Comments of the Association of the Bar of the City of New York on Proposed Rule Changes Based Upon the Reports of the Commission to Promote Public Confidence in Judicial Elections

December 22, 2004

The Association of the Bar appreciates the efforts of the Commission to Promote Public Confidence in Judicial Elections, and the work of the Administrative Board of the Courts in issuing the proposed rules. These efforts grew out of a concern that the current system of electing judges in New York has substantial shortcomings that reflect negatively on the perceived impartiality and integrity of the judicial system.

The Association has a number of specific comments on the proposed rules. However, as a preliminary matter, we feel it necessary to note that the shortcomings of the judicial election system run too deep to be solved by the proposed rules. The ability of political leaders to control who goes on the bench and to hold them politically indebted during their tenure would not change. We also wonder whether the proposed rules, if adopted, would improve public confidence in the judiciary.

The Association has long advocated that judges be appointed through the use of a merit selection procedure, under which broadly-based nominating commissions would report a limited number of candidates from whom the appointing authority must choose. Recognizing that merit selection is not likely to be implemented any time soon, the Association's Task Force on Judicial Selection last year recommended that political parties establish committees to recruit and review judicial candidates, that they report only three persons per vacancy, and that political leaders agree to select only from among those candidates. The committees would be comprised of representatives of bar and other local organizations, and would operate independently of the political leaders. Incumbent judges up for re-election who are approved by the commissions would be placed on the ballot without opposition from within the nominating party.

We recognize that there are serious questions as to whether any proposed court rules could implement the full set of Task Force recommendations. In fact, questions have been raised as to the extent to which a government agency may involve itself in the elective process to the extent set forth in the proposed rules. Though we are not aware of any cases that are on point, there are decisions that suggest that government cannot appear to differentiate between candidates on the ballot. See *Cook v. Gralike*, 531 U.S. 510 (2001) (designation on ballot of congressional candidates regarding their support for term limits ruled unconstitutional. In a federal context, the Court, citing *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833-834 (1995), said, "the framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to … favor or disfavor a class of candidates…"); *Jack van Valkenburgh v. Citizens for Term Limits*, 135 Idaho 121; 15 P.3rd 1129 (2000) (ballot legend re: candidates' making term limits pledge violates state constitution). In addition, we raise the concern that requiring a candidate to submit to the screening panel (and to have real

meaning, candidates should feel pressured to participate) might constitute a qualification for election to judicial office, which is governed by Article VI of the State Constitution.

We believe these issues, and the others that follow, raise enough concerns with regard to the proposed rules to prompt us to urge that the Administrative Board provide more time for reflection and consideration of the proposals, including perhaps convening public hearings, before implementing the rules creating the Independent Judicial Qualifications Commissions. In that vein, it seems to us that the commissions would constitute a change in election procedure that would require pre-clearance under Section 5 of the federal Voting Rights Act. We commend to you the full discussion of this topic in the comments of the New York County Lawyers' Association.

Specific Comments

A. Proposed Rules Regarding Campaign Speech

The Association generally supports the amendments to Sections 100.3 and 100.5 of the proposed rules with regard to permissible speech by judges and judicial candidates, with two provisos. The Commission recommended the following language for Rule 100.3(B)(9)(b):

(9) A judge shall not:

> (b) make statements that commit the judge with respect to cases, controversies or issues that are likely to come before the court.

The proposed rules provide the following language for (b):

> (b) with respect to cases, controversies or issues that are likely to come before the court, make commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.

We recommend the adoption of the phrase in the Commission's report, "statements that commit" rather than "commitment". A similar change should be made to Rule 100.5(A)(4)(d)(ii). This language is clear but somewhat broader than the language of the proposed rules. We understand that the American Bar Association committee addressing the canons of judicial conduct may well be adopting that approach, and there is an advantage in having uniformity with other jurisdictions.

In addition, the Association believes the "commit" clause should be applied to a judge's administrative as well as adjudicative duties. The appointments a judge makes may have substantive consequences, and certainly go toward affecting the public's confidence in the judiciary. Judges should be impartial and of an open mind in making administrative as well as judicial decisions.

