



***Handbook for  
Judicial  
Nominating  
Commissioners***

***2nd Edition***



***By  
Marla N. Greenstein  
Revised by  
Kathleen M. Sampson***



The *Handbook for Judicial Nominating Commissioners*, 2nd Edition, is made possible by a generous grant from The Greater New Orleans Foundation. Any analyses, conclusions, and opinions are the authors' and do not necessarily represent the official positions or policies of the American Judicature Society or The Greater New Orleans Foundation.

ISBN 1-928919-15-4

Copyright: The American Judicature Society 1984, 1985, 2004

**The American Judicature Society**

The Opperman Center at Drake University  
2700 University Avenue  
Des Moines, IA 50311

515/271-2281

Fax: 515/279-3090

**[www.ajs.org](http://www.ajs.org)**

Allan D. Sobel

*Executive Vice President and Director*

Founded in 1913, the American Judicature Society is an independent, national, nonpartisan, nonprofit organization supported by a national membership of judges, lawyers and other members of the public. Through research, educational programs, and publications, AJS addresses concerns related to ethics in the courts, judicial selection, the jury, court administration, judicial independence, and public understanding of the justice system.

# Contents

<b>Preface</b> .....	<b>vii</b>
<b>Acknowledgments</b> .....	<b>xi</b>
<b>Introduction</b>	<b>1</b>
<b>Chapter 1 Commission Ethics</b>	<b>3</b>
Formal Provisions .....	4
Oaths of Office .....	5
Conflict of Interest .....	5
Confidentiality .....	9
Communication Policies .....	10
Post-Nomination Communications .....	11
Conclusion .....	13
<b>Chapter 2 Confidentiality and Privacy</b>	<b>17</b>
What Are Confidentiality and Privacy? .....	18
Waivers, Consents and Authorizations .....	19
What Is Confidential and What Is Public? .....	21
Conclusion .....	26
<b>Chapter 3 The Organizational Meeting</b>	<b>31</b>
Purposes of the Meeting .....	32
Role of the Chair .....	34
General Topics for Discussion .....	35
The Applicant Questionnaire .....	37
Establishing a Schedule for Future Meetings .....	39
Ethical Considerations .....	39
Conclusion .....	39
<b>Appendix</b>	<b>41</b>
A. Sample Applicant Questionnaire .....	42
B. Sample Instructional Sheet to Accompany Questionnaire .....	51
C. Sample Certifications and Waivers .....	53

**Chapter 4 Notice of Vacancy and Recruitment 57**

Notice of Vacancy . . . . . 58

Active Recruitment . . . . . 61

Ethical Considerations . . . . . 62

Conclusion . . . . . 63

**Appendix 65**

A.Notification Checklist . . . . . 66

B.Notice . . . . . 67

**Chapter 5 Evaluative Criteria 69**

Establishing Criteria . . . . . 70

Core Evaluative Criteria . . . . . 70

Additional Criteria . . . . . 77

A Consideration . . . . . 78

Ethical Considerations . . . . . 78

Conclusion . . . . . 80

**Appendix 81**

A.“Judicial Nominating Commissions and the ADA” . . . . . 83

B.Suggested Measures for Evaluation . . . . . 89

**Chapter 6 Screening and Investigation 105**

Preliminary Screening . . . . . 106

Investigation . . . . . 107

Selecting Interviewees . . . . . 110

Ethical Considerations . . . . . 111

Conclusion . . . . . 112

**Appendix 113**

A.List of Suggested Questions for Information Sources . . . . 114

B.Nebraska Reference Inquiry Forms . . . . . 117

C.Alaska and Idaho Attorney Surveys . . . . . 125

**Chapter 7 Interviewing the Candidates 131**

Notification and Scheduling Procedures ..... 132  
Commission Preparation ..... 133  
Determining the Questions ..... 133  
Proper and Improper Questions ..... 135  
Tailoring the Inquiry ..... 136  
Structuring the Interview ..... 137  
Ethical Considerations ..... 138  
Conclusion ..... 139

**Appendix 141**

A.Procedural Checklist for Commissioners ..... 143  
B.Suggested Interview Questions ..... 145  
C.Idaho Interview Guidelines ..... 149

**Chapter 8 Voting and Submitting Names of Nominees 153**

Final Deliberations ..... 154  
Voting Procedures ..... 154  
Recommended Method ..... 156  
Submission of Names and Disclosure of Nominees ..... 157  
Confidentiality ..... 157  
Ethical Considerations ..... 158  
Conclusion ..... 158

**Appendix 161**

A.Iowa Recommended Voting Rule ..... 163  
B.Nevada Voting Rule ..... 164  
C.Rhode Island Voting Rule ..... 165



# **Preface**

The development of a nonpartisan plan for selecting judges is among the American Judicature Society's chief accomplishments. As a result of AJS activity in the last six decades, three-fifths of the states use a merit plan to select some or all of their judges. A key component of any merit plan is a nominating commission composed of both lawyers and nonlawyers. Traditionally, commission members come from various walks of life and begin their terms knowing little about their new duties and responsibilities. Often, commissioners have to learn as they go.

