Upon a majority vote, the Commissioner will be disqualified from voting on the applicant. [Rule 3.c.]

Influence. A Commissioner shall not be influenced other than by facts or opinions which are relevant to the judicial qualifications of the applicants. A Commissioner shall promptly report to the Chair any attempt to influence a Commissioner other than by facts or opinions. [Rule 3.d.] All people have particular philosophies and viewpoints. Commissioners can only recognize these exist and make every effort to ensure they do not cloud the decision-making process. However, a commissioner who is subjected to bribes, threats, or any other illegal or unethical activity intended to influence the commissioner should take the matter seriously and immediately report the incident to the Chair.

Contact with Applicants. A Commissioner shall not communicate verbally or in writing with an applicant about the application or the nomination process from the time the application is submitted until the individual's application is no longer under consideration. Commissioners may communicate with individuals whose applications rolled over from a previous vacancy from the date the application was released from consideration in the previous vacancy until the date the new application period closes. [Rule 3.e.] This rule recognizes the fact that some commissioners and applicants may be required to have contact during the nomination process about matters unrelated to the judicial vacancy, e.g., in the course of their employment, as fellow participants in community activities, etc. However, commissioners should diligently avoid discussing any aspect of the application or vacancy, as described in the rule, until their applications is no longer under consideration. Nothing in this rule should be construed to limit a commissioner's ability to recruit applicants, but at the point an applicant recruited by a commissioner submits his or her application, communication between the commissioner and the applicant regarding any aspect of the nominating process should cease.

After the Commission conducts its final vote on the nominations, some applicants may contact commissioners for feedback on their application or interview, or for an assessment of their chances of future nomination. Commissioners may respond to those requests using the following guidelines:

1. Commissioners should never reveal executive session discussions. This includes any information or comments provided by sources of background information and comments made by other commissioners in executive session. See "Definition of Executive Session" on page 23 for more information.
2. No commissioner should represent any feedback given to an applicant as expressing the commission's opinions or comments, unless expressly authorized by the commission to speak for the commission.

3. Any commissioner may speak with an applicant, after their application is no longer being considered, about that commissioner's opinion of the application or interview, or the applicant's overall chances of future nomination in that commissioner's opinion. The commissioner should clearly indicate that these opinions are only their own opinion and do not express the views of the commission as a whole. Commissioners may also want to remind applicants that many variables influence the nominations for any given vacancy, aside from the individual applicant's qualifications, e.g., the overall quality of the applicant pool, the commission's need to consider the constitutional requirement that lists of nominees be politically balanced, the perceived needs of the court at that point in time, etc.

Attendance at Meetings. A commissioner should make every effort to attend the entire commission screening and interview meetings. It is inappropriate for a commissioner to express an opinion about or to vote on an applicant without having been present at the meeting or portion of the meeting that considered that applicant. Public support for the merit selection system depends on the integrity of the process; the perception of fairness and due consideration to all applicants is undermined when commissioners appear to participate inappropriately.

THE APPLICATION PROCESS

Notice of Vacancy. *Each Commission shall widely publicize vacancies by issuing press releases, posting notices online, and/or emailing vacancy notices to interested parties and groups. When feasible, such notices shall be given thirty (30) days or more before the deadline for applications. The notice of vacancy shall state that a Commission may, at its discretion, use the applications filed for the vacancy that is the subject of the announcement to nominate candidates for any additional vacancy or vacancies known to the Commission before the screening for the announced vacancy is held. [Rule 5.c.]*

A notice of vacancy is made public in the form of a press release. The notice includes the name of the court in which the vacancy exists, the legal requirements for judicial office (e.g., age, residency and years in practice), the methods of obtaining application forms and the application deadline. The notice is posted online and emailed to interested parties and groups, in the geographical jurisdiction of the court in which the vacancy exists. It is also distributed to the State Bar and all local and specialty bars, as well as the Governor's office, presiding or chief judge, court clerks and the courts' public information offices. All notices are posted online at the Arizona Judicial Department's website at: <https://www.azcourts.gov/jnc>

Because the Arizona Constitution requires that a justice of the Supreme Court reside in Arizona for 10 years and any other judge reside in Arizona for five years immediately preceding appointment, there is no circulation of the vacancy notice outside the state.

Each Commission has the discretion to determine if it will address a new vacancy or vacancies when it meets to address a previously-announced vacancy. Because a Commission has only 60 days from the effective date of a vacancy to submit nominees to the Governor, this flexibility is useful when an unexpected vacancy occurs shortly before a Commission holds a screening meeting. The Commission may determine that the new vacancy(ies) will be addressed with the previously-announced vacancy to minimize the need for additional meetings within a very short period of time. The option to address the additional vacancy(ies) is discretionary, so the Commission must vote on whether or not it wishes to incorporate the additional vacancy(ies) into the announced vacancy proceedings.

Recruitment. Commissioners shall actively seek out and encourage applications from qualified individuals who will reflect the diversity of the community they will serve. It is incumbent upon Commissioners to seek out well-qualified persons who may not otherwise apply. [Rule 5.a]

A Commissioner shall under no circumstances commit in advance to vote for any applicant. [Rule 5.b.]

Applications. Every applicant shall complete and file with the Administrative Office of the Supreme Court a signed original "Application for Nomination to Judicial Office" and a .pdf version of the application, in the manner instructed in the public announcement for each judicial vacancy. The application shall be on a form approved by the Supreme Court. The signed original paper application governs should discrepancies exist with the .pdf version. [Rule 6.a.]

The application form approved for use by the Supreme Court is at Appendix 3. Application forms are available from and are submitted to the Administrative Office of the Courts at the address indicated in the judicial vacancy announcement. The application form is also made available to applicants via electronic mail, upon request, and online.

Reference Letters. The commissions welcome and need written assessments of the applicants' skills, expertise, ethics and any other qualities relevant to an individual's qualifications. Many applicants solicit reference letters supporting their application.

However, applicants are advised in the instruction sheet attached to the application form to solicit ten to twelve substantive letters of reference, from a diverse group of people who well-acquainted with the applicant to give the commission an insight into what others think of the applicant. Because the commissions have sometimes been inundated with huge numbers of letters written on behalf of applicants who organized letter-writing

campaigns, the commissions provide those directions to applicants to ensure the commission receives a manageable number of meaningful letters expressing an applicant's qualifications for judicial office. However, commissioners should keep in mind that some applicants do not solicit letters, for various reasons, so an absence of letters of reference does not necessarily indicate the applicant lacks qualifications or community support. As an example, the Code of Judicial Conduct imposes some limitations on sitting judicial officers with respect to solicitation of letters from attorneys appearing before them in pending cases.

All documents received with respect to the person's application shall also be retained for one year. At an applicant's request, the original application, the .pdf version, and any supplemental material submitted by the applicant will be returned to the applicant during the one year period. Otherwise all documents and the .pdf shall be retained and provided to the Commission that originally considered the application if a new vacancy arises during the one year period [Rule 6.b.] Because of this requirement, commissioners may receive copies of letters or other documents that pre-date the current judicial vacancy. Letters are retained for one year to avoid duplication of effort by an applicant who reapplies within that time.

