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## THE JUDICIAL INDEPENDENCE THROUGH FAIR APPOINTMENTS ACT

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# THE JUDICIAL INDEPENDENCE THROUGH FAIR APPOINTMENTS ACT

## **Cover Page Footnote**

¶ Norman L. Greene, 2007. Norman L. Greene is a member of the New York bar practicing in New York, N.Y. He is the author of *What Makes A Good Appointive System for the Selection of State Court Judges: The Vision of the Symposium*, 34 FORDHAM URB. L.J. 35 (2007), and organizer of the symposium held on April 7, 2006 at Fordham Law School referenced in that article.

## THE JUDICIAL INDEPENDENCE THROUGH FAIR APPOINTMENTS ACT\*

AS OF FEBRUARY 21, 2007

Minnesota has chosen to select its judges through contested popular elections instead of through an appointment system or a combined appointment and retention election system . . . . If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.<sup>1</sup>

### INTRODUCTION: THE PURPOSE OF THE MODEL

The United States Supreme Court's 2002 decision in *Republican Party of Minnesota v. White*<sup>2</sup> and lower court decisions following it in various states have intensified the debate over alternatives to election, such as appointment of judges. According to these decisions, judicial candidates may state their own personal views on political and legal issues and to some extent personally solicit campaign funds. The cases have raised concerns that judges are committing or giving the appearance of committing themselves to outcomes and compromising their neutrality.

Virtually every state appoints some judges, whether the appointments are of interim judges who are selected to fill unexpired terms of departing judges, initial appointments of all judges, or something in between. A commission-based model of appointment, in which a commission recommends a limited number of candidates for the executive or appointing authority to select, has been the classic appointment model for states for decades. Yet there are many possible variables even for commission-based systems.

The Judicial Independence Through Fair Appointments Act is a model act which provides a merit-based system for selecting a qualified, independent, accountable, and diverse judiciary based on

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1. *Republican Party of Minn. v. White*, 536 U.S. 765, 792 (2002) (O'Connor, J., concurring).

2. 536 U.S. 765 (2002).

close study of existing systems.<sup>3</sup> It provides the entire structure of a judicial selection by appointment system, building on concepts in established commission-based appointment plans and incorporating important refinements. Although the act is designed as a statute, many states may need or wish to convert some or all of it into a constitutional provision in order to increase the permanence of the scheme or because a constitutional amendment is otherwise required. Selected portions may also be enacted separately as rules and regulations governing the process.

### THE SUMMARY OF THE MODEL AND SECTION ANALYSIS

#### The Judicial Nominating Commission and Commissioners

The principal element of the model act is a judicial nominating commission, which is subject to the oversight of a judicial nominating review commission. The mandate of the judicial nominating commission is, among other things, to seek and receive applications from candidates; review their credentials; interview them as appropriate; investigate them through the due diligence process; and propose nominees for the executive to select. The act provides alternatives in which the commission proposes three or five individuals, depending on the preferences of the enacting state.<sup>4</sup>

Judicial nominating commissions are created for each district for the trial courts, for each department or circuit for intermediate appellate courts, and for the highest court, a statewide commission is created.<sup>5</sup> A department or circuit is presumed to be the area served by a single intermediate appellate court, which would include a number of trial courts. The model act takes the position that the selection process should be decentralized through a number of commissions, with local chief executives selecting judges for local courts and with the governor selecting judges in other cases. Decentralization helps ensure that those involved in the judicial selection process are familiar with the area which the court serves. Some states, however, may have a more limited pool of available commissioners or significantly fewer judicial positions to fill than other states and therefore may wish fewer commissions. Alternatives suggested include one judicial nominating commission for all courts of the state or one commission for a department or circuit to

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3. The definitions of judicial independence, accountability, and diversity can themselves be the subject of lengthy discussion.

4. *See infra* Sec. 1.2(d).

5. *See infra* Sec. 2.1(a).

nominate judges for both the mid-level appellate court and trial courts within the department or circuit.<sup>6</sup>

Commissions consist of thirteen members, including seven lawyers and six non-lawyers.<sup>7</sup> This close division recognizes not only the lawyers' special expertise in matters involving the judiciary, but also the non-lawyers' stake in the system as consumers of judicial services. Non-lawyers may also be keen observers of the qualities that may make someone a good judge. Using fewer commissioners may be acceptable without affecting the structure of the model, although using fewer than nine commissioners is not advisable. The terms of judicial nominating commissioners are four years.<sup>8</sup> The model act specifies the method of appointing lawyer and non-lawyer members of the commission.<sup>9</sup> The model seeks to create a non-partisan structure by requiring a balance among political parties, with no more than a simple majority of commissioners belonging to the same party.<sup>10</sup> Commissioners unaligned with any party would not affect the balance. Since judicial selection requires certain knowledge and abilities, judicial nominating commissioners are required to receive training in the performance of their duties and meet certain experience requirements.<sup>11</sup> Among other things, commissioners are expected to attend commission meetings, with automatic termination for poor attendance.<sup>12</sup> Both the commissioners and applicants for judicial office are governed by rules of conduct.

