

Report of Task Force on the Evaluation of Candidates for Election to Judicial Office

“Judicial elections, if fair and open, could be an essential forum for society to discuss and define the attributes of judicial excellence and to find ways to discern those qualities in the candidates. The organized bar, the legal academy, public advocacy groups, a principled press, and all the other components of functioning democracy must engage in this process.” Concurring Opinion of Mr. Justice Kennedy in *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 212 (2008).

I Introduction to the Work of the Task Force

A. The Task Force and Its Mandate

The New York State Bar Association’s [NYSBA] Executive Committee on June 1, 2018 established the “Task Force on the Evaluation of Candidates for Election to Judicial Office” [Task Force]. The mission statement provides that the Task Force:

will investigate and report on the various vetting structures that exist throughout New York State pertaining to candidates for election to judicial office. Based upon its investigation, the task force will propose best practices, guidelines and minimum standards for review of such judicial candidates. It will also make recommendations to assist local bar associations, good government groups and other stakeholders in developing effective non-partisan evaluation and screening of candidates for election to judicial office and improving those efforts that already exist.

President Michael Miller in his speech to the House of Delegates at NYSBA’s June 16, 2018 meeting at Cooperstown elaborated on the role of the Task Force. He stated:

There is no more important pillar to the foundation of our justice system than the quality of our judiciary. It has long been the policy of NYSBA to advocate for the selection of judges by appointment, rather than by election. However, as long as there are judicial elections, it is vitally important that the process of evaluation is fair and fosters the best judiciary possible. I have heard from the highest levels of the court system that there are significant concerns regarding the existing evaluation system. Therefore, we have established the Task Force on the Evaluation of Candidates for Election to Judicial Office, co-chaired by Robert L. Haig, and former Court of Appeals Judge Susan Phillips Read.¹

At the initial meeting of the Task Force on August 1, 2018, President Miller reiterated the significance of the work of the Task Force. His charge to the members of the Task Force was, “I

¹ Michael Miller, “President’s Report to the House of Delegates,” June 16, 2018.

don't need to have to tell you folks how important the quality of our judiciary is...It's not hyperbole; this is incredibly important stuff." President Miller found that as stewards of the judicial system, the Bar Association should not be allowing a vacuum where no process is in place to review the qualifications of candidates for judicial office.

President Miller's thoughts were similarly emphasized by the Hon. Lawrence K. Marks, the Chief Administrative Judge of the Courts. Judge Marks, on behalf of the Administrative Board of the Courts advised the Task Force that the Independent Judicial Elections Qualification Commissions would be disbanded at the end of 2018. "A decision had been made to take the Judiciary out of the business of evaluating judicial candidates." Judge Marks stated, "The plan is to disband them at the end of the calendar year." The concerns are, despite the best efforts of the commission members, that the judicial election qualification commissions are not working well and that the system is "not fulfilling the goals it was set out to do." Judge Marks also questioned whether it was appropriate for the court system to be injecting itself into a political process by administering a system of evaluating judicial candidates.

With the imminent termination of the Independent Judicial Election Qualification Commissions, the importance of the work of the Task Force has grown significantly. Action would need to be taken in 2019 to insure the continued availability of judicial screening throughout New York State.

The 26-member Task Force is co-chaired by Robert L. Haig, Esq. of Kelley Drye & Warren LLP and the Hon. Susan Phillips Read (Court of Appeals, ret.) of Greenberg Traurig LLP. The other members of this geographically, experientially and otherwise diverse Task Force are:

- Alyssa M. Barreiro, Esq., Wilmington Trust [Broome County]
- Eileen E. Buholtz, Esq., Connors, Corcoran & Buholtz, PLLC [Monroe County]
- Jeffrey T. Buley, Esq., Brown & Weinraub LLC [Albany County]
- David Louis Cohen, Esq., Law Office of David L. Cohen, Esq. [Queens County]
- Vincent E. Doyle, III, Esq., Connors LLP [Erie County]
- Norman P. Effman, Esq., Wyoming County Public Defender [Wyoming County]
- Timothy J. Fennell, Esq., Amdursky, Pelky Fennell & Wallen, P.C. [Oswego County]
- Lucas A. Ferrara, Esq., Newman Ferrara LLP [New York County]
- Michael J. Gaffney, Esq., Law Office of Michael J. Gaffney [Richmond County]
- Elena DeFio Kean, Esq., DeFio Kean, PLLC [Albany County]
- Daniel J. Kornstein, Esq., Emery Celli Brinckerhoff & Abady LLP [New York County]
- A. Thomas Levin, Esq., Meyer, Suozzi, English & Klein P.C. [Nassau County]
- Lawrence A. Mandelker, Esq., Eiseman Levine Lehrhaupt & Kakoyiannis, PC [New York County]
- Alan Mansfield, Esq., Greenberg Traurig LLP [New York County]
- Michael J. McNamara, Esq., Seward & Kissel LLP [New York County]
- Neil Merkl, Esq., Kelley Drye & Warren LLP [New York County]
- Eileen D. Millett, Esq., Phillips Nizer LLP [New York County]
- Thomas E. Myers, Esq., Bond, Schoeneck & King, PLLC [Onondaga County]

- Domenick Napoletano, Esq. [Kings County]
- Sandra Rivera, Esq., Rivera Law, PLLC [Albany County]
- Robert T. Schofield, IV, Esq., Whiteman Osterman & Hanna LLP [Albany County]
- Kevin S. Schwartz, Esq., Wachtell, Lipton, Rosen & Katz [New York County]
- Kathleen Marie Sweet, Esq., Gibson McAskill & Crosby LLP [Erie County]
- G. Robert Witmer, Jr., Esq., Nixon Peabody LLP [Monroe County]

Kevin M. Kerwin, Esq. has served as the Staff Liaison for NYSBA, and Bennett M. Liebman, Esq., a Government Lawyer in Residence at Albany Law School, has served as the Reporter for the Task Force.

The Task Force conducted meetings on August 1, 2018, October 3, 2018, November 15, 2018 and December 3, 2018.

The Task Force reviewed the work of the New York State Commission to Promote Public Confidence in Judicial Elections [the Feerick Commission], the Independent Judicial Election Qualification Commissions [IJEQCs], and local, affinity and specialty bar associations that evaluate judicial candidates subject to election; and researched judicial screening in other states.

The Task Force surveyed local, affinity and specialty bar associations asking them to assess their work and positions on judicial screening and their work with the IJEQCs. The Task Force solicited views on judicial screening and the efficacy of the current judicial screening regimen from political party leadership in each county, individual members of the IJEQCs and sitting elected judges.

The conclusions and recommendations of the Task Force are very much driven by the facts that the Task Force ascertained during its extensive investigations of current practices throughout New York State. For example, in many parts of the state, bar associations provide excellent judicial screening, and we are not inclined to recommend reconstructing what is not broken.

Perhaps most importantly, individual members of the Task Force engaged in reporting their own assessments on the work of local bar associations in screening candidates, on the role of the IJEQCs, and on what they believed to be both politically achievable and desirable in the uncertain and complex world of New York State government.

The Task Force worked collaboratively and with extraordinary collegiality to achieve the goals established by its mission statement.

B. The Task Force Surveys

1. Survey of Bar Associations

The Task Force in early August of 2018 sent a survey to 130 local, affinity and specialty bar associations to ascertain their thoughts on the evaluation of candidates for election to judicial office and their interactions with the IJEQCs. Responses to the survey were spotty with slightly more than 10% of the organizations responding. While most of the respondents had little to do with the IJEQCs, those that had worked with the IJEQCs had a mixed response. Some credited

the IJEQCs as being a positive experience while others questioned the value and the knowledge of the IJEQCs in their districts. In the absence of the IJEQCs, all the bar associations that are currently conducting evaluations would continue to do so. Many of the respondents welcomed the possible opportunity to participate in a NYSBA/regional effort to conduct candidate evaluations.

2. Survey of Members of the Independent Judicial Election Qualification Commissions

An email questionnaire was sent in mid-October to 180 members of the IJEQCs. 43 members (24%) responded to the questionnaire.

An overwhelming majority of those Commission members who responded thought that the current process was effective, and almost all respondents believed that the candidate interviews were crucially important. There was considerable controversy over the ratings system. Many believed that the rating system was effective but could benefit from greater clarity. The most serious point seemed to be the use of the “Highly Qualified” ratings and its relationship to the “Qualified” rating. Several people thought “Highly Qualified” favored sitting judges only. Others thought there should be more clarity and differentiation between the two ratings, and in general more specific criteria and more choices. To some, the categories, especially “Qualified,” were too broad. The respondents also believed that calling references (especially those not listed by the candidate) was important, and that the Commissions should continue.

The responses also favored mandatory participation, greater publicity, and more willingness to make adverse findings.

3. Survey of Judges

With the assistance of the Office of Court Administration, in mid-October, emails were sent to a database that included approximately 1,200 sitting judges in New York State. Responses were due by November 1, 2018. 98 elected judges (8.2% of the 1,200 judges) representing 11 of the 13 judicial districts responded. It is possible that the limited time frame for responses could have affected the number of judges who responded to the survey.

The survey results showed several common themes. A number of respondents believed that the screening committee questionnaires should be standardized or uniform, that the screening committee members be independent and knowledgeable about the relevant courts, that the public be clearly informed about the rating system, that results should be published and that local bar associations should coordinate their work so that candidates need not participate in multiple interviews and complete multiple questionnaires. Some of the responses displayed a wide range of sentiments. For example, while many respondents believed that the screening process should be mandatory, others believe that screening should be eliminated and determinations about candidates be left to the voters.

Overall, the survey results suggest that: NYSBA and/or local bar associations should publicize the names of judicial candidates who refuse to participate in judicial screening so that voters can take that information into account before voting; political party leaders should encourage candidates to participate in judicial screening; NYSBA and local bar associations should

organize regional judicial screening for those counties that do not have local judicial screening; and the local bar associations should be encouraged to coordinate their questionnaires, interviews and ratings.

4. Survey of County Political Leaders

Given the outsized role played by political party leadership in the determination of who serves as a judge in New York State, the Task Force sent an electronic questionnaire to the Democratic and Republican Party leaders in all of New York's 62 counties.

The six-question survey submitted to the county leaders was designed to ascertain how political parties felt about the entrance of the bar associations into their electoral realm. Was there a common attitude among party leaders about using non-partisan screening committees to evaluate the qualifications of candidates for elective judicial office? The leaders were asked whether there should be pre-nomination screening of all judicial candidates, when the results of such screening should be publicly disclosed, whether they would even trust bar association screening and whether they would view bar association involvement as a challenge to their control of the judicial nomination process.

Only 16 of the 124 county political leaders (12.9%) chose to respond to the survey. Over 80% of the respondents agreed that a screening committee should evaluate the qualifications of all judicial candidates prior to the date of their nomination, and the same 80% would support evaluation of judicial candidates by a screening panel, the members of which were selected with input from their party. 90% of the respondents stated that their party does not require a potential judicial candidate to obtain the party's permission before agreeing to be evaluated by the relevant bar associations.

On the other hand, nine of the 16 respondents would not support evaluation of judicial candidates by a screening panel, the members of which were selected without input from their party. Only nine of the 16 respondents believed that the evaluations should be disclosed to the media for dissemination prior to the candidates' nomination, and that same nine of 16 stated that their party would not nominate a judicial candidate who declined to be evaluated by the relevant bar associations.

While it may be hard to draw any firm conclusions from this limited survey size and the self-selection of the respondents, there appeared to be significant support of judicial screening and evaluation in theory. Yet, where the screening of judicial candidates might be viewed as impinging on the prerogatives of political selection, that support for judicial screening diminished.

