

NEW YORK CITY BAR

COUNCIL ON JUDICIAL ADMINISTRATION

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September 21, 2009

Stephen Younger, Esq.
Patterson Bellknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, New York 10036

Re: Proposed Revisions to the Rules of the
Commission on Judicial Nomination

Dear Stephen:

As Chair of the Council on Judicial Administration of the New York City Bar Association, I am sending you the Council's Comments regarding the Proposed Revisions to the Commission's Rules for the Commission's consideration. The NYC Bar Association and the Council are grateful for the hard work of the Commission in selecting and nominating candidates for the Court of Appeals. We especially wish to congratulate the Commission for its efforts to revise its rules with the goals of transparency, attracting a wide range of well-qualified candidates, promoting diversity, and utilizing a well thought out, unbiased, and fair process. We have enclosed suggestions which we believe will further these goals. We thank you and the Commission for the opportunity to present them. They are summarized below. For your easy reference and comparison, they are also placed below each proposed Rule in the enclosure to this letter. Our suggestions are as follows:

7100.2 Counsel.

(a) The commission may appoint, and at its pleasure remove, a counsel and such other staff as may be required from time to time, and prescribe their powers and duties. The commission shall fix the compensation of its staff and provide for reimbursement of their expenses within the amounts appropriated by law. [WE DO NOT OBJECT TO THE CONCEPT OF NEW LANGUAGE COVERING THE COUNSEL. WE ARE UNCLEAR AS TO WHY 7100.2(a) IS ADDED AND WOULD APPRECIATE THE COMMISSION ISSUING FURTHER CLARIFICATION.]

7100.5 Quorum for meetings.

(a) At least 10 members of the commission-a quorum, according to Section

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62(6) of the Judiciary Law-must be present, either in person or by telephone, at the time a vote of the full commission is taken. For the consideration and selection of candidates, a quorum must be physically present.

[WE SUGGEST (a) BE REVISED TO STATE: "A QUORUM SHALL CONSIST OF AT LEAST 10 MEMBERS OF THE COMMISSION, ACCORDING TO SECTION 62(6) OF THE JUDICIARY LAW. A QUORUM FOR ANY MEETING OF THE COMMISSION SHALL BE 10 MEMBERS WHO MAY BE PRESENT EITHER IN PERSON, BY TELEPHONE OR BY ONLINE TELEPHONE CONFERENCE SERVICES. FOR THE CONSIDERATION, INTERVIEWING AND SELECTION OF CANDIDATES A QUORUM MUST BE PRESENT IN PERSON."] [OUR PROPOSED CHANGES ATTEMPT TO MAKE CLEARER THE MEANING OF THE PROPOSED RULE REVISIONS. THE WORD "INTERVIEWING" IS ADDED TO THE LAST SENTENCE TO CLARIFY THE MEANING OF "CONSIDERATION AND SELECTION" AND TO MAKE CLEAR THAT A QUORUM MUST ALSO BE PRESENT IN PERSON FOR THE INTERVIEWING PROCESS.]

(b) In the event that seven or more members are present in person at a duly called meeting at which a quorum fails to appear, those members who are present at such meeting are constituted as a committee of the commission, and are authorized to conduct all business of the commission and enact resolutions on behalf of the commission, except as to the consideration, selection ["AND INTERVIEWING"] of candidates; provided that the absent members of the commission are given prompt notice of any action taken by the committee; and provided that any action taken by that committee is ratified at the next commission meeting at which at least 10 members are present in person or by telephone, or is ratified by a writing, or writings, signed by all the absent members of the commission. [THIS ADDS "INTERVIEWING" WHICH IS CONSISTENT WITH OUR OTHER PROPOSED CHANGES.]

7100.6 Solicitation of candidates.

In its solicitation of candidates, the commission's objective is to have broad outreach in order to enable the commission to identify qualified candidates from a wide range of New York's diverse communities. When the commission has been duly notified that a vacancy on the Court of Appeals has occurred, or is about to occur, the following steps directed to achieving the Commission's objective will be taken. [WE SUGGEST THE FIRST SENTENCE BE REPLACED WITH THE FOLLOWING:

"IN ITS SOLICITATION OF CANDIDATES, THE COMMISSION'S OBJECTIVE IS TO GIVE QUALIFIED CANDIDATES OF EVERY BACKGROUND AN OPPORTUNITY TO BE CONSIDERED FOR NOMINATION. THE COMMISSION WILL STRIVE TO IDENTIFY CANDIDATES THAT REFLECT THE DIVERSITY OF THE CITIZENS OF THE STATE OF NEW YORK AND BROADEN ITS OUTREACH TO ENCOURAGE WIDER PARTICIPATION IN THE PROCESS."] [OUR PROPOSED CHANGES ARE TO BETTER STATE WHAT WE BELIEVE WAS THE INTENT OF THE PROPOSED LANGUAGE TO REACH OUT AND CONSIDER DIVERSE CANDIDATES. THE PROPOSED LANGUAGE STATED: "IDENTIFY QUALIFIED CANDIDATES FROM A WIDE RANGE OF NEW YORK'S DIVERSE COMMUNITIES."]

