
MODEL JUDICIAL SELECTION PROVISIONS

Revised 2008



Model Judicial Selection Provisions
Revised 1994, 2008

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DEDICATION

These provisions are dedicated to the late Judge John L. Hill, Jr., who worked tirelessly toward judicial selection reform in his home state of Texas and who provided the inspiration and funding to make this revision possible. Judge Hill was firmly committed to the principle that the selection of judges should be based upon qualifications and experience rather than politics and money.

Judge Hill is the only person in Texas history to serve as Secretary of State, Attorney General, and Chief Justice of the Supreme Court. He resigned from the Court in 1988 to campaign for changes in the method for selecting Texas' judges.

Judge Hill served on the AJS Board of Directors and as President of the Texas State Chapter of AJS. He was also the recipient of the AJS Herbert Harley Award, an award given to individuals whose outstanding efforts result in substantial, long-term improvement to the state justice system.

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PREFACE TO THE 2008 REVISION

First compiled in 1985 and revised in 1994, the American Judicature Society's Model Judicial Selection Provisions offer exemplary language for establishing judicial nomination and evaluation processes of the highest quality. In early 2007, with the guidance of AJS staff, an outstanding advisory committee of members of the AJS Board of Directors began the task of updating the model provisions. The 2008 revisions represent American Judicature Society policy as to the "best practices" in selecting, retaining, and evaluating judges.

While earlier versions of the model provisions offered a variety of alternatives regarding the role and composition of judicial nominating and evaluation commissions, this version limits the availability of alternative provisions to provide for the strongest possible processes. Earlier versions also offered language for establishing judicial nominating commissions by constitutional provision, or by statute or executive order. With this version, in order to create a nomination process with the greatest stability and legitimacy, model constitutional or statutory language is provided in Part I and model language for an executive order process is offered in the Appendix.

New provisions have been added to require that nominating commissions establish written procedural rules and that members participate periodically in education and training programs. Provisions encouraging diversity among nominating and evaluation commission members, and in the recruitment of judicial applicants, have been strengthened.

New commentary accompanying these provisions addresses current concerns faced by judicial nominating commissions, such as the importance of striking an appropriate balance between providing transparency in the screening process and protecting applicant privacy, and relevant considerations as to whether nominating commissions should have a majority of lawyer or non-lawyer members.

The most significant additions are found in Parts III and IV regarding judicial performance evaluation. Establishing provisions and procedural rules for judicial performance evaluation, and accompanying commentary, have been expanded substantially with these revisions.

These provisions reference complementary AJS materials where appropriate, including the *Handbook for Judicial Nominating Commissioners* and *Judicial Merit Selection: Current Status*. These resources and others are available online on AJS' Judicial Selection in the States website at www.judicialselection.us. Links to state

constitutional and statutory provisions and court rules regarding judicial nomination and evaluation are also available on the website.

This revision would not have been possible without the committed efforts of the advisory committee:

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An electronic version of the *Model Judicial Selection Provisions* is available for download at www.judicialselection.us.

Malia Reddick

AJS Director of Research and Programs

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I.

ESTABLISHING A COMMISSION PLAN FOR APPOINTMENT TO OFFICE

Commentary

These provisions provide for the establishment of a merit selection process by constitution or statute. In several jurisdictions, merit plans have been established by executive order, but the stability of a constitutional or statutory system is preferable.

Section ____ . Commission-Based Appointment to Judicial Office

Section ____ .01. Nomination and Appointment.

The governor shall fill any vacancy in an office of ____ court justice or ____ court judge by appointing one person nominated by the judicial nominating commission [for the district/circuit where the vacancy occurs]. The judicial nominating commission shall nominate no more than five nor less than two best qualified persons for each vacancy. If the governor fails to fill a vacancy within 30 days from the day the names are submitted, the [chief justice] [presiding judge for that district/circuit] shall appoint one of the nominated persons.

Commentary

Each judicial vacancy should be treated individually to the greatest extent possible. If the positions to be filled require specialized knowledge and legal experience (i.e. family law, juvenile matters), individual consideration of applicants for each vacancy becomes even more important. Although the number of names submitted to the governor need not be capped at five, the number should be sufficiently low that the commission nominates only the best qualified candidates. Five names appears to be an appropriate maximum because it gives, and limits the governor to, the best qualified candidates. Commissions in less populated areas may have difficulty finding five best qualified nominees and should therefore be allowed the flexibility to submit fewer names. In most states, the names submitted to the governor are listed in alphabetical order to avoid any indication of a commission's preference. Thirty days is allowed as a reasonable amount of time for the governor to conduct an investigation of the nominees. In the event that the governor fails to act within that reasonable time period, a judicial officer may appoint from the commission's list. This provision ensures that the final appointment will be made within

a reasonable time and from the list of nominees. This separation of functions allows for independent and nonpartisan evaluations and nominations by a responsible commission and final appointment by a governor who is politically accountable. If necessary, Section __.01 may be adapted to allow for filling midterm vacancies. For information on how merit-plan jurisdictions deal with these variables, see Tables 2 and 3, *Judicial Merit Selection: Current Status* (AJS: 2008), at http://www.judicialselection.us/judicial_selection_materials/. For example, only five states permit as many as six or seven nominees; the great majority require between two and five names. The majority of merit-plan states specify that the list be submitted in alphabetical order.

Section __.02. Judicial Nominating Commission.