5. Other Potential Inquiries

The Task Force considered whether or not to poll New York voters for their views on the screening of candidates for the judiciary. While the members of the Task Force believed that a survey might produce useful information on the public's views on the qualification of judges, the costs involved in conducting a poll, coupled with the limited time period for the Task Force's report, were sufficient to convince the majority of the Task Force members that a poll was

unnecessary. Some expressed the view that there was little reason to believe that a poll would provide information that was significantly different than the polls undertaken in the prior decade by the Feerick Commission.²

Similarly, given the considerable work that the Feerick Commission had performed with focus groups, the Task Force saw little reason to utilize focus groups.

² The polling of registered voters undertaken by the Marist Institute for Public Opinion for the Feerick Commission in October of 2003 showed that voters were divided over how well they thought elected judges were performing their jobs in New York State. 45% of the voters believed that the judges were good or excellent while 48% rated the job performance of judges as fair or poor. While over two-thirds of voters believed that judges were fair and impartial, Latino and African-American voters were considerably less likely than white voters to believe that judges were fair and impartial. The voters believed that wealthier parties receive more favorable treatment than others. 90% of voters believed that it was important for judges to be independent from political party leaders and campaign contributors, but 86% of voters believed that political party leaders had a great deal or some influence over who becomes a judge. The Marist poll data is contained in Appendix B of the Feerick Commission's June 29, 2004 report.

II Executive Summary

The Task Force’s review of judicial screening systems in New York State found that the discontinuation of the independent judicial election qualification commissions in 2019 will leave a significant vacuum in the evaluation of elected judicial candidates in some areas of New York State. If the Task Force is to be successful in its mission of “developing effective non-partisan evaluation and screening of candidates for election to judicial office and improving those efforts that already exist,” it is vital to help effectuate systems that will truly foster the best judiciary possible.

The Task Force understands that its goals are to develop recommendations, best practices and guidelines that are effective, practical and politically achievable. It does little good to recommend a utopian judicial evaluation system for New York State that cannot realistically be accomplished. New Yorkers deserve a system that can be put in place in 2019. The Task Force’s recommendations in no manner depart from the NYSBA’s longstanding commitment to the commission based appointive system for selecting judges in New York State.

The Task Force believes that in 2019, NYSBA needs to address and to recommend actions to assure that all candidates for election to the judiciary in New York State are effectively screened to determine their qualifications.

The systems in place by local bar associations vary from county to county. County, affinity and specialty bar associations have their own evaluation systems. Some local bar associations have a significant number of members and resources, and do an extensive, complete and non-partisan job in evaluating judicial candidates. Other bar associations – especially outside the City of New York – lack this capacity. In some counties, the bar association screening processes are active, robust and efficacious. In others, there is minimal screening.

The Task Force believes that the one-size-fits-all approach to determining the composition of judicial screening panels will not work for New York State. The State and the local bar associations are extremely diverse, with widely varying resources, and the methods for selecting judges in this state are extraordinarily complex. The Task Force is not trying to impose a single judicial evaluation structure on the entire state. A top-down one-sized approach providing a statewide uniform structure is likely to be a recipe for failure.

Where the existing bar association reviews are effective, the Task Force recommends their continuation. There are dozens of judicial screening review processes in place throughout New York State. The culture, the assets, the procedures and the mechanics of local bar associations vary tremendously. The Task Force believes that in some areas of the State, the systems that are in place are operating effectively. They should not be changed.

In New York City, the City Bar– working with the five county bar associations within the City – has a vigorous and successful system in place that works to promote the highest standards of the judiciary. On Long Island, in the 10th Judicial District, both the Nassau County Bar Association and the Suffolk County Bar Association maintain vibrant judicial evaluation systems that are working effectively. In many of the upstate urban counties, the

county bar associations are working forcefully and are employing evaluation systems that serve the public and the judiciary well. The Task Force believes that these bar associations should be encouraged to continue their efforts. There are effective judicial evaluation systems in place in 10 of the 11 largest counties in New York State. Nearly three-quarters of the state's population is currently being well served by the judicial screening of the local bar associations.

Nonetheless, there are some judicial districts (such as the 7th Judicial District, which encompasses Monroe County and seven smaller counties) where there is almost no judicial screening whatsoever.³ There are many small counties in other districts (such as Hamilton County in the 4th District and Lewis County in the 5th District) where the size of the county and the absence of a significant body of resident attorneys in the county virtually precludes the possibility or even the potential for any meaningful judicial screening.

The Task Force believes that increased judicial screening needs to be encouraged throughout the state. NYSBA should not allow the systematic screening currently performed by the IJECQs to fall through the potential upstate cracks. Screening ought to be available for all judicial candidates. In order to assist those judicial districts with limited screening, the Task Force recommends that NYSBA work with all local bar associations in those districts to establish regional or district screening committees in 2019. Underwriting support for this initiative should come from the Office of Court Administration which has funded and staffed the IJECQs.

NYSBA must take appropriate action to continue non-partisan evaluation and screening of candidates for election to judicial office. This should include the establishment of a NYSBA working group to help implement the availability of screening panels throughout the state and the creation of resource guides as well as web pages to assist bar associations on the subject of judicial screening.

In keeping with its mission, the Task Force accordingly has developed a series of best practices that should help guide local bar associations and regional screening commissions in their role in evaluating candidates for judicial office. These best practices should include:

1. The bar association should establish a separate judiciary committee which would be charged with the duty of investigating and evaluating candidates for judgeships.
2. Judiciary committees should consider and establish term limits for members of the committee to ensure new members with diverse perspectives and opinions.
3. The questionnaire used by the City Bar to evaluate candidates should be used as a suggested model for other bar associations conducting evaluations, with local bar associations using variations to fit their needs and capabilities.
4. The members of the judiciary committee, or a subcommittee of the judiciary committee, would conduct investigations of the candidates for the judiciary.
5. The judiciary committee should use six basic criteria to evaluate judicial candidates. These criteria would be integrity, independence, intellect, judgment, temperament, and

³ The Monroe County Bar Association has advised the Task Force that it has sought with some success to achieve at least the public information goal of judicial evaluations in other ways.

experience. Individual bar associations would be free to add additional criteria, but these six standards should serve as best practices at the heart of the evaluation process.

6. The judiciary committee should consider using either a two-tiered or three-tiered rating system. Where a two-tiered system is adopted, a candidate would be rated “Approved” or “Not Approved.” Where a three-tiered system is adopted, a candidate would be rated “Well-Qualified,” “Qualified” or “Not Approved.”⁴
7. Where a judiciary committee offered only two ratings to candidates, a majority vote would be needed to secure an “Approved” rating.
8. Candidates who received the “Not Approved” rating should be entitled to petition the judiciary committee to reconsider its evaluation.
9. An appeals process should be a required feature of a judicial evaluation process.
10. A judiciary committee should implement exclusion and recusal provisions to address actual or perceived conflicts of interest.
11. The judiciary committee should consider utilization of candidate waiver of confidentiality forms, such as those used by the IJEQCs.
12. Membership on judiciary committees should reflect the state and region’s diversity in order to promote public confidence in the court system.
13. Bar associations should consider the possibility of naming non-lawyers to the judiciary committees.
14. The entire operation of the judicial screening system must be held in the highest confidentiality.
15. Candidates who receive a “Not Approved” rating and who expeditiously withdraw their candidacy for judicial office should not have their rating publicized in any manner.
16. Bar associations should consider, without revealing confidential information, providing informal feedback to candidates about their performance.
17. Bar associations should determine a policy as to whether the judiciary committee’s rating of a candidate will remain valid beyond the immediate election ratings for which the review is being conducted and, if so, for how many years a rating for a judicial candidate would be valid.
18. Bar association ratings of judicial candidates should be conducted at the earliest possible point in the election cycle.

NYSBA should work with the local bar associations in making the ratings of judicial candidates known to the public. Where the local bar association does seek NYSBA involvement, NYSBA should work with the local bar to maximize the public distribution and exposure of the candidate ratings.

⁴ The text of this best practice was adopted by the House of Delegates on April 13, 2019 and is not the original recommendation of the Task Force.

III The Background of the Judicial Evaluation Process in New York

A. The Early History

New York State has for 172 years been largely committed to the election of judges. As a result of the 1846 Constitutional Convention, the state shifted from a system of appointive judges to one where all judges were elected.⁵

While the number of appointed judges has increased, the Feerick Commission reported that “73% of the State's 1,143 full-time judges are elected.”⁶ In addition, New York’s methods for judicial selection make for a complete enigma. “New York uses almost as many methods of judicial selection as there are courts.”⁷ “New York State has a complicated judicial system, perhaps the most complicated in the nation. We have at least 11 different levels of courts, although some people claim that there are actually 13 distinct courts. And we select judges for different courts in different ways—a judge may be appointed by the Governor from a list open to all lawyers, or appointed from a pool of elected trial court judges, or elected through a primary system, or elected through a nomination system. In some cases, judges for the same court may be elected in certain parts of the state and appointed in others.”⁸

After the 1846 Constitution, at the state supreme court level, the political parties directly chose their candidates.⁹ In 1911, towards the close of the Progressive era, and after years of intense advocacy for direct primaries by former Governor Charles Evans Hughes (as well as support from former President Theodore Roosevelt¹⁰), primary elections were mandated for most every elected position in the State by the Ferris-Blauvelt Direct Nominations bill.¹¹

⁵ Constitution of 1846, Article VI, §12 “The judges of the court of appeals shall be elected by the electors of the state, and the justices of the supreme court by the electors of the several judicial districts, at such times as may be prescribed by law.” The question of whether and how best to select state judges and how to structure the State court system was arguably the principal topic of the 1846 Convention. “The importance of the subject was fully appreciated by the Convention, and the suggestion was made several times while the judiciary article was under consideration, that the reconstruction of the judicial system was the chief reason for calling the Convention.” Charles Z. Lincoln, 2 *The Constitutional History of New York from the Beginning of the Colonial Period to the Year 1905*, 140 (1906).

⁶ Commission To Promote Public Confidence In Judicial Elections, *Final Report To The Chief Judge Of The State Of New York*, 5 (2006). [hereinafter referred to as Final Report].

⁷ Commission To Promote Public Confidence In Judicial Elections, *Report to the Chief Judge of the State of New York*, 5 (2004). [hereinafter referred to as 2004 Report].

⁸ *Id.*, Appendix A at 36.

⁹ A joint legislative committee in 1910 stated, “The investigation of this Committee convinces it that no political movement in recent years has so excited the public mind, has aroused so much animosity, has split national parties into such bitterly opposing factions, as has the agitation for and the operation of direct nomination systems in the several northern States which are trying the experiment.” *Report of the Joint Committee of the Senate and Assembly of the State of New York Appointed to Investigate Primary and Election Laws of this and Other States* (1910).

¹⁰ See “State Convention Mere Device for Registering Decrees of the Bosses Says Roosevelt at Elmwood Meeting,” *Buffalo Courier* June 11, 1913; Theodore Roosevelt, “Two Issues: Direct Primaries and Judges of The Right Type,” *Outlook*, July 12, 1913.