(b) The chairperson will request a meeting between the commission and the governor or governor-elect to discuss the vacancy and efforts to recruit candidates. [WE RECOMMEND THIS PROPOSED PROVISION (b) BE DELETED FROM THE PROPOSED RULES. WE ARE CONCERNED THE PROPOSED PROVISION (b) WOULD CREATE A PERCEPTION

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ISSUE AND WOULD APPEAR TO RE-POLITICIZE THE NOMINATION AND SELECTION PROCESS.]

(d) The chairperson additionally may appoint a search committee, comprised of commissioners, which will solicit recommendations from the legal community to enhance candidate outreach. [WE RECOMMEND THIS PROPOSED PROVISION (d) BE DELETED FROM THE PROPOSED RULES. WE ARE CONCERNED THIS CONCEPT OF A SEARCH COMMITTEE RUNS THE RISK OF UPSETTING THE BALANCE OF THE COMMISSION AS CONTEMPLATED BY THE CONSTITUTION, IT IS COVERED BY (c), AND GIVES POWER TO THE CHAIRPERSON WHICH MAY RESULT IN CHALLENGES BY THOSE OPPOSED TO THE MEMBERS OF THE SEARCH COMMITTEE. IT MAY RESULT IN A CHARGE THAT TOO NARROW A GROUP IS ENGAGED IN AN IMPORTANT PART OF THE NOMINATION AND SELECTION PROCESS.]

(e) (6) Send the notice to the Speaker of the New York State Assembly and the President Pro Tempore of the New York State Senate, urging them to take special efforts to notify their members and constituents.

(e) (6) [WE RECOMMEND THIS PROPOSED PROVISION (6) BE DELETED FROM THE PROPOSED RULES. WE ARE CONCERNED THAT THIS PROVISION GIVES THE APPEARANCE OF INCREASED POTENTIAL POLITICAL INFLUENCE. MOREOVER, THIS IS UNNECESSARY BECAUSE THE SPEAKER AND THE PRESIDENT PRO TEMPORE ARE ALREADY ON NOTICE OF THE VACANCY BY OTHER MEANS.]

[SUGGESTED ADDITIONAL PROVISION TO 7100.6:

“(h) PRIOR TO THE COMMENCEMENT OF THE INITIAL SCREENING PROCESS FOR A VACANCY, THE COMMISSION’S WEBSITE WILL PROVIDE ANSWERS TO FREQUENTLY ASKED QUESTIONS ABOUT THE REQUIREMENTS OF THE POSITION AND THE COMMISSION’S PROCEDURES AND RULES FOR SUBMITTING RECOMMENDATIONS OF QUALIFIED CANDIDATES. TO THE EXTENT PRACTICABLE, CONFIDENTIAL QUESTIONS MAY BE ANSWERED ELECTRONICALLY.”] [THE CHANGE IS INTENDED TO PROVIDE ON-LINE SUPPORT IN ADDITION TO THE MEETINGS SUGGESTED IN 7100.6 SECTION G.]

7100.7 Investigation of candidates.

(b) Counsel will investigate the background and qualifications of a candidate as is necessary to determine that all statutory or constitutional criteria for appointment to the Court of Appeals are met, and to ensure that the commission has the fullest possible information available for its deliberations with respect to the candidate. [WE DON’T OPPOSE THIS PROPOSED REVISION BUT WOULD REQUEST AN EXPLANATION AS TO THE REASONS FOR THE CHANGE. THIS WILL PERMIT A BETTER UNDERSTANDING OF WHETHER THE LANGUAGE SHOULD BE REVISED.]

7100.8 Consideration of candidates.

(a) Commissioner impartiality.

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(1) A commissioner will consider each applicant in an impartial, objective manner, and disclose to the commission any relationship with an applicant that has [“OR MAY REASONABLY APPEAR TO HAVE”] a bearing on the nomination process.

(3) A commissioner will not individually communicate, [“DIRECTLY OR INDIRECTLY”] orally or in writing, with an applicant about the application or the process, from the time the application is submitted until completion of the final vote on the nominations. [THE ADDITIONAL LANGUAGE WE BELIEVE FURTHERS THE INTENT OF THE PROPOSED REVISION (3).]