The act recognizes the importance of limiting the appointing authority's actual or perceived control over the judicial nominating commission. Common criticisms are that some commissioners do not exercise independent judgment, but rather respond to the directions of politicians outside the commission (principally the executive) concerning who they should select as nominees. Potential applicants who believe that only an executive's favorites have a chance at appointment may choose not to apply. This defeats the

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6. *See id.*

7. *See infra* Sec. 2.1(b).

8. *See infra* Sec. 2.1(o).

9. *See infra* Sec. 2.1(f)-(g). The judicial nominating commissioners are principally appointed by public officials. The public officials who appoint commissioners vary in part depending on the type of court for which the vacancy exists. The use of fewer commissions pursuant to Section 2.1(a) *infra* or fewer commissioners would require modifying those who are designated to select commissioners pursuant to Sections 2.1(f)-(g) *infra*.

10. *See infra* Sec. 2.1(h).

11. *See infra* Sec. 2.1(c)-(e).

12. *See infra* Sec. 2.1(p).

goal of obtaining the best judicial candidates, harms the image of the selection system, and lessens public support for the appointive process.

The act therefore prohibits the appointing authority from suggesting names to the commission and thus controlling or appearing to control the commission.<sup>13</sup> The penalty for violating the provision regarding communications between the appointing authority and the commission is the inability of the appointing authority to select the judge from the names proposed by the commission, with the power going to the chief judge of the court for which the vacancy exists.<sup>14</sup> Similarly, those who appoint commissioners are precluded from making such suggestions to those they appoint.<sup>15</sup> The model also limits the appointing authority's selection of members of the judicial nominating commission to one lawyer and one non-lawyer on the grounds that the plan should not give the appearance, whether based on perception or fact, of executive control.<sup>16</sup> The executive's principal, if not only function, should be to select from a list of approved nominees. Commissioners are responsible for identifying the most qualified candidates regardless of the likelihood of their appointment by the appointing authority; qualifications, and not political acceptability, are determinative.<sup>17</sup>

### The Selection Process

The model establishes procedures for obtaining an invitation for interviews, conducting interviews, a due diligence stage in which the candidate is investigated, secret ballots and absentee ballots, and voting for and transmitting selected candidates to the appointing authority for further study and action.<sup>18</sup>

A non-exclusive list of qualifications guides commissioners in identifying and nominating judicial candidates.<sup>19</sup> The list shares

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13. *See infra* Sec. 1.2(g).

14. *See infra* Sec. 1.2(i).

15. *See infra* Sec. 1.2(j)-(k).

16. *See infra* Sec. 2.1(f)-(g). Because of the concerns stated above, one may argue that the appointing authority should have no selections to the judicial nominating commission. The model addresses these concerns by limiting the number of selections to the commission by the appointing authority and precluding certain communications between the appointing authority and the commission. The model act has not taken the additional step of barring the appointing authority from making any selections, however. Selection of commissioners by an appointing authority may be eliminated without affecting the structure of the model.

17. *See infra* Sec. 3.1(a)-(d),(f).

18. *See infra* Judicial Nominating Commission Procedures.

19. *See infra* Sec. 3.1(a).

some similarities with those used in some states and models, although its terminology may vary. A refinement is a provision that commissioners may not give undue consideration to the law school attended by the applicant.<sup>20</sup> This responds to concerns that some commissions may be elitist by preferring applicants from certain law schools. Quality, however, is not measured exclusively by easy devices, such as the candidate's law school, class rank, or judicial clerkships as a young lawyer. These early achievements fail to measure the whole person, and a judicial candidate should be considered on his or her full record. In listing various qualifying criteria, the model act also recognizes the significance of the applicant having had prior judicial education.<sup>21</sup>

Diversity in the nominating process is responsive to core American values and essential to building public confidence in the appointive system. The model provides that to the extent practicable, commissioners must reflect the diversity of the jurisdiction.<sup>22</sup> The commission is also to exercise "due regard" for the demographic characteristics of the district for which a judge is to be nominated and, more specifically, diversity of nominees in the broadest sense.<sup>23</sup> Nor are nominees to be predominantly from one area of practice, a problem in various jurisdictions, typically where former public servants of one type or another have an advantage or disadvantage.<sup>24</sup> Although no one segment of the profession should be artificially excluded from the judiciary, no one aspect of the profession should serve disproportionately. The judiciary should reflect the broad range of experience within the legal community.

The model act does not take a position on the confidentiality of the proceedings, except in limited instances. For example, by implication, because public hearings would be part of the reappointment process, some of the process will be open.<sup>25</sup> In addition, the judicial nominating commission is required to report publicly on its work, including the demographic characteristics of the applicants.<sup>26</sup> The model's code of conduct also includes confidentiality provi-

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20. *See infra* Sec. 3.1(c).

21. *See infra* Sec. 3.1(a)(i).

22. *See infra* Sec. 2.1(i).

23. *See infra* Sec. 2.1(i), 3.1(b) (mentioning specific factors for consideration).

24. *See id.*

25. *See infra* Sec. 5.1(c), (h) (public hearing on judge considered for reappointment; commission to prepare and make public a "detailed narrative report for each judge seeking reappointment").