[The] [Each] judicial nominating commission shall consist of seven members. Four attorney members shall be selected for six-year terms by the bar of the [state] [judicial district/circuit], except as provided by Section __.03. Three lay members shall be appointed [from among the residents of the district/circuit] for six-year terms, except as provided in Section __.03, by the governor. [The] [Each] commission shall choose one of its members to serve as chair for a term of three years. Appointments and elections to the commission[s] shall be made with due consideration to geographic representation and to ensure that no more than a simple majority of commissioners are of the same political party. All appointing authorities shall make reasonable efforts to ensure that the commission substantially reflects the diversity of the jurisdiction (e.g., racial, ethnic, gender, and other diversity). Vacancies shall be filled for an unexpired term in like manner. No member of [the] [a] nominating commission may hold any other office under the United States, the State, or other governmental entity for which monetary compensation is received. No member shall be eligible for appointment to a state judicial office so long as he or she is a commission member and for [four] [three] years thereafter.

Commentary

In a democratic society it is important that public bodies such as judicial nominating commissions are broadly representative of the communities they serve. Care should be taken to ensure that the composition of the commission is reflective of the geographic and demographic makeup of the state or district and that neither political party has more than a simple majority of commission members. A balanced commission will include attorneys who can advise on the needs of the court and the professional qualifications of applicants. Lay members represent the public and have useful links to the community when screening and investigating applicants, and their non-legal perspective lends the process credibility and legitimacy in the eyes of the public. For these reasons, some jurisdictions have opted for a majority of lay members on the commission. If a judge is a commission member, s/he should have limited power so as to avoid exercising undue influence over other commission members. A method for selecting the attorney members is not specified here since bar organizations vary significantly from state to state. Many

states hold elections to select the attorney members, while in other states bar leaders make the appointments. Members should serve for a period long enough to enable them to develop selection skills. No member of a commission should seek judicial office until a sufficient amount of time has passed to ensure a commission's objectivity and preserve public confidence. Large jurisdictions or those with many vacancies to fill each year may want to expand the number of commissioners to nine in order to facilitate the commission's work of recruiting, screening, and investigating applicants. *Judicial Merit Selection: Current Status*, Table 1, at http://www.judicialselection.us/judicial_selection_materials/, details commission composition in jurisdictions with commission-based appointment of judges.

Section __.03. Terms of Initial Commission Members.

The initial members of [the] [each] judicial nominating commission shall serve for terms as follows: one lay member and one attorney member for two years, one lay member and one attorney member for four years, and one lay member and two attorney members for six years.

Commentary

Commissioners' terms are staggered to balance the new perspectives of incoming members with the expertise and experience of continuing members. Staggered terms also help deter the development of blocs in the commission; such blocs may subvert the goal of nominating only the best qualified candidates.

Section __.04. Reimbursement, Compensation, and Administrative Assistance.

(a) Members of [the] [each] judicial nominating commission shall be reimbursed for all expenses incurred in carrying out their official duties.

(b) Compensation also may be prescribed by law.

(c) All resources necessary to carrying out [the] [each] commission's official duties shall be provided, including staff, equipment, and materials.

Commentary

Offering compensation could help increase commission diversity, as it will provide an incentive to encourage those with lower incomes, those who must travel a significant distance, and/or those who would otherwise be reluctant to serve. To foster an effective commission, essential services must be made available. These services should include staff support to coordinate commission travel, meetings, conference calls, and candidate interviews; office services; and any other necessary support so that commissions receive timely assistance. In some jurisdictions, the state or local court administrator provides this support; in others, the commission chair's administrative assistant coordinates commission activities.

Section __.05. Powers of the Judicial Nominating Commission.

[The] [Each] judicial nominating commission shall have the power to adopt written rules to formalize and standardize its procedures for selecting the best qualified nominees for judicial office.

Commentary

The benefits of standard, written procedures are many. Written rules guide commissioners and applicants. They help ensure that all applications are handled similarly, and reassure the public that the process is fair and will withstand scrutiny. Written rules governing commissioner ethics have been adopted by a number of states. Examples include specific provisions requiring disclosure of personal, business, or professional relationships with applicants and commissioner recusal in instances of close relationships; impartiality in selecting nominees; and adherence to commission confidentiality requirements. Alaska, Idaho, Missouri, Nebraska, and Rhode Island require new commissioners to take an oath of office. Additionally, Florida, Hawaii, and Tennessee have adopted specific ethical guidelines. Many other states have adopted rules regarding criteria to be used in evaluating applicants, investigating and interviewing them, and voting for the final nominees, as well as other commission procedures. A number of states post their written rules on state court websites. Rules may also be laid out in statutory language or in a governor's executive order. For details about various commissions' written procedural and ethical rules, see the relevant chapters on these topics in the *Handbook for Judicial Nominating Commissioners* (AJS: 2004) at http://www.judicialselection.us/judicial_selection_materials/.

Alternative retention provisions:

Section __.06. Retention Elections.

Any judge who seeks additional terms for the same judicial office shall be retained in office by vote of the electorate. The retention election shall be nonpartisan, shall require the affirmative vote of a majority of those voting on the question to retain the judge, and shall be coupled with a judicial performance evaluation program that will provide information to voters in retention elections. (See Section __.07 below.)