[A NEW (5) PROVISION NEEDS TO BE ADDED, ESPECIALLY WITH THE ELIMINATION OF THE “INTERVIEWING LANGUAGE” IN (c)(2) IN THE COMMISSION’S PROPOSED REVISED RULES. NO PROVISION EXISTS IN THE RULES SETTING FORTH THE INTERVIEWING PROCESS FOR CANDIDATES. THIS PROCESS NEEDS TO BE MADE CLEAR AS TO THE SELECTION OF CANDIDATES TO BE INTERVIEWED, AND THE MECHANISM, TIMING, AND PROCESS FOR CONDUCTING INTERVIEWS.]

(c) Nomination procedures.

(2) Following completion of all interviews, the commission will meet and discuss the relative merits of the remaining candidates and attempt to reach a consensus as to which candidates should be nominated (bearing in mind that each nomination must have the affirmative vote of eight members “PURSUANT TO SECTION 63(3) OF THE JUDICIARY LAW”.]). In the event a consensus is not reached as to all nominations, the balloting procedure described in Appendix I will commence. The balloting procedure will be utilized only as to nominations that have not been made by consensus. [THE NEW LANGUAGE IS SIMPLY FOR CLARIFICATION PURPOSES.]

(d) Consideration of the qualifications of a candidate.

In considering and evaluating each candidate’s qualifications for the Court of Appeals, the commission will consider criteria and standards including character, temperament, professional aptitude and experience. Commissioners and commission staff will not discriminate against any candidate on the basis of any legally impermissible factor. [WE SUGGEST DELETING THE WORDS “AND COMMISSION STAFF”]

[OUR PROPOSED REVISION TO (d) IS BECAUSE WE BELIEVE WE HAVE NO INDICATION IN THE RULES OF WHAT OTHER ROLE THE COMMISSION STAFF PLAYS IN THE PROCESS AND IT IS ONLY THE COMMISSION THAT HAS THE RESPONSIBILITY FOR NOMINATION.]

(e) Commitment to diversity.

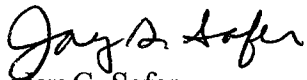
The commission is committed to considering nominees for the Court of Appeals with outstanding personal and professional qualifications who reflect the diversity of [THE PEOPLE OF] New York including, but not limited to, diversity in race, ethnicity, gender, religion, sexual orientation and geography. A diverse Judiciary ensures that a broad array of perspectives and experiences are brought to the bench; reinforces public trust and confidence in the fairness of the justice system and the administration of justice; and ultimately enhances the delivery of justice and the Judiciary’s credibility and moral authority. [THE ABOVE LANGUAGE HAS BEEN

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SUGGESTED AS A MORE FORCEFUL STATEMENT TO MEET THE INTENT OF
7100.8(d) AND (e).]

Thank you for your consideration of our Comments. Please let me and the NYC Bar know if we
can of assistance to the Commission in any way as it determines it Revised Rules.

Yours very truly,

A handwritten signature in cursive script, appearing to read "Jay G. Safer".

Jay G. Safer

Chair of the Council of Judicial Administration

cc: Patricia M. Hynes
Alan Rothstein

**RESPONSE OF THE
COUNCIL ON JUDICIAL ADMINISTRATION
OF THE NEW YORK CITY BAR ASSOCIATION
TO THE PROPOSED REVISED RULES OF
THE COMMISSION ON JUDICIAL NOMINATION**

Proposed Revisions to the Rules of the Commission on Judicial Nomination
Title 22 N.Y.C.R.R. Section 7100

7100.0

Preamble.

Under the Constitution and laws of the State of New York, the Commission on Judicial Nomination is entrusted with responsibility for evaluating, and then recommending to the Governor, candidates to fill vacancies on the State's highest court, the Court of Appeals of the State of New York. These rules implement the overarching constitutional and statutory mandate that the commission vigorously seek out, carefully evaluate and then nominate to the Governor well qualified candidates from the extraordinary, diverse community of lawyers admitted to practice in New York State for at least 10 years. The commission seeks to discharge this duty with diligence and transparency in a manner consistent with the confidentiality provisions of the Judiciary Law.

7100.1

Chairperson.

The chairperson of the commission will preside at any meeting of the commission at which the chairperson is present, and, if absent, will designate another member to preside. If the chairperson is unable to fulfill the duties of office, or if the position of chairperson becomes vacant, the longest-serving commissioner able to fulfill the duties of chairperson will act as chairperson. The chairperson will be the sole spokesperson for the commission unless the

chairperson designates another member of the commission or counsel as spokesperson in a specific regard. In any event, the confidentiality mandated by Section 66(1) of the Judiciary Law will be maintained by all members and staff. The chairperson will have such other functions and duties as may be assigned by the commission, or are customary for the office.