The judicial vacancy announcement usually states a deadline for receipt of public comment. However, public comment is forwarded to the commissioners upon receipt, even if the deadline has passed, unless the applicant has already been eliminated from consideration by virtue of not having been included on the interview list.

Deadline. The deadline for applications is stated in the press release and judicial vacancy announcement. It is also stated on the first page of the application form for each vacancy. Any application received after the deadline is forwarded to the commission and the commission decides whether the late application will be considered. In the rare event that all applicants are members of the same political party, the deadline is extended and commissioners may be asked to renew their recruitment efforts to ensure a diversity of political affiliations among the applicants.

Distribution of Application Materials: ***Applications, .pdf files, and documents on file for each judicial vacancy shall be provided to the members of the appropriate Commission at least seven (7) calendar days before the first Commission meeting concerning each vacancy. [Rule 6.c.]*** After the application deadline has passed, commission staff post the confidential applications on the Commission's secure website along with an alphabetized list of all the applicants all documents received regarding the applicants. The Commission is notified via e-mail of the updates on the secure website and notified of the date, place and time of the commission's screening meeting and the interview date(s), if known.

Confidentiality of Materials. ***The applications and letters received regarding an applicant are public, except: (1) All information in response to questions contained***

in Section II of the application form; (2) Written information provided to the Commission by a third party regarding an applicant, including the third party's identity, which the third party designates in writing as confidential information; (3) All individual Commissioner's notes that are generated for personal use; (4) Any information obtained by or submitted to the Commission that is confidential by law. [Rule 6.d.]

Applicants are advised in the application form that the fact they have applied is not confidential. However, section II of the application must remain confidential. All letters and documents received by the commission regarding an applicant, are public unless the third party asks to remain confidential. Commissioners must obviously reveal the names of applicants when investigating their qualifications, but no portion of section II in the application should be given or disclosed to anyone not a commission member.

SCREENING OF APPLICANTS

Public Notice and Comment. Names of applicants and the date, place and time of the Commission meeting to screen applications shall be widely disseminated to the public. Comments about applicants should be made, if feasible, at least three (3) working days before the screening meeting as follows: (1) in writing to the Judicial Nominating Commission for distribution by staff to the Commission, or (2) verbally or by written or electronic means to the Commissioners. [Rule 7.a.]

The notice to the public is in the form of a press release that is distributed in the same manner as the notice of vacancy (see page 10). The notice states the time scheduled at the screening meeting for public comment.

Review of Applications. As soon as Commissioners receive applications and documents on file, they may begin investigating the background and qualifications of applicants. Using the application as a starting point, Commissioners may contact as many of the individuals and institutions knowledgeable about the applicant as deemed beneficial. Commissioners shall encourage sources to allow their names to be disclosed to the commission, the applicant and the public but may accept comments about an applicant from a source that requests confidentiality as to the other Commissioners, the applicant, and/or the public, if the Commissioner believes it is in the public's best interest to accept such comments. [Rule 7.b.]

In reviewing applications, commissioners are seeking to identify and evaluate each applicant's qualifications for judicial office. At a minimum, applicants must meet the constitutional and statutory requirements listed on the next page. It is rare for an applicant who does not meet these requirements to apply, but there are a few cases that present a "gray area" for interpretation. In those cases the commission must make a decision as

to the applicant's eligibility, seeking legal advice if necessary.

Each commissioner is strongly encouraged to review the evaluation criteria discussed on pages 16-22 and consider how he or she will apply those and possibly other criteria to the current judicial vacancy, before beginning the review of individual applications. There will always be differences among commissioners with respect to the importance each assigns to any given criterion. However, one strength of the merit selection process is the unique perspective that each commissioner brings to the selection of nominees and the blending of those perspectives into the collective decision-making process of the commission. Using the criteria in the manner he or she believes most appropriate, each commissioner reviews the applications and letters of reference to determine the degree to which the various qualifications are present or absent in each applicant, and to identify those areas which may require investigation.

The commission's objective in screening applicants is not to retain for further investigation and interview all applicants who may conceivably be qualified, but to retain enough applicants so as to be reasonably certain the best qualified applicants are among them, given the information available to the commission at the time, the number of vacancies to be filled, and the overall quality of the applicant pool.³ Some commissioners find it helpful to prepare for the screening meeting by categorizing the applicants into three groups: (1) those whose qualifications appear to be so high that there is little doubt they should be considered further; (2) those who may merit further consideration pending investigation and commission discussion of their qualifications, and (3) those whose qualifications do not appear to meet the majority of or most important criteria, and can therefore be eliminated from further consideration.

Constitutional and Statutory Minimum Requirements. The following requirements must be met by applicants seeking judicial office.

Supreme Court: A Supreme Court justice must be a person of good moral character and admitted to the practice of law in and a resident of Arizona for ten years next preceding taking office. [AZ Const., Art. 6, § 6] A nominee must be under 65 years of age at the time the nomination is submitted to the Governor. [AZ Const., Art. 6, § 28]

Court of Appeals: A judge of the Court of Appeals must be: (1) not less than 30 years of age; (2) of good moral character; (3) a qualified elector of his/her county of residence and a resident of such county for not less than three years next preceding taking office; (4) a resident of the division in which he/she is elected; (5) admitted to the practice of law in Arizona for not less than five years next preceding

³Manual of Procedures for Judicial Nominating Commissions, State of Utah Judicial Council, December 18, 1996

taking office; and (6) a resident of Arizona for not less than five years next preceding taking office. [A.R.S. § 12-120.01.A.] A nominee must be under 65 years of age at the time the nomination is submitted to the Governor. [AZ Const., Art. 6, § 28]

Superior Court: A Superior Court judge must be at least 30 years of age, of good moral character, and admitted to the practice of law in and a resident of Arizona for five years next preceding their taking office. [AZ Const., Art. 6, § 22] A nominee must be a resident of the county in which the vacancy exists for at least one year prior to appointment and under 65 years of age at the time the nomination is submitted to the Governor. [AZ Const., Art. 6, § 37.D.]

Investigation of Applicants. In reviewing applications and letters, commissioners may wish to highlight responses or list those areas where they believe further investigation may be warranted. Commissioners may seek information from any source likely to provide insight into the qualifications of applicants to serve in the judiciary, including but not limited to attorneys, judges, and fellow participants in bar or community organizations and activities. Commissioners should not solicit information from clients of an applicant, unless the applicant has initiated the solicitation. Sample questions that can be posed to judges, attorneys and others, and a form for recording responses, are at Appendix 4.

When a source provides a negative opinion about an applicant's character, fitness, or competency, the commissioner shall ask the source to provide a detailed factual basis for that opinion. The Commissioner shall also ask for the names and contact information of others who might have knowledge about the opinion. The Commissioner shall contact any individuals identified to ask about the applicant's character, fitness or competency. [Rule 7.b.]

This rule applies to comments sought by a commissioner as part of the investigation and to unsolicited comments made to a commissioner by persons who contact the commissioner on their own initiative. Commissioners usually receive numerous telephone calls and messages from persons wishing to comment on applicants, and should handle those contacts in the same way as those they initiate.