26. *See infra* Sec. 4.1.

sions.<sup>27</sup> Where possible, however, states should consider opportunities to open the selection process to encourage public involvement and trust, where this would not unduly compromise candid exchanges among judicial nominating commissioners, an applicant's need for privacy, the willingness of the public to provide pertinent information (some may do so only if confidentiality is assured), and other competing concerns.

### Judicial Terms of Office

The model act proposes a ten-year term of office for judges at all levels.<sup>28</sup> The recommendation of substantial terms recognizes that attorneys may not give up careers in practice for short-term judicial appointments; also, terms of sufficient magnitude are required to guarantee a reasonable measure of judicial independence. Long terms may be perceived as tilting the plan in favor of judicial independence as opposed to accountability for judicial performance. States may employ other ways to achieve accountability, however, including through various evaluative processes, court administrators, and judicial conduct commissions.

### The Judicial Nominating Review Commission

A judicial nominating review commission oversees the selection process and reviews the performance of the judicial nominating commission and its commissioners. The review commission may terminate or suspend commissioners for violating the rules and provides general oversight.<sup>29</sup> The review commission has access to the records of the nominating commission to perform its functions.<sup>30</sup> Review of the judicial nominating commission process is important to ensure that the commissioners comply with their legislative mandate and the applicable rules and regulations. Although this element of the model act is novel, the built-in review process is consistent with democratic practices of checks and balances.

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27. *See infra* Code of Conduct—Judicial Nominating Commissions and Judicial Nominating Review Commission, Sec. 1.

28. *See infra* Sec. 1.3.

29. *See infra* Sec. 6.1.

30. *See infra* Sec. 6.1(c).



### Reappointment of Judges

The judicial nominating commission reviews applications of judges seeking reappointment after expiration of their terms.<sup>31</sup> Using a commission for reappointment differs from most current state appointive systems, many of which rely on retention elections. With retention elections, a judge runs “against himself or herself,” with the only question on the ballot being whether the judge should be retained. Some jurisdictions, however, already rely on commission-based reappointments. The closest analogue is the District of Columbia reappointment plan. Hawaii and New York also have commission-based reappointment systems for their highest appellate courts.

The New York Court of Appeals process does not adequately protect experienced judges since the incumbent, if reported favorably by the commission, is only listed with other candidates, none of whom has an advantage over the others. The model act presumes that a sitting judge should have an advantage when it comes to reappointment, and the incumbent should be reappointed if his or her performance satisfies the commission following appropriate investigation. Retention elections have many of the failures of elections, including the possibility of special issue campaigns against the incumbent judge, lack of voter knowledge of judicial performance, and limited voter participation. Therefore, the model does not adopt that approach.

The model act directs the commission to gather extensive information on a judge’s performance before deciding on reselection.<sup>32</sup> In order to reach an informed decision, the model provides for a public hearing,<sup>33</sup> personal interview, questionnaires, solicitation of public input, and an observation of the judge in court through unannounced court monitoring.<sup>34</sup> The judicial disciplinary authorities are required to share information on the judge with the judicial nominating commission.<sup>35</sup> Judges rated “well qualified” are auto-

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31. *See infra* Sec. 5.1.

32. *See generally id.*

33. *See infra* Sec. 5.1(c). Although the model does not discuss the public input process in detail, all those who observe judicial conduct (jurors, court personnel, witnesses, attorneys, and the like) must be provided with simple and confidential methods to report their observations. Optimally, attorneys would be mandated reporters of judicial conduct. Retaliatory conduct by the judge who is the subject of the report should be prohibited.

34. *See generally infra* Sec. 5.1(b)-(d).

35. *See infra* Sec. 5.1(g). Various states, such as Arizona and Colorado, employ judicial performance review or evaluation before a judge is reselected, often in the context of retention elections. A state may follow these or other methods of review

matically retained, judges rated “unqualified” are not retained, and judges rated “qualified” are retained at the discretion of the appointing authority.<sup>36</sup> The rating is to be accompanied by a detailed narrative report on the judge which is to be made public.<sup>37</sup> The public has the opportunity for further comment after the issuance of the report so as to permit reconsideration.<sup>38</sup> Given the importance of judicial independence, the model act specifically provides that disagreement with a decision of the judge is not itself grounds for refusing to recommend the judge for reappointment.<sup>39</sup>

### The Alternative of Legislation Confirmation

The model act leaves the need for legislative confirmation of judicial appointments by the appointing authority to the preference of the jurisdiction considering it.<sup>40</sup> Whether a state chooses to require legislative confirmation may depend on local culture and practice. The presence or absence of such confirmation will not disturb the integrity of the structure. In some jurisdictions where there is legislative ratification of appointments, the legislature plays a minor role, although as the federal experience shows, the potential for active legislative involvement remains.

Where a judge is reappointed by the commission following a finding of “well qualified” or rejected by a commission following a finding of “unqualified,” it is anticipated that the legislature will not have a role since in neither case is an appointment “by the appointing authority” involved.<sup>41</sup>

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or evaluation so long as they provide sufficient information on judicial performance to enable a proper and informed decision to be made on reselection.