7100.2

Counsel.

(a) The commission may appoint, and at its pleasure remove, a counsel and such other staff as may be required from time to time, and prescribe their powers and duties. The commission shall fix the compensation of its staff and provide for reimbursement of their expenses within the amounts appropriated by law. **[WE DO NOT OBJECT TO THE CONCEPT OF NEW LANGUAGE COVERING THE COUNSEL. WE ARE UNCLEAR AS TO WHY 7100.2(a) IS ADDED AND WOULD APPRECIATE THE COMMISSION ISSUING FURTHER CLARIFICATION.]**

(b) The commission's counsel will assist the chairperson; supervise the implementation of the commission's rules and resolutions; organize, oversee and report to the commission on the investigation of candidates; supervise any other commission staff; serve (when present) as secretary of commission meetings; and fulfill such other duties as may be delegated by the commission or chairperson.

7100.3

Commission membership is governed by Section 62 of the Judiciary Law. No later than 30 days prior to the occurrence of a vacancy on the commission, notice will be published on the commission's website, distributed to the press, and sent in writing to the relevant appointing authority, together with a statement that the ultimate objectives of wide diversity and broad

outreach in the nomination of well-qualified candidates for the Court of Appeals are best served by a commission that itself reflects the diversity of New York's communities.

7100.4

Meetings.

Meetings of the commission may be called by the chairperson, or a majority of the members of the commission, by written or electronic notice to the other members specifying the time and place of meeting. Such notice will be given at least seven days before the time specified, except that a meeting may be held on shorter notice, and by telephone notice, if it is impractical to do otherwise. Notice of meeting may be waived by any member before or after the meeting, and attendance at a meeting by a member will constitute a waiver of notice. At least one meeting of the commission will be held in every calendar year.

7100.5

Quorum for meetings.

(a) At least 10 members of the commission-a quorum, according to Section 62(6) of the Judiciary Law-must be present, either in person or by telephone, at the time a vote of the full commission is taken. For the consideration and selection of candidates, a quorum must be physically present. **[WE SUGGEST (a) BE REVISED TO STATE: "A QUORUM SHALL CONSIST OF AT LEAST 10 MEMBERS OF THE COMMISSION, ACCORDING TO SECTION 62(6) OF THE JUDICIARY LAW. A QUORUM FOR ANY MEETING OF THE COMMISSION SHALL BE 10 MEMBERS WHO MAY BE PRESENT EITHER IN PERSON, BY TELEPHONE OR BY ONLINE TELEPHONE CONFERENCE SERVICES. FOR THE CONSIDERATION, INTERVIEWING AND SELECTION OF CANDIDATES A QUORUM MUST BE PRESENT IN PERSON."]** **[OUR PROPOSED**

CHANGES ATTEMPT TO MAKE CLEARER THE MEANING OF THE PROPOSED RULE REVISIONS. THE WORD “INTERVIEWING” IS ADDED TO THE LAST SENTENCE TO CLARIFY THE MEANING OF “CONSIDERATION AND SELECTION” AND TO MAKE CLEAR THAT A QUORUM MUST ALSO BE PRESENT IN PERSON FOR THE INTERVIEWING PROCESS.]

(b) In the event that seven or more members are present in person at a duly called meeting at which a quorum fails to appear, those members who are present at such meeting are constituted as a committee of the commission, and are authorized to conduct all business of the commission and enact resolutions on behalf of the commission, except as to the consideration, selection [**“AND INTERVIEWING”**] of candidates; provided that the absent members of the commission are given prompt notice of any action taken by the committee; and provided that any action taken by that committee is ratified at the next commission meeting at which at least 10 members are present in person or by telephone, or is ratified by a writing, or writings, signed by all the absent members of the commission. [**THIS ADDS “INTERVIEWING” WHICH IS CONSISTENT WITH OUR OTHER PROPOSED CHANGES.**]

7100.6

Solicitation of candidates.

In its solicitation of candidates, the commission’s objective is to have broad outreach in order to enable the commission to identify qualified candidates from a wide range of New York’s diverse communities. When the commission has been duly notified that a vacancy on the Court of Appeals has occurred, or is about to occur, the following steps directed to achieving the Commission’s objective will be taken. [**WE SUGGEST THE FIRST SENTENCE BE REPLACED WITH THE FOLLOWING:**

“IN ITS SOLICITATION OF CANDIDATES, THE COMMISSION’S OBJECTIVE IS TO GIVE QUALIFIED CANDIDATES OF EVERY BACKGROUND AN OPPORTUNITY TO BE CONSIDERED FOR NOMINATION. THE COMMISSION WILL STRIVE TO IDENTIFY CANDIDATES THAT REFLECT THE DIVERSITY OF THE CITIZENS OF THE STATE OF NEW YORK AND BROADEN ITS OUTREACH TO ENCOURAGE WIDER PARTICIPATION IN THE PROCESS.”] [OUR PROPOSED CHANGES ARE TO BETTER STATE WHAT WE BELIEVE WAS THE INTENT OF THE PROPOSED LANGUAGE TO REACH OUT AND CONSIDER DIVERSE CANDIDATES. THE PROPOSED LANGUAGE STATED: “IDENTIFY QUALIFIED CANDIDATES FROM A WIDE RANGE OF NEW YORK’S DIVERSE COMMUNITIES.”]