Information received in the course of the investigation that is material and adverse and is reasonably presumed to have a potential to influence the decision of the Commission shall be treated as follows:

Negative opinions that are not supported with a factual basis, or a second source shall not be disclosed at the Commission meeting. If disclosed, the supporting information must also be disclosed. [Rule 7.c.3.]

Information from an anonymous source shall not be considered by any Commissioner or shared with any other Commissioner or the Commission at any point in the screening process. [Rule 7.c.4.]

Given these rules, it is incumbent upon commissioners to make every reasonable effort to obtain information about the factual basis or corroboration of potentially damaging comments about an applicant. If the commissioner receiving the opinion is not satisfied he or she has obtained sufficient basis or corroboration for the negative opinion, the commissioner should not share the opinion offered.

In summary: All information and third-party opinions a commissioner plans to share with any other commissioner or at the screening meeting should be based on sufficient facts, circumstances or a second source to support the opinion. Many applicants will be screened from further consideration at the commission's screening meeting and therefore have no opportunity to respond to negative information collected during the investigation. For that reason, it is essential the investigation be thorough and fair, and that commissioners exercise responsibility in sharing third-party opinions or potentially damaging information.

A commissioner may seek comment on applicants via telephone, letter, fax or e-mail. However, if a third party requests that their name and the content of the comments stay confidential, precaution must be taken to assure the confidentiality of the comments shared with the commissioner. Careless handling of confidential comments offered to a commissioner can make it more difficult for the commission to obtain information in the future.

EVALUATION CRITERIA

American Bar Association Guidelines. These guidelines are intended for use by bar association committees and judicial nominating commissions which are evaluating applicants for state and local judicial office. It is assumed that the evaluators desire to recommend to the electorate or to the appointing authority the applicants who are most qualified by virtue of merit.

The guidelines attempt to identify those characteristics to be sought after in the judicial applicants. They attempt to establish criteria for the prediction of successful judicial performance. The identified traits are not mutually exclusive and cannot be wholly separated from one another. The outlined areas have been selected as essential for inquiry in considering all applicants for judicial office. With the exception of integrity, which is always indispensable, the degree to which the characteristics should be present in any particular applicant may vary in relation to the responsibility of the office.

These guidelines are not intended to deal with methods or procedures for judicial selection; nor are they intended to provide specific operating rules for the commissions and committees. The guidelines are not intended as a definitive review of the qualifications of sitting judges when being considered for retention or evaluation, since judicial experience will then provide important additional criteria which are treated elsewhere.

It is hoped that the use of these guidelines, if made known to the public and the press, will enhance the understanding and respect to which the judiciary is entitled in the community being served. The ultimate responsibility for selecting the judiciary is in the appointing power of any given judicial system. The function of these guidelines is to present minimum criteria for appointment; the more rigorous the criteria the better the quality of the judiciary.

1. Integrity. An applicant should be of undisputed integrity.

The integrity of the judge is, in the final analysis, the keystone of the judicial system, for it is integrity which enables a judge to disregard personalities and partisan political influences and enables him or her to base decisions solely on the facts and the law applicable to those facts. It is, therefore, imperative that a judicial applicant's integrity and character with regard to honesty and truthfulness be above reproach. An individual with the integrity necessary to qualify must be one who is able, among other things, to speak the truth without exaggeration, admit responsibility for mistakes and put aside self-aggrandizement. Other elements demonstrating integrity are intellectual honesty, fairness, impartiality, ability to disregard prejudices, obedience to the law and moral courage.

An applicant's past personal and professional conduct should demonstrate consistent adherence to high ethical standards. The evaluator should make inquiry of judges before whom the applicant has appeared and among other members of the bar as to whether or not an applicant's representations can be relied upon. An applicant's disciplinary record, if any, should be considered. Hence, an applicant should waive any privilege of confidentiality, so that the appropriate disciplinary body may make available to the evaluator the record of disciplinary sanctions imposed and the existence of serious pending grievances. The reputation of the applicant for truthfulness and fair dealing in extra-legal contexts should also be considered. Inquiry into an applicant's prejudices that tend to disable or demean others is relevant. However, since no human being is completely free of bias, the important consideration is that of whether or not the applicant can recognize his or her own biases and set them aside.

2. Legal Knowledge and Ability. An applicant should possess a high degree of knowledge of established legal principles and procedures and have a high degree of ability to interpret and apply them to specific factual situations.

Legal knowledge may be defined as familiarity with established legal principles and evidentiary and procedural rules. Legal ability is the intellectual capacity to interpret and apply established legal principles to specific factual situations and to communicate, both orally and in writing, the reasoning leading to the legal conclusion. Legal ability connotes also certain kinds of behavior by the judge such as the ability to reach concise decisions rapidly once he or she is apprized of sufficient facts, the ability to respond to issues in a reasonably unequivocal manner and to quickly grasp the essence of questions presented.

Legal knowledge and ability are not static qualities, but are acquired and enhanced by experience and the continual learning process involved in keeping abreast of changing concepts through education and study. While an applicant should possess a high level of legal knowledge, and while a ready knowledge of rules of evidence is of importance to judges who will try contested cases, an applicant should not normally be expected to possess expertise in any particular substantive field. More important is the demonstration of an attitude reflective of willingness to learn the new skills and knowledge which will from time to time become essential to a judge's performance and of a willingness to improve judicial procedure and administration.

A review of an applicant's academic distinctions, participation in continuing legal education forums, legal briefs and other writings, and reputation among judges and professional colleagues who have had first-hand dealings with the applicant will be helpful in evaluating knowledge and ability.

3. Professional Experience. An applicant should be a licensed, experienced lawyer.

An applicant should be admitted to practice law in the jurisdiction. The length of time that a lawyer has practiced is a valid criterion in screening applicants for judgeships. Such professional experience should be long enough to provide a basis for the evaluation of the applicant's demonstrated performance and long enough to ensure the applicant has had substantial exposure to legal problems and the judicial process.

It is desirable for an applicant to have had actual trial experience, as an attorney, a judge or both, beyond general litigation experience. This is particularly true for an applicant for the trial bench.

The extent and variety of an applicant's experience should be considered in light of the nature of the judicial vacancy being filled. Although substantial trial experience is desirable, other types of legal experience should also be carefully considered. An analysis of the work performed by the modern trial bench indicates that, in addition to adjudication, many judges perform substantial duties involving administration, discovery, mediation and public relations. A private practitioner who has developed a large clientele, a successful law teacher and writer, or a successful corporate, government or public interest attorney all may have experience which will contribute to successful judicial performance. Outstanding persons with such experience should not be deemed unqualified solely because of lack of trial experience. The important consideration is the depth and breadth of the professional experience and the competence with which it has been performed, rather than the applicant's particular type of professional experience.

For an applicant for the appellate bench, professional experience involving scholarly research and the development and expression of legal concepts is especially desirable.

4. Judicial Temperament. An applicant should possess a judicial temperament, which includes common sense, compassion, decisiveness, firmness, humility, open-mindedness, patience, tact and understanding.

Judicial temperament is universally regarded as a valid and important criterion in the evaluation of an applicant. There are several indicia of judicial temperament which, while premised upon subjective judgment, are sufficiently understood by lawyers and non-lawyers alike to afford workable guidelines for the evaluator.