To provide much-needed orientation and guidance, AJS in 1984 first published the *Handbook for Judicial Nominating Commissioners* and its educational counterpart, the *Institute for Judicial Nominating Commissioners*, which was a program of slides based on the chapters in the handbook.

Since publication of the first *Handbook* in 1984, commissions have refined their procedural rules and, in some instances, state or local jurisdictions have published their own handbooks for commissioners. In addition, some national developments, such as passage of the *Americans with Disabilities Act*, increased concern about applicants' privacy and commissions' confidentiality procedures, the changing role of the trial judge, newer interviewing techniques, and the ever-present importance of ethical conduct by commissioners have indicated the need for an updated edition of the *Handbook for Judicial Nominating Commissioners*.

AJS began the update process by gathering an advisory committee of experts in the commission process, including commission chairs and staff. Committee members met first in Chicago for a full-day meeting. At that time, they recommended the following major changes to the *Handbook*:

- Update the commission ethics chapter and move it from the back to the front of the book to underline the importance of ethical conduct by commissioners;
- Pull together scattered references and expand the discussion of privacy and confidentiality issues in a new and separate chapter; and
- Offer additional information about the *Americans with Disabilities Act* and its implications for judicial nominating commissions.

The advisory committee also recommended we gather information about current nominating commission practices by surveying commission representatives about how they address health issues, whether they have written procedural and ethics rules, whether they use waivers to gather background information, the

extent of commission concerns about privacy and confidentiality and whether those issues were addressed in the commission's procedural rules or governing provisions, and the kind of staff support available to commissions. As part of the survey, we also asked for copies of commissions' procedural and ethics rules and their applicant questionnaire.

About two-thirds of the surveyed commissions responded, and generously so—not only answering the questions and sending the requested materials, but also enclosing copies of handbooks they had developed for their commissioners. Drawing on this wealth of information, conducting some new research into modern business interviewing methods, and enlisting the research and writing assistance of law students to produce new chapters on ethics, privacy and confidentiality, and the *Americans with Disabilities Act*, we have produced this second edition of the *Handbook*.

Here is some of the new information you will find in the *Handbook for Judicial Nominating Commissioners, 2nd Edition*:

- *Chapter 1*, a rewritten chapter on ethics, which strongly emphasizes the link between the highest standards of commissioner conduct and the public's trust and confidence in the merit process, and offers specific examples of how commissions seek to ensure that all members avoid the actuality and appearance of impropriety;
- *Chapter 2*, a new chapter on privacy and confidentiality that explores legal and practical issues pertinent to commission activity and cites actual practice by nominating commissions;
- *Chapter 3*, The Organizational Meeting, revised somewhat to describe the purpose and logistics of an organizational meeting, but with all-new materials in the appendix, including a sample applicant questionnaire, a sample instructional page to accompany the questionnaire, and sample certifications or waivers from three jurisdictions;
- *Chapter 4*, Notice of Vacancy and Recruitment, with suggestions for using electronic means to disseminate the notice of the vacancy;
- *Chapter 5*, Evaluative Criteria, with modifications to the 1984 edition's *Suitable Age and Good Health* criteria and, among other things, expansion of the *Professional Skills* criterion beyond litigation experience to other relevant and transferable knowledge and skills. The appendix includes an essay titled "The ADA and Judicial Nominating Commissions," which gives an overview of the

ADA, discusses some recent case law affecting commissions, and urges commissioners to stay abreast of developments in this fluid area of the law;

- *Chapter 6, Screening and Investigation*, includes a new section titled “Going Beyond Reference Checks,” and new appendix materials that include standardized reference inquiry forms used in Nebraska and attorney survey questionnaires used in Alaska and Idaho;
- *Chapter 7, Interviewing the Candidates*, which has been significantly rewritten to discuss in detail four categories of interview questions, examples of questions used by selected commissions, and, in the appendix, the Idaho Interview Guidelines, which address proper and improper questions; and
- *Chapter 8, Voting and Submitting Names of Nominees*, which describes several less effective voting methods and the preferred successive-majority voting procedure; the appendix includes sample voting rules from three jurisdictions.

Since 1984 we have observed an increasing sophistication in the procedures nominating commissions use, and have made a concerted effort to share this experience in the revised *Handbook*. When it is time to produce a third edition, we expect that commissions will have further standardized and professionalized their practices.

# ***Acknowledgments***

It would not have been possible to update the 1984 *Handbook for Judicial Nominating Commissioners* without a generous grant from The Greater New Orleans Foundation and the urging of Mr. H. Eustis Reily of New Orleans. We thank Mr. Reily and the foundation for giving us the encouragement and the means to revise the Handbook.

The American Judicature Society called on the talent and experience of five very special people to advise us as we wrote the update. Composed of nominating commission chairpersons and staff, they are:

**Honorable Celeste F. Bremer**

U. S. Magistrate Judge, U. S. District Court for the Southern District of Iowa,  
Des Moines

**Ms. Teri Carns**

Senior Staff Associate  
Alaska Judicial Council, Anchorage

**Mr. Robert Corrente**

Hinckley, Allen & Snyder, LLP  
Providence, RI  
Former Chair, Rhode Island Judicial Nominating Commission

**Mr. David R. Grundy**

Lemons, Grundy & Eisenberg, Reno, NV  
Vice-Chair, Nevada Judicial Selection Commission

**Ms. Janet Hammer**

Public Information and Education Officer  
Nebraska Supreme Court, Lincoln

Advisory committee members spent a considerable amount of time reviewing the 1984 Handbook to identify sections in need of revision, attending a meeting in Chicago to discuss and prioritize changes, reading the rewritten handbook, recommending changes and additions to it during a two-hour conference call, and reacting to rewritten sections in subsequent email exchanges. They are a knowledgeable, committed and collegial group. We thank them for giving so generously of their time and experience. Their collective wisdom was of inestimable value.