¹¹ L. 1911, ch. 891. “Direct Primary Bill Is Passed,” *New York Sun*, October 5, 1911. “Voters to Enroll Soon After Nov. 15,” *New York Times*, October 8, 1911. The Ferris-Blauvelt law was amended by Chapter 820, L.1913. “Bills All Passed by Legislature,” *New York Tribune*, December 13, 1913, “Legislature’s Deathbed Repentance” *New York*

The workings of the Ferris-Blauvelt law were such that many believed that it gave party bosses excessive control over judicial nominations. Former Chief Judge of the Court of Appeals Edgar Cullen stated, “Already nearly everyone sees that Judges ought to be selected by conventions rather than by direct primaries.”¹² While one might have assumed that direct primaries might have lessened the role of the political parties in determining the candidates, in the case of judicial elections – where there was limited public interest and minimal public knowledge of the qualifications of individual candidates – many believed that the party leaders had carte blanche to select their judicial choices.¹³

Republican legislators had been generally opposed to the Ferris-Blauvelt law, and in 1920, Republican Nathan Miller (a former judge of the Court of Appeals) was elected Governor. Miller was an outspoken opponent of the direct primary system for judges.¹⁴ In 1921, a joint legislative committee recommended the abolition of the direct primary for Supreme Court justices and its replacement by “judicial district conventions.”¹⁵ The Legislature soon took action, and the direct primaries for the supreme court were replaced by nominations via party conventions. The legislation specified that “party nominations of candidates for the office of the justice of the supreme court, shall be made by party conventions.”¹⁶

This 1921 system has lasted until the current day. As described by the United States Court of Appeals for the Second Circuit, “The Legislature did not entirely dispense with primary elections. Instead, it enacted a three-part scheme that combines a primary election, a nominating convention, and a general election. During the first phase, the State holds a primary election at which rank-and-file party members elect judicial delegates. N.Y. Elec. L. §§ 6–106, –124. Next, those delegates attend a convention at which they select their party's nominees. N.Y. Elec. L. §§ 6–106, –124, –158. The individual so chosen receives a place on the general election ballot as

Tribune, December 13, 1913, stating “The state will have a direct primary law abolishing all nominations by party convention and an Election Day ballot minus the party column.”

¹² “The State Convention,” *New York Times*, May 1, 1917. See also “Noted Men Attack the Direct Primary System,” *New York Times*, March 14, 1918.

¹³ Successful 1920 Republican gubernatorial candidate Nathan Miller stated, “The direct primary we have was inaugurated in the interest of Tammany Hall, to enable Tammany to control the Democracy of the State of New York.” “Hoover Makes Strong Plea for Judge Miller,” *New York Tribune*, October 23, 1920.

¹⁴ “Miller Declares Primary a Fraud,” *New York Times*, Oct. 23, 1920; “Miller Ready to Lead Fight on Primaries,” *Albany Times Union*, March 11, 1921. By contrast, Republican Charles Whitman, who served as governor from 1914-1918, had been a supporter of the primary system. See “Republicans Hold to Direct Primary,” *New York Times*, September 29, 1916. Legislation to end the direct primary for supreme court justices had been vetoed by Governor Alfred E. Smith in 1920. See “Vetoes Bill to Name Judges by Convention,” *New York Times*, May 18, 1920; “Smith Vetoes Bill for Convention to Nominate Justices,” *New York Tribune*, May 18, 1920. In his veto message Smith wrote, “The fitness of any candidate, for any office, can best be discussed by all the members of the party which makes the nomination. It is infinitely better for the State that every candidate, particularly a candidate for a place in the judiciary, receives his nomination at the hands of a majority of the voters of his party, than through the favor of the few.” “To Amend the Election Law so as to Break Down the Direct Primary System by Substituting Party Nominating Conventions for the Office of Justice of the Supreme Court,” *Public Papers of Alfred E. Smith, Governor*. 324 (1920).

¹⁵ *Report of the Joint Legislative Committee on Election Law*, 6 (1921).

¹⁶ L. 1921, Ch. 479 §4. See also “Leaders Rush Repeal Vote of Primary,” *New York Times*, April 11, 1921. Besides ending primaries for supreme court justices, the legislation also ended primaries for all statewide political offices. Primaries for statewide offices in New York were only reauthorized in 1967. See L. 1967, ch.716. See also Richard Madden, “Rockefeller Signs Bill Authorizing Direct Primaries,” *New York Times*, May 3, 1967.

the party's nominee. N.Y. Elec. L. § 7-116(1). Last, the State holds a general election at which Justices are elected. N.Y. Elec. L. § 8-100(1)(c)."¹⁷

Most significantly, the 1921 system has withstood constitutional scrutiny. A unanimous Supreme Court in *Lopez-Torres v. New York St. Board of Elections*,¹⁸ ruled that the law did not violate the First Amendment associational rights of independent candidates challenging candidates favored by the party convention system. The Justices did not rule on the wisdom of the New York Law. Justice Souter's concurring opinion read in its entirety:

While I join Justice Scalia's cogent resolution of the constitutional issues raised by this case, I think it appropriate to emphasize the distinction between constitutionality and wise policy. Our holding with respect to the former should not be misread as endorsement of the electoral system under review, or disagreement with the findings of the District Court that describe glaring deficiencies in that system and even lend support to the broader proposition that the very practice of electing judges is unwise. But as I recall my esteemed former colleague, Thurgood Marshall, remarking on numerous occasions: "The Constitution does not prohibit legislatures from enacting stupid laws."¹⁹

Justice Kennedy in his concurring opinion wrote:

Even in flawed election systems there emerge brave and honorable judges who exemplify the law's ideals. But it is unfair to them and to the concept of judicial independence if the State is indifferent to a selection process open to manipulation, criticism, and serious abuse.

Rule of law is secured only by the principled exercise of political will. If New York statutes for nominating and electing judges do not produce both the perception and the reality of a system committed to the highest ideals of the law, they ought to be changed and to be changed now.²⁰

At no point in the existing system is there any government requirement that judicial candidates subject to election be evaluated or screened for their capabilities, integrity and independence.

The idea of screening judicial candidates is hardly a new one. Many local organizations use a sort of screening process to identify preferred judicial candidates for their constituents. For instance, local bar associations and local branches of the League of Women Voters often interview and rate candidates for local judicial office."²¹

For more than a half century, NYSBA leadership has supported the concept of judicial screening to promote an independent, principled and qualified judiciary. In 1961, as local governments in

¹⁷ *Lopez-Torres v. New York St. Board of Elections*, 453 F. 161, 172 (2nd Cir. 2006); rev'd 552 U.S. 196 (2008).

¹⁸ 552 U.S. 196 (2008). Justice Scalia's opinion for the Court found plaintiff's claimed "associational right not only to join, but to have a certain degree of influence in, the party" had no support in the First Amendment or the precedents of the Court. *Id.* at 203.

¹⁹ *Id.* at 209

²⁰ *Id.* at 212-213.

²¹ *Id.* at 37.

New York State began the consideration of formally utilizing judicial screening procedures, the State Bar Association's Executive Committee adopted the following resolution:

WHEREAS to assure the election of qualified candidates for judicial office it is vital that the organized bar be consulted on the qualifications of judicial candidates before nominations be made; therefore be it resolved that the New York State Bar Association in convention assembled;

Before any judicial nomination is made, an adequate opportunity should be given by the appropriate bar associations to report on the qualifications of candidates for judicial office.²²

In 1962, New York City Mayor Robert Wagner inaugurated the concept of a nonpartisan evaluation committee to review his potential judicial nominees.²³ He started a voluntary merit selection system for the city's criminal and family courts.²⁴ In commenting on the Wagner action, NYSBA president, and former Presiding Justice of the Appellate Division, First Department, David Peck termed Wagner's work "as 'the most exciting development' in the drive by the organized bar to gain a stronger voice in the selection of judges."²⁵ Justice Peck added that the Wagner evaluation committee was a "happy augury for the better judicial selections in New York City."²⁶

The State Bar Association was similarly positive about a plan worked out by the Nassau County Bar Association²⁷ with the political leaders in that county under which the parties would submit potential judicial candidates to the bar association for approval before they were recommended for party nomination.²⁸

While the Wagner administration's "Mayor's Committee on the Judiciary" was continued during the administrations of Mayors Lindsay and Beame,²⁹ little action was taken at the state level. The closest the state may have come to enacting a screening policy for elected judges came in 1970. Assembly Speaker Perry Duryea gave his support to legislation that required the screening of all candidates for the Supreme Court. No individual could be nominated by a political party unless the screening committee had determined that the nominee was highly qualified.³⁰ The Assembly leadership stated that the leadership of the State Senate supported the mandatory screening bill.³¹ State Republican Party leaders were said to be in favor of mandatory screening.³² State Senator

²² "Association Activities," 33 *N.Y. St. B. J.* 205, 206 (1961).

²³ Peter Kihss, "Judgeship Panel Takes First Step," *New York Times*, June 6, 1962. See also James Edward Lozier, "Judicial Selection in New York: A Need for Change," 3 *Fordham Urban Law Journal* 605, 626 (1975).

²⁴ Martin I. Kaminsky, *A Proposal for Mandatory Preselection Screening for State Court Judges*, 51 *St. John's L. Rev.* 516, 541 (1977).

²⁵ Douglas Dales, "Screening Policy on Judges Hailed," *New York Times*, June 23, 1962.

²⁶ *Id.*

²⁷ *Id.*

²⁸ See Charles P. Buckley, Jr., "The 'Nassau Plan' for Selection of Better Judges," 34 *N.Y. St. B. J.* 345 (1962)

²⁹ Lozier *supra* at note 21.

³⁰ Thomas P. Ronan, "Bill in Albany Would Require Screening of Judiciary Aspirants," *New York Times*, January 30, 1970. See Assembly Bill No. 3195 (1970) by Mr. Hansen.

³¹ *Id.*, Edward G. Smith, "Panel Is Sought to OK Judges," *Newsday*, January 30, 1970.

³² Dick Zander, "Judicial Screening Favored," *Newsday*, January 31, 1970.

John Dunne from Nassau County declared, “This appears to be a highly desirable aid to choosing the best possible candidates for the Supreme Court.”³³ Nonetheless, State Senate Majority Leader Earl Brydges, withdrew his support of the mandatory screening bill and stated that he doubted it would pass the Senate.³⁴ Instead, he supported the use of advisory screening panels whose advice would be “highly respected” but not binding upon nominating conventions.³⁵

In the absence of any chance that Speaker Duryea’s proposal would be acted on by the Senate, the Speaker’s own proposal was defeated in the Assembly by a vote of 79-64.³⁶ The State Senate then passed the advisory judicial screening bill supported by Senator Brydges by a vote of 33-23.³⁷ The Senate proposal was not taken up by the Assembly.

With the Legislature not supporting judicial screening,³⁸ any state judicial screening needed to be established by the Governor’s Office, and it would only extend to judges appointed by the Governor. Governor Hugh Carey in February of 1975 formally introduced the concept of judicial screening to the State.³⁹ He promulgated an Executive Order creating judicial nominating commissions to recommend “well qualified” candidates to the Governor for those judicial offices for which the Governor had the power of appointment.⁴⁰ Every successive Governor has utilized a variant of the system instituted by Governor Carey to provide for judicial nominating/screening commissions. Currently in place is Governor Cuomo’s Executive Order No. 15.⁴¹

That Order establishes a series of judicial screening commissions. These commissions are to recommend candidates for appointment who are highly qualified, and the governor is to select an appointee from the candidates recommended by the commissions. There is a state screening commission to screen candidates for the Court of Claims. There are four departmental judicial screening commissions that evaluate candidates for the Appellate Division and vacancies in the office of Supreme Court Justice. Finally, there are county judicial screening committees which recommend appointments “to the offices of Judge of the County Court, Judge of the Surrogate's Court, and Judge of the Family Court outside of the City of New York.”⁴²

³³ Smith, *supra* at note 29.

³⁴ Francis X. Clines, “State Judicial Reform Bill Hits a Snag,” *New York Times*, March 5, 1970.

³⁵ Id. Senate Bill No. 4621 (1970) by Mr. Brydges. Similar advisory screening bills introduced by Senator Brydges passed the Senate in both 1969 (S.4621) and in 1971 (S. 1899).