36. *See infra* Sec. 5.1(h)-(k).

37. *See infra* Sec. 5.1(h).

38. *See id.*

39. *See infra* Sec. 5.1(e), (f).

40. *See infra* Sec. 7.1.

41. *See id.*

2007]            *FAIR JUDICIAL APPOINTMENTS ACT*            21

**THE JUDICIAL INDEPENDENCE THROUGH FAIR  
APPOINTMENTS ACT**

*SECTION 1.1. DECLARATION OF PURPOSE AND  
INTENT*

(a) It is the declared purpose and intent of the legislature by passing this act to find and appoint the best qualified persons available for service on the courts of the State of \_\_\_\_\_; to insulate the judges of the courts from political influence and pressure; to improve the administration of justice; to enhance the prestige of and respect for the courts by eliminating the need for political activities by prospective or actual candidates for judicial office; and to make the courts nonpolitical to the maximum extent possible.

(b) It is the further declared purpose and intent of the legislature to enhance the confidence of the public in the processes by which judges are selected in this state; to create a process open to all qualified persons, each of whom shall consider himself or herself to have a fair opportunity for selection; and to eliminate control and the appearance of control of any single individual or individuals over the judicial nomination process other than the commission created for that purpose and such persons as may be empowered to select the approved nominees following the commission's report on such nominees.

*SECTION 1.2. SELECTION OF JUDGES*

(a) All judges shall be appointed to vacancies from nominees submitted by judicial nominating commissions. Judges shall be appointed to vacancies in county-wide judgeships by [insert name of County chief executive officer, such as county executive] and to municipal judgeships by the mayor and in all other cases by the governor.

(b) A vacancy in a judgeship shall occur upon a judge's death, resignation, retirement, or removal, upon expiration of his or her term, or whenever an increase in the number of judges is authorized.

(c) As soon as a vacancy occurs or is reasonably expected to occur within the next 6 months, the administrative director of the courts shall promptly notify the chair of the appropriate judicial nominating commission, who shall immediately convene the commission.

(d) The judicial nominating commission shall simultaneously submit to the appointing authority and make public a list of 3 nom-

inees who shall be recommended for appointment by the appointing authority, with a report of the nominees' qualifications. In case of more than one vacancy in any such court, the list shall contain at least 2 additional nominees for each vacancy to be filled.

ALTERNATE A. The judicial nominating commission shall simultaneously submit to the appointing authority and make public a list of 5 nominees who shall be recommended for appointment by the appointing authority, with a report of the nominees' qualifications. In case of more than one vacancy in any such court, the list shall contain at least 2 additional nominees for each vacancy to be filled.

(e) Nominees shall be submitted by the judicial nominating commission to the appointing authority, in alphabetical order, within 60 days after the receipt of such notice of vacancy, without indication of preference by the judicial nominating commission.

(f) The appointing authority shall select from the list of nominees a person qualified to fill the vacancy. Such selection shall be made no fewer than 30 nor more than 60 days after the appointing authority's receipt of a list of nominees. If no appointment is made by the appointing authority within such time, the judicial nominating commission shall immediately submit the list and any reports prepared by the commission regarding the persons on the list to the [highest court of the State], which shall make an appointment from the list within 30 days of receipt of the list. Such court may conduct such further interviews or investigations as may be required to select nominees from the list.

(g) Before submission of a list of judicial nominees to the appointing authority, the appointing authority shall not suggest or propose, directly or indirectly, the name of a person either to the commission as a whole or to any commissioner, with the intent to influence the nomination process in favor of or against such person or the selection or rejection of such person.

(h) A commissioner who receives any communication in violation of subsection (g) of this Section 1.2 shall promptly report such communication to the chair of the commission, and the chair shall promptly make such communication public.

(i) Violation of subsection (g) of this Section 1.2 by an appointing authority shall deprive such appointing authority of his or her selection of a nominee for the vacancy for which the commission is meeting. Such selection shall instead be made by the chief judge of the court for which the vacancy exists from the list from which the appointing authority would have otherwise selected.

2007]            *FAIR JUDICIAL APPOINTMENTS ACT*            23

(j) Before submission of a list of judicial nominees to the appointing authority, no person who is empowered to appoint a judicial nominating commissioner shall suggest or propose, directly or indirectly, to any commissioner appointed by such person the name of any person, with the intent to influence the nomination process in favor of or against such person or the selection or rejection of such person.

(k) A communication made in violation of subsection (j) of this Section 1.2 shall preclude the recipient of the communication from further participation in the judicial nominating commission for the vacancy for which the commission is meeting, unless the recipient shall promptly and fully disclose the communication to the chair of the commission.

#### SECTION 1.3. *TERMS OF OFFICE*

(a) The term for each judge appointed to office shall be 10 years. Terms of reappointment shall likewise each be 10 years.

(b) Terms of judges elected or appointed before the effective date of this act shall expire at the end of the term for which they were elected or appointed. The reappointment of such judges shall be governed by this act.