(a) The chairperson and counsel will arrange for broadly disseminated public notice of the existence of the vacancy, the procedure to be followed by prospective candidates in order to be considered by the commission, the procedure to be followed by the public to bring qualified candidates to the attention of the commission, and any deadline that has been fixed for the receipt of questionnaires.

(b) The chairperson will request a meeting between the commission and the governor or governor-elect to discuss the vacancy and efforts to recruit candidates. **[WE RECOMMEND THIS PROPOSED PROVISION (b) BE DELETED FROM THE PROPOSED RULES. WE ARE CONCERNED THE PROPOSED PROVISION (b) WOULD CREATE A PERCEPTION ISSUE AND WOULD APPEAR TO RE-POLITICIZE THE NOMINATION AND SELECTION PROCESS.]**

(c) Each member of the commission, and counsel, will encourage persons who may be

well qualified to fill a vacancy on the Court of Appeals to file an executed questionnaire for consideration by the commission. In seeking recommendations or encouraging prospective candidates, members of the commission, and counsel, should make clear that no commitment or support for nomination is implied. A commissioner will disclose to the commission that he or she has encouraged a candidate to apply to fill a vacancy when that candidate is first considered by the commission.

(d) The chairperson additionally may appoint a search committee, comprised of commissioners, which will solicit recommendations from the legal community to enhance candidate outreach. **[WE RECOMMEND THIS PROPOSED PROVISION (d) BE DELETED FROM THE PROPOSED RULES. WE ARE CONCERNED THIS CONCEPT OF A SEARCH COMMITTEE RUNS THE RISK OF UPSETTING THE BALANCE OF THE COMMISSION AS CONTEMPLATED BY THE CONSTITUTION, IT IS COVERED BY (c), AND GIVES POWER TO THE CHAIRPERSON WHICH MAY RESULT IN CHALLENGES BY THOSE OPPOSED TO THE MEMBERS OF THE SEARCH COMMITTEE. IT MAY RESULT IN A CHARGE THAT TOO NARROW A GROUP IS ENGAGED IN AN IMPORTANT PART OF THE NOMINATION AND SELECTION PROCESS.]**

(e) The commission will disseminate the notice of vacancy in at least the following ways:

(1) Announce the vacancy to the media.

(2) Announce the vacancy to bar associations in the State of New York urging them to take special efforts to notify their members.

(3) Announce the vacancy to deans of New York law schools, urging them to take special

efforts to notify faculty and other eligible candidates.

(4) Encourage members of the public to identify qualified candidates.

(5) Place official notice on the commission's website, and request the posting of the official notice on court websites, the Governor's website and the Attorney General's website.

(6) Send the notice to the Speaker of the New York State Assembly and the President Pro Tempore of the New York State Senate, urging them to take special efforts to notify their members and constituents. **[WE RECOMMEND THIS PROPOSED PROVISION (6) BE DELETED FROM THE PROPOSED RULES. WE ARE CONCERNED THAT THIS PROVISION GIVES THE APPEARANCE OF INCREASED POTENTIAL POLITICAL INFLUENCE. MOREOVER, THIS IS UNNECESSARY BECAUSE THE SPEAKER AND THE PRESIDENT PRO TEMPORE ARE ALREADY ON NOTICE OF THE VACANCY BY OTHER MEANS.]**

(f) The questionnaire will be made available on the commission's website.

(g) Prior to the commencement of the initial screening process for a vacancy, the commission, through subcommittees or other arrangement as appointed by the chairperson, may convene an informational meeting, open to the public, in each of the four Judicial Departments of the State. The date, time and place of the informational meeting will be published on the commission's website and distributed to the press as part of the notice of the vacancy or in a separate public notice. At the informational meeting, the commission will discuss the requirements for the position and the commission's procedures and rules for submitting recommendations of qualified candidates; copies of the commission's rules also will be made available. At that time, the public may be heard (orally or in writing) about community needs,

the general qualifications for judicial office and the nominating process.