We also thank others for their contributions, especially the following:

- **Marla N. Greenstein**, author of the 1984 *Handbook*; much of her earlier work has withstood the test of time and is the solid foundation on which this revision is built;

- **Allan A. Ashman**, Director of the AJS Hunter Center for Judicial Selection at the time the project began, and facilitator of the Chicago meeting with the advisory committee;
- **Katherine Borden, Jennifer Jackson** and **Mary Ann Braun**, our three Loyola University Chicago law students who researched and wrote the new ethics and privacy and confidentiality chapters and the ADA essay appended to Chapter 5;
- And last, but most certainly not least, the following representatives of judicial nominating commissions who graciously granted permission to reprint various documents, forms and voting rules used in their jurisdictions, which we have reproduced in the appendices to various chapters:

**Teri Carns**, Senior Staff Associate, Alaska Judicial Council

**Vicki Brand**, Assistant to the Executive Director, The Florida Bar

**Robert G. Hamlin**, Executive Director, Idaho Judicial Council

**Honorable Celeste F. Bremer**, U. S. Magistrate Judge and Editor, *Handbook for Iowa Judicial Nominating Commissioners*

**Elissa Flynn-Poppey**, Executive Director  
Massachusetts Judicial Nominating Commission

**Janet Hammer**, Public Information and Education Officer  
Nebraska Supreme Court

**David R. Grundy**, Vice-Chair, Nevada Judicial Selection Commission

**Girard R. Visconti**, Chair, Rhode Island Judicial Nominating Commission

It is clear that the 2004 edition of the *AJS Handbook for Judicial Nominating Commissions* is the culmination of a collaborative effort. We are grateful to everyone who contributed. Any errors of omission or commission are those of the authors.

# ***Introduction***

The America Judicature Society, founded in 1913, has since its inception been dedicated to the effective administration of justice. A national, nonpartisan, non-profit organization, the Society has long sought to help states develop strong and viable judiciaries. In fact, AJS has provided technical assistance and sponsored or cosponsored educational programs in all 50 states. One of its most important projects has been the development and advocacy of judicial merit selection.

Judicial merit selection plans generally have three basic components: a nominating commission composed of both lawyers and nonlawyers; appointment of judges by the governor; and judicial retention in office either by vote of the electorate or by commission review and reappointment. Work to implement the merit plan in state courts began in the early 1900s, but it was not until 1940 that one state—Missouri—pioneered its adoption. Missouri stood alone until the 1950s, when three additional states, Alabama, Alaska and Hawaii, adopted similar plans for their courts. Colorado, Idaho, Indiana, Iowa, Nebraska, Oklahoma, Utah, and Vermont adopted their merit plans in the 1960s. In the 1970s and 1980s, Arizona, Connecticut, Delaware, DC, Florida, Georgia, Kansas, Kentucky, Maryland, Massachusetts, Minnesota, Montana, Nevada, New Mexico, New York, North Dakota, South Dakota, Tennessee, Wisconsin and Wyoming all established plans for some of all of their judges. In 1994, Rhode Island enacted a plan.

In addition, during the 1970s, 1980s and 1990s many states refined or expanded their plans. For example, in 1972 Kansas initiated its merit plan with the Supreme Court, and added the Court of Appeals and optional participation by the district courts in 1975.

The key to the essential functioning of this method of judicial selection is the nominating commission. Traditionally the commissions have had a diverse membership. Members have included teachers, members of the clergy, doctors, business men and women, farmers, lawyers, judges and other citizens active in the community.

The responsibility of selecting the best-qualified judicial nominees falls upon individuals who are generally unprepared for such a task. Any plan that has as its goal the selection of the most qualified candidates for judicial office will necessarily depend on the integrity, sincerity, and preparedness of the hard-working and unpaid volunteers who undertake this responsibility. A number of states—Colorado, Idaho, Nebraska and Utah, for example, have developed handbooks to help their commissioners understand their responsibilities and complete their tasks.

The purpose of the *AJS Handbook for Judicial Nominating Commissioners* is to supplement the guidance provided in local jurisdictions by synthesizing information about commission practices and procedures across the country, and organizing and presenting it in a manner that will take commissioners step by step through the nominating commission process. AJS also offers an accompanying educational program, the *Institute for Judicial Nominating Commissioners*, which helps commissioners process the information in the *Handbook* and apply it to their own needs and practices. The Society is pleased to offer these resources to commissions nationwide.

## Chapter 1

### **Commission Ethics**



The judicial nominating commission is the cornerstone in the merit selection of judges.<sup>1</sup> The effectiveness of a merit plan is dependent upon the successful functioning of the judicial nominating commission as these commissioners ultimately decide which candidates are qualified to hold judicial office. Likewise, maintaining public trust in the judicial nominating process is crucial in a merit selection system. To accomplish this, commissioners must avoid impropriety and the appearance of impropriety at all stages of the selection process.