Among the qualities which comprise judicial temperament are patience, open-mindedness, courtesy, tact, firmness, understanding, compassion and humility. Because the judicial function is essentially one of facilitating conflict resolution, judicial temperament requires an ability to deal with counsel, jurors, witnesses and parties calmly and courteously, and the willingness to hear and consider the views of all sides. It requires the ability to be even-tempered, yet firm; open-minded, yet willing and able to reach a decision; confident, yet not egocentric. Because of the range of topics and issues with which a judge may be required to deal, judicial temperament requires a willingness and ability to assimilate data outside the judge's own experience. It requires, moreover, an even disposition, buttressed by a keen sense of justice which creates an intellectual serenity in the approach to complex decisions, and forbearance under provocation. Judicial temperament also implies a mature sense of proportion; reverence for the law, but appreciation that the role of law is not static and unchanging; understanding of the judge's important role in the judicial process, yet recognition that the administration of justice and the rights of the parties transcend the judge's personal desires. Judicial temperament is typified by recognition that there must be compassion as the judge deals with matters put before him or her.

Factors which indicate a lack of judicial temperament are also identifiable and understandable. Judicial temperament thus implies an absence of arrogance, impatience, pomposity, loquacity, 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.

Wide-ranging interviews should be undertaken to provide insight into the temperament of a judicial applicant.

5. Diligence. An applicant should be diligent and punctual.

Diligence is defined as a constant and earnest effort to accomplish that which has been undertaken. While diligence is not necessarily the same as industriousness, it does imply the elements of constancy, attentiveness, perseverance and assiduousness. It does imply the possession of good work habits and the ability to set priorities in relation to the importance of the tasks to be accomplished.

Punctuality should be recognized as a complement of diligence. An applicant should be known to meet procedural deadlines in trial work and to keep appointments and commitments. An applicant should be known to respect the time of other lawyers, clients and judges.

6. Health. A candidate should be in good health.

Good health embraces a condition of being sound in body and mind relative to the extraordinary decision making power vested in judges. Physical handicaps and diseases which do not prevent a person from fully performing judicial duties should not be a cause for rejection of an applicant. However, any serious condition which would affect the applicant's ability to perform the duties of a judge may be further investigated by the evaluator.

Good health includes the absence of erratic or bizarre behavior which would significantly affect the applicant's functioning as a fair and impartial judge. Addiction to alcohol or other drugs is of such an insidious nature that the evaluator should affirmatively determine that a candidate does not presently suffer from any such disability.

The ability to handle stress effectively is a component of good mental health. A candidate should have developed the ability to refresh himself or herself occasionally with non-work-related activities and recreations. A candidate should have a positive perception of his or her own self-worth, in order to be able to withstand the psychological pressure inherent in the task of judging.

7. Financial Responsibility. An applicant should be financially responsible.

The demonstrated financial responsibility of an applicant is one of the factors to be considered in predicting the applicant's ability to serve properly. Whether there have been any unsatisfied judgments or bankruptcy proceedings against an applicant and whether the applicant has promptly and properly filed all required tax returns are pertinent to financial responsibility. Financial responsibility demonstrates self-discipline and the ability to withstand pressures that might compromise independence and impartiality.

8. Public Service. Consideration should be given to an applicant's previous public service activities.

Participation in public service and pro bono activities adds another dimension to the qualifications of the applicant. The degree of participation in such activities may indicate social consciousness and consideration for others. The degree to which bar association work provides an insight into the qualifications of the applicant varies in each individual. Significant and effective bar association work may be seen as a favorable qualification.

The rich diversity of backgrounds of American judges is one of the strengths of the American judiciary, and an applicant's non-legal experience must be considered together with the applicant's legal experience. Experience which provides an awareness of and a sensitivity to people and their problems may be just as helpful in a decision making process as a knowledge of the law. There is, then, no one career path to the judiciary. A broad, non-legal academic background, supported by varied and extensive non-academic achievements, are important parts of an applicant's qualifications. Examples of such non-legal experience are involvement in community affairs and participation in political activities, including election to public office. The most desirable applicant will have had broad life experiences.

There should be no issue-oriented litmus test for selection of an applicant. No applicant should be precluded from consideration because of his or her opinions or activities in regard to controversial public issues. No applicant should be excluded from consideration because of race, creed, sex or marital status.

While interviews of applicants may touch on a wide range of subjects in order to test an applicant's breadth of interests and thoughtfulness, the applicant should not be required to indicate how he or she would decide particular issues that may arise on litigated cases. However, an applicant's judicial philosophy and ideas concerning the role of the judicial system in our scheme of government are relevant subjects of inquiry.

Other Considerations for Qualification. In addition to the ABA guidelines, a commissioner should consider the following in analyzing the qualifications of an applicant for judicial office.

Diversity on the Bench. When deciding among applicants whose qualifications appear to be relatively comparable, it is relevant to consider the background and experience of the applicants in relation to the current composition of the bench on which the vacancy exists. While the primary consideration must be merit, the constitutional requirement that the commissions consider the diversity of the state's or county's population in making their nominations is intended to promote a judiciary of sufficient diversity that it can most effectively serve the needs of the community.

Impartiality. A judge must be able to determine the law and sometimes the facts of a dispute objectively and impartially. Applicants may be evaluated on their ability to make the transition from advocate to arbiter, and their ability to hear and consider all sides of an issue.

Industry. Applicants should demonstrate a willingness to dedicate themselves to diligent, efficient and thorough work. Rising court caseloads demand industry of judges. This means the ability to manage time, resources and priorities efficiently; to persevere against obstacles; to prepare thoroughly and punctually; and to resolve issues concisely and decisively.

Trial Court Judges. 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 overemphasized. A trial court judge must also be an able administrator and mediator.

A trial court judge should speak effectively in order to be understood by those appearing before the bench as well as by visitors in the courtroom. Communication skills are vitally important in dealing with litigants who are unrepresented by counsel and in communicating with jurors. The judge must be able to give the jury an understanding of its role and instruct the jurors on the law using plain language.

A trial court judge must be able to make quick decisions under pressure. The judge must be able to rule on motions and objections quickly in order to keep cases moving. A trial court judge must be able to quickly assimilate law and facts 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.

Appellate Court Judges. Because of the collegial decision making process on the appellate bench, it is important judges be able to understand and respect differing opinions without personal rancor. A good appellate court judge should be able to give and receive criticism of opinions and arguments without giving or taking personal offense.

Appellate court judges should have well-developed research and writing skills, and backgrounds with broad experience. It is crucial that they be able to produce understandable opinions. The judge's written opinion should persuade the reader through its logic and internal coherence.