Commentary

Only one state, New Mexico, requires a supermajority of 57% of votes cast to retain a "merit-selected" judge in office. The nonpartisan court plan, or merit selection, is designed to initially select the best qualified persons for judgeships, and then provide appropriate public accountability through uncontested retention elections. Because of the increasing involvement of interest groups that oppose judges in retention elections and threaten their decision-making independence, a simple affirmative majority of votes cast is designed to safeguard that independence.

Section __.06. Retention by Reappointment.

Any judge who seeks additional terms for the same judicial office shall be retained in office by a finding of the appointing authority that the judge has served competently and with integrity.

Commentary:

The competence of all judges should be periodically reviewed, although methods of retention may vary. In some jurisdictions it may be preferable to hold retention elections, in others to allow the appointing authority (usually the governor) to make the retention decision. Regardless of the form it takes, judicial retention should be designed to ensure that only qualified judges remain on the bench. A judicial performance evaluation program (see Section __.07) may be implemented to inform the reappointing authority's decision.

Section __.07. Retention Evaluation of Justices and Judges.

The [supreme court] [judicial council] shall establish, after public hearings, a process for evaluating judicial performance for all justices and judges who file a declaration to be retained in office, and shall provide information gathered in the evaluation process [to the public at a time reasonably prior to the election, but in no event less than 60 days before the election] [to the reappointing authority]. The rules governing the evaluation process shall include written performance criteria and call for performance reviews that survey opinions of persons who have knowledge of the justice's or judge's performance. The public shall have a full and fair opportunity to participate in the evaluation process.

II.

IMPLEMENTING A COMMISSION PLAN FOR APPOINTMENT TO OFFICE

Rule ____. JUDICIAL NOMINATING COMMISSION

Rule ____.01. **Written rules.**

[The] [Each] commission shall adopt written rules that formalize and standardize all operating procedures and ethical practices.

Commentary

If the commission does not have written ethical and procedural rules and explicit, measurable selection criteria, commissioners should develop and adopt them. The use of written, uniform rules reassures the public and potential applicants that the process is designed to treat all applicants equally and to nominate the best qualified persons. A copy of the rules should be given to all applicants and made available to the public on request, by posting on a court website, distributing through the media, or disseminating in a manner best suited to the jurisdiction. The commission rules should explicitly address, for example, situations that pose a conflict of interest to a commissioner, such as when a business or law partner or a close relative applies for a judgeship. Commission rules should also clarify the confidentiality of commission proceedings such as deliberations and voting. For detailed instruction on commission ethics and examples of ethics provisions adopted by various commissions across the country, see Chapter 1: Ethics, in the *Handbook for Judicial Nominating Commissioners* at http://www.judicialselection.us/judicial_selection_materials. Subsequent chapters address the importance of the organizational meeting, measurable evaluative criteria, screening and investigation of applicants, interviewing candidates, voting for the nominees, and submitting the names to the appointing authority.

Rule ____.02. **Vacancy.**

The commission shall meet and submit a list of no more than five nor less than two persons best qualified for the judicial office to the governor within 60 days of the occurrence of a vacancy.

Commentary

Commissions in most jurisdictions submit between two and five names to the appointing authority. For a comparative overview, see *Judicial Merit Selection: Current Status*, Table 3, at http://www.judicialselection.us/judicial_selection_materials/.

Rule __.03. Quorum.

The commission cannot act unless a quorum exists. A quorum consists of a majority of the commission plus one.

Commentary

In light of the importance of the nominating commission's role in judicial selection, more than a simple majority of commission members should participate in the commission's deliberations and decision making.

Rule __.04. Chair.

The chair shall convene and preside at all meetings. When the chair is absent, the commission shall choose a member to act as temporary chair.

Commentary

The role of the chair is to call commission meetings, keep commission members notified of commission business, act as a spokesperson for the commission, monitor commission activities, and ensure that all commissioners and applicants abide by commission rules.

Rule __.05. Open meetings.

(a) All organizational meetings of the judicial nominating commission shall be open to the public. An "organizational meeting" is an initial meeting to discuss the commission's procedures and requirements for the vacancy. The commission shall make available copies of its written rules. A notice outlining the topics to be discussed should be given to the public 72 hours prior to the meeting. Public participation should be encouraged at each organizational meeting.

(b) All final deliberations of the judicial nominating commission shall be secret and confidential.

(c) The confidentiality of other proceedings of the judicial nominating commission shall be determined by commission rule.

Commentary

Among states that use judicial nominating commissions, what is treated as confidential and what is made public (applications, interviews, deliberations, voting) varies greatly. For more information on state practices, see *Judicial Merit Selection: Current Status*, Table 4, at http://www.judicialselection.us/judicial_selection_materials/. Finding the appropriate balance between preserving the privacy of judicial applicants and providing transparency in the screening process is one of the greatest challenges that nominating commissions face. Applicants should be protected from public scrutiny regarding their private lives and from public embarrassment that could result from failure to receive a nomination. At the same time, the public should have sufficient knowledge of the nominating process to maintain confidence in that process. Commission proceedings should be as open as possible. However, the final deliberations and selection of nominees should remain confi-

dential to encourage free and open discussion of the candidates' qualifications. To preserve confidentiality of these proceedings, some states may need to exempt the final deliberations from the state Open Meetings Act.

Rule __.06. Publicity.

When a judicial vacancy occurs or when it is known that a vacancy will occur at a definite date, the chair shall publicize the vacancy and solicit the submission of names of qualified individuals by press release to the media; notice to state, local, women, and minority bar associations; and posting in the courthouse[s] of the [state] [district] [circuit].