B. Purchase of Dinner Tickets and Campaign-Related Goods and Services

In its February 13, 2004, comments on proposed amendments to the Chief Administrator's Rules, the Association recommended that judges be permitted to buy tickets to politically sponsored dinners and other functions at no higher price than the lowest price for general admission, with a reasonable ceiling price. We still believe that is the most appropriate method of proceeding. However, if the Administrative Board has established that the $250 threshold it proposes reasonably reflects the costs of such functions, we are prepared to accept that approach.

With regard to the proposed rule governing payments by a judicial candidate for goods and services, we support the thrust of the proposal but are concerned about how the fair market value of goods and services is to be determined. The Chief Administrative Judge, we believe, should prepare guidelines with objective criteria. One clear measure we propose is that any payment for a service by a judicial candidate would be above fair market value if the same service were offered to candidates for other offices at a lower rate.

C. Judicial Election Qualifications Commissions

1. The Composition of the Commissions

The proposed rules would establish Judicial Election Qualifications Commissions, in each judicial district. The commissions would have 15 members, six appointed by the Governor and legislative leaders, two by the Chief Judge, two by the Presiding Justice of the relevant Department, one by the President of the State Bar, and four by bar associations designated by the Presiding Justice. This structure poses a number of problems. In particular, the proposal to involve the Governor and the legislative leaders in a significant number of appointments to all judicial screening committees is troublesome. Notably, it would significantly increase the involvement of the Executive and Legislative branches of government in the selection of elected members of the Judicial branch of government. In addition, the leverage potentially exercised by the political appointees is significant. With a quorum of 10 and two-thirds of a quorum required to vote a candidate qualified, these appointees may hold substantial leverage. We note the appointees would serve "at the pleasure of" the appointing authorities, rather than be removable only for cause, which gives the political appointees further, inappropriate leverage on their appointees.

So long as the state Constitution continues to require the election of judges, we believe the selection of judicial candidates for those elected positions should remain independent of Executive and Legislative control. Furthermore, conferring commission appointments on the Governor and legislative leaders operates to adjust the balance of power among the branches of state government. Whatever one's view of the merits of that adjustment, if adjustments to the balance of power are to be made with regard to the selection of judicial candidates for elective positions, they should not be effected by administrative rules. That political decision is uniquely legislative in nature.

It is essential that members of the commissions function independently of the appointing authorities. One approach, which was advocated by this Association's Task Force with regard to party screening committees, is to have the commissions comprised entirely of members of bar and civic organizations and law school faculties. In selecting the organizations under this approach, sensitivity must be given to diversity – and we note that the appointment allocation under the proposed rules may well not result in the level of diversity desired. The process would be designed so that nonlawyers as well as lawyers are appointed. The organizations selected would designate someone to be a commission member, not as a representative of the organization, but to serve in an independent capacity.

If the proposed structure is maintained, we do not believe that adequate time is provided to the appointing authorities. Under the proposed rules, the Chief Judge has the power to fill vacancies if the appointment is not made within 30 days. We recommend appointing authorities be given at least 60 days in which to make the appointment. We note that, once appointed by the Chief Judge, that person serves not as an interim, but for the full term (presumably at the pleasure of the Chief Judge, as with the other appointments).

2. Term of Membership

The Association opposes the proposal that each commission member be appointed for a three year term with a possible renewal for another three-year term. A six-year stay on the commission is much too long. The dynamics of a commission requires that the appointees not become part of an institution, such that they become established power brokers themselves.

One could argue that commission members should only serve one-year terms, to avoid any entrenchment. There is also merit to the argument that having members serving a more than one year term would help them gain experience, particularly with staggered terms to assure that a significant number of commission members turn over each year. Certainly, no member should serve more than three years, and no member should be eligible for reappointment for at least two years after his or her term has ended.

3. Conducting the Evaluation

The proposed rules provide that the commissions "shall evaluate candidates for elected judicial office, other than justice of a town or village court." There is no specific requirement that judicial candidates appear before a commission. However, the proposed rules provide that the commissions will publish lists of candidates who do not participate. We recognize the twin pulls inherent in trying to compel participation – a desirable result but possibly beyond the authority of the Administrative Board. Nevertheless, the commissions cannot fully achieve their purpose unless all candidates submit to their review. The rules could provide that the commissions find nonparticipating candidates unqualified by reason of failing to demonstrate their qualifications to the commission.