MEETINGS - GENERAL INFORMATION

Notice. *Meetings of a Commission may be called by the Chair or a majority of Commissioners by written notice to the entire Commission specifying the time and place of meeting. Such notice shall be posted on the Commission's website at least seven (7) calendar days before the meeting date, except that an emergency meeting may be held on shorter notice if the Chair or a majority of Commissioners conclude it is essential to hold an emergency meeting. The right to notice of a meeting may be waived by any Commissioner either before or after the meeting takes place. Attendance at a meeting by any Commissioner shall constitute a waiver of such notice unless the Commissioners, at or promptly after the beginning of such meeting, objects to the holding of the meeting on the ground of lack of, or insufficiency of, notice. [Rule 4.a.]* Notice of a meeting called by the Chair is in the form of an email to the commissioners. Usually AOC staff or the Chair sends an email to the Commission upon learning of a vacancy. The email proposes meeting dates for the

commission's screening meeting and the interviews. Occasionally it becomes necessary to poll members to determine the best dates on which to hold meetings.

Notice of all Commission meetings other than emergency meetings shall be posted to the Commission's website at least seven (7) calendar days before the meeting. The notice shall state the date, time and specific location of the meeting. Each Commission shall provide notice as reasonable and practicable. [Rule 4.d.]

The statements filed with the Clerk of the Supreme Court by each commission state that, at a minimum, public notices of commission meetings are available in the office of the Clerk of the Supreme Court and the office of the Clerk of the Court in the court in which the vacancy exists. If the vacancy is on an appellate court, the notices are also posted in the Superior Court Clerk's Office in the county in which the commission will meet.

Quorum and Actions. ***A quorum for a Commission meeting shall be a majority of the Commissioners in office and eligible to participate at the time of the meeting. The Commission may act on any matter by majority vote of the Commissioners in attendance. [Rule 4.f.]***

All Commissioners are strongly encouraged to attend every meeting in person. The Constitutional deadline for submitting nominations to the Governor requires that meetings be held as scheduled. In extenuating circumstances, the Chair may permit a Commissioner to attend and vote in an administrative meeting or in a screening meeting via telephone, video conferencing, or similar means. With the exception described in this subsection, a Commissioner shall not participate in applicant interviews or vote on nominations through electronic means. If the Commission would otherwise be unable to obtain a quorum for scheduled interviews, thereby risking the Commission's ability to meet the 60-day Constitutional deadline for submitting nominations to the Governor, the Chair may allow a Commissioner to participate in applicant interviews and vote on nominations through electronic means. A member who attends electronically accepts the risk that technical problems could disrupt participation. [Rule 4.b.]

Presumption of Public Session. There is a presumption that the commissions will conduct their deliberations in public session except where it is deemed necessary or appropriate to enter an executive session because of the nature of the matter or information to be discussed. In fact, the commissions' rules only permit executive sessions for the purposes of discussing applicants' individual and relative qualifications, or for conducting a portion of an interview. A motion to go into an executive session must be approved by a majority of the commissioners in attendance.

Definition of Executive Session. Executive session means a closed meeting held for the purpose of discussing sensitive information about a particular applicant or the relative qualifications of all the applicants, or for interviewing an applicant about sensitive information. Only those individuals necessary to conduct the executive session are

present in the room. No individual has the authority to disclose the contents of an executive session unless the commission as a whole authorizes the disclosure, except that ***a portion of the interview may occur in executive session unless, after given a choice, the interviewee elects to remain in public session.*** (Rule 8.d.5.).

Role of the Chair. *The Chief Justice of Arizona, or such other Justice of the Supreme Court as shall be appointed by the Supreme Court to serve in place of the Chief Justice, shall be chair of each Commission. The Chair shall preside at all meetings of each Commission. [Rule 2]* The primary role of the chair is to ensure that each commissioner has the opportunity to be a full participant in the commission process. The chair also has the responsibility to ensure the constitutional provisions and Uniform Rules of Procedure are followed, and resolves any questions regarding the application and interpretation of the requirements set forth in those documents. The chair may also participate fully in commission discussions, interviews and voting.

Minutes. The meeting minutes are the “record of action taken.” The minutes are drafted by commission staff and submitted to the commissioners for review and action at the next meeting. If no meetings are scheduled in the near future, staff circulates the draft minutes to the commissioners with a deadline for submission of corrections or additions. Upon approval, the minutes are made available to the public. The minutes include:

- 1) The date, time and place of the meeting;
- 2) A list of the commissioners present and a list of those absent or recused;
- 3) A general description of the matters discussed or considered;
- 4) An accurate description of all actions proposed, discussed or taken, and the names of members who propose each motion;
- 5) The number of members voting for or against, or abstaining from voting on, each motion;
- 6) The names of persons making statements or presenting material to the commission and a reference to the specific matter addressed by the person;
- 7) Sufficient information to permit further investigation of the background or specific facts of a decision if the discussion in the public session does not adequately disclose the subject matter and specifics of the action taken; and
- 8) A statement setting forth the reasons necessitating a discussion, consideration or decision without the matter being placed on the agenda in case of an actual emergency.

Minutes of all commission meetings are maintained on file in the Human Resources Department of the Administrative Office of the Courts and are available on request for five years from the date the names of nominees are submitted to the Governor.

SCREENING MEETING

Public Comment. *Members of the public are invited to briefly comment orally at the screening meeting. The Chair shall allocate equal time at the screening meeting for relevant comment on each applicant. The Chair may terminate comments which exceed the time allocated or which are irrelevant to the qualifications of applicants. The Chair may also limit duplicative comments regarding an applicant. Applicants are encouraged to invite no more than two (2) speakers to comment on their behalf. [Rule 7.c.2.]*

The public comment period is always scheduled at the beginning of the meeting so that comments about applicants are presented to the commission before the discussion of the applicants' qualifications begins.

Members of the public who wish to comment on an applicant are asked to complete a short form that asks for their name, address, the organization they are representing (if any) and the name of the applicant they plan to comment on. They are called to address the commission in the order they arrived.

The commission may invite the presiding or chief judge of the court in which the vacancy exists to speak to the commission about the nature of and issues affecting the vacant position, or the court in general. The presiding or chief judge's comments should also be made in public session at the beginning of the meeting.

Discussion of Applicants. *The Commission shall meet to decide which applicants to interview. Each Commissioner shall disclose comments and other information relied upon to evaluate each applicant. If confidentiality has been promised to a source, commissioners should consider whether less weight should be given to that source's information. The Commission may hold an executive session upon a majority vote of Commissioners in attendance to promote open and frank discussion of applicant qualifications. The substance of deliberations in executive session shall not be disclosed. [Rule 7.c.1.]*

After the public comment period ends, the Chair calls for discussion of each applicant's qualifications. Applicants are discussed in alphabetical order. Each commissioner has read the applications, written public comments and letters of reference before the screening meeting. Commissioners are also likely to have received verbal comments about many of the applicants' qualifications and to have conducted some investigation on their own. As each applicant is discussed, each commissioner in turn shares the comments they received about that applicant, subject to the restrictions discussed below, and their evaluation of the applicant's qualifications. A commissioner's evaluation may address what the commissioner believes to be areas of strength, areas of concern and areas that may warrant further investigation.