Commentary

These requirements are minimal and should be supplemented with active recruitment techniques. Special effort should be made to circulate the notice of vacancy to women and minority bar associations and organizations of public-sector attorneys.

Rule __.07. Recruiting applicants.

Commissioners shall recruit qualified individuals to apply for judicial appointment.

Commentary

If the commission reflects the geographic and demographic makeup of the jurisdiction, its members will have links to various communities. Therefore, in a further effort to broaden and diversify the applicant pool, commissioners should seek out and encourage applications from highly qualified individuals who might not actively seek a judicial appointment. See Chapter 4: Notice of Vacancy and Recruitment, in the *Handbook for Judicial Nominating Commissioners* at http://www.judicialselection.us/judicial_selection_materials/. However, it is imperative that commissioners indicate to recruited applicants that they are soliciting applicants on behalf of the entire commission, and that the recruited applicant will be subject to the same evaluative scrutiny as other applicants.

Rule __.08. Submitting names of nominees to the appointing authority.

(a) The names of nominees shall be submitted to the appointing authority in alphabetical order.

(b) A memorandum may accompany the list of nominees and may state facts concerning each of the nominees listed.

(c) Upon submission of the names to the appointing authority, the appointing authority shall make the names public and public comment shall be encouraged.

Commentary

Once the names of nominees are submitted to the appointing authority, the commission may provide additional information only on request of the appointing authority. The commission's written rules should address how the commission

responds to any post-nomination communications from the appointing authority. If the commission would like to provide supplemental background information on the nominees, it may do so in a memo without indicating any commission preference. A substantial majority of states also allow for public comment at this point in the selection process. This is the point at which public preferences are appropriately voiced. By providing the opportunity for public participation, the appointing authority also fosters public confidence in the final appointment.

Rule __.09. Candidacy and selection of commission members.

(a) Any individual wishing to serve on the judicial nominating commission can declare his or her candidacy as follows:

Any person may be considered for an attorney position by declaring his or her candidacy in writing to the __ at __, if that person has been a resident of this state for 3 years and is licensed to practice law in this state.

Any person may be considered for a lay position by declaring his or her candidacy in writing to the governor's office at __, if that person has been a resident of this state for 3 years.

(b) Declarations of candidacy must be submitted within 30 days after publication of notice of the vacancy and should be accompanied by descriptions of the candidates' qualifications for service on the commission.

(c) A commission member's term shall commence on __, the day of appointment. A commissioner may remain on the commission until his/her replacement has actually been appointed.

Commentary

The process for declaring an interest in serving on the judicial nominating commission should be open and accessible. A residency requirement of three years' duration has been included to ensure that commissioners have knowledge of the state and the community.

For those states using retention elections add:

Rule __.10. Judicial retention ballot.

A separate nonpartisan judicial ballot shall be designed for each judicial district in which a justice or judge is seeking an additional term. The ballot shall be divided into __ parts corresponding to the court to which the candidate is seeking to be retained. Within each part the ballot shall read:

“Shall __ be retained as [justice] [judge] of the __ court for __ years?
 __Yes __No”

Rule __.11. Commissioner education.

Every [two] [three] years, the [commission chair] [state court administrator] shall conduct an educational program for commissioners in which the mission of the judicial nominating commission[s] and [its] [their] policies and procedures are thoroughly reviewed and discussed.

Commentary

It is important that commissioners have the opportunity periodically to step back from their work to assess what they are doing and how they are doing it. Given that most commissioners have staggered terms, an educational program every two or three years will orient new commissioners to the process, and give experienced commissioners time to reflect on their past work. Commissioners can discuss ethical and procedural challenges they have encountered and whether or how they need to revise their rules to meet those challenges. If a state has an appellate commission and a number of local ones, commissioners can discuss and learn from the challenges and successes of members of other commissions. Finally, education reinforces the commission's role as an independent body with a mission to nominate the best qualified candidates for judgeships.

III.

ESTABLISHING A PERFORMANCE EVALUATION PROGRAM FOR RETENTION IN OFFICE

Section ____. Judicial Performance Evaluation for Retention in Office

Section ____.01. Purposes.

These provisions are intended to establish a judicial performance evaluation program that will (1) provide fair, responsible, and constructive information about judicial performance [to persons voting on the retention of justices and judges] [to the authority responsible for reappointing justices and judges]; (2) facilitate self improvement of all such justices and judges; and (3) ensure judicial integrity and competence. Any commission established under these provisions also may conduct midterm evaluations of judges not then standing for retention.

Commentary

Judicial performance evaluation programs are and should be designed for the purposes of reaffirming the integrity and competence of the judiciary. At the same time, such programs should be implemented in a manner that preserves judicial independence. The evaluation process should be designed so as to avoid partisan, political, and other external influences that could undermine these fundamental goals. To that end, judges should be evaluated according to whether they demonstrate the qualities that all judges should possess—e.g., knowledge of the law, impartiality, professionalism—rather than whether they make decisions with which the public agrees. Judicial performance evaluation programs have additional benefits as well, in that they may identify the need for and improve the content of judicial education programs and increase public awareness of the work of the judiciary.

Section ____.02. Appellate Commission on Judicial Performance Evaluation.