³⁶ William E. Farrell, “Judicial Reform Backed by Duryea Is Defeated,” *New York Times*, March 17, 1970; Robert Reno, “Duryea Court Bill Fails,” *Newsday*, March 17, 1970, “Duryea-Backed Bill to Reform Judicial Plan Fails in Albany,” *Schenectady Gazette*, March 17, 1970. Democratic opposition to the bill was based on the belief that the screening committees would likely have more Republican than Democratic members. At the conclusion of the legislative session, on April 19, 1970, when it was certain that the Senate would not act on the Duryea –supported bill, the Assembly repassed the legislation.

³⁷ Francis X. Clines, “Bill on Judiciary Gains in Albany,” *New York Times*, March 25, 1970.

³⁸ Even as of 1977, the *New York Times* could write, “Scores of proposals for restructuring the courts have been made only to meet defeat in the Legislature.” Tom Goldstein, Appointment of Judges Winning,” *New York Times*, November 9, 1977.

³⁹ Lozier, *supra* note 21 at 631. By his Executive Order No. 5, Governor Carey created a system of judicial nominating committees for his selections.

⁴⁰ 9 NYCRR §3.5 (February 21, 1975).

⁴¹ 9 NYCRR §8.15.

⁴² *Id.*

While the Legislature has not seen fit to require the use of judicial screening committees for elected judges, there is a judicial screening committee in legislation for selecting nominees to the Court of Appeals. In 1977, the Constitution was amended to make the positions of Judges on the Court of Appeals appointive rather than elected positions.⁴³ The Judges would be selected by the Governor, subject to the advice and consent of the Senate. The Governor's nominee would need to come from a list of candidates determined to be well qualified based on their "character, temperament, professional aptitude and experience"⁴⁴ by a newly created Commission on Judicial Nomination. The legislature was charged under the Constitution with the duty of providing for the organization and procedure of the Commission on Judicial Nomination.⁴⁵

The Legislature in 1978 established the framework for the process of selecting judges of the Court of Appeals.⁴⁶ The Commission would submit to the Governor seven candidates for appointment to the position of Chief Judge and between three to five nominees for the position of Associate Judge.⁴⁷ In 1983, the maximum number of candidates to be recommended for Associate Judge was increased from five to seven.⁴⁸ The Commission has been in place now for 40 years and has screened all Court of Appeals judges from Chief Judge Lawrence Cooke in 1979 to Associate Judge Paul Feinman in 2017.

NYSBA continued its support for judicial screening in its review of the Feerick Commission report. Soon after the first Feerick Commission report was issued in 2003, NYSBA established the Special Committee on Court Structure and Judicial Selection chaired by former Court of Appeals Judge Richard D. Simons. The Special Committee supported the basic concept developed by the Feerick Commission for independent judicial evaluation qualifications commissions. In late June of 2004, the Special Committee voted in favor of the Feerick Commission recommendations subject to the need to further involve local bar associations in the screening process and the need to provide judicial candidates with a right to appeal from IJEQC determinations.

After the Chief Administrative Judge proposed rules in November of 2004 to establish IJEQCs, the Special Committee again supported the IJEQC screening process.⁴⁹ It also continued to press for a right to appeal determinations and the need to ensure that local bar associations played a meaningful role in the process.

The Executive Committee of the State Bar in 2004 largely supported the findings of the Special Committee. The Executive Committee recommended the adoption of the proposed IJEQC rules of the Chief Administrator of the Courts with the additional procedural safeguards. The Executive Committee desired more participation by local bar associations, a right of appeal by

⁴³ "Amendment Victory Spurs Court Change," *New York Times*, November 10, 1977.

⁴⁴ NY Constitution, Article VI, §2.c.

⁴⁵ *Id.*

⁴⁶ L. 1978, ch. 156.

⁴⁷ See generally Sheila Rule, "Court Amendments Still Face a Hurdle," *New York Times*, March 30, 1978.

⁴⁸ L.1983, ch. 35.

⁴⁹ The Special Committee would have preferred making participation in the IJEQ process mandatory for all candidates.

candidates to contest a finding by the IJEQCs, the barring of sitting judges from serving on IJEQCs, and the mandatory evaluation of all candidates.⁵⁰

B. The Feerick Commission

Chief Judge Judith S. Kaye in April of 2003 formed the 29-member New York State Commission to Promote Public Confidence in Judicial Elections [Feerick Commission]⁵¹ in order "to provide New York's courts with a blueprint for preserving the dignity of judicial elections and promoting meaningful voter participation, which will serve to reaffirm public trust in our judiciary."⁵² Dean Feerick has noted that Chief Judge Kaye's specific instruction to him was, "Don't get hung up with appointive systems and changing the elective system and the idea of amending the New York State Constitution, because you know there's no support for that."⁵³ "Finding out what we could do to promote confidence in judicial elections was the task and assignment of our commission, a commission of twenty-nine citizens and judges—a lot of different backgrounds, from every part of the state."⁵⁴

The Feerick Commission issued its first interim report in December 2003, a second in June 2004, and its third final Supplemental Report in February 2006. Chief Judge Kaye, in reviewing the body of work of the Feerick Commission, stated, "In their totality, these reports represent a body of work unprecedented in depth and quality. The Feerick Commission held statewide public hearings, conducted citizen focus groups, sponsored a public opinion poll and a survey of judges, met with political leaders, addressed bar and judicial groups, testified before legislative committees, and heard from numerous individuals in meetings and correspondence."⁵⁵ The Feerick Commission itself noted that it had held public hearings, conducted focus group meetings, sponsored a public opinion poll, conducted a survey of sitting judges, met with political leaders, addressed bar, judicial and civic groups, testified before the Senate Judiciary Committee and heard from many citizens in private meetings."⁵⁶ "The Commission also conducted extensive research on the history of judicial elections in New York State and elsewhere."⁵⁷

The Feerick Commission determined to develop "an interdependent set of reforms to the current judicial election system."⁵⁸ It created an "integral model comprised of recommendations—on candidate selection, campaign conduct, campaign finance and voter education—meant to be instituted together."⁵⁹ In its first interim report issued on December 3, 2003, the Commission

⁵⁰ New York State Bar Association, Minutes of Executive Committee, Conference Call Meeting December 16, 2004.

⁵¹ John D. Feerick Esq., the former dean of Fordham Law School, served as the chair of the Commission.

⁵² Press Release, New York State Unified Court System, *Commission to Foster Public Confidence in State's Elected Judges and the Electoral Process* (Apr. 16, 2003). See also James C. McKinley, Jr., "State Can't Afford to Let Court System Remain Inefficient, New York's Chief Judge Says," *New York Times*, January 4, 2003.

⁵³ John D. Feerick, "Why We Seek Reform," 34 *Fordham Urb. L.J.* 3, 4 (2007).

⁵⁴ *Id.* at 4.

⁵⁵ Judith S. Kaye, *The State of the Judiciary 2006* www.nycourts.gov/Admin/stateofjudiciary/soj2007.pdf - 178k - 2007-02-26 [last viewed October 15, 2018].

⁵⁶ Final Report, *supra* at note 4.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

recommended “establishment of independent commissions to evaluate the qualifications of judicial candidates throughout the State; amendments to the Chief Administrator’s Rules Governing Judicial Conduct concerning campaign speech restrictions, disqualification and campaign expenditures; the creation of a campaign ethics and conduct center; the expansion of judicial campaign finance disclosure; and the establishment of a State-sponsored judicial election voter guide.”⁶⁰

Specifically, as part of its candidate selection focus, the Feerick Commission recommended that the independent judicial election qualifications commissions (“IJEQCs”) should have the following jurisdiction and authority:

“Each judicial district should have a commission;

- The commission members should reflect the State’s great diversity;
- The commissions should actively recruit judicial candidates;
- The commissions should publish a list of all candidates found well qualified;
- The commissions should apply consistent and public criteria to all candidates;
- Member terms should be limited;
- Uniform rules should govern commission proceedings and its members’ conduct;
- The commissions should have the necessary resources to fulfill their functions; and
- The Chief Administrator’s Rules Governing Judicial Conduct should require all judicial candidates to participate in the IJEQC process.”⁶¹

The June 2004 Report “provided more detail on the interim recommendations for State-sponsored independent judicial election qualifications commissions, for a State-sponsored judicial voter guide and an update on the Commission’s campaign finance disclosure recommendation. It also addressed issues of public financing, voter education, retention elections and the enforcement of the judicial conduct rules.”⁶²

The June 2004 report recommended a 15-member independent judicial election qualification commission in each of New York’s judicial districts. The selections to the IJEQCs would be made by the Governor, the legislative leaders, the Chief Judge, the Presiding Justice of the applicable Appellate Division, the State Bar Association and four local bar associations.

Members would only serve a single three-year term. They would become re-eligible to serve on the panel after a one-year absence. Membership on the IJEQCs should reflect the state’s diversity in order to promote public confidence in the court system.

The IJEQCs would actively recruit judicial candidates, use uniform rules and consistent procedures, and apply a rigorous process to the judicial applicants. Two-thirds vote of a quorum of the IJEQC would be needed to find a candidate qualified. Finally, all candidates were to be

⁶⁰ *Id.*

⁶¹ Final Report *supra* note 4 at Appendix A. See also 2004 Report *supra* note 5 at 18-19.

⁶² *Id.* A summary of the recommendations of the 2003 and 2004 Feerick Commission reports can be found in Appendix A of its Final Report.

required to participate in the IJEQC process, and the IJEQCs would publish a list of all the qualified candidates.⁶³

The final 2006 report focused on the use of judicial nominating commissions as the means to nominate candidates to the Supreme Court. The report was issued one week after the federal district court decision in *Lopez Torres v. New York State Bd. of Elections*,⁶⁴ which found that the use of nominating commissions infringed the First Amendment rights of candidates for the Supreme Court. In that report, the Feerick Commission concluded that in the absence of public financing of judicial elections, the primary system – the assumed alternative to replace the convention system – was not superior to the convention system. Instead, the Commission proposed a series of reforms to the convention system to make it more open and equitable to potential candidates, including a reduction in the number of delegates to the judicial district convention; a minimum of two delegates to the convention from each assembly district; weighted voting, reducing the number of signatures required for nomination as a delegate or alternate delegate candidate to 250; and additional reforms designed to make the delegates to the nominating convention more independent.

While legislation was introduced to implement many of the Feerick Commission recommendations, these legislative proposals were largely unsuccessful. The State Assembly in 2004⁶⁵ and 2005⁶⁶ passed its “Judiciary Qualification Act,” introduced by Assembly Member Helene Weinstein which proposed many of the Feerick Commission’s recommendations including the establishment of mandatory judicial candidate screening panels. While the Senate in 2005 did hold a hearing on the independent screening of judges⁶⁷, the Judiciary Qualification Act was not acted upon by the state Senate. Assemblywoman Weinstein’s “Judiciary Qualification Act” was not passed by the Assembly in 2006 or 2007.⁶⁸ Only enacted was a single bill in 2005, which implemented the Commission’s recommendation that all judicial candidates’ campaign finance disclosures be made available online in a timely, inexpensive and accessible format.⁶⁹

C. The Independent Judicial Election Qualification Commissions

Soon after the initial report by the Feerick Commission supported the introduction of independent judicial election qualification commissions, the leadership of New York’s state court system began to look at the process of establishing IJEQCs via court rule. On November 8, 2004, Chief Administrative Judge Jonathan Lippman released for public comment proposed rule changes based on the work of the Feerick Commission. These administrative efforts picked up

⁶³ 2004 Report, *supra* note 5 at 19-22.

⁶⁴ 411 F. Supp. 2d 212 (EDNY 2006) aff’d 462 F. 3rd 161 (2nd Cir 2006); rev’d 552 US 196 (2008).