#### SECTION 2.1. *JUDICIAL NOMINATING COMMISSIONS*

(a) In each judicial district, a judicial nominating commission shall be created and empowered to nominate judges for the [trial] courts for that district. In each [appellate department or circuit], a separate judicial nominating commission shall be created and empowered to nominate judges for appellate courts [for that department or circuit]. A statewide judicial nominating commission shall be created and empowered to nominate judges for [the Supreme Court or otherwise named highest court of the state].

ALTERNATE A. In each [appellate department or circuit], a separate judicial nominating commission shall be created and empowered to nominate judges for appellate and trial courts [for that department or circuit]. A statewide judicial nominating commission shall be created and empowered to nominate judges for [the Supreme Court or otherwise named highest court of the state].

ALTERNATE B. A statewide judicial nominating commission shall be created and empowered to nominate judges for the courts of this state.

(b) Each judicial nominating commission shall consist of 13 members: 7 lawyers and 6 non-lawyers. All members shall be residents of the judicial district or circuit [or department] for which

they serve. Members of the statewide commission shall be residents of the state.

(c) Lawyer members of the judicial nominating commissions shall be members of the bar of this state who from knowledge, experience or observation are familiar with the best qualifications and characteristics of judges. Such commissioners shall have at least 5 years experience as former judges, government counsel, corporate counsel, private practitioners or law professors. Actual experience as trial counsel shall not be a requirement for membership on judicial nominating commissions.

(d) Commissioners who are not members of the bar of this state shall be familiar with the attributes that best qualify a person for appointment as a judge, including to the extent practicable, through regular observation or study of the courts or otherwise. Actual participation or involvement in the court system shall not be a prerequisite for service as a nonlawyer member of the judicial nominating commissions.

(e) Each judicial nominating commissioner shall receive training in the performance of his or her duties before their commencement and no less frequently than annually thereafter. The chair of the commission may direct additional training as appropriate.

(f) The lawyer members of judicial nominating commissions shall be appointed by the appointing authority, who shall have one selection; the chief judge of the state, who shall have one selection; for a judge for the highest court of the state, by the president of the state bar, who shall have one selection; for a judge for a circuit court [or department] or for the highest court of the state, by the majority and minority leaders of the state legislature, each of whom shall have one selection; for a judge for a district or circuit court [or department], by the chief judge of the appellate court for the circuit [or department] for which the judge is being selected, who shall have one selection; and for a judge for a district court, by the chief judge of the district court, the majority and minority leaders of the local legislature covering the jurisdiction of the district court, and the president of the local bar association, each of whom shall have one selection. [Alternate or additional selectors to be determined based on locale, such as educational institutions, including law schools, and not-for-profit civic and community organizations, including bar associations.]

(g) The members of the commission who are not members of the bar shall be appointed by the appointing authority, who shall have one selection; the chief judge of the state, who shall have one selec-

2007]

*FAIR JUDICIAL APPOINTMENTS ACT*

25

tion; for a judge for the highest court of the state or for a circuit court [or department], by the majority and minority leaders of the state legislature, each of whom shall have one selection; for a judge for a district or circuit court [or department], by the chief judge of the appellate court for the circuit [or department] for which the judge is being selected, who shall have one selection; and for a judge for a district court, by the chief judge of the district court for which the judge is being selected, who shall have one selection, and by the majority and minority leaders of the local legislature covering the jurisdiction of the district court, each of whom shall have one selection. [Alternate or additional selectors to be determined based on locale, such as educational institutions, including law schools, and not-for-profit civic and community organizations, including bar associations.]

(h) No more than a simple majority of the commissioners appointed shall belong to the same political party.

(i) To the extent practicable, the commissioners shall reflect the diversity of the jurisdiction for which the judicial nominating commission shall be held, including diversity of race and ethnicity. In addition, the commissioners shall reflect the diversity of gender and geography (including both urban and rural); and among commissioners who also are members of the bar, practice areas and types and sizes of practice. Persons appointing commissioners shall confer with each other on their appointments to the commission in an effort to enhance diversity.

(j) A person who holds elected municipal, state or federal office, holds office in or takes an active part in the management of the affairs of a political party, a registered lobbyist, or the immediate families of any such persons, may not be appointed as, or, if already appointed, remain as a member of a judicial nominating commission.

(k) No member of a judicial nominating commission shall be a candidate for nomination or election to public office while a member of the commission.

(l) No member of a judicial nominating commission shall be eligible for nomination as a judge until 2 years after his or her completion of service on the judicial nominating commission.

(m) No more than one person from the same company, firm or office may serve on the same judicial nominating commission.

(n) Each judicial nominating commission shall have a chair who shall be selected by majority vote of all the members of the com-

mission. The term of a chair shall be 2 years unless his or her remaining term as a commissioner expires sooner.

(o) The term of each member of the judicial nominating commission shall be 4 years. Four of the initially appointed commissioners shall be appointed for 2 years, four for 3 years, and five for 4 years. The initial term of all members shall commence on January 1, 20\_\_\_\_. No member of the judicial nominating commission shall serve for more than 2 complete consecutive terms.