To ensure that those who select judicial candidates are representative of the community, commissions include both lawyer and nonlawyer members. Nonlawyer members may have a special sense of community needs and therefore be particularly valuable as commission members, while the attorney members can bring a deeper understanding of legal competence and insights into whether applicants possess the appropriate temperament to be a judge.

*Ethics* is used here as a broad term encompassing propriety and responsibility. A responsible commission must be prepared and must value each of its members. Throughout this chapter it will be assumed that each commissioner has actively reviewed all relevant materials necessary for meaningful participation in recruiting, evaluating, investigating, interviewing and voting on the candidates. Without preparation by every commissioner, the quality of the entire commission's work will be significantly impaired.

This chapter offers an overview of some formal ethics provisions used by commissions, as well as common ethical dilemmas nominating commissioners face, and how different commissions deal with them. The commission's work, and its credibility and legitimacy in the eyes of the public, are grounded in the ethical behavior of all its members. In each of Chapters 3-8, which track the procedural steps in the nominating process, we have included a comment on the ethical considerations pertinent to that particular step.

## **Formal Provisions**

The American Judicature Society encourages the adoption of a formal ethics provision. A formal ethics provision emphasizes the importance of ethical behavior, establishes minimum standards for commissioner behavior, provides aspirational goals for commissioners, and promotes public trust by emphasizing propriety and the appearance of propriety in all the commission's activities. Such a provision also gives consistent and explicit guidance over time as commissioners' terms expire and new members join.

A number of states have adopted formal ethics provisions as guidelines for commissioner conduct. Titles of these various provisions include: "Ethical Considerations,"<sup>2</sup> "Code of Conduct for Commission Members,"<sup>3</sup> and "Ethical Responsibilities"<sup>4</sup>. Although the majority of jurisdictions have not adopted a formal ethics provision, most commissions include some form of ethical guidance in their judicial nominating commission rules, legislative enactments, executive orders, constitutions, or supreme court rules.

“Section VII, Ethical Responsibilities,” from the *Rhode Island Uniform Rules of Procedure for the Judicial Nominating Commission*, is reproduced below as an example of a formal ethics provision:

Judicial Nominating Commissioners hold positions of public trust. Public confidence in Commission members and the composition of the Commission itself is paramount. Any factors which might erode such public confidence, or be perceived to do so, shall be avoided. No Commissioner shall conduct himself in a manner which reflects discredit upon the judicial selection process. Consideration of the applicants shall be made impartially, discreetly, and objectively.

A Commissioner shall disclose to other Commissioners all personal and business relationships with an applicant for judicial vacancy that may directly or indirectly influence the Commissioner’s decision. If a substantial conflict of interest is apparent, the Commissioner shall disqualify himself from voting on further consideration of any affected applicant.

The Commission shall not rank nominees or otherwise disclose a preference of the Commission.

Each Commissioner shall read and maintain a working knowledge of these Rules.

## **Oaths of Office**

Another means of formally regulating and emphasizing the importance of the conduct of judicial nominating commissioners is to require an oath of office. Several states require commissioners to take an oath of office upon the commencement of their duties.<sup>5</sup> One example of a judicial nominating commissioner oath follows:

I do solemnly swear (or affirm) that I will faithfully discharge my duties as a member of the Judicial Nominating Commission for the \_\_\_\_\_ Court, that I will neither accept nor receive, directly or indirectly, any money or other valuable thing or any promise of office or assistance from any corporation, company, or person, for any vote or influence I may give or withhold in connection with the nomination of any person to a judicial vacancy; that I will, as necessary or expedient, encourage qualified candidates to accept judicial office or nomination for judicial office, and that I will vote to nominate to judicial vacancies only candidates I believe are sufficiently qualified for judicial office.<sup>6</sup>

## **Conflict of Interest**

Throughout the entire nominating process, the most common and challenging ethical dilemma occurs when a conflict exists between a commissioner’s personal interest and the commissioner’s responsibility to remain fair and impartial.

Conflict of interest situations arise when commissioners and applicants maintain a relationship outside the nominating process, and this relationship could give even the appearance of partiality, bias or impropriety. To maintain public trust, such outside relationships between commissioners and applicants must be disclosed and addressed early in the process.

Conflicts of interest can occur at several stages of commission activities and exist in a variety of forms. Before problems arise, it is crucial for commissioners to recognize the potential pitfalls and institute procedures and solutions to manage the situation. Therefore, the American Judicature Society encourages commissions to incorporate conflict of interest provisions in their rules, guidelines, or handbooks to specify under which conditions commissioners shall or may disclose certain information they have about, or a relationship they may have with, an applicant, and the circumstances under which they will be disqualified from participating in all or part of the nominating process.

Conflicts of interest most commonly arise in three areas:

- In personal, business, or professional relationships with an applicant;
- In political party affiliations; and
- When a commissioner or former commissioner applies for a judgeship.