The periodic evaluation of appellate judges subject to retention shall be conducted by the Appellate Commission on Judicial Performance Evaluation. The appointment of commissioners and the activities and operations of the commission shall be governed by the following provisions:

(a) *Appointment of Commissioners:* The commission shall consist of nine (9) members appointed by the [supreme court] [judicial council]. There shall be adequate representation of laypersons on the commission, but at least five members of the

commission shall be attorneys. The appointing authority shall make reasonable efforts to ensure that the commission substantially reflects the diversity of the jurisdiction (e.g., racial, ethnic, gender, and other diversity). Commission members shall choose one of their number to serve as chair.

(b) *Terms.* All members of the commission shall serve staggered terms of four years except that, of those first appointed, four members shall serve terms of two years. No member may serve more than two terms. A member appointed to fill an unexpired term shall serve the remainder of that term.

(c) *Powers and Duties of the Commission.* The powers and duties of the commission shall be as follows:

(1) To develop techniques for evaluating all justices and judges subject to retention on relevant performance criteria which include, but are not limited to, legal ability, integrity and impartiality, communication skills, professionalism and temperament, and administrative capacity.

(2) To assist trial court commissions in identifying additional evaluation criteria appropriate for trial judges;

(3) To develop uniform statewide evaluation procedures;

(4) To develop performance evaluation surveys of lawyers, jurors, litigants, other judges, court personnel, and others who have recently had direct contact with justices and judges;

(5) To employ agents to distribute, collect, and tabulate surveys;

(6) To produce and distribute to [the public] [the authority responsible for retention] no later than [60 days before the retention election] [[90] [120] days before the judge's term expires] pertinent information concerning each justice or judge subject to retention.

(7) To develop a procedure for justices and judges to receive and respond to their evaluation reports before they are made public.

(8) To promulgate, subject to approval by the [supreme court] [judicial council], rules necessary to implement the provisions of this legislation.

Optional provision for midterm evaluations:

(9) To conduct confidential midterm evaluations of the performance of appellate judges not then standing for retention. The results shall be shared only with the reviewed judge and an appropriate supervising judge or justice as determined by the commission.

Commentary

The size of currently operating commissions varies substantially, from 7 to 30 members. One factor that should be considered in determining the size of the commission is the number of judges to be evaluated. Commissions should also be large enough to represent the demographic and geographic diversity of the juris-

diction. The process for appointing commissioners varies from state to state. While most states call for a single appointing authority, others allow multiple entities (e.g., the governor, legislative leaders, the bar) to nominate and/or to appoint commission members. To prevent political or special interests from influencing the composition or work of the commission, commission members should be appointed by a single authority within the judicial branch. Having a single appointing authority should also facilitate diversity on the commission.

These criteria represent qualities that all justices and judges should possess and demonstrate. Justices and judges demonstrate their “legal ability” in their legal reasoning skills and knowledge of substantive and procedural law. “Integrity and impartiality” is evidenced by the fair and respectful treatment of all litigants, the avoidance of impropriety and the appearance of impropriety, and the rendering of decisions based solely on law and fact. “Communication skills” encompass the ability to communicate effectively orally and in written orders and opinions. Justices and judges demonstrate their “professionalism” not only in the courtroom and in their chambers, but also in the legal community and in the public arena. Their “temperament” is indicated by the extent to which they treat those with whom they interact with courtesy and patience. “Administrative capacity” represents control over judicial proceedings, docket management and timely case disposition, and effectiveness in dealing with other participants in the judicial process. Performance evaluation criteria should also address particular skills required for the level of court on which a justice or judge sits (trial or appellate) and knowledge required for justices or judges of courts with specialized jurisdiction. Evaluation criteria should not include whether justices and judges make decisions that have political or popular support. The commission should take appropriate steps (e.g., developing a website) to make the public aware of the evaluation program and to allow public comment. When the commission receives written information from an identified individual who has had recent direct contact with a justice or judge being evaluated, the commission should share that information with the justice or judge if it is considered in the evaluation.

Section __.03. Trial Court Commissions on Judicial Performance Evaluation.

(a) *Appointment of Commissioners:* There is hereby established in each judicial [district] [circuit] a trial court commission on judicial performance evaluation. Each such commission shall consist of nine (9) members appointed by the [supreme court] [judicial council]. There shall be adequate representation of laypersons on the commission, but at least five members of the commission shall be attorneys. Appointing authorities shall make reasonable efforts to ensure that the commission substantially reflects the diversity of the jurisdiction (e.g., racial, ethnic, gender, and other diversity). Commission members shall choose one of their number to serve as chair.

(b) *Terms.* All members of the commission shall serve staggered terms of four years except that, of those first appointed, four members shall serve terms of two years. No member may serve more than two terms. A member appointed to fill an unexpired term shall serve the remainder of that term.

(c) *Powers and Duties of the Commissions.* In addition to other powers and duties conferred on the trial court commissions by this legislation, a trial court commission has the following powers and duties:

(1) To oversee the distribution of questionnaires and interview judges under the state commission's direction;

(2) To produce and distribute [to the public] [to the authority responsible for retention] no later than [60 days before the retention election] [90/120 days before the judge's term expires] pertinent information concerning each judge subject to retention.

Optional provision for midterm evaluations:

(3) To conduct confidential midterm evaluations of the performance of trial court judges not then standing for retention. The results shall be shared only with the reviewed judge and an appropriate supervising justice or judge as determined by the commission.