⁶⁵ Assembly Bill No. 11456 (2004) by the Assembly Rules Committee at the request of Ms. Weinstein.

⁶⁶ Assembly Bill No. 7 (2005) by Ms. Weinstein.

⁶⁷ Matt Smith, *Associated Press*, “State Judge-Selection Process Scrutinized During Hearing,” March 9, 2005.

⁶⁸ See Assembly Bill No. 2897 (2007).

⁶⁹ L. 2005, ch. 406. That chapter applied to all political committees and not simply to those involved with judicial elections.

momentum as the legislature failed to act on the IJEQC recommendation of the Feerick Commission.

In 2006, the Court of Appeals approved rules establishing a statewide system of independent judicial qualification commissions to screen all candidates for elective judicial office. Chief Judge Kaye emphasized that “these commissions do not alter the current elective system but rather bolster it by providing credible, independent local bodies to evaluate the qualifications of judicial aspirants. The ratings issued by these panels will stand as assurance to the public that whoever ultimately appears on the ballot has been found qualified for judicial service.”⁷⁰

In early 2007 Chief Judge Kaye and Chief Administrative Judge Lippman announced “the appointment of first-rate qualification commissions in every Judicial District of the State. These commissions, consisting of local lawyers and members of the public appointed by the Presiding Justices, the Chief Judge, and the State and local bar associations, will screen candidates for election beginning in April, so that the process can be complete before candidates have to go on the ballot. A published list of candidates found qualified will be provided to the media and made available in voter guides.”⁷¹

The IJEQCs were established by the rules of the Chief Administrator of the Courts, effective on February 14, 2006,⁷² which created a new part 150 of the rules relating to the operations of independent judicial election qualifications commissions. The preamble to the substantive rule stated “It is essential to the effectiveness of an elected judiciary that well qualified candidates obtain judicial office. Yet the public frequently is unaware of the qualifications of candidates who run for judicial office, because the candidate-designation process often is not conducted in public view. The public will have greater confidence in the judicial election process if they know that those judicial candidates who appear on the ballot were screened by independent screening panels and found to possess the qualities necessary for effective judicial performance.”⁷³

There would be a 15-member panel created for each judicial district. The judges would be screened for “public election to the Supreme Court, County Court, Surrogate's Court, Family Court, New York City Civil Court, District Courts and City Courts.”⁷⁴ The Chief Judge would select five of the members (two of whom would be non-lawyers). The Presiding Justice of the applicable Appellate Division would select five members (again with two of the members being non-lawyers). The State Bar Association would select one member, and four local bar associations, as designated by the Presiding Justice would name one member. The Chief Judge would select the chair of the panel.⁷⁵

⁷⁰ Judith S. Kaye, *The State of the Judiciary* 2006 5 (2006).

⁷¹ Judith S. Kaye, *The State of the Judiciary* 2007 5 (2007)

⁷² 2006-10 N.Y. St Reg. 101 (March 8, 2006).

⁷³ 22 NYCRR § 150.0.

⁷⁴ 22 NYCRR § 150.1.

⁷⁵ 22 NYCRR § 150.2. See generally Rebecca Love Kourlis; Jordan M. Singer, *A Strategy for Judicial Performance Evaluation in New York*, 72 Alb. L. Rev. 655, 661- 664 (2009).

Initially, the IJEQCs standard for evaluation included “professional ability, character, independence and integrity; reputation for fairness and lack of bias; and temperament, including courtesy and patience.”⁷⁶ Over the years that standard was amended to include:

professional ability; character, independence and integrity; reputation for fairness and lack of bias; and temperament, including courtesy and patience. Candidates found highly qualified must be preeminent members of the legal profession in their community; have outstanding professional ability, work ethic, intellect, judgement and breadth of experience relevant to the office being sought; possess the highest reputation for honesty, integrity and good character, including the absence of any significant professional disciplinary record; and either demonstrate or exhibit the highest capacity for distinguished judicial temperament, including courtesy, patience, independence, impartiality and respect for all participants in the legal process.⁷⁷

Initially, a two-thirds vote of a quorum was needed in order to find a candidate “Qualified” for judicial office.⁷⁸ Currently, there is an added category of “Highly Qualified.”⁷⁹ A majority vote of a quorum is now required to find a candidate “Qualified” for judicial office. A two-thirds majority of the quorum is needed to find a candidate to be “Highly Qualified.”⁸⁰

Given the issues involving the court system’s authority to impose its procedures on candidates for elective office, the Chief Administrative Judge did not make participation in the IJEQC review process mandatory. Consequently, the failure to participate in the IJEQC process is not an ethical violation. Nothing “requires judges or candidates for elective judicial office to cooperate with the Part 150 Commissions. Absent such a mandate, there is no ethics violation should a judge or candidate for elective judicial office decline to engage in the Commissions’ evaluation process.”⁸¹

An appendix to Part 150 provides most of the procedures to be followed by the IJEQCs in the course of their reviews of candidates.⁸² The procedures, when viewed in their totality, represent what should be regarded as a court operated vigorous process.

Whatever the good intentions of the founders of the IJEQC system, it should be clear that its evaluations have not received much public notice. While in the early days of the existence of the IJEQCs, there was some media scrutiny on the evaluations of the candidates, by now it is clear that the IJEQC evaluations are given minimal attention by the media.⁸³ Several Task Force members observed that almost no New Yorkers — including the majority of lawyers — are even

⁷⁶ New York State Register 28 N.Y. Reg. (March 8, 2006).

⁷⁷ 22 NYCRR §150.5(b).

⁷⁸ State Register *supra* at note 70.

⁷⁹ See 22 NYCRR §150.10 Appendix A, Section 3.

⁸⁰ 22 NYCRR §150.5(c).

⁸¹ Advisory Committee on Judicial Ethics, *Opinion 07-91*, June 7, 2007.

⁸² 22 NYCRR §150.10.

⁸³ See Robert Magee, “The Trial, the Bench, the Net, and the First Amendment: The Possibilities of Reform in New York State Judicial Elections,” 25 *Touro L. Rev.* 1003, 1064 (2009) suggesting that the IJEQCs should play more of an educational role and less of an evaluative role.

aware of the existence of the IJEQCs, with the belief that nobody would know if and when the IJEQCs go out of existence.

While a noble experiment, there have been concerns that the IJEQC system is not working well and is not achieving the goals it was set out to fulfill. Too many candidates opt out because the process is seen too often as burdensome, duplicative and risky.

Moreover, some have maintained that New York's court system should not be involved in the evaluation of its own elective officials. There is a philosophical issue as to whether the courts are the right entity to run what is seen as a political process. No other court system in the United States handles the evaluation of candidates for elective office, and it can be argued that the IJEQCs are not an appropriate part of a court system.

In any event, it is certain the IJEQC system will come to an end in 2018. The Task Force was advised definitively that the IJEQCs would cease their work at the end of the 2018 calendar year. Despite high hopes, over the years of its operation, the IJEQC system has experienced limited participation by judicial candidates and dwindling publicity for its ratings. Accordingly, the current leadership of the State Courts has decided to discontinue the Part 150 Commissions as of December 31, 2018, and NYSBA pledged to undertake this Task Force to vet and build on statewide and local bar association initiatives already in place throughout the State and ensure robust evaluation of judicial candidates tailored to reflect local needs.

D. Judicial Evaluation by New York Bar Associations

1. The Statewide Associations

(a) The New York State Bar Association

NYSBA has guidelines for evaluating the qualifications of certain judicial positions. There is a Committee to Review Judicial Nominations, which reviews candidates for the Court of Appeals, and, upon the request of the president of NYSBA, other federal and state appointive judicial candidates.

Candidates are evaluated on their "professional ability and experience, character, temperament, and the possession of the special qualities necessary or desirable for the performance of the duties of the office." There are three rating categories, "Not Qualified," "Qualified" and "Well Qualified." The rating of "Well Qualified" is reserved for candidates who possess "preeminent qualifications."

A subcommittee actively investigates each candidate. Determinations of the ratings are made by a concurrence of the lesser of two-thirds of the full membership of the committee or three-quarters of the committee members present. Voters must be present in person, and their votes are by secret ballot.

Candidates who are rated as "Not Qualified," have a right of appeal. The appellate panel consists of the President and President-Elect of NYSBA and seven members of the Executive Committee. A vote to modify the finding of the Judicial Nominations committee also requires the

concurrence of the lesser of two-thirds of the full membership of the appellate panel or three-quarters of the members of the appellate panel who are present. The entire work of the committee and the appellate panel is confidential.

(b) Women’s Bar Association of the State of New York [WBASNY]

Members of the judiciary/courts committee are appointed by the President from each chapter of WBASNY. There are currently 20 chapters. Each member serves a three-year term, and members can be reappointed for additional terms. There are very strict recusal provisions for committee members.

An investigative subcommittee is appointed for each candidate. The evaluation criteria are “experience,” “integrity,” “professional competence,” “judicial temperament” and “service to the law and contribution to the effective administration of justice and/or the community.”

There are three ratings plus a fourth additional discretionary rating. The three grades are “Approved,” “Approved as Highly Qualified,” and “Not Approved.” The discretionary grade is for “Commended” where the candidate has “demonstrated an outstanding sensitivity to issues of gender bias, women, children and minorities.” For candidates who do not participate in the evaluation process, there are possible ratings of “Disapproved for Refusal to Participate” or “Not Rated for a Legitimate Purpose.”

The rating of “Approved” requires a majority vote, but a two-thirds vote is needed to achieve the “Approved as Highly Qualified” or a “Commended” rating.

The committee reports its findings to the President and the officers of WBASNY. By a two-thirds vote, the officers can either change the rating – if the committee decision was made by a margin of three or fewer votes - or disapprove the rating and return the evaluation to the committee for reconsideration. If the officers take no action to disapprove or change the rating, the committee’s report is deemed approved.

The proceedings are considered highly confidential.

2. The Association of the Bar of the City of New York [City Bar]

The City Bar, over a period of 150 years, dating to the era of the Tweed Ring, has developed detailed procedures to govern its judicial evaluation process. There is a standing Committee on the Judiciary composed of 50 members from across the City. Significant efforts are made to secure membership on the committee that reflects the geographic and other diversity of the City. Members serve a three-year term, and every year one-third of the committee rotates off. Once a member’s term expires, that member cannot be reappointed to the committee for at least a year.

A subcommittee is appointed to perform a detailed investigation of the qualifications of each candidate. The candidate completes a uniform judicial questionnaire, which is similar to the form that has been used by the IJEQCs. A member of the Judiciary Committee serves as the

subcommittee's Reporter and Chair. The Reporter "must prepare a report setting forth the results of the subcommittee's investigation."

The City Bar reviews the qualifications of all candidates for judicial office for courts based in New York City. The City Bar works cooperatively with all five county bar associations within New York City as part of its screening.

The full Judiciary Committee considers the report of the subcommittee and an interview with each candidate. In evaluating candidates for judicial office, the Committee on the Judiciary should determine whether the candidates have the following qualifications: "integrity, impartiality, intellectual ability, knowledge of the law, industriousness, and judicial demeanor and temperament."

Candidates receive either a grade of "Approved" or "Not Approved." The "Approved" ratings are reserved for "candidates who have affirmatively demonstrated qualifications which are regarded by the committee to be necessary for the office for which they are being considered."

Candidates who are found "Not Approved" may ask for a rehearing, which is subject to the "sole discretion" of the chair of the Judiciary Committee. "Not Approved" candidates may in prescribed circumstances, appeal the rating to the Executive Committee. In order to appeal, there must have been a requisite number of votes among voting members of the committee in support of finding the candidate "Approved." The City Bar maintains strict rules requiring recusals and disqualifications from voting by judiciary committee members. "No members of the Judiciary Committee, or of the subcommittee investigating the candidate's qualifications may make . . . a [campaign] contribution directly or indirectly, or participate actively in the campaign of any candidate for judicial or other office within the jurisdiction of [the] Committee."