[SUGGESTED ADDITIONAL PROVISION TO 7100.6:

“(h) PRIOR TO THE COMMENCEMENT OF THE INITIAL SCREENING PROCESS FOR A VACANCY, THE COMMISSION’S WEBSITE WILL PROVIDE ANSWERS TO FREQUENTLY ASKED QUESTIONS ABOUT THE REQUIREMENTS OF THE POSITION AND THE COMMISSION’S PROCEDURES AND RULES FOR SUBMITTING RECOMMENDATIONS OF QUALIFIED CANDIDATES. TO THE EXTENT PRACTICABLE, CONFIDENTIAL QUESTIONS MAY BE ANSWERED ELECTRONICALLY.”] [THE CHANGE IS INTENDED TO PROVIDE ON-LINE SUPPORT IN ADDITION TO THE MEETINGS SUGGESTED IN 7100.6 SECTION G.]

7100.7

Investigation of candidates.

(a) In order to receive consideration by the commission, candidates must set forth and verify all the information called for by the questionnaire furnished by the commission, and execute the accompanying forms by which the commission is given access to information or records that may otherwise be confidential.

(b) Counsel will investigate the background and qualifications of a candidate as is necessary to determine that all statutory or constitutional criteria for appointment to the Court of Appeals are met, and to ensure that the commission has the fullest possible information available for its deliberations with respect to the candidate. **[WE DON’T OPPOSE THIS PROPOSED REVISION BUT WOULD REQUEST AN EXPLANATION AS TO THE REASONS FOR THE CHANGE. THIS WILL PERMIT A BETTER UNDERSTANDING OF WHETHER**

THE LANGUAGE SHOULD BE REVISED.]

(c) Counsel is authorized to utilize, on the commission's behalf, the power granted to the commission by Section 64(3) of the Judiciary Law, to request assistance, information and data from any State agency, and, specifically, shall procure the assistance of the State Police in acquiring background information with respect to candidates.

(d) In the event that the chairperson, counselor any member believes that the power granted by Section 64(2) of the Judiciary Law to administer oaths or affirmations, or to subpoena witnesses or documents, should be utilized, they shall request the authority to do so from the commission at a duly constituted meeting; except that, in the event the chairperson believes that any such power should be utilized on an emergency basis, the chairperson may do so pursuant to the agreement of a majority of the commission given by telephone or in writing. Subpoenas, or other process, issued on behalf of the commission will be signed by the chairperson or, if unavailable, by counsel; and the chairperson (or a member of the commission designated by the chairperson) and counsel are hereby empowered to administer oaths or affirmations on behalf of the commission.

7100.8

Consideration of candidates.

(a) Commissioner impartiality.

(1) A commissioner will consider each applicant in an impartial, objective manner, and disclose to the commission any relationship with an applicant that has [**"OR MAY REASONABLY APPEAR TO HAVE"**] a bearing on the nomination process.

(2) A commissioner will not be influenced other than by facts or opinion that are relevant

to the judicial qualifications of the applicants, and will promptly report to the chairperson any attempt to influence a commissioner other than by fact or opinion.

(3) A commissioner will not individually communicate, [**“DIRECTLY OR INDIRECTLY”**] orally or in writing, with an applicant about the application or the process, from the time the application is submitted until completion of the final vote on the nominations. [**THE ADDITIONAL LANGUAGE WE BELIEVE FURTHERS THE INTENT OF THE PROPOSED REVISION (3).**]

(b) Initial screening procedures.

(1) The commission will establish a date by which questionnaires must be filed for a particular vacancy, and after that date the procedures for initial screening of candidates will commence.

(2) Each member of the commission will be furnished a copy of each application received, together with any further necessary background information, and the chairperson will request each member to provide prompt written advice as to the names of those candidates that the member believes merit further consideration as part of the final nomination process. The chairperson’s request will indicate the date by which the members should submit such names. Candidates whose names have not been submitted to the chairperson by at least one member, within the specified time, or who are not proposed for further consideration by the chairperson, shall not be given further consideration for the particular vacancy.

(3) The chairperson will call a meeting of the commission, for a date following the date by which the members are to have proposed candidates who merit further consideration, to assess the relative merits of the remaining candidates and to determine the procedures to be

followed for their further consideration. The commission thereafter will meet to determine which candidates will be interviewed by the commission as part of the nomination procedures described in subdivision (c) of this section. Each candidate to be interviewed will be asked to file with the commission, prior to the interview, a sworn financial statement in a form supplied by the commission.

(4) Notwithstanding the above, the commission may employ a two-step application procedure in which a candidate's initial submission consists of a short-form questionnaire, including a resume, a statement setting forth the candidate's qualifications and interest in seeking nomination, and any other materials the candidate wishes to include. Each member of the commission will be furnished with a copy of each initial submission received, together with any further background information that may be pertinent, and the chairperson will request each member to provide prompt advice as to the names of those candidates that the member believes merit an interview as part of the final nomination process. The chairperson's request will indicate the date by which the members should submit such names. If the commission determines that a candidate merits an interview by the full commission, that candidate will be asked to submit a full questionnaire. Screening of the candidate would then proceed as set forth above.