Section ____ .04. Dissemination of Performance Evaluations of Justices and Judges.

(a) The state appellate commission and each trial court commission shall conduct an evaluation of each justice or judge who is subject to retention. Evaluations shall be completed and a narrative profile prepared for communication to the justice or judge no later than thirty days prior to the last day on which a justice or judge can declare his or her intent to stand for retention. The justice or judge shall have the opportunity to meet with the appropriate commission or respond in writing to the evaluation, at his or her discretion, no later than ten days following receipt of such evaluation. If such a meeting is held or response is made, the commission may revise its evaluation.

(b) After the requirement in paragraph (a) is met, a factual report concerning each justice or judge subject to [retention election shall be released to the public] [reappointment shall be given to the authority responsible]. The report shall include a narrative summary of the evaluation findings, and shall state whether the judge meets or fails to meet performance criteria.

Commentary

In some jurisdictions, the commission also makes a recommendation to the public or to the authority responsible for retention as to whether the judge should be retained or not retained.

Section __.05. Administrative Assistance.

(a) All resources necessary to carrying out [the] [each] commission's official duties shall be provided, including staff, equipment, and materials.

(b) Commission members shall receive no compensation, but shall be reimbursed for all reasonable expenses incurred in carrying out their official duties.

Section __.06. Privilege and Immunity.

All documents and information obtained by or submitted to the committee and all results of judicial evaluations are absolutely privileged, and no lawsuit predicated thereon may be brought. Statements made to the commission are absolutely privileged, provided, however, that this absolute privilege does not apply to statements made in any other forum. Members of the committee and staff shall be immune from suit and liability for any conduct in the course of their duties.

IV.

IMPLEMENTING A PERFORMANCE EVALUATION PROGRAM FOR RETENTION IN OFFICE

Rule __. JUDICIAL PERFORMANCE EVALUATION

Rule __.01. Meetings, Majority, Minutes.

The commission shall meet at the call of the chair and shall conduct no business except upon the attendance of at least five members. Members shall be permitted to attend and participate in meetings by telephone or videoconference. All meetings shall be open to the public except as provided in Rule __.03 below. All actions shall require a majority vote of those present, except for a determination of whether a justice or judge meets or fails to meet performance criteria. That determination shall require a majority vote of the commission. Except for the requirements of Rule __.03, minutes of meetings of the commission shall be considered public documents.

Commentary

If the commission is empowered to make a retention recommendation, such action should also require a majority vote of the commission.

Rule __.02. Executive Session.

The commission shall meet in executive session at the time of (1) presentation and discussion of a judge's written response or the results of any interview with a justice or judge concerning the commission's draft evaluation; (2) discussion of whether a justice or judge meets or fails to meet performance criteria; and (3) voting on whether the narrative report shall say the justice or judge meets or fails to meet performance criteria. The commission may meet in executive session at any other time upon two-thirds vote of commission members then in attendance. The substance of deliberations in executive session shall be confidential.

Rule __.03. Removal of Commissioners.

Any member may be removed from the commission by the [chief justice] [judicial council] for conduct that substantially interferes with the performance of the commission's duties.

Rule __.04. Commissioner Impartiality and Disqualification.

- (a) A commissioner shall perform his or her duties in an impartial and objective manner.
- (b) A commissioner is disqualified from taking any action with respect to a justice or judge who is a family member, spouse, or domestic partner within the third degree of consanguinity, or a justice or judge who was a commissioner's business associate, attorney, or client within the preceding four years.
- (c) A commissioner shall disclose to the full commission any relationship with a justice or judge being evaluated, whether business, personal, or attorney-client, or any other cause for conflict of interest, and the commission shall determine whether a commissioner shall be disqualified.
- (d) A commissioner shall promptly report to the full commission any information conveyed to him or her concerning any justice or judge under review. The commissioner also shall promptly report to the full commission any attempt by any person or organization to influence him or her other than by fact or opinion.
- (e) No commissioner shall complete a survey for any justice or judge.

Rule __.05. Data Collection.

- (a) The commission [shall] [may] employ a qualified contractor whose duty it shall be to prepare the surveys referred to herein, process the survey responses, and compile the statistical reports of the survey results in a manner that will ensure the confidentiality and accuracy of the process.
- (b) The commission also may formulate a justice's or judge's self-evaluation questionnaire, contact the state's judicial conduct commission, interview the reviewed justice's or judge's colleagues on the bench, and seek other relevant information that will ensure a full and fair evaluation process.

Commentary

Additional sources of information that may be used in the evaluation process include case management statistics, courtroom observation, and participation in mandatory judicial education.

Rule __.06. Confidentiality and Disclosure of Records.

- (a) All information, completed survey forms, letters, notes, memoranda, and other data obtained and used in the course of any judicial performance evaluation shall be strictly confidential and shall not be disclosed by any commissioner, staff person, or agent except as provided herein. All survey forms and other evaluation information shall be anonymous.
- (b) Under no circumstances shall the data collected or the results of the evaluation be used to discipline an individual justice or judge or be disclosed to authorities charged with disciplinary responsibility, unless required by law or by the state's code of judicial conduct.
- (c) Notwithstanding the foregoing, information disclosing a criminal act may be provided to law enforcement authorities at the direction of the supreme court.

Requests for such information in the possession of a commission shall be made by written petition setting forth the specific information needed. All information and data provided to law enforcement authorities pursuant to this paragraph shall no longer be deemed confidential.