A conflict of interest dilemma most frequently arises when a commissioner has a personal, business, or professional relationship with an applicant. Commissions must determine which relationships cause a conflict of interest, who decides when a relationship will impede the commissioner's ability to remain impartial and fair, and what happens when it is found that a conflict exists. These issues should be discussed and settled during the organizational meeting, as each commissioner should exercise due diligence in becoming aware of conflicts of interest and understand the procedures for addressing potential conflicts before work begins to fill a vacancy.

Furthermore, each judicial nominating commission should adopt a commissioner-disqualification policy tailored to the composition of the commission and the uniqueness of the community it serves. As each commissioner serving in a smaller community may have some relationship with every applicant, those commissions should discuss conflict of interest problems thoroughly to determine which specific relationships cause concern. On the other hand, commissioners serving in a larger community may address conflicts of interest differently because every commissioner will not know every applicant.

A conflict of interest exists between the commissioner's duty to the fairness of

the nominating process and the commissioner's relationship with an applicant when any relationship may influence or appear to influence a commissioner's fair and impartial decision based solely on the applicant's merits. There are several types of relationships that potentially create a conflict of interest dilemma. Commissions often differentiate between personal relationships and business or professional relationships.

**Personal relationships.** Certain personal relationships cause an inherent conflict of interest. Commission provisions vary in the degree this relationship is defined. While some provisions simply state that any personal relationship causes a conflict of interest,<sup>7</sup> other provisions explain that any relationship by blood, marriage, or family within the third degree of consanguinity<sup>8</sup> inherently causes a conflict.<sup>9</sup> One commission provision includes any relationship where the commissioner shared a residence with the applicant during the previous five years.<sup>10</sup>

When a personal relationship exists that inherently causes a conflict of interest, most commissions require, and the American Judicature Society encourages, a strict disqualification rule preventing the affected commissioner from interviewing, deliberating, and voting on the applicant. To enhance public trust and avoid any hint of impropriety, the commission should make this disqualification rule (and indeed all its operating rules) available to applicants, the media and the public.

**Business or professional relationships.** In addition, certain business or professional relationships potentially create a conflict of interest for commissioners. The degree of specificity appropriate for a particular commission may depend on the characteristics of the community it serves. For instance, lawyers serving on commissions in smaller communities could have some business or professional relationship with almost every applicant. The commission would be ineffective if every commissioner needed to be recused because of a potential conflict. On the other hand, lawyers serving on commissions in larger communities may be unfamiliar with most applicants and may have to recuse themselves in only a few situations.

Some commission provisions include a general definition of a business or professional relationship, whereas other provisions specifically include law partners, associates, employers, employees or other co-workers.<sup>11</sup> Alternatively, several provisions include any relationship where the commissioner has a substantial and direct pecuniary or monetary interest associated with the applicant.<sup>12</sup> When these types of conflicts arise, most commissions oblige the commissioner to disclose any potential conflict. Other commissions require a majority of the commission to determine if the conflict will unduly influence the commissioner's ultimate

decision.<sup>13</sup> One nominating commission allows any commissioner to challenge a potential conflict between another commissioner and an applicant,<sup>14</sup> and another allows any person to challenge the impartiality of a member.<sup>15</sup> On the other hand, one nominating commission directs a commissioner with a potential conflict to provide a written statement either requesting to be recused, or explaining why the commissioner can fairly, objectively, and impartially participate in the process despite the potential conflict.<sup>16</sup> Many provisions also preclude commissioners from participating in the nominating process if the applicant is a judge and the commissioner or any of the commissioner's clients has a substantive matter pending before the judge.<sup>17</sup>

**Political party affiliation.** A second form of conflict of interest exists when a commissioner is affiliated with a political organization. Almost all commission governing provisions prohibit commissioners from holding office in a political party, forbid commissioner participation in political activities, and bar commissioners from making political contributions while serving on the commission.<sup>18</sup> One commission prohibits a commissioner from being registered as a state or federal lobbyist or executive agent.<sup>19</sup> Some of these prohibitions may raise First Amendment issues, and commissions are encouraged to examine their own state's constitution and statutes to discern the boundaries of commissioners' free speech and association rights. The ultimate goal is to adopt provisions that safeguard the appearance and reality of a nonpartisan merit selection process.

**Application of a commissioner or former commissioner.** A third conflict arises when a commissioner applies for judicial office while serving as a commissioner or soon thereafter. Several commissions expressly prohibit commissioners to be considered for judicial office while serving on the commission.<sup>20</sup> However, as commissioners often make ideal candidates for judicial office, many commissioners seek judicial office after their position on the commission has terminated. Depending on the commission, the amount of time between termination and eligibility to apply varies from six months<sup>21</sup> to five years.<sup>22</sup>

In its *Model Judicial Selection Provisions*, the American Judicature Society recommends that "No member shall be eligible for appointment to a state judicial office as long as he or she is a commission member and for [four] [three] years thereafter...."<sup>23</sup> However, each commission may need to determine an appropriate period of ineligibility based on the length of commissioners' terms of office and the nature of the jurisdiction the commission serves. For instance, in a community with a small number of attorneys, a shorter time frame may be necessary to ensure the largest possible pool of applicants. In a community with a larger number of attorneys, a longer time frame is appropriate.