The proposed rules provide for communicating the names of candidates found qualified and candidates not participating, but they do not provide for disclosure of candidates found unqualified. Presumably, the public would have to assume that a candidate for office who was not reported as qualified or non-participating was found not to be qualified. We recommend that persons found unqualified who then run for judicial office be reported. We suggest that a candidate found unqualified be informed of the evaluation and given an opportunity to withdraw. If the candidate withdraws, the report would not be made public. However, if a candidate decides to run after having been found unqualified, the public should be made aware of the finding and not be left to guess.

We debated the complicated issue of whether to recommend that the qualifications commissions go beyond finding candidates to be qualified and better differentiate for the voters. Such an approach would be more in line with the recommendation of the Association's Task Force, and the legislation being advanced by Assembly Member Helene Weinstein (Assembly bill 11456), that only a limited number of candidates per vacancy be reported per party. This may prompt the objection that suggesting certain candidates are highly qualified, or otherwise differentiating among qualified candidates, would be either inappropriate or beyond the Administrative Board's authority. This objection may have merit but, as we noted above, the whole notion of designating candidates as qualified and unqualified may raise similar issues. The commissions will already be making a determination as to whether someone is qualified, which would involve exercising substantial judgment in applying criteria. There may not be that much of a difference between distinguishing qualified from unqualified candidates, and adding an additional level for those found "highly qualified".

The proposed rules provide that two-thirds of the members of the full commission shall constitute a quorum and that "[T]wo-thirds of the quorum's vote shall be required to find a candidate qualified for judicial office." To avoid any confusion, we suggest the rules explicitly provide that the vote of two-thirds of those present and voting be necessary to find a candidate qualified.

The proposed rules do not state how long a finding of qualification by a commission remains in effect. This should be clarified. As the proposed rules stand, they could be interpreted to mean that once a candidate is found qualified, that finding lasts forever. That would, of course, be unfounded. Alternatively, if the intention is that candidates must go back before a panel every time they run, then some sort of limited carry-over provision for candidates who have been reported out more than once should be incorporated. See, e.g., proposed Judiciary Law Section 140-C.1 (C) of Assembly bill 11456, which is modeled in the New York County Democratic Committee's rules.

We urge that guidelines for the commissions' operation (presumably referred to in Section 150.6(a) of the proposed rules) be issued in advance of their beginning work. The guidelines should address matters such as due process, conflicts of interest, criteria for evaluating candidates, affirmative action and insulation from communications by appointing authorities that could compromise a commission's independence. In addition,

the guidelines, or the court rules, should expressly include timetables for the reports of the commissions.

4. Commission Resources

The proposed rules make no provision for resources to staff and operate the commissions. We question whether, in the absence of resources, the commissions could meaningfully conduct investigations of the background and qualifications of applicants. Accordingly, we urge that adequate staff be provided to ensure that the qualifications of applicants are reviewed and that suitable outreach for candidates is conducted.

5. Local Screening Processes

We believe the rules should incorporate the statement in the Report of the Commission to Promote Public Confidence in Judicial Elections that the qualifications commissions "are not designed to supplant local screening processes." Party screening panels should be permitted to function. It is our hope that they will incorporate the procedures of the 2003 report of the Association's Task Force on Judicial Elections.

6. Possible Status as Public Officers

We raise the question of whether the members of the commissions would have legal status as public officers. If so, we question whether the commissions' determinations would be subject to Article 78 review. What due process requirements would be necessary? And, on what basis would communications remain confidential and exempt from public disclosure under the Freedom of Information Law (much of the information collected by the commissions could be protected under Section 89(2) of that Law, and perhaps there are other provisions that can be invoked, though we note the definition of "judiciary" in the Law does not seem to encompass the commissions)?

D. Electronic Filing

We support the concept of requiring electronic filing by judicial candidates, to improve access to important information regarding campaign receipts and expenditures. We raise a question as to whether OCA has the authority to impose electronic filing requirements. The Election Law requires electronic filing on behalf of Supreme Court candidates but not for candidates to other judicial offices. If legislation is necessary to implement these requirements, we support such legislation.

Further, we suggest that OCA clarify what is intended by an "electronic campaign filing website in searchable format," given the significant difference between the two existing New York models for such an online database. Compare State Board of Elections (www.elections.state.ny.us) with New York City Campaign Finance Board (www.nyccfb.info).