APPENDIX

ESTABLISHING A COMMISSION PLAN FOR APPOINTMENT TO OFFICE BY EXECUTIVE ORDER

Commentary

As noted in Part I, the stability of a constitutional or statutory plan is preferable, but if such a plan is not in place, governors and other appointing authorities may establish a commission plan by executive order. The following provisions lay out the essential components of an executive order establishing a commission plan, leaving some aspects to the discretion of the appointing authority. Accompanying commentary provides an overview of existing executive order-based plans.

I, _____, [Governor] [Mayor] of the [State] [City] of _____, desiring to maintain the highest quality of justice in [State] [City], establish a Judicial Nominating Commission to nominate the best qualified lawyers through a fair and open process that promotes a judiciary representative of the racial, ethnic, gender, and other diversity of [State] [City].

Section 1. Nomination and Appointment.

The [Governor] [Mayor] shall fill any vacancy in an office of ____ court justice or ____ court judge by appointing one person nominated by the judicial nominating commission [for the district/circuit where the vacancy occurs]. The judicial nominating commission shall nominate no more than ____ nor less than ____ best qualified persons for each vacancy.

Optional provision for filling interim vacancies only:

Section 1. Nomination and Appointment.

The [Governor] [Mayor] shall fill an interim vacancy in an office of ____ court justice or ____ court judge by appointing one person nominated by the judicial nominating commission [for the district/circuit where the vacancy occurs]. The judicial nominating commission shall nominate no more than ____ nor less than ____ best qualified persons for each vacancy.

Commentary

In jurisdictions with commission plans established by executive order, the number of nominees submitted to the appointing authority varies from 2 to 7. For more

information, see *Judicial Merit Selection: Current Status*, Table 3, at http://www.judicialselection.us/judicial_selection_materials/.

Section 2. Judicial Nominating Commission.

(a) [The] [Each] judicial nominating commission shall consist of ___ members appointed by the [Governor] [Mayor]. Commission members shall serve ___-year terms at the pleasure of the [Governor] [Mayor]. Appointments and elections to the commission[s] shall be made with due consideration to [geographic] [community] representation and without regard to political affiliation. The [Governor] [Mayor] shall make reasonable efforts to ensure that the commission substantially reflects the diversity of the jurisdiction (e.g., racial, ethnic, gender, and other diversity). No member of [the] [a] nominating commission may hold any other office under the United States, the State, or other governmental entity for which monetary compensation is received. No member shall be eligible for appointment to a state judicial office so long as he or she is a commission member and for ___ years thereafter.

Commentary

In a democratic society it is important that public bodies such as judicial nominating commissions be broadly representative of the communities they serve. Care should be taken to ensure that the composition of the commission is reflective of the demographic makeup of the jurisdiction. No member of a commission should seek judicial office until a sufficient amount of time has passed to ensure a commission's objectivity and preserve public confidence. In states with commission plans by executive order, the size of the nominating commissions varies from 9 to 21 members. Governors appoint most or all commission members in these states, with the state bar association appointing some members in some states. Under most executive order plans, commission members serve terms of up to three years and/or at the governor's discretion. For more information, see *Judicial Merit Selection: Current Status*, Tables 1 and 2, at http://www.judicialselection.us/judicial_selection_materials/.

Section 3. Reimbursement and Administrative Assistance.

(a) Members of [the] [each] judicial nominating commission shall be reimbursed for all expenses incurred in carrying out their official duties.

(b) All resources necessary to carrying out [the] [each] commission's official duties shall be provided, including staff, equipment, and materials.

Commentary

To foster an effective commission, certain minimal services should be made available. These services should include staff support to coordinate commission travel, meetings, conference calls, and candidate interviews; office services; and any other necessary support so that commissions receive timely assistance.

Section 4. Powers of the Judicial Nominating Commission.

[The] [Each] judicial nominating commission shall have the power to adopt written rules to formalize and standardize procedures for selecting the best qualified nominees for judicial office.

Commentary

In some states with executive order plans, procedural rules are provided in the executive orders. In others, commission chairs or members adopt their own rules.

Section 5. Vacancies.

Within ___ days of the occurrence of a vacancy, the judicial nominating commission shall meet and submit a list of not more than ___ nor less than ___ best qualified candidates for the judicial office.

Commentary

Some executive order plans require the commission to submit the list of nominees within a certain timeframe, ranging from 60 to 90 days, following the announcement of the vacancy. For more information, see *Judicial Merit Selection: Current Status*, Table 3, at http://www.judicialselection.us/judicial_selection_materials/.

Section 6. Quorum.

The commission cannot act unless a quorum exists. A quorum consists of a majority of the commission plus one.

Commentary

In light of the importance of the nominating commission's role in judicial selection, more than a simple majority of commission members should participate in the commission's deliberations and decision making.

Section 7. Chair.

The [Governor] [Mayor] shall appoint one commission member to serve as chair.

Commentary

The role of the chair is to order commission meetings, notify commission members of commission business, and act as a spokesperson for the commission.

Section 8. Publicity.

When a judicial vacancy occurs or when it is known that a vacancy will occur at a definite date, the chair shall publicize the vacancy and solicit the submission of names of qualified individuals by press release to the media; notice to state, local, women, and minority bar associations; and posting in the courthouse[s] of the [state] [district/circuit].

Commentary

These requirements are minimal and should be supplemented with active recruitment techniques.