Opinion Comments. *Negative opinions that are not supported with a factual basis, or a second source shall not be disclosed at the Commission meeting. If disclosed, the supporting information must also be disclosed. [Rule 7.c.3.]*

Anonymous Comments. *Information from an anonymous source shall not be considered by any Commissioner or shared with any other Commissioner or the Commission at any point in the screening process. [Rule 7.c.4.]*

Selection of Applicants for Interviews. *The Chair shall invite Commissioners to nominate applicants to be placed on a tentative list of those to be interviewed. Such a nomination requires the concurrence of one additional Commissioner. The name of each applicant who receives a vote of the majority of Commissioners voting shall be placed on a tentative list. Following this procedure with or without an additional executive session or sessions, the tentative list of interviewees may be added to or subtracted from by public vote until a final list of applicants to be interviewed is determined. The Commission may vary these procedures at its discretion. [Rule 7.c.5.]*

The Constitution requires that all commission votes take place in public session. “Straw polls” and similar methods of attempting to determine in executive session how the majority of commissioners will vote in public session infringe on the constitutionally required public vote, in which each commissioner publicly votes his or her conscience in selecting the applicants to be interviewed. If commission votes are perceived by the public as having been predetermined in executive session, public trust in the commissions’ ability to ensure that the selection process is fair to all applicants and open to public scrutiny can be seriously damaged. Actual and perceived fairness and openness in the process are critical to public support for merit selection.

Closely related to the determination of the applicants to be placed on the interview list is the commission’s determination of how many applicants should be interviewed. Reasons for adopting a larger list of interviewees include: multiple vacancies to be filled; the need to ensure the interview list contains sufficient numbers of applicants of different political affiliations so that a politically balanced list of nominees can ultimately be selected; assuring the option of recommending more than three nominees by interviewing enough applicants from which to choose more than three; and a desire to give as many applicants as possible an opportunity to be considered for nomination.

Reasons for narrowing the list of applicants to be interviewed include: a belief the commission should devote its time to extensively interviewing the most highly qualified applicants, as opposed to conducting brief interviews of a larger number; time restrictions affecting the commission’s ability to adequately investigate and interview a larger number of applicants; and, in a few cases, the restrictions inherent in a small pool of applicants when there are some applicants who are clearly not qualified for the position. The commission discusses these considerations with each vacancy and determines how many applicants will be interviewed. The commission may make that determination

before any voting on individual applicants begins, or it may choose to begin the voting process and consider the maximum number of applicants to be interviewed after one or more rounds of voting are completed. The discussion and decision on the number of applicants to be interviewed should be conducted in public session, as it is not related to any individual applicant's qualifications. Commissioners generally feel that 12 interviews are the maximum number they can properly conduct in one day; eight to 10 interviews per day permits longer interviews and a more comfortable schedule. Serious consideration should be given to scheduling more than one day for interviews if the commission decides to interview more than 12 applicants.

Administrative Issues. The selection of the applicants who will be interviewed is followed by a discussion of the interview schedule and assignments for further investigation of those applicants. The commission usually assigns one or more commissioners to contact each applicant's references, the judges on the bench in which the vacancy exists and in other courts where the applicants have practiced (e.g., U.S. District Court), and each applicant's opposing counsel or other lawyers who are familiar with the applicant's practice. Assignments to investigate any specific concerns or questions about an applicant may also be made at this time.

FURTHER INVESTIGATION OF INTERVIEWEES

Public Notice and Comment. *Names of applicants selected for interview and the date, place and time of the Commission meeting to interview applicants shall be widely disseminated to the public. The public, the judiciary and bar associations shall invited to provide comments regarding these applicants. Comments about applicants should be made, if feasible, at least three (3) working days before the interview meeting as follows: (1) in writing to the Judicial Nominating Commission for distribution by staff to the Commission, or (2) verbally or by written or electronic means to the Commissioners. [Rule 8.a.]* The notice to the public is in the form of a press release that is distributed in the same manner as the notice of vacancy (see page 10). The notice states the time scheduled at the interview meeting for public comment. Applicants who will be interviewed receive a letter notifying them of the location, date and time of the interview. Applicants not selected for an interview are advised by letter.

Criminal, Disciplinary and Credit Investigations. Commission staff requests and reports to the commission the results of:

- 1) The criminal history investigation
- 2) The history of complaints and disciplinary action (if any) taken by the State Bar of Arizona; and

- 3) The history of complaints and disciplinary action (if any) taken by the Arizona Commission on Judicial Conduct

At its discretion, the Commission may direct staff to provide a consumer (credit) report on an applicant as part of the Commission's investigation of that applicant. In submitting an application, each applicant authorizes the Commission to obtain a consumer report.

Investigation by Commissioners. The Commission shall further evaluate selected applicants by contacting as many individuals, community groups and other sources as deemed reasonable to obtain information about the applicants' life experiences, community activities and backgrounds. Commissioners shall encourage sources to allow their names to be disclosed to the Commission, the applicant and the public, but may accept comments about an applicant from a source that requests confidentiality as to the other Commissioners, the applicant and/or the public if the Commissioner believes it is in the public's best interest accept such comments.

When a source provides a negative opinion about an applicant's character, fitness or competency, the Commissioner shall ask the source to provide a detailed factual basis for that opinion. The Commissioner shall also ask for the names and contact information of others who might have knowledge about the opinion. The Commissioner shall contact any individual identified to ask about the applicant's character, fitness or competency.

[Rule 8.b.]

Commissioners may seek information from any source likely to provide insight into the qualifications of individual applicants to serve in the judiciary, including but not limited to attorneys, judges, and fellow participants in bar or community organizations and activities. The commission may choose to assign one or more commissioners to contact the references of assigned applicants. Sample questions that can be posed to judges, attorneys and others, and a form for recording responses, are at Appendix 4.

Judges before whom an applicant has practiced can be excellent sources of information about an applicant's qualifications. Judges can often make comparative assessments of several applicants on the interview list. The commission should therefore make a serious effort to contact all or as many as possible of the judges on the bench in which the vacancy exists. Seeking comment from a diverse group of judges that includes women, minorities and all areas of practice (e.g., civil, criminal, domestic relations, juvenile, and probate) will allow the commission to evaluate all the applicants' qualifications and provide various perspectives on the needs of the court. One method of obtaining comments from many judges is to equally divide all the judges on the bench among the commissioners, with each commissioner assigned to contact a number of judges.

An applicant's opposing counsel and colleagues can also be valuable sources of information on the applicant's qualifications. Applicants list at least four such contacts in their application and additional names may be obtained from the cases referenced elsewhere in the application. The commission may choose to assign each commissioner one or more applicants for whom the commissioner is responsible for contacting all the attorney references listed in the application. Alternatively, the commission may choose to designate a small group of commissioners to collectively contact the attorney references of all applicants.

Regardless of any investigation assignment(s) given to a commissioner, a commissioner may contact any person or organization about any applicant even if that source is not among the contacts the commissioner has been assigned to make. However, commissioners should keep in mind the commission is relying on each commissioner to make any assigned contacts with references or other sources. A commissioner may contact as many sources as he or she deems desirable or necessary, but at a minimum should make the contacts assigned to him or her.

A commissioner may seek comment on applicants via telephone, letter, fax or e-mail. However, if a third party requests that their name and the content of the comments stay confidential, precaution must be taken to assure the confidentiality of the comments shared with the commissioner. Careless handling of confidential comments offered to a commissioner can make it more difficult for the commission to obtain information in the future.