## Confidentiality<sup>24</sup>

Throughout the nominating process, commissioners enhance public trust in the process by informing the public and applicants of commission procedures and activities, being and appearing to be impartial, and promoting a transparent nominating process to the greatest extent possible. Although encouraging transparency enhances public trust, ethics requires commissioners to maintain a confidential relationship with the applicants in certain circumstances. Safeguarding certain documents and processes, like deliberations, encourages more applicants to seek judicial nomination, and promotes full disclosure by them.

The work of most nominating commissions is strictly confidential. As a general practice amongst commissions, results of investigations, deliberations, files, minutes, voting and records of the commission are kept confidential, including any internal or external communication regarding the qualifications of an applicant. Currently, most commissions prohibit disclosure of the commission proceedings.<sup>25</sup> Only one state expressly maintains that all proceedings of the commission and its documents shall be open to the public except when, by a majority vote of the commission, the commission declares that the demand of individual privacy clearly exceeds the merits of public disclosure.<sup>26</sup>

Releasing the names of applicants also raises several confidentiality problems for commissions. Although revealing the identity of the applicants may enhance transparency of the nominating process, many attorneys would not consider applying for a judgeship if the commission released their names. Most commissions forbid the release of the identity of the applicants throughout the entire nominating process.<sup>27</sup> For practical purposes, several commissions explicitly allow commissioners to reveal the identity of the applicant when seeking information about the applicant's qualifications during the investigative process,<sup>28</sup> or to convene a public hearing on applicants' qualifications.<sup>29</sup> A very few commissions allow commissioners to disclose the identity of the applicants to the appointing authority during the nominating process.<sup>30</sup> However, most commissions stipulate that the names of the applicants remain strictly confidential.<sup>31</sup>

The situation changes when the list of nominees is submitted to the appointing authority. At this point, most release the nominees' names to the public.<sup>32</sup> In its *Model Judicial Selection Provisions*, the American Judicature Society recommends that "the governor shall make the names public and public comment should be encouraged."<sup>33</sup>

## Communication Policies

The American Judicature Society encourages commissions to consider in advance how they will deal with certain kinds of *ex parte* communications. These contacts may occur with applicants, with other commissioners outside commission meetings, and with persons or organizations outside the commission who may be lobbying on behalf of or against particular applicants.

**With applicants.** Some *ex parte* communications between commissioners and applicants could be problematic. Commissioners should not discuss with individual applicants matters such as who else has applied (this applies in jurisdictions where the names of applicants are confidential), and what are the inquiring applicant's chances of being nominated. If necessary, commissioners may supply procedural information such as application deadlines, when interviews will be scheduled, and the like. However, commissioners should discuss ways to reduce or eliminate the need for this kind of *ex parte* communication, such as including procedural and timeline information in the application packet. If such support is available, the application materials should name a commission staff person as the contact for any subsequent questions. If a staff person is not available, the commission may want to designate one of their members, perhaps the chair, as the sole contact person.

**Between or among commissioners outside commission meetings.** Except for exchanging procedural information, such as a change in the interview schedule, for example, communications between or among individual commissioners outside commission meetings regarding specific applicants should be prohibited. Several states do prohibit such *ex-parte* communications.<sup>34</sup> It will undermine the integrity of the process and the public's trust in the commission if it appears that some commissioners are operating in blocs to push or block certain applicants. All concerns about or support of an applicant must be discussed only with the full commission during meetings.

**Disclosing information from external sources.** All communications received by a commissioner from any external source (person or organization) regarding the qualifications or potential nomination of any applicant must be disclosed to all other commissioners, as is required in a number of jurisdictions.<sup>35</sup> Copies of written communications may be provided to all commissioners, or should at least be summarized orally for the full commission if the source requests anonymity and the information appears to be credible. The commissioners also should decide how they will handle communications about applicants from anonymous sources. The key point is to disclose and discuss these communications with all other commissioners.

## Post-Nomination Communications

**With the appointing authority.** After a commission decides on the final nominees to submit to the appointing authority, several ethical dilemmas may arise. Foremost, commissioners may not advocate for or against any particular nominee. Therefore, no attempt should be made to rank the nominees or otherwise disclose a preference of the commission. The American Judicature Society recommends that the nominees' names be listed alphabetically when given to the appointing authority.<sup>36</sup> In practice, most commissions do list the nominees alphabetically when transmitting the names to the appointing authority.<sup>37</sup> To emphasize this, one commission sends the list on a form that states, "We have listed the names of the nominees in alphabetical order; and there is no significance in the order in which the names are listed."<sup>38</sup>

Along with the list of nominees, some commissions also send the commission's investigative files to the appointing authority's office.<sup>39</sup> Individual commissions must determine what information, if any, should accompany the list of nominees submitted to the appointing authority. Ethical problems may arise should the commission wish to pass on confidential information. If applicants have been informed ahead of time that such information will be available to the appointing authority and the confidential information remains confidential in its new hands, many problems can be avoided.

Currently, some commissions forward the entire applicant's file to the appointing authority including all information gathered during the nominating process.<sup>40</sup> Other commissions only forward limited information to the appointing authority such as the applicant's questionnaire.<sup>41</sup> As advocacy for any nominee is improper, commissions should determine what information will assist the appointing authority in its investigation process, but will not advocate for or against any nominee. Commissioners should transmit the same type of information for every nominee.