All of the Committee's work forming the basis of its rating determinations is confidential.

3. The Major Suburban and Urban County Bar Associations

(a) Albany County Bar Association

The Albany County Bar Association has a judiciary committee of 15 members selected by the Association president. Members serve three-year terms and may serve no more than two consecutive terms. "At least three new members shall be designated each year." The Association strives for a diverse membership on the judiciary committee. No more than six members of the committee may be from the same political party.

The committee reviews Supreme Court candidates and candidates for countywide positions. It does not review Albany city court judges. The committee requires a completed written questionnaire and a personal interview. A minimum of nine committee members must "be present at the interviewing of and voting on any applicant." There is no proxy voting.

There are 11 separate criteria for rating candidates. These criteria are very broad and include integrity, experience, professional ability, education, reputation and a host of other factors. The criteria are to "be given equal weight with no single factor being determinative or preclusive of

any particular rating.” There are four grades for candidates. They are “Outstanding,” “Well Qualified,” “Qualified” and “Not Recommended.” An 80% vote of committee members is needed to achieve the “outstanding” rating. A 60% vote is required for “Well Qualified.” “Qualified” and “Not Recommended” ratings require a majority vote.

Individuals with “Not Recommended” ratings may appeal the rating to the Executive Committee of the Association. The Executive Committee determines whether the judiciary committee’s “rating was erroneous in light of the evidence presented to it” and then determines what the candidate’s rating will be.

There is a conflict policy, and all proceedings are confidential.

(b) Broome County Bar Association

The Broome County Bar Association has a judicial candidate committee which is composed of 24 members serving three-year terms. The membership “should reflect the diversity of the membership” of the association.

There are term limits. A committee member may serve a maximum of six consecutive years or seven consecutive years if the member serves as an alternate member. Once the member is term limited, the member may not serve on the committee for two years.

The candidates are evaluated based on a set of 11 attributes. These are “competence,” “temperament,” “courteousness,” “dignity,” “diligence,” “fairness,” “freedom from prejudice,” “impartiality,” “integrity,” “promptness” and “ability and/or experience.”

There are four authorized ratings: “Highly Qualified,” “Qualified,” “Not Qualified” and “Not Rated.” A two-thirds vote is needed to achieve the “Highly Qualified” rating. A majority vote is needed to achieve the “Qualified” rating. Failure to receive the “Qualified” rating marks the candidate as “Not Qualified.”

Any candidate who does not achieve a “Highly Qualified” rating can appeal the rating to the board. The board by majority vote may remand the decision to the committee for review. The board may also review the decision itself. The board by a majority vote can affirm the committee decision, set aside the committee decision if it finds by a majority vote that the initial decision was “arbitrary and capricious” or remand the decision to the committee.

The entire evaluation procedure is confidential.

(c) Erie County Bar Association

The Erie County Bar Association has a judiciary committee which is composed of 29 members. The board of directors of the association appoints the committee members. There are nine new members each year, and not more than 14 members may belong to the same political party. Fifteen members are needed for a quorum.

The candidates are rated on 11 separate benchmarks which include integrity, experience, professional ability, education, reputation, industry and temperament. There are four ratings: “Outstanding,” “Well Qualified,” “Qualified” and “Not Recommended.”

An 80% vote of the committee is needed for the “Outstanding” rating. A two-third’s vote is needed for “Well Qualified.” A majority vote is needed for “Qualified” and “Not Recommended.” A candidate who receives the “Not Recommended” rating may request reconsideration by the committee. The board’s procedures include a mechanism “whereby the applicant’s request for reconsideration is first presented to the committee, which will make recommendations to the board in accordance with the board’s procedures for reconsideration.” The board will then make a final determination on the candidate.

A candidate can appeal a “Not Recommended” rating to the board of the Bar Association.

There are recusal and conflict-of-interest provisions, and the procedures are held in “strictest confidence.”

(d) Monroe County Bar Association

The Monroe County Bar Association has advised the Task Force that, after an extensive year-long process led by a task force consisting of representatives of the political parties, lawyers and retired judges, the Bar Association decided to suspend judicial evaluations and to examine how to communicate effectively with and educate the public about judicial candidates. Over the last two election cycles, the Bar Association has held a public forum in which candidates who chose to appear could respond to questions from a panel of lawyers, and a series of programs broadcast on NPR where candidates were interviewed and able to respond to callers. The Monroe County Bar Association continues to evaluate and explore how best to serve its members and the community by effectively informing and educating the public about the qualifications of judicial candidates.

(e) Nassau County Bar Association

The Nassau County Bar Association has extensive written rules governing its operations. Its Judiciary Committee consists of 21 members appointed by the President with the approval of the Board of Directors. No judicial or non-judicial employee of a court of record may be a member of the Committee.

Members are appointed in two classes, for two-year terms. There are term limits. These permit a maximum of three consecutive terms and no more than seven years in any nine-year period. Once the member reaches the term limit, there is a required two-year waiting period before the member can return to the Committee.

No more than 10 members of the Committee may be enrolled in the same political party. Committee members are prohibited from serving as an officer or member of any campaign committee for any candidate for judicial office in New York State.

Committee members may not directly or indirectly contribute to, support, or participate in the campaign of any candidate for judicial office in New York State.

Thirteen members of the Committee constitute a quorum. All actions of the Committee are taken by a majority of the members present and voting. All proceedings are confidential.

A secret ballot is taken to determine by majority vote, of those present and voting, whether the candidate is “Well Qualified” or “Not Approved at This Time.” No matter how many committee members are present, at least seven affirmative votes are required for the “Well Qualified” rating.

Criteria are whether or not (1) the person has established a reputation for good character and temperament, (2) the person has a sufficient degree of professional experience, scholarship and ability to perform the duties of the office for which the person is being considered, (3) whether the conduct of such person has been above reproach, (4) whether such person is known as a conscientious, studious, thorough, courteous, patient, punctual, just and unbiased person who can be counted upon to be fearless and truthful when subject to public and/or political pressure, (5) whether such person is of good moral character and (6) whether such person is emotionally, cognitively and physically able, with any reasonable accommodations, to fulfill the duties of the office for which the person is being considered.

Any person found “Not Approved at this Time” may request reconsideration by the Committee. The reconsideration is de novo.

Candidates dissatisfied with the results can appeal to the Board of Directors and be heard in executive session. The Board of Directors’ review is treated as an appellate review, not a de novo review. The Board of Directors’ decision is either “Well Qualified” or “Not Approved at This Time.” Decisions contrary to that of the Committee require the support of a two-thirds vote of the Directors present and voting.

(f) Oneida County Bar Association

The Oneida County Bar Association has a 13-person judiciary committee. The committee makes a recommendation to the board of directors. The committee members have one-year terms and are limited to a maximum of six consecutive years.

There are four ratings: “Highly Qualified,” “Qualified,” Not Qualified,” and “No Rating” for candidates who fail to cooperate. The recommendations are made by majority vote.

(g) Onondaga County Bar Association

The Onondaga County Bar Association has a 39-person judiciary committee which is elected by the Board of Directors of the association. “In so far as possible, the membership of the committee shall be representative of the bar association as a whole.” The committee makes its recommendations on candidates to the board of directors. A three-person subcommittee performs the investigation. The committee members serve one-year terms. Twenty committee members in person are required for a quorum on voting on the qualifications of candidates.

There are two grades for candidates: “Recommended as Qualified” and “Not Recommended.” A two-thirds vote is required to achieve the “Recommended as Qualified” rating. If a candidate scores less than the two-thirds vote, that candidate is “Not Recommended.” The criteria for rating candidates are: “competence, courteousness, dignity, diligence, fairness, freedom from prejudice, impartiality, integrity, promptness and temperament.”

There are disqualification rules, and candidates rated “Not Recommended” may appeal to the directors of the board of the Bar Association. The board can only reverse the recommendation of the committee by a two-thirds vote. On appeal, a candidate and/or a representative may appear before the board.

The entire process is confidential.

(h) Suffolk County Bar Association

The Suffolk County Bar Association has a Judicial Screening Committee consisting of 25 members, five of whom are designated from the Suffolk County Criminal Bar Association. Terms are three years, and the terms are staggered. All are appointed by the Association President subject to the approval of the Board of Directors. Committee members may not be members of the Executive Committee of a political party during their Committee tenure. In addition, the Committee is specifically directed to “discourage political considerations from outweighing fitness in the election or appointment of candidates for judicial office.”

Officers or Directors of the bar association may not represent a candidate before the Committee with regard to qualifications while in office or for a period of three years thereafter.

All candidates are “required to complete a questionnaire, the form and content of which shall be proposed by the Committee” and to submit to an interview. The Committee can dispense with the questionnaire and interview of a candidate interviewed by the Committee during a previous one-year period.

The burden is upon the candidate to affirmatively establish qualifications for the office sought. “No candidate shall be presumed to be qualified for office.” Candidates may request disqualification of any member of the Committee. The Chair determines whether prejudice or other good cause exists for disqualification.

The Committee considers, and votes by secret ballot separately as to each of the following criteria: Temperament, Character and Integrity, Legal Scholarship and Professional Ability and Reputation. The rules for the Committee establish definitions for each of the criteria.

After these initial deliberations are completed, the Committee first votes by secret ballot as to the issue of “character and integrity.” The Committee member either votes that the candidate is: (1) “Qualified” or (2) “Not Approved at This Time.”

Each ballot cast for “Not Approved at This Time” must include the Committee member’s statement about the reasons for his/her vote.

A two-thirds vote is required for a finding of “Qualified,” which means the candidate possesses affirmative qualities with respect to candor, impartiality and respect for and adherence to ethical standards and conduct.

If the candidate fails to receive the two-thirds vote, on the character and integrity criterion (known as a “passing vote”), the candidate is found “Not Approved at This Time” for the office under consideration.

The Committee members then vote on the remaining three criteria. If the candidate receives a majority vote in his or her favor on the other three criteria (and has achieved the two-thirds vote on the “character and integrity” criterion), then the candidate is found “Qualified” by the Committee.

There is a limited right to a rehearing based on “good cause.” At least one-third of the Committee members who made the “Not Approved” finding must agree to a rehearing.

Adverse committee determinations may be appealed to the Board of Directors. The committee’s decision is given “substantial deference” and can only be reversed if the Board finds that the committee decision was arbitrary, capricious or irrational by clear and convincing evidence.

The proceedings are confidential.

(i) Westchester County Bar Association

The Westchester Bar Association has a Judiciary Committee which meets prior to each annual election to interview candidates who have completed an extensive questionnaire. The Committee reviews the qualifications of the candidates, reviews state records concerning the ethics and judicial conduct of the candidates and conducts in-person interviews.

The Executive Committee of the Bar Association needs to confirm the recommendations of the Judiciary Committee.

The Judiciary Committee has six ratings. These are “Exceptionally Well Qualified,” “Well Qualified,” “Qualified,” “Meets Minimum Requirements,” “Not Qualified,” and “Not Qualified by Failure to Appear.” Where a candidate fails to appear for the interview, that candidate is rated either “Not Qualified” or “Not Qualified by Failure to Appear.”

4. Smaller, Affinity and Specialty Bar Associations

(a) Central New York Women’s Bar Association (based in Syracuse)

The Central New York Women’s Bar Association has a judiciary committee with a minimum of 12 members who serve three-year terms.