Communication with Applicants. *Nothing in this rule prohibits the Chair of the Commission staff from contacting an applicant the Chair determines that such contact is in the best interests of the Commission, the applicant or the public. [Rule 8.d.]*

Commissioners should note that only the Chair of Commission may contact an applicant during the nomination process. The Chair may, for example, contact an applicant to ask the applicant to prepare to respond to public comment made to the Commission that raises allegations about the applicant's qualifications or fitness for appointment. In some cases the allegations relate to the applicant's conduct or actions in a particular legal proceeding. Contact by the Chair prior to the applicant's interview allows the applicant to review the record of the proceedings before discussing the allegations with the Commission at the interview, so the matter can be fully discussed.

INTERVIEWS AND SELECTION OF NOMINEES

Public Comment: *Members of the public are invited to briefly comment orally at the screening meeting. The Chair shall allocate equal time at the screening meeting for relevant comment on each applicant. The Chair may terminate comments which*

exceed the time allocated or which are irrelevant to the qualifications of applicants. The Chair may also limit duplicative comments regarding an applicant. Applicants are encouraged to invite no more than two (2) speakers to comment on their behalf. [Rule 8.d.2.] The public comment period is always scheduled at the beginning of the meeting so that comments about applicants are presented to the commission before the interviews begin.

Interview Meeting: Each Commission shall meet for the purpose of interviewing selected applicants in order to compile a list of nominees to be forwarded to the Governor. The Commission shall schedule sufficient time prior to the interview of each applicant to discuss and evaluate each applicant's qualifications and to determine whether any matter should be raised with the applicant during the interviews. Each Commissioner shall disclose comments and other information relied on to evaluate each applicant. If confidentiality has been promised to a source, Commissioners should consider whether less weight should be given to that source's information. The Commission may hold an executive session upon a majority vote of Commissioners in attendance to promote open and frank discussion of applicant qualifications. The substance of deliberations in executive session shall not be disclosed. [Rule 8.d.1.]

Following public testimony, the commission prepares for interviews by sharing the results of commissioners' investigations and deciding whether any particular matter should be discussed with an applicant. The commission may choose to discuss the investigation results for all applicants before beginning the first interview, or may choose to schedule the discussion of investigation results throughout the day, so long as the discussion of any given applicant takes place before that applicant's interview.

Opinion Comments. Negative opinions that are not supported with a factual basis, or a second source shall not be disclosed at the Commission meeting. If disclosed, the supporting information must also be disclosed. [Rule 8.d.3.]

Anonymous Comments. Information from an anonymous source shall not be considered by any Commissioner or shared with any other Commissioner or the Commission at any point in the screening process. [Rule 8.d.4.]

Conduct of Interviews. Selected applicants shall be publicly interviewed by Commissioners. The Chair shall admonish the public in attendance not to disclose the interview questions or candidate answers until the conclusion of all interviews. A Commissioner may question an applicant about comments made about the applicant for which confidentiality has been requested so long as the source of comment is not identified. Upon motion and a majority vote of the Commission, a portion of the interview may occur in executive session unless, after given a choice, the interviewee elects to remain in public session. [Rule 8.d.5.]

Before beginning the interviews the commission selects the questions to be asked of the applicants. The commission usually selects four to six questions that will be asked of all applicants, and then decides who will ask each question and in what order. Commission staff may provide a list of questions that have been used at previous interviews and from which the commission may select again. Commissioners are encouraged to arrive at the meeting prepared with questions they want to ask.

Ideally, each interview should be conducted in a similar fashion. The Chair briefly introduces the applicant to the commissioners and each commissioner in turn states his or her name for the applicant's benefit. The commission begins the interview by asking the few questions selected for all applicants. Following those questions, each commissioner may ask one or more questions designed for a particular applicant. Any commissioner may follow up on an applicant's response to a question by asking another question or by asking for clarification of the response.

Phrasing of the questions is important. The commission may question the applicant about social issues, but the questions should be phrased to avoid "opinion shopping" or reducing the interview to a political interrogation. The questions should be designed to elicit an applicant's knowledge and understanding of important issues. Questions that may offer insight into the applicant's ethics, temperament, work habits and preferences can also be valuable. It is best to avoid "leading" questions that give the applicant a clue as to the response the questioner is seeking, because this practice usually brings only "social answers" -- those the applicant perceives will please the commission or at least the commissioner asking the question. Commissioners should also avoid argumentation with or comment on an applicant's response. A commissioner's comment, whether positive or negative, is feedback to the applicant and the applicant may adjust future responses as well as their attitude to what they perceive will be the best method of pleasing the commission. Applicants must be treated fairly, but commissioners are entitled to closely question potential judges. Judges must frequently face the stress of decisions affecting the lives and property of other people. Commissioners have the responsibility to assess the applicant's ability to resolve close questions under stress, and to look beyond the applicant's ability to interview well and try to determine whether the applicant will make a good judge.

However, there are a few areas of questioning that are not appropriate. Those areas include marital status, religious practices, child care arrangements, domestic problems and physical attributes. If a commissioner is unsure whether a question they want to ask is appropriate, it is advisable to share the question with the commission before the interviews begin so the commission may discuss whether the question is appropriate.

Commissioners should take brief notes of each applicant's remarks and their overall impression of the applicant. Each commissioner has the opportunity to share his or her impressions when the commission discusses each applicant's interview. Commissioners should also consider how they will weigh an applicant's interview performance with their

accomplishments, skills and reputation as evidenced in the application and the comments given to the commission. Some believe the historical review of the applicant's achievements should be given the majority of weight (e.g., 70%), in the belief that what a person has achieved over the years is a more reliable indicator of future performance than a 30-minute interview. Others assign more importance to their impressions of the applicant based on the interview (e.g., 50%), in the belief they cannot be comfortable nominating an applicant without first being comfortable with the "person" regardless of the applicant's achievements to date.

The commission's discussion of each applicant's interview should ideally occur soon after the interview, when memories are fresh. Commissioners may find it helpful to use a ranking system (e.g., one to five system) for comparison of applicants. Any ranking system used should be very flexible in order to allow for subjective considerations and changed perceptions after seeing other applicants.