(p) Commissioners are expected to attend all commission meetings. Failure by a commissioner to attend at least half of commission meetings held within a 12-month period shall result in automatic termination of the commissioner's term, and another member shall be promptly appointed by the person or entity which initially appointed the terminated member.

(q) The commission shall be provided with staff to assist in the performance of commission duties. The chair may appoint an executive director of the commission.

(r) Commissioners shall not receive compensation for their services but shall be reimbursed for their reasonable expenses incurred in the course of performing their duties for the commission.

### SECTION 3.1. JUDICIAL NOMINEES

(a) Persons shall be recommended by judicial nominating commissions for appointment as judges who by their character, background, temperament, professional aptitude, experience and commitment to equal justice under law are deemed by the commission to be qualified to fill the vacancy. Qualifying criteria shall include the following:

(i) Recognized intellectual capacity, sound personal and professional judgment, analytical and writing ability, and knowledge of the law and scholarship, including judicial education.

(ii) A general reputation in the community for honesty, industry, diligence and ethical conduct.

(iii) Courtesy, civility, excellent temperament, open-mindedness, compassion, freedom from bias, and the ability to decide issues according to law.

(iv) A commitment to equal justice under law and personal service to the law.

(b) The judicial nominating commission shall give due regard to diversity in the judiciary, including to the factors set forth in section 2.1(i) of this Act, in recommending nominees for appoint-



ments as judges and shall seek out members of diverse backgrounds to apply as nominees.

(c) Each judicial nominee must be a member of the bar of this state and a graduate of an accredited law school. The commission shall not otherwise give consideration to the law school attended in determining the qualifications of the nominee.

(d) Each applicant for a court vacancy shall have been admitted to the bar for at least 10 years by the time of his or her appointment, at least 5 years of which consist of experience relevant to the courts as a government counsel, corporate counsel, private practitioner, law professor, or judge.

ALTERNATE A. Each applicant for a trial court vacancy shall have been admitted to the bar for at least 10 years by the time of his or her appointment, at least 5 years of which consist of experience relevant to the courts as a government counsel, corporate counsel, private practitioner, law professor, or judge. Each applicant to an appellate court shall have been admitted to the bar for at least 15 years, at least 10 years of which consist of such experience.

(e) The judicial nominating commission shall not ask an applicant whether he or she belongs to a political party, no applicant may disclose this fact to the commission, and the commission may not consider any such information that it has or receives in connection with his or her application.

(f) The judicial nominating commission may not consider the likelihood of the applicant's appointment by the appointing authority in connection with his or her application.

(g) Judicial nominations shall be submitted by the judicial nominating commission to the appointing authority only upon concurrence of no fewer than 8 members of the commission.

#### SECTION 4.1. *REPORTS*

(a) The commission shall compile, maintain, and make publicly available annually a report which shall describe the work of the commission over the prior year, including the number of applicants to the commission for each vacancy, the number of interviews provided to applicants by the commission, the numbers of persons recommended for nomination, and the number of vacancies filled. The report shall also describe in general detail the demographic characteristics of the applicants and the numbers and percentages of applicants who are nominated in each demographic group.

SECTION 5.1. *REAPPOINTMENT PROCEDURES FOR JUDGES*

(a) A judge seeking reappointment shall notify the judicial nominating commission no fewer than 6 months before the expiration of his or her term of his or her wish to be reappointed.

(b) The judicial nominating commission shall make public the names of each judge being considered for reappointment and solicit comment on the reappointment from the public and organizations regularly involved in the evaluation of judicial candidates, including bar associations and other civic groups.

(c) The judicial nominating commission shall hold a public hearing on each judge being considered for reappointment. The commission shall advertise the hearing in a manner reasonably calculated to inform the public of the hearing sufficiently in advance of the date, including by publication on its website and in major newspapers, so as to maximize the likelihood of public participation.

(d) The judicial nominating commission shall conduct a personal interview with the judge seeking reappointment. The commission shall also prepare and solicit questionnaires with respect to the judge to be completed by, among others, attorneys, judges, jurors, litigants, probation officers, social services case workers, crime victims, court personnel, law enforcement officers, court monitors, and others with knowledge of the judge; and a self-evaluation form shall be completed by the judge and submitted to the commission. The commission also shall observe the demeanor of the judge in court through unannounced court monitoring or other appropriate observation.

(e) The standards for determining qualifications to serve another term shall include the same as those used to determine whether a person shall be recommended to fill a vacancy, but with particular reference to demonstrated judicial temperament; knowledge and understanding of substantive, procedural and evidentiary law; impartiality; communication skills; preparation; attentiveness; administrative skills; punctuality; working relationships with participants in the judicial process; and service to the profession and the public.

(f) Public or personal disagreements by the judicial nominating commission or any commissioner with any decisions by the judge being considered for reappointment shall not be grounds for refusal to recommend reappointing the judge; however, a judge's decisions may be considered in determining whether the judge meets the standards set forth in subsection (e) of this Section 5.1.