Section 9. Open Meetings.

(a) All organizational meetings of the judicial nominating commission shall be open to the public. An “organizational meeting” is an initial meeting to discuss the commission’s procedures and requirements for the vacancy. A notice outlining the topics to be discussed should be given to the public 72 hours prior to the meeting. Public participation should be encouraged at each organizational meeting.

(b) All final deliberations of the judicial nominating commission shall be secret and confidential.

(c) The confidentiality of other proceedings of the judicial nominating commission shall be determined by commission rule.

Commentary

Commission proceedings should be as open as possible. The final deliberations and selection of nominees should remain confidential to encourage free and open discussion of the candidates’ qualifications. To preserve confidentiality of these proceedings, some states may need to exempt the final deliberations from the state Open Meetings Act.

Section 10. Submitting Names of Nominees to the [Governor] [Mayor].

(a) The names of nominees shall be submitted to the [Governor] [Mayor] in alphabetical order.

(b) A memorandum may accompany the list of nominees and may state objective facts concerning each of the nominees listed.

(c) Upon submission of the names to the [Governor] [Mayor] , the [Governor] [Mayor] shall make the names public and shall encourage public comment.

Commentary

Once the names of nominees are submitted to the appointing authority, the commission should provide additional information only on request of the appointing authority. If the commission would like to provide supplemental background information on the nominees, it may do so in a memo without indicating any commission preference. A substantial majority of states also allow for public comment at this point in the selection process. By providing the opportunity for public participation, the appointing authority can foster public trust in the final appointment.

THE AMERICAN JUDICATURE SOCIETY'S ELMO B. HUNTER CITIZENS CENTER FOR JUDICIAL SELECTION

The American Judicature Society (AJS) works to maintain the independence and integrity of the courts and increase public understanding of the justice system. AJS is a nonpartisan, nonprofit organization with a national membership of judges, lawyers, and other citizens interested in the administration of justice.

AJS' Elmo B. Hunter Citizens Center for Judicial Selection was founded in 1991 to further the American Judicature Society's historic interest in judicial selection issues. The Hunter Center provides nonpartisan public education and outreach, conducts applied research, and offers expertise and assistance in support of judicial selection reform. The Center serves its core audiences—state court administrators, lawmakers, the media, the legal and academic communities, and court reform organizations—in a number of ways:

- Maintaining the Judicial Selection in the States website (www.judicialselection.us), the leading resource for information about the selection and retention of judges nationwide.
- Conducting groundbreaking research on such topics as demographic diversity in the merit selection process, the prevalence of midterm appointments in states that utilize contestable elections for judicial office, and the use of nominating commissions by U.S. senators to identify potential nominees for federal judgeships.
- Working with other court-related organizations to increase public awareness of, and involvement with, state justice issues through forums and public discussions. The Center convened the first national forum on judicial selection in Washington, D.C. in 2000. A follow-up program was held in Birmingham, Alabama in 2006. A symposium on federal judicial selection was held in Washington, D.C. in 2002.
- Monitoring and providing assistance to grassroots judicial reform efforts in the states. Center staff works closely with state-based reform groups to promote the adoption of judicial merit selection.
- Educating international visitors on methods of judicial selection in the United States and their respective implications for judicial independence and accountability.
- Organizing meetings and conferences for AJS members and others on judicial selection topics of current interest. In 2006, AJS presented a program on rethinking strategies for judicial selection reform.

Publications and resources offered by the Hunter Center include the following:

- *Model Judicial Selection Provisions*, revised in 2008, offer exemplary language for establishing judicial nomination and evaluation processes of the highest quality and represent AJS policy as to the “best practices” in selecting, retaining, and evaluating judges.
- *Judicial Selection in the States: How It Works, Why It Matters* is a guide prepared for state legislators to promote greater understanding of the complex and critical issue of selecting state court judges.
- *Judicial Merit Selection: Current Status* is a detailed description of selection provisions in states with “merit selection,” or commission-based appointment, of judges at some level of court.
- *Judicial Selection in the States: Appellate and General Jurisdiction Courts* is a set of tables that provide basic information about the initial selection and subsequent retention of state judges.
- *Judicial Selection Reform: Examples from Six States* examines successful judicial selection reform efforts in six states, discussing the nature of each reform and its implementation in other states, the events that provided the impetus for reform, and the actors who were instrumental in bringing about the reform.
- *Judicial Selection in the United States: A Special Report* describes the historical evolution of judicial selection in the U.S.
- *Handbook for Judicial Nominating Commissioners, 2nd Edition* leads commissioners through each step of the nominating process—getting organized, establishing evaluative criteria, publicizing the judicial vacancy, investigating and screening applicants, interviewing, voting, and submitting names to the appointing authority. The revised and updated 2nd edition offers two expanded chapters that address specific ethics considerations and privacy and confidentiality concerns.
- *Merit Selection: A Review of the Social Scientific Literature* synthesizes existing social science research on “merit selection” of judges.
- *Research on Judicial Selection* is a two-volume, peer-reviewed series featuring studies of unexplored and under-explored aspects of judicial selection.
- *Ensuring Judicial Excellence* is a video that describes the benefits of judicial merit selection through interviews with voters, judges, attorneys, and judicial nominating commissioners.
- *Judicial Selection in the United States: A Compendium of Provisions* is a compilation of state statutory and constitutional provisions relating to judicial selection.