Commission Deliberations. *To the extent possible, no material and adverse information about an applicant that a Commissioner knows before the interview may be disclosed to the Commission after the interview occurs. Whether in public or in executive session, the Chair shall read the names of the applicants in alphabetical order and open the meeting to a discussion of that particular applicant's qualifications for judicial office. After this procedure has been followed for each applicant, the Chair shall open the meeting to a general discussion of the relative qualifications of all applicants. The Commission may hold an executive session upon a majority vote to promote open and frank discussion regarding the qualifications of applicants interviewed. The substance of deliberations in executive session shall not be disclosed. [Rule 8.d.6.]*

Selection of Nominees. *All voting by each Commission on the number of nominees to be forwarded to the Governor and on the applicants nominated shall be in public session. The Chair shall invite Commissioners to nominate applicants interviewed to be placed on a tentative list of those to be nominated to the Governor. Such a nomination requires the concurrence of one additional Commissioner. The name of each applicant who receives a vote of the majority of Commissioners voting shall be placed on the tentative list. Following this procedure, with or without an executive session or sessions, the tentative list of nominees may be added to or subtracted from by public vote until a final list of nominees is determined. The Commission may vary these procedures at its discretion.[Rule 8.d.7.]*

The Constitution requires that all voting on nominations occur in public session. One aspect of the commission's decision on the names and number of nominees to submit to the Governor is the political affiliation of potential nominees. The Constitution requires that at least three nominees be submitted to the Governor for each judicial vacancy, no more than two of whom may be members of the same political party unless there are more than four nominees, in which event no more than 60% of such nominees may be

members of the same political party. The “math” on this requirement works out as follows:

If 3 nominees:	No more than two nominees of same affiliation
If 4 nominees:	No more than two nominees of same affiliation
If 5 nominees:	No more than three nominees of same affiliation
If 6 nominees:	No more than three nominees of same affiliation
If 7 nominees:	No more than four nominees of same affiliation
If 8 nominees:	No more than four nominees of same affiliation
If 9 nominees:	No more than five nominees of same affiliation
If 10 nominees:	No more than six nominees of same affiliation

Communication After Interview Meeting. After the nominees are selected, the Chair sends a letter to each applicant who was interviewed expressing the commission’s appreciation for their interest in the position and confirming the names of the nominees.

If a commissioner receives written information about a nominee after the interview meeting, the commissioner should forward the information to the Chair for transmittal to the Governor as described in the rule. If a commissioner is contacted by a source who wishes to comment verbally on a nominee, the commissioner should refer the source to the Governor’s office.

After adopting a list of nominees the commission may decide to designate a member or members to communicate with applicants not nominated to the Governor. The designated member or members may be instructed to communicate on behalf of the commission with one or more of the applicants, or may simply be asked to respond to applicant inquiries.

Transmittal to the Governor. *The names of the nominees, listed in alphabetical order, shall be delivered to the Governor as directed by the Chair. The Chair shall promptly inform the public of the names of the nominees.*

To facilitate the Governor’s selection of the appointee, the Commission file concerning each nominee shall be provided to the Governor with the list containing that nominee’s name unless the respective Commission directs otherwise. Commission staff shall separately identify the information that is deemed confidential under these rules and ask that this information continue to be kept confidential.

[Rule 9]

Commission staff prepare a transmittal letter for the Chair’s signature and deliver the transmittal letter to the Governor’s office along with the commission files of all nominees. The commission file contains the application and any letters of reference or written public comment about the applicant. When the appointment is made, the Governor’s office retains the commission file of the person appointed.

Commission staff also prepare a news release announcing the names, political affiliations, cities of residence and current employment of the nominees. The press release is distributed in the same manner as the announcement of the vacancy.

Because the commission's authority ends with the submission of nominees, there should be no collective effort among commissioners to influence or persuade the Governor in the appointment. While commissioners generally do not contact the Governor, they may respond to inquiries initiated by the Governor's office.

RETENTION / DESTRUCTION OF RECORDS

Public Records. Commission records are maintained by the Human Resources Department of the Administrative Office of the Courts. Records are maintained on each judicial vacancy for five years from the date the names of nominees are submitted to the Governor. Records open for public inspection include:

- Press releases announcing the vacancy, meetings and the names of the applicants, interviewees and nominees
- Application forms and instructions for applicants
- Public notices of meetings
- Meeting agendas
- Meeting minutes
- Commission correspondence to the Governor, an applicant or any other person or organization regarding the judicial vacancy
- Commission membership lists
- Uniform Rules of Procedure for the Commissions
- this Handbook

Applications and Documents. *The original application and the .pdf version filed by an applicant not appointed by the Governor shall be retained for one year after the application deadline date stated on the first page of the application. All documents received with respect to the person's application shall also be retained for one year. At an applicant's request, the original application, the .pdf version, and any supplemental material submitted by the applicant will be returned to the applicant*

during the one year period. Otherwise all documents and the .pdf shall be retained and provided to the Commission that originally considered the application if a new vacancy arises during the one year period. The applicant can withdraw his or her application for any or all vacancies occurring during that period by notifying the Commission in writing of the withdrawal. At the expiration of the one year period, any applications, .pdf files and supplemental materials retained by the Commission shall be destroyed and deleted. [Rule 6.b.]

The applications and letters received regarding an applicant are public, except: (1) All information in response to questions contained in Section II of the application form; (2) Written information provided to the Commission by a third party regarding an applicant, including the third party's identity, which the third party designates in writing as confidential information; (3) All individual Commissioner's notes that are generated for personal use; (4) Any information obtained by or submitted to the Commission that is confidential by law. [Rule 6.d.] The applications (Section I only) and materials received regarding an applicant are made available to the public. The original application may be returned to the applicant, upon the applicant's request.

Applications and other documents regarding an applicant are destroyed at the end of the one-year retention period.

Criminal, Disciplinary and Credit Records. The criminal history, disciplinary and consumer reports obtained by the commission are confidential materials regarding applicants that are not released to the public. Federal credit and criminal reporting laws contain restrictions on and penalties for disclosure of the information to persons not specifically authorized by law to obtain the information. Public release of that information would violate state and federal law.

Commissioner Notes. The commissioners' personal notes are not public information. Commissioners are responsible for safeguarding and/or destroying personal notes.

BIENNIAL MEETING AND EDUCATION OPPORTUNITIES

The Chief Justice shall call a meeting of all Commissioners at least once every two years for the following purposes:

- 1. Educating Commissioners about procedures and purposes as stated in Rule 1 and discussing an individual Commissioner's role in accomplishing those purposes.***
- 2. Reviewing Commission actions during the preceding years. This review shall include a presentation of statistical information about applications,***

nominations and appointments relative to the Constitutional goal of diversity and such other matters as the Commission deems appropriate. Such statistics shall be compiled from information obtained in the applications.

3. *Educating Commissioners about means for improving the judicial nominating process. [Rule 4.e.]*

The biennial meeting is usually held in the fall. Commissioners are advised of the date well in advance and are encouraged to submit agenda items and attend the meeting. Topics presented over the years have included interviewing techniques, panel discussions on public perceptions of the merit system, and techniques for investigating and assessing applicants' qualifications. The meeting is an especially valuable opportunity for new members to ask questions of and learn from experienced commissioners. Another important aspect of the meeting is the forum it provides for all commissioners to discuss common issues and procedural changes.

Commissioners are also strongly encouraged to observe various proceedings in the court for which they are nominating persons to fill judgeships. Commissioners who have spent little or no time in court gain a far greater understanding of the judge's role and responsibilities when they observe proceedings. There are often great differences in the environment and people with whom a judge interacts in the course of his or her duties, especially at the trial court level where judges rotate among the civil, criminal, juvenile, domestic relations and probate divisions of the court. Even attorney members of the commission can benefit from observing proceedings, if their own experience has been limited to a particular division of the court. At the appellate level, first-hand observation of oral arguments and the opportunity to speak with appellate court judges about the court's decision-making process provide valuable insight into the role of the judge in those courts.

New commissioners are especially encouraged to read this Handbook, attend the meetings and take advantage of opportunities to observe proceedings during their first year on the commission. Review of the articles on merit selection at Appendix 6 is also recommended.