[A NEW (5) PROVISION NEEDS TO BE ADDED, ESPECIALLY WITH THE ELIMINATION OF THE "INTERVIEWING LANGUAGE" IN (c)(2) IN THE COMMISSION'S PROPOSED REVISED RULES. NO PROVISION EXISTS IN THE RULES SETTING FORTH THE INTERVIEWING PROCESS FOR CANDIDATES. THIS PROCESS NEEDS TO BE MADE CLEAR AS TO THE SELECTION OF CANDIDATES TO BE INTERVIEWED, AND THE MECHANISM, TIMING, AND PROCESS FOR CONDUCTING INTERVIEWS.]

(c) Nomination procedures.

(1) If the nominations are for the office of Chief Judge, the number of candidates to be nominated will be seven pursuant to Section 63(2)(a) of the Judiciary Law. If the nominations are for the office of Associate Judge, the number of candidates to be nominated will be the maximum number specified by Section 63(2)(b) or (c) of the Judiciary Law, unless fewer candidates receive the affirmative vote of at least eight members of the commission.

(2) Following completion of all interviews, the commission will meet and discuss the relative merits of the remaining candidates and attempt to reach a consensus as to which candidates should be nominated (bearing in mind that each nomination must have the affirmative vote of eight members **“PURSUANT TO SECTION 63(3) OF THE JUDICIARY LAW”**.)). In the event a consensus is not reached as to all nominations, the balloting procedure described in Appendix I will commence. The balloting procedure will be utilized only as to nominations that have not been made by consensus. **[THE NEW LANGUAGE IS SIMPLY FOR CLARIFICATION PURPOSES.]**

(3) The objectives of the nomination and voting procedures are:

(i) to ensure that the commission thoroughly considers and evaluates each candidate;

(ii) to ensure that the commission is impartial in its deliberations;

(iii) to promote consensus in the selection of nominees; and

(iv) to ensure that each nominee receives at least eight affirmative votes from the commissioners, as required by Section 63(3) of the Judiciary Law.(4) All votes taken with respect to nominations will be by secret ballot.

(5) Pursuant to Section 65(4) of the Judiciary Law, upon the completion by the

commission of its consideration and evaluation of the qualifications of a candidate, there will be no reconsideration of that candidate for the vacancy for which the candidate was considered, except with the concurrence of nine members of the commission. For this purpose, the commission will not be considered to have completed its consideration and evaluation of the qualifications of a candidate until the conclusion of the meeting at which the candidate was nominated or eliminated for the particular vacancy.

(d) Consideration of the qualifications of a candidate.

In considering and evaluating each candidate's qualifications for the Court of Appeals, the commission will consider criteria and standards including character, temperament, professional aptitude and experience. Commissioners and commission staff will not discriminate against any candidate on the basis of any legally impermissible factor. **[WE SUGGEST DELETING THE WORDS "AND COMMISSION STAFF"] [OUR PROPOSED REVISION IS BECAUSE WE BELIEVE WE HAVE NO INDICATION IN THE RULES OF WHAT OTHER ROLE THE COMMISSION STAFF PLAYS IN THE PROCESS AND IT IS ONLY THE COMMISSION THAT HAS THE RESPONSIBILITY FOR NOMINATION.]**

(e) Commitment to diversity.

The commission is committed to considering nominees for the Court of Appeals with outstanding personal and professional qualifications who reflect the diversity of **[THE PEOPLE OF]** New York, including, but not limited to, diversity in race, ethnicity, gender, religion, sexual orientation and geography. A diverse Judiciary ensures that a broad array of perspectives and experiences are brought to the bench; reinforces public trust and confidence in the fairness of the justice system and the administration of justice; and ultimately enhances the delivery of justice

and the Judiciary's credibility and moral authority. [THE ABOVE LANGUAGE HAS BEEN SUGGESTED AS A MORE FORCEFUL STATEMENT TO MEET THE INTENT OF 7100.8(d) AND (e).]

7100.9

Report to the Governor.

Following the conclusion of the meeting of the commission at which the nomination procedure has been concluded, the chairperson and counsel will prepare, in consultation with the commission, and the chairperson will sign, a single written report to the Governor or Governor elect, as the case may be, which will contain the commission's nominations, in conformance with Section 63(3) of the Judiciary Law. The report will set forth (a) the relevant accomplishments of each nominee, and include major legal matters in which the nominee participated, as well as other notable professional qualities that the commission considered important in determining that each was well qualified and fit to serve as the Chief or an Associate Judge of the Court of Appeals, as the case may be; and (b) the efforts made by the commission and counsel to publicize each vacancy and to solicit applications from the broadest group of well qualified candidates. However, the report will not compromise the confidentiality of commission proceedings, as mandated by Section 66 of the Judiciary Law.