There are four rating categories: “Commended,” “Qualified,” “Not Qualified” and “Not Rated.” Candidates are graded on seven separate factors. These are “judicial temperament,” “legal ability and experience,” “legal writing ability,” “general reputation,” “industriousness,” “impartiality” and “attitudes towards gender neutrality and sensitivity to gender issues.” In

order to achieve the “Commended” status, the candidate must score well in the first six categories and especially well in the “attitude towards gender neutrality” category.

Three-fourths of the judiciary committee must be present at the interviewing and voting on each candidate. A majority vote determines the rating to be given each candidate.

The full board of directors can request the judiciary committee to reconsider its decision. Candidates given the “Not Qualified” rating may appeal the decision. The appeal is heard by five Board members appointed by the Board of Directors.

The procedures are confidential.

(b) Greater Rochester Association for Women Attorneys

The Greater Rochester Association for Women Attorneys has a judiciary committee composed of a minimum of 15 members who serve two-year terms. Members can serve past their initial term, and it is recommended that not more than half the members rotate off at one time. The committee strives for an even balance between “political parties, large firms/small firms, public sector representation, and litigators as well as non-litigators.”

The Association has extensive conflict of interest provisions for committee members.

The criteria for evaluating candidates include five explicit categories. These are “experience,” “integrity,” “professional competence,” “judicial temperament,” and “service to the law and contribution to the effective administration of justice and/or the community.” These are the same criteria used by the WBASNY.

There are five rankings. Candidates can be judged “Exceptionally Well Qualified,” “Well Qualified,” “Qualified” or “Not Qualified.” Candidates who reach the rating of “Qualified” or better can receive the additional rating of “Commended” if they demonstrate “outstanding sensitivity to issues of women, minorities and bias.”

“Qualified” and “Well Qualified” candidates need a majority of members voting.

“Exceptionally Well Qualified” candidates need a three-quarters vote. To achieve the “Commended” rating, the successful candidate needs a three-quarters vote plus one additional vote. The judiciary committee formally makes a recommendation to the board of directors. The board by a majority vote will either accept the rating or remand the rating to the judiciary committee.

A candidate who receives a “Not Qualified” rating may appeal the rating to the board where it is heard by a five-member appeals panel. The appeals panel determined whether the committee’s rating “was erroneous in light of the evidence presented to it.”

The entire evaluation procedure is confidential.

(c) Oswego County Bar Association

The Oswego County Bar Association has a nine-member judicial screening committee. Membership on the screening committee is intended to be representative of the membership of the Bar Association. Members on the committee serve one-year terms.

The candidates are judged on the following criteria: competence, courteousness, dignity, diligence, fairness, freedom from prejudice, impartiality, integrity, promptness and temperament.

There are only two ratings given candidates: “Recommended as Qualified” and “Not Qualified.” The vote is a majority vote. The committee vote is a recommendation to the full Bar Association. Candidates who have received a “Not Qualified” grade can appeal the recommendation.

The review procedures are confidential.

(d) Ulster County Bar Association

The Ulster County Bar Association may create evaluation committees composed of 6-10 members “to pass upon the qualifications of candidates for election or appointment.” The committee is chaired by the first vice president of the bar association. The committee members are “solicited annually from the members of the Ulster County Bar Association” and must be admitted to practice law for at least eight years.

The evaluation committees review each candidate’s credentials and assign ratings of “Highly Qualified,” “Qualified” and “Not Qualified” to candidates. The ratings are determined by majority vote. A “committee may also compose a brief paragraph or list of strong points, areas in need of improvement and general comments about each candidate.”

The evaluation committee will not publicize a “Not Qualified” rating if the candidate, within three business days, agrees to withdraw from consideration for the office.

E. Evaluation Systems Employed by Other States

Upon the request of the Task Force, the National Center for State Courts provided information on how judicial screening is implemented or carried out in other states. The data come from states where judicial screening is mandated either by the state’s laws or constitution. The 15 states are Alaska, Arizona, Colorado, Connecticut, Hawaii, Iowa, Kansas, Missouri, Nebraska, New Mexico, Rhode Island, South Carolina, Utah, Vermont and Wyoming. In these states, the screening is typically done for appointive – rather than for elective – judiciary positions.

As a general rule, these states in their screening for trial court judge follow what they term the “classic” structure, which was advocated by the American Judicature Society and the American Bar Association. This “classic” structure involves a 3-3-1 composition mix where there are three bar members selected by the leadership of the state bar, three non-attorneys selected by the governor or other elected officials, and one judge of a higher court who often serves as the chair of the committee. In some states, selections of the governor for the screening commission are frequently subject to a form of legislative confirmation. For example, in Alaska, three non-attorney members of the judicial council are selected by the governor, subject to confirmation by

the full legislature, three are selected by the state bar, and the seventh member is the chief justice of the supreme court, who also serves as the chair of the council.⁸⁴

For circuit court judges in Missouri, there is a circuit court judicial commission. It consists of five members. One is the chief judge of the intermediate appellate court for the district. Two are selected by the members of the state bar in the district, and two non-lawyers are selected by the governor.⁸⁵

In other states, the leadership of the legislative body is involved in the selection of the screening commission. For example, in Connecticut, the judicial selection commission is composed of 12 individuals, all selected by elected officials. The governor selects six members, half of whom are non-lawyers. Individual legislative leaders pick one each, and the law specifies whether they are to select lawyers. Not more than six members can belong to the same party.⁸⁶

In Vermont, there is a judicial nominating board which nominates supreme court judges, superior court judges and magistrates. It is an 11-member board. Attorneys admitted to practice before the supreme court select three members. The House and the Senate select three members each, and the governor selects two members. The board appointments are structured in a way that non-lawyers will constitute a majority of the board.⁸⁷

⁸⁴ AK Const. Art. 4, § 8. A similar 3-3-1 commission is in place in Wyoming, WY CONST Art. 5, § 4.(c). For the trial court nominating commission in Utah, the governor appoints all six members, but two are from nominations submitted by the state bar. The chief justice appoints an ex officio non-voting member. Only a maximum of four members can be attorneys. UT ST § 78A-10-302.

⁸⁵ V.A.M.S. Const. Art. 5, § 25(d).

⁸⁶ C.G.S.A. § 51-44a.

⁸⁷ VT ST T. 4 § 601.

IV Analyzing Judicial Screening in New York State

In addition to the screening done by the IJEQCs, there is a considerable amount of judicial screening taking place in New York State. The local, affinity and specialty bar associations throughout the state have taken it on themselves to screen judicial candidates.

The framework for judicial screening is basically similar throughout the bar associations. The association appoints a committee – typically a judiciary committee – which reviews the written submissions and interviews judicial candidates. The committee then votes on the qualifications of the candidates, and candidates found to be unqualified are generally entitled to ask the committee for reconsideration and/or appeal the committee’s decision to the executive body of the bar association.

Yet, within this basic framework of candidate review, there are myriad issues and considerations. The bar associations do not handle the candidate screening process in exactly the same manner. The differences among their practices are considerable. There are no minimum basic standards. There are no best practices. Each bar association does as it sees fit.

This critique is not in any way meant to imply or suggest that the bar associations are performing their screening in a less than satisfactory manner. In fact, the evidence is to the contrary. The bar associations that are doing judicial screening are, by and large, providing excellent work in their screening. The bar association members are volunteering enormous amounts of time to improve the judicial process. They should only be commended for their time, efforts, patience and services. The screening systems work because of the dedication of the members of the local bar associations.

Yet the differences among the bar association practices and policies are significant, and they largely define any analysis of the judicial screening process in New York.

A. Different Regional Approaches Throughout the State

The Task Force believes that in some areas of the State, the systems that are in place are operating effectively. Not surprisingly, the performance of the bar associations often depends on the resources that they can bring to the process. In New York City, the City Bar – working with the five county bar associations in the City – devotes significant time and resources to the process. The City Bar has a system in place that works to promote the highest standards of the judiciary. The system is working well within New York City. The traditionally competitive bar associations have joined together collaboratively to establish an effective evaluation system.

Outside the City of New York, the workings of the judicial evaluation systems vary. The fact is that the evaluation process in New York City while highly admirable, is not replicable outside New York City. Yet in many of the suburban and upstate urban counties, the existing screening processes are also efficacious.

On Long Island, in the 10th Judicial District, both the Nassau County Bar Association and the Suffolk County Bar Association maintain vibrant judicial evaluation systems that are working effectively. In many of the upstate urban counties, (which would include Albany, Broome, Erie,

Oneida and Onondaga counties) the county bar associations are working forcefully and are employing evaluation systems that serve the public and the judiciary well.

Nonetheless, there are 35 counties in upstate New York with a population of less than 100,000. Fifteen counties have populations below 50,000, with less than 5,000 in Hamilton County. The county bar associations in these 35 counties have limited financial resources. There are only a few elected judicial positions in counties with small populations. They have a limited pool of attorneys, and these factors virtually preclude the possibility or even the potential for any meaningful judicial screening. Screening works in some upstate areas but not in all of them.

B. Different Standards Throughout the State

The bar associations have implemented different sets of procedures and standards in their assessment of candidates. The procedures and standards that differ throughout the state include the following:

- Who selects the judiciary panel? Is it the president or the board of directors of the bar association?
- Do the members of the judiciary panel serve fixed terms? Are there term limits for the members? Are the terms of the members staggered? Is there a cooling-off period during which panel members who have been term-limited may not rejoin the panel?
- Is there a questionnaire requirement, and how does it differ from the IJEQC questionnaire or the City Bar's questionnaire?
- Who casts the binding votes on the candidate rating qualifications? Is it the judiciary panel, or does the governing body of the bar association review what are essentially advisory recommendations of the judiciary committee?
- Is there an in-depth investigation of judicial candidates? Is it undertaken by a subcommittee of the judiciary panel or by a single member of the panel?
- Is diversity in membership a stated goal for the judiciary panel? Is the diversity goal to establish a panel that is representative of bar association membership or, should it be representative of the demographics of the area served by the bar association?
- Are non-lawyers permitted to serve on a judiciary panel?
- Is there a secret ballot at the meeting where the candidates are rated? Is proxy voting authorized, and is there a need to be physically present at a meeting in order to vote? Can a panelist utilizing a phone or other form of electronic communication be deemed present?
- Must a panel member participate in screening of all candidates for a particular office in order for that panelist to participate in rating candidates for that particular office?
- What is the quorum requirement for meetings of the judiciary panel?
- What should the conflicts policy be for members of the judiciary panel? Must they recuse for political contributions to a candidate? Prior legal association with the candidate or the candidate's firm? Previous work with the candidate on that candidate's election campaigns? Previous business relationship with the candidate? Can public officials

(including judges) or party officials be part of a judiciary panel? Can a written conflicts policy be effective?