(g) The judicial disciplinary commission shall make available to the judicial nominating commission all records relating to a judge being considered for reappointment. Complaints or pending proceedings regarding a judge or sanctions or discipline of the judge by a judicial disciplinary commission shall not by themselves disqualify the judge for recommendation for reappointment but shall be considered by the judicial nominating commission and may form a basis for a decision not to recommend reappointment. For purposes of this section, “judicial disciplinary commission” shall also include the office of court administration.

(h) The judicial nominating commission shall prepare and make public a detailed narrative report for each judge seeking reappointment, including a recommendation of “qualified,” “unqualified” or “well qualified” and the reasons for the recommendation. The recommendation shall be effective 45 days after issuance of the narrative report. During such 45-day period, the commission shall consider any further public comment that it shall receive on such recommendation.

(i) Upon the receipt of material information bearing on the recommendation within such 45-day period, the commission may revise or withdraw such recommendation and resume deliberations. Information received beyond the 45-day period may be submitted to the judicial discipline commission for further consideration.

(j) Judges rated “unqualified” may apply to the judicial nominating commission for reconsideration of their rating within 45 days of the issuance of the rating. Absent reconsideration by the commission and change of rating, the term of a judge rated “unqualified” shall expire as provided by law.

(k) Judges rated “well qualified” shall be automatically reappointed for an additional term. Judges rated “qualified” may be reappointed in the reasonable discretion of the appointing authority to an additional term after the end of the 45-day period but no later than 60 days after the issuance of the rating. The term of a judge rated “qualified” and not reappointed by the appointing authority shall expire as provided by law.

#### *SECTION 6.1. JUDICIAL NOMINATING REVIEW COMMISSION*

(a) The judicial nominating review commission shall review the performance of the judicial nominating commissions and the conduct and performance of judicial nominating commissioners for compliance with this act and any rule promulgated under it. Such

review may be conducted on the judicial nominating review commission's own initiative or upon receipt of a request to do so.

(b) The judicial nominating review commission may suspend or terminate any judicial nominating commissioner for violation of the terms of this act or any rule promulgated under it. A commissioner terminated under this section shall be replaced by the person or entity which initially appointed him or her within 30 days of termination.

(c) The judicial nominating review commission shall have access to all records of the judicial nominating commissions for purposes of performing its functions.

(d) The judicial nominating review commission shall consist of 7 members who shall be appointed as follows: (i) one by the governor, (ii) one by the chief judge, (iii) one each by the majority and minority leaders of the legislature, and (iv) one by the president of the state bar.

(e) The criteria for appointment of members of the judicial nominating review commission shall be the same as the criteria for appointment of members of judicial nominating commissions. Four members of the judicial nominating review commission shall be members of the bar of this state, and three members shall not be members of the bar of this state.

(f) The term of each member of the judicial nominating review commission shall be 4 years. The terms of the initially appointed members shall be as follows: two members for 2 years, two members for 3 years, and three members for 4 years. The initial term of all members shall commence on January 1, 20\_\_\_\_. No member of the judicial nominating review commission shall serve for more than two complete consecutive terms. A vacancy in the membership of a judicial nominating review commission shall be promptly filled by the person or entity who appointed the person whose seat became vacant.

(g) The chair of the judicial nominating review commission shall be elected by majority vote of the members of the judicial nominating review commission. The term of a chair shall be 2 years.

(h) The commission shall be provided with staff to assist in the performance of commission duties.

(i) Commissioners shall not receive compensation for their services but shall be reimbursed for their reasonable expenses incurred in the course of performing their duties for the commission.

## [SECTION 7.1. SENATE CONFIRMATION

Appointments of judicial nominees and reappointment of judges by the appointing authority shall be subject to confirmation by the senate of this state.]

**CODE OF CONDUCT—JUDICIAL NOMINATING COMMISSIONS AND  
JUDICIAL NOMINATING REVIEW COMMISSION**

1. *Confidentiality*: Except as otherwise may be necessary to conduct due diligence of an applicant's qualifications, each commissioner shall keep confidential all information received by the commission concerning each applicant. The commissioners may disclose information to other members of the commission and investigators employed on behalf of the commission for purposes of due diligence. Such investigators shall also be under the same obligation of confidentiality. No information bearing on the commission's consideration of an applicant may be directly or indirectly disclosed by any commissioner to any person other than another commissioner or investigator for the commission. The commission shall refrain from disclosing the fact of an application to a current employer of an applicant.

2. *Ex Parte Communications*: Except as may be required during the conduct of due diligence investigations, and excluding communications with the chair, all communications between commissioners concerning applicants shall occur in the course of commission meetings. Commissioners may participate in telephone calls that provide material information regarding the fitness of any applicant for judicial office.

3. *Conflict of Interest*:

(a) Commissioners shall avoid self-promotion in the course of their service and shall not seek any advantage in threatened or pending litigation or in professional or personal relationships related to their service or membership on the commission.

(b) No commissioner or his or her immediate family may accept a gift or anything of value from any applicant or the immediate family members of any applicant, unless the commissioner has a bona fide friendship with the applicant and has recused himself or herself from participation in consideration of the applicant.