7100.10

Amendment or waiver of rules.

Consistent with applicable law, any rule adopted by the commission may be amended, revoked, or waived in a specific instance by the commission by the affirmative vote of eight members of the commission present at a duly constituted meeting.

7100.11

Website.

The commission will maintain a website for the purpose of communicating with the public and to aid in soliciting candidates pursuant to section 7100.6 of these rules. The website will contain contact information for the commission's counsel, an overview of the commission, a compilation of the commission's statutory authority and its rules, and a directory of current commission members. The website will also contain a record of recent commission press releases, a list of past nominees and other non-confidential information of interest to the public. Additionally, the website will set forth the procedure by which members of the public may (a) bring qualified candidates for vacancies on the Court of Appeals to the attention of the commission; and (b) sign up to receive commission press releases and notices by email. The website will be maintained by commission staff at the direction of the chairperson. Access to the commission's internet security and privacy policy will be clearly posted on the website, and all information posted to the website will comply with the confidentiality requirements mandated by Section 66 of the Judiciary Law.

Part 7100 Appendix I Voting procedures.

(a) Each member of the commission present, including the chairperson, will be given a ballot, which will contain the names of each remaining candidate in alphabetical order. Each member voting will place a number next to the name of 15 candidates he or she considers well qualified, which number indicates the member's order of preference; that is, next to the

member's first choice the member will place the number "15."¹ Members will not assign a number to candidates other than those 15 candidates. Notwithstanding the foregoing, the commission, with the approval of at least eight commissioners, may select a different number of candidates to receive votes.

(b) The numbers each candidate receives will be added, and the aggregate is referred to, hereinafter, as the candidate's "points." In order for a candidate to be nominated, he or she must be a candidate receiving the greatest number of points, and have the affirmative votes of eight members of the commission pursuant to Section 63(3) of the Judiciary Law. If the candidate or candidates receiving the greatest number of points are nominated, then, if a candidate receiving the second greatest number of points also received the affirmative vote of eight commissioners, that candidate will also be nominated. This process will be repeated with regard to the candidate receiving the next highest point total until no candidate has received the affirmative vote of eight commissioners.

(c) If this first balloting yields an indecisive result as to one or more nominations because of a tie, or because a candidate who has received among the greatest number of points has not received eight affirmative votes, additional balloting will be conducted. On ballots subsequent to the first, there shall be listed only those candidates not receiving nomination on a prior ballot or by consensus. No candidate will be considered nominated if he or she has received a lower number of points than a candidate as to whom the result is indecisive. The members will again vote by listing their order of preference. The number of candidates assigned a numerical vote by each member will be reduced by the number of nominations that have been made. For instance,

¹ This procedure assumes that the commission has not changed the number of candidates to be voted on and that no nominations have been made by consensus. If, for example, the commission selects four nominees by consensus, each member voting will place a number next to the name of eleven candidates he or she considers well qualified.

if the commissioners has voted for 15 candidates and the first ballot yields two nominations, on the second ballot members will place a number next to the name of thirteen candidates they consider well qualified, and again that number indicates the member's order of preference; that is, next to the member's first choice the member will place the number "13."

(d) Following the completion of a ballot, the chairperson may call for further discussion on the relative merits of all candidates not previously nominated. At any time following the completion of the first ballot, in the case of a vacancy in the office of Associate Judge, a member may offer a resolution reducing the number of candidates to be nominated, within the range stated in Section 63(2)(b) or (c) of the Judiciary Law. The affirmative votes of eight members of the commission will be required to pass such a resolution.

(e) This balloting procedure will be continued until all nominees are selected for the particular vacancy.

(f) At any time during the voting process, a member may offer a resolution dropping a particular candidate from consideration so long as the number of remaining candidates plus the number of candidates already nominated remains within the range stated in Section 63(2)(b) or (c) in the case of a vacancy in the office of Associate Judge or is at least seven in the case of a vacancy in the office of Chief Judge. The affirmative votes of eight members of the commission will be required to pass such a resolution.

Section 7101.4

Location.

Records shall be available for public inspection at:

State of New York Commission on Judicial Nomination

c/o Stephen P. Younger, Esq.

1133 Avenue of the Americas

New York, NY 10036-6710

For any questions or comments regarding these proposed revisions, please contact
counsel to the Commission on Judicial Nomination:

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