Although most of the commissioners' duties terminate when the list of nominees is sent to the appointing authority, several ethical dilemmas may arise after the commission transmits the list of nominees. When the commission receives information about a nominee after deliberations have adjourned, commissions may decide to forward the information to the appointing authority with a memorandum explaining that the information was submitted after the commission deliberated and the applicant was neither questioned nor had an opportunity to respond to the information. Other than this type of limited communication, commissioners should not attempt to influence the appointing authority's decision in any way.

If the appointing authority wishes to contact any commissioner, several commissions permit commissioners to answer specific questions about each nominee. However, this communication can raise several ethical issues. A key point for commissioners to keep in mind in this situation is that they represent the public in the judicial selection process; they are not agents or representatives of the individuals (e.g., governor, chief justice, legislative leader) or organizations (e.g., bar associations) that appointed or elected them.

Because commissioners have a duty to safeguard their independence as members of a public body, and to refrain from advocating for or against any nominee, they need to establish clear policies for responding to questions by the appointing authority, such as who will respond and what limits they will place on post-nomination communication. Commissions may wish to consider the following when setting policies:

- Establishing uniform responses when the appointing authority or his or her staff contacts a commissioner.
- Adopting rules prohibiting commissioners from initiating post-nomination contact with the appointing authority and communicating to the appointing authority their individual preference for the position, even if the appointing authority explicitly asks for it.
- Specifying how to assist the appointing authority in its investigation, if asked to do so, without advocating for or against any nominee.

The commissioners may designate the chair as their spokesperson, or a subcommittee of the commission, or the entire commission.

**With applicants not nominated.** Sometimes these individuals may wish to communicate with commissioners to discuss the nominating process.<sup>43</sup> If the applicant seeks advice on whether to apply for future vacancies, the commissioners should be aware that the commissions encourage and welcome as many qualified applicants as possible for every judicial vacancy. The larger the pool of applicants, the more representative it will be of the community. In addition, commissioners should respond to the applicant's inquiries without disclosing the confidential deliberations or votes of the commission. In addition, a commissioner should never advise an applicant that it would be futile to reapply or, conversely, pledge his or her support if the applicant applies again. Commissioners should understand that the composition of the commission changes over time, as do the qualifications of the applicants and the mix of applicants. Therefore, a current commissioner cannot speak for the entire commission or future commissions.

## Conclusion

As the success of a merit selection system is dependent upon the proper functioning of the judicial nominating commission, the credibility and legitimacy of the commission will be determined by the ethical behavior of its members. Discussing the potential ethical challenges that have been raised in this chapter, and developing responses to them in advance will prepare commissioners to respond appropriately when they are confronted by ethical dilemmas.

In addition, commissioners have ethical obligations at each stage of the selection process to keep abreast of commission activities, read all relevant materials, and attend every commission meeting and applicant interview. By behaving ethically, impartially and objectively, the commission will enhance the necessary public trust and confidence in the merit selection process and generate the best-qualified nominees for judicial office.

We are grateful to the researcher and primary author of this chapter, Katherine Borden, who at the time of writing was a student at Loyola University Chicago School of Law.

- 
- 1 Allan Ashman and James J. Alfini, *The Key to Judicial merit Selection : The Nominating Process* 22 (Chicago: American Judicature Society, 1974)
  - 2 Bylaws and Rules of Procedure for the Tennessee Judicial Selection Commission – § XII.
  - 3 Hawaii’s Judicial Selection Commission – Rule 5.
  - 4 Florida’s Uniform Rules of Procedure for District Courts of Appeals Judicial Nominating Committee – § VIII (amended 6/25/03); Florida’s Uniform Rules of Procedure for Circuit Judicial Nominating Commissions – § VII (amended 6/25/03); Rhode Island’s Uniform Rules of Procedure for the Judicial Nominating Commission – § VII; South Dakota’s Rules of Procedure of the Judicial Qualifications Commission – Rule I(3).
  - 5 E.g., Bylaws of the Alaska Judicial Council – Article 2, § 3; Rules of the Idaho Judicial Council General Rules of Procedure – Rule 1; Missouri Supreme Court Rule 10.05; Supreme Court Rules for Operation of the Judicial Nomination Commission – Rules for Nebraska Judicial Nominating Commissions - § C(1); Rhode Island Statutes § 8-16.1-2(h).
  - 6 *Commissioner’s Manual Nebraska Judicial Nominating Commission*, Appendix 1 (revised September 2000).
  - 7 E.g., Bylaws of the Alaska Judicial Council – Article V, § 2.
  - 8 A family member within the third degree of consanguinity includes any applicant’s spouse, parent, grandparent, aunt, uncle, sibling, nephew, niece, or spouse of any of these.
  - 9 E.g., Supreme Court Rules for Operation of the Judicial Nomination Commission – Rules for Nebraska Judicial Nominating Commission - §B(1).
  - 10 E.g., Supreme Court Rules for Operation of the Judicial Nomination Commission – Rules for Nebraska Judicial Nominating Commission - §B(1).
  - 11 E.g., Maryland’s Judicial Nominating Commission Rules - Rule D(1).
  - 12 E.g., Rhode Island’s Code of Ethics Memorandum for Board Members - citing to R.I.G.L. § 36-14-7.
  - 13 E.g., Rules of Indiana Judicial Nominating Commission – Rule 11; Utah’s Manual for Procedures for Judicial Nominating Commissions - § VII(C).
  - 14 Florida’s Uniform Rules of Procedure for Circuit Judicial Nominating Commissions § VIII.