4. *Political Contributions*: No commissioner shall solicit other persons to make political contributions on behalf of any candidate for elected office.

*5. Impartiality:*

(a) No commissioner shall conduct himself or herself in a manner that reflects discredit upon the judicial selection process or discloses partisanship or partiality in the consideration of applicants.

(b) Each commissioner shall disclose to the commission all current or past personal and business relationships with an applicant before the commission.

(c) No commissioner shall vote or otherwise participate in the consideration of (i) any applicant who is or has been a business associate or law partner of the commissioner, and (ii) any other applicant whom the commissioner reasonably believes he or she is incapable of considering impartially.

(d) Commissioners shall not give preferential assistance to any applicant to the exclusion of any other applicant.

(e) After the commission certifies the names of qualified applicants to the appointing authority, no commissioner shall attempt, directly or indirectly, to influence the decision of the appointing authority with respect to such persons.

(f) No attempt shall be made to rank applicants, to comment publicly on, or to disclose any preference of the commission concerning applicants whom the commission has certified.

*6. Code of Conduct for Applicants for Judicial Office:*

(a) Applicants for judicial office shall not communicate and shall not cause or encourage other persons to communicate with any commissioner (including the commissioner's family members, law partners or business associates) in support of their applications following their submission, except as stated in this Paragraph 6.

(b) Applicants who have been offered an interview with the commission are permitted to invite persons with actual knowledge of their abilities to write letters to commissioners in support of their applications.

(c) Applicants may return telephone calls, faxes, emails or other communications initiated by a commissioner.

*7. Political Contributions to Appointing Authority Prohibited:* No person applying for appointment as a judge shall make any political contribution directly or indirectly to, or solicit any such contribution for, any appointing authority while his or her application is pending.

**JUDICIAL NOMINATING COMMISSION PROCEDURES**

1. *Staff Review:* The commission is responsible for reviewing all applications for conformity with the application procedures. All

applications shall be acknowledged in writing. Applications by persons failing to meet minimum qualifications shall be returned to the applicant with an explanatory letter and invitation to reapply after minimum qualifications have been satisfied.

2. *Invitation for Interviews:* The commission shall determine who shall be invited to appear before the commission for an interview. An applicant must receive at least 5 votes from the commission to be invited for an interview. The commission shall maintain a list of the applicants accepted for an interview and not accepted for an interview. Applicants not initially invited for an interview may subsequently be invited for an interview upon the receipt of sufficient votes. A decision to invite or not invite an applicant for an interview may only be based upon permissible criteria set forth in Section 3.1 of the Act.

3. *Interview Procedure:* Any commissioner may ask questions of an applicant which in the commissioner's judgment will assist in performing his or her function. All questions and comments to applicants shall be courteous, fair, and respectful. No commissioner may inquire into particular decisions that an applicant has made or will be likely to make as a judge or concerning the merits of any actual case, subject to Section 5.1(f) of the Act. Applicants may be asked questions concerning their administrative capabilities and decisions. Applicants may be invited for additional interviews at the discretion of the commission.

4. *Due Diligence:* After an interview, the commission shall decide whether to proceed with due diligence inquiries regarding each applicant. An applicant shall require at least 7 affirmative votes from the commission to proceed to the due diligence stage. There is no minimum or maximum number of applicants from those pending who may be subject to due diligence review. The chair of the commission shall assign 2 or more commissioners to undertake due diligence responsibility for a particular applicant and to report on the results of their inquiry at the next scheduled meeting of the commission or such further meeting as the chair may designate. All due diligence research shall use a form provided by the commission to ensure uniform inquiry and basis for dissemination of due diligence information to the commission.

5. *Deliberations:* After completion of the due diligence process and upon consideration of information and evidence regarding applicants obtained during due diligence or otherwise, the commission shall deliberate and discuss the relative strengths and

weaknesses of applicants and may consider the particular needs of courts for which actual or mandated vacancies exist.

6. *Ballot:*

(a) Commissioners shall vote by secret ballot.

(b) Any commissioner who the chair determines is unable for good cause to be present in person to cast his or her votes may vote by absentee ballot by giving, faxing or mailing his or her completed and signed ballot form to the chair in advance of the vote, provided that such commissioner shall have reviewed the qualifications of the applicant, participated in deliberations concerning the applicant, and obtained all relevant information concerning the applicant available to other commissioners.

(c) Proxy votes are prohibited.

7. *Voting for Recommendation for Nomination:* Voting for recommendation for nomination shall proceed in the same manner as voting for interview, except:

(i) No applicant shall be recommended for nomination without receiving at least 8 affirmative votes of the commission.

(ii) If fewer than the required minimum number of applicants are selected for recommendation for nomination, the commission shall not transmit the names of the applicants to the appointing authority until supplemented by additional names recommended for nomination to a particular vacancy.

8. *Transmission to Appointing Authority:* The list of persons recommended for nomination for each vacancy shall be transmitted by the commission to the appointing authority for review, interview or such further investigation as the appointing authority may undertake. The appointing authority may undertake further background and due diligence investigation of any person recommended for nomination and may require the applicant to provide releases or further documentation in support of such investigation.