- 15 Supreme Court Rules for Operation of the Judicial Nomination Commission – Rules for Nebraska Judicial Nominating Commission - §B(3).
- 16 Rhode Island’s Code of Ethics Memorandum for Board Members - citing to R.I.G.L. § 36-14-6.
- 17 E.g., Hawaii’s Judicial Selection Commission Rules – Rule 5, § 3(B).
- 18 E.g., Connecticut Statute § 51-44a(a); Massachusetts Executive Order 445(03-3) – § 1.5.1; New York Executive Order No. 10 - Rule7; Wyoming Constitution – Article 5, § 5.
- 19 Massachusetts Executive Order 445(03-3) – § 1.4.3.
- 20 E.g., Indiana Constitution – Article 7, §9, Indiana Statute §§ 33-5-5.1-31.1(b), 33-5-29.5-29(d), 33-5-40-34; Oklahoma Constitution – Article-B, §3(f).
- 21 Constitution of Kansas – Article 3, § 5(g).
- 22 Constitution of Oklahoma – Article 70B, §3(f)
- 23 *Model Judicial Selection Provisions*, Art. \_\_, Sec. 2 at 2 (Chicago: American Judicature Society, 1994).
- 24 Although the legal aspects of commission confidentiality and applicant privacy issues are addressed in detail in Chapter Two, discussion of the ethical dimensions of confidentiality is appropriate here.
- 25 E.g., State of Minnesota Applicant Procedures for District Court Judge – Rule I(D). See also Table 4: Rules of Confidentiality, *Judicial Merit Selection: Current Status* (Chicago: American Judicature Society, 2003).
- 26 Montana’s Judicial Nomination Commission Rules – Rule VIII.
- 27 E.g., Rules of the Idaho Judicial Council General Rules of Procedure – Rule 12.
- 28 E.g., Kentucky Supreme Court Rule 5.050; Massachusetts Executive Order 454(03-3) – § 1.5.4; Bylaws and Rules of Procedure for the Tennessee Judicial Selection Commission - § XIII; Colorado Judicial Nominating Commission Handbook – Chapter One.
- 29 E.g., Nebraska Const. Art.V, Sec. 21(4).
- 30 E.g., New Hampshire Executive Order 2000-9 - § 8 (As of late 2003, the judicial nominating committee had been discontinued;) Rules of the Judicial Nominating Board of the State of Vermont – Rule 4(c).
- 31 For a summary of confidentiality rules used by all merit-plan jurisdictions see *Judicial Merit Selection: Current Status*, Table 4: Rules of confidentiality (Chicago: American Judicature Society, 2003).
- 32 E.g., Colorado Judicial Nominating Commission Handbook – Chapter One; Kentucky Supreme Court Rule 6.050; Montana Statute 480B.01, Subdivision 11; New Mexico’s Rules Governing Judicial Nominating Commissions - § 9; Bylaws and Rules of Procedure for the Tennessee Judicial Selection Commission - § XIII. See also Table 3: Rules governing submission of list of nominees, *Judicial Merit Selection: Current Status* (Chicago: American Judicature Society, 2003).
- 33 *Supra* note 24, “Implementing a Commission Plan: Model Court Rules (or Legislation);” Rule 6
- 34 E.g., Hawaii’s Judicial Selection Commission Rules – Rule 5, § 2(B).
- 35 E.g., Missouri Supreme Court Rule 10.32(b),(c).
- 36 *Model Judicial Selection Provisions*, Implementing a Commission Plan: Model Court Rules (or Legislation), Rule\_\_06(a) (Chicago: American Judicature Society, 1994).
- 37 E.g., South Dakota’s Rules of Procedure of the Judicial Qualifications Commission - Rule II(4); see also *Judicial Merit Selection: Current Status*, Table 3: Rules governing submission of list of nominees (Chicago: American Judicature Society, 2003).
- 38 Rules of the Baldwin County Judicial Commission, Alabama – Rule 11; Rules of the Jefferson County Judicial Commission, Alabama – Rule 11; Rules of the Tuscaloosa County Judicial Commission – Rule 8.
- 39 *Supra* note 37, Table 3: Rules governing submission of list of nominees.
- 40 E.g., Kansas District Judicial Nominating Commission Manual – Rule 18; Montana Statute § 3-1-1010(2); see also note 37, Table 3.
- 41 E.g., Iowa’s Internal Rules of Procedure of State Judicial Nominating Commission – Rule 4(9); see also note 37, Table 3.

42 E.g., Florida Supreme Court Judicial Nominating Commission Rules of Procedure - § IV; Florida's Uniform Rules of Procedure for District Courts of Appeals Judicial Nominating Committee - § VIII; Florida's Uniform Rules of Procedure for Circuit Judicial Nominating Commissions - § VII.

43 See Colorado Judicial Nominating Commission Handbook, Chapter One.