- What are the criteria to be used for the ratings of judicial candidates? The survey of the bar associations showed up to 11 criteria in regular use by the bar associations. How does a bar association determine which criteria to use, and is there much of a difference between the individual criteria? For example, the IJEQCs utilize six separate criteria: “professional ability; character, independence and integrity; reputation for fairness and lack of bias; and temperament, including courtesy and patience.” Is integrity, however, different than independence? Is character different than integrity? Is patience different than temperament? There reaches a point where adding additional attributes to judicial qualities may simply be gilding the lily. Can there be an excess of judicial criteria?
- Should there be negative criteria which the panel should be precluded from utilizing? For example, the judicial screening committees established by the Governor are precluded from giving “any consideration to the age, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, marital status or political party affiliation of the candidate.”
- How many grades can a panel give to a candidate? While in some associations, candidates receive only two possible grades and can be rated as either “Approved/Qualified,” or “Not Approved/Qualified,” other bar associations use from three to six grades. In a three-grade system, there is often the added grade of “Highly Approved/Qualified.” Some associations give a separate grade to candidates who are not rated because they refused to participate in the process. Some associations add a “Commended” category to demonstrate that candidate’s sensitivity to issues that are particularly important and relevant to that bar association. For example, the Greater Rochester Association for Women Attorneys ranks candidates as “Exceptionally Well Qualified,” “Well Qualified,” “Qualified” or “Not Qualified.” Candidates ranked “Qualified” or higher can receive the additional rating of “Commended.”
- Should candidates be graded either as “Approved” or “Qualified?”
- Is there a majority or a super-majority requirement for certain candidate grades?
- Will the judiciary panel evaluate a candidate who does not appear for evaluation?
- Are rehearings authorized? Who decides on the rehearing, the judiciary panel, the chair of the judiciary committee, or the full executive board? Do you need a certain number of dissenters from a rating to authorize a rehearing? If there is a rehearing, is the original rating decision entitled to respect, or is there a de novo review of the original rating?
- Can a candidate deemed unqualified withdraw before a report is made public?
- Who can appeal the rating? Is the appeal authorized for anyone who did not receive the top rating (i.e., candidates who received an “Approved/Qualified” rating in an association that utilized the “Highly Approved/Qualified” rating) or only for individuals found “Not Approved/Qualified?” Who hears the appeal: the full executive board or a committee of the board? Is the appellant entitled to representation at the meeting of the appeals board? What respect is given to the original decision of the judiciary panel? Can new evidence that was not before the judiciary panel be submitted by the appellant? Can the appeals

body remand the decision back to the judiciary panel for its decision, or must the appeals board make the decision itself?

- In associations where the board makes the actual decisions based on recommendations by the judiciary panel, can the judiciary panel recommendation be changed by a majority vote or is there a need for a super-majority vote to change a recommendation? In these associations, is the board limited to reviewing “Not Approved/Qualified” applications, or could a board change a rating from “Approved/Qualified” to “Highly Approved/Qualified?”
- At what point in time during the political process should the judiciary committee issue its ratings?
- For what period of time is a candidate rating valid? Should it be for one year or a period of time greater than one year? Should the rating only apply to the position for which the candidate was initially evaluated?
- Are the reasons for the decision made public? Is the reasoning supporting the decision made available to the candidates? If a candidate is appealing an adverse panel decision, is the basis for the panel’s decision disclosed to the candidate in order to assist that candidate with the appeal? Should the judiciary panel provide feedback to the candidates? Should it provide detailed feedback on judicial performance?
- How much of the process is confidential?
- How is the public advised of the ratings?
- How is the public advised of candidates who refused to participate in the screening process?

C. The Role of the Political Parties

No analysis of the judicial selection system can ignore the fact that it is largely part and parcel of the political process. Political party leadership has the decisive say in who becomes an elected judge in New York State. This is a veritable fact of life.

The relationship between political party leadership and the bar associations involved in screening judges varies across the state. Some political leaders cooperate with bar associations. Others do not. Some political leaders are openly antagonistic to the work of the bar associations.

Members of the Task Force generally understood that when push came to shove, the political leaders would make decisions in their own interest and not consistent with the interests of the evaluation systems of the bar associations.

The November 2018 Supreme Court elections in New York State help to illustrate the reach of the political leadership. In the 11 judicial districts where more than one candidate was running for a judgeship, the dominant party in the district won 49 of the 50 contests. The dominant party’s candidates were often unopposed or ran with cross-endorsements from other parties. Few

of the contested elections were remotely close.⁸⁸ Judicial elections inhabit a political world; the bar associations find themselves in supporting roles.

The Task Force members understand the reality of the role of the political parties in judicial elections. The intention of the Task Force is to develop best practices that will garner the support of the political leaders and make them part of a system that legitimately evaluates the qualifications of all candidates seeking elective judicial office.

D. The Multiplicity of Bar Associations

The Task Force is encouraged by the fact that numerous local, affinity and specialty bar associations are engaged in the process of screening judicial candidates. That is the proper role of bar associations and what they should be doing. The Task Force believes that the process of judicial candidate evaluation will only be enhanced by the active involvement of more bar associations.

The primary concern of the Task Force is that the active participation of so many bar associations does not overburden judicial candidates. It should not in any way serve to deter qualified candidates from seeking judicial office.

The Task Force encourages bar associations in their respective judicial districts to use the same basic judicial questionnaire and to coordinate their activities with other bar associations to make the review process less onerous for candidates for the judiciary.

⁸⁸ In the one exception in 2018, the winning candidate from the non-dominant party had endorsements from two minor parties. The one dominant party candidate who lost the election lacked the endorsement of the two minor parties.

V Recommendations and Conclusions

A. General Recommendations

The Task Force's review of judicial screening systems in New York State found that the discontinuation of the IJEQCs will leave a significant vacuum in the evaluation of elected judicial candidates in some areas of New York State. Whether or not the IJEQCs ever were able to succeed in their mission of ensuring New York voters of a well-qualified judiciary, the absence of any formalized statewide review of judicial candidates will leave New Yorkers in some areas of the state in a weaker position to judge the merits of judicial candidates. If the Task Force is to be successful in its mission of "developing effective non-partisan evaluation and screening of candidates for election to judicial office and improving those efforts that already exist," it is vital to help effectuate systems that will truly foster the best judiciary possible.

The Task Force understands that its goals are to develop recommendations, best practices and guidelines that are effective, practical and politically achievable. It does little good to recommend a utopian judicial evaluation system for New York State that cannot realistically be accomplished. New Yorkers deserve a system that can be put in place in 2019.

To that end, the Task Force in its review of the current bar association practices has postulated a number of core precepts. The Task Force's recommendations in no manner depart from the NYSBA's longstanding commitment to the merit selection of judges in New York State.

Rather, the Task Force's belief is that in 2019, the State Bar Association needs to address and to recommend actions to assure that candidates for election to the judiciary in New York State are effectively screened to determine their qualifications.

The systems in place by local bar associations vary from county to county. County, affinity and specialty bar associations have their own evaluation systems. Some local bar associations have a significant number of members and resources, and do an extensive, complete and non-partisan job in evaluating judicial candidates. Other bar associations – especially outside the City of New York – lack this capacity. In some counties, the bar association screening processes are active, robust and efficacious. In others, there is minimal screening.

The Task Force believes that the one-size-fits-all approach to determining the composition of judicial screening panels will not work for New York State. The State and the local bar associations are extremely diverse, and the methods for selecting judges in this state are extraordinarily complex. What works in Soho may not work in Schenectady or Skaneateles. What works in Garden City may not work in Gowanda. The Task Force is not trying to impose a single judicial evaluation structure on the entire state. A top-down one-sized approach providing a statewide uniform structure is likely to be a recipe for failure.

Where the existing bar association reviews are effective, the Task Force recommends their continuation. It is simple. It is not rocket science. Where the screening system is not broken, the Task Force sees no reason to fix it.

The simpler the evaluation system, the easier it will be to implement. There are dozens of judicial screening review processes in place throughout New York State. The culture, the assets, the procedures and the mechanics of local bar associations vary tremendously. The simpler and more uniform we make the process, the more likely the process will be successful. The Task Force accordingly has developed a series of best practices that should help guide local bar associations in their role in evaluating candidates for judicial office. The Task Force believes that the adoption of these practical guidelines will help to assure a high-quality judiciary for New York State.

The Task Force believes that in some areas of the State, the systems that are in place are operating effectively. They should not be changed. As the Task Force noted previously, this is the case in New York City where the City Bar— working with the five county bar associations within the City – has a vigorous and successful system in place that works to promote the highest standards of the judiciary. There is strong participation by the judicial candidates, and even the candidates are generally satisfied with the workings of the evaluation system.

On Long Island, in the 10th Judicial District, both the Nassau County Bar Association and the Suffolk County Bar Association maintain vibrant judicial evaluation systems that are working effectively. In many of the upstate urban counties, the county bar associations are working forcefully and are employing evaluation systems that serve the public and the judiciary well. The Task Force believes that these bar associations should be encouraged to continue their efforts.

In reviewing the work of the local bar associations, there are effective judicial evaluation systems in place in 10 of the 11 most populous counties in New York State. Nearly three-quarters of the state’s population is currently being well served by the work of the local bar associations.

Nonetheless, there are some judicial districts (such as the 7th Judicial District, which encompasses Monroe County and seven smaller counties) where there is almost no judicial screening whatsoever.⁸⁹ There are many small counties in other districts (such as Hamilton County in the 4th District and Lewis County in the 5th District) where the size of the county and the absence of a significant body of resident attorneys virtually preclude the possibility or even the potential for any meaningful judicial screening. Moreover, there are very few elected judicial positions in small population counties. For example, Lewis County has no city court judges and only one county-wide judge elected once every 10 years, i.e., a “three-hat judge” (Surrogate/County Court/Family Court Judge).

The Task Force believes that increased judicial screening needs to be encouraged throughout the state. The State Bar should not allow the systematic screening currently performed by the IJECQs to fall through the upstate cracks. Screening ought to be available for all judicial candidates. In order to assist those judicial districts with limited screening, the Task Force recommends that the State Bar work with all local bar associations in those districts to establish

⁸⁹ Monroe County, the ninth largest county in the state with a population of approximately 750,000, is the largest county where the county bar association does not conduct judicial screening. See https://www.newyork-demographics.com/counties_by_population [last viewed November 26, 2018].

regional screening committees in 2019. Underwriting support for this initiative should come from the Office of Court Administration which has funded and staffed the IJEQCs.

These regional screening panels should have broad representation from participating counties in the judicial district. The State Bar must take appropriate action to continue non-partisan evaluation and screening of candidates for election to judicial office. This should include the establishment of a State Bar working group to help implement the availability of screening panels throughout the state and the creation of resource guides as well as web pages to assist bar associations on the subject of judicial screening. The Task Force believes that it would be valuable to include local officials and representatives of local bar associations in any working group.

Again, while a uniform system will not work for every district in New York, the State Bar needs to join forces with local bar associations to create regional systems that will work to improve and ensure the overall quality of the state’s judiciary.

The Task Force emphasizes, however, that it recommends regional judicial screening committees only to fill the gap created where local bar associations lack the members and other resources necessary to support local bar association judicial screening committees, and only where local bar associations prefer and affirmatively elect to participate in regional screening.

B. Best Practices for Bar Association Evaluation Committees

The qualities of a jurist do not know any geographical boundaries. Therefore, the judicial screening systems in place in the state ought to –as much as possible – be using the same procedures in order to properly evaluate candidates. This is part of the mandate of the Task Force. Our mission statement requires that “the task force will propose best practices, guidelines and minimum standards for review of such judicial candidates.” Given the overwhelming number of potential issues involved in creating and maintaining a judicial screening system, the Task Force focused on the most important elements of a “best practices” program. The Task Force believes that the establishment of best practices will help to improve the judiciary and make the evaluation process simpler for both the candidates and those charged with evaluating the candidates.

The determination of “best practices” was not an easy task for the Task Force. Some members of the Task Force believed that the overall goal of an independent and well-accomplished judiciary would be better served by the establishment of what might be termed “apple pie” minimum standards for rating judicial candidates rather than the use of “best practices.” Many also believed that in reviewing the individual best practice benchmarks, the use of minimum standards — rather than the mandating of detailed criteria — could prove helpful to local bar associations in achieving these “best practice” benchmarks.⁹⁰ While the Task Force was able to

⁹⁰ For example, instead of providing in detail all the conflict of interest standards that would be appropriate for members of a judiciary committee, it might be preferable and simpler to suggest that judiciary committees establish certain basic conflict standards.

come to quick agreement on many of the best practice benchmarks, a number of these measures were subject to significant debate.

The Task Force members also wanted to assure bar associations that in no manner was there a belief that the “best practices” would serve as mandates. Local bar associations have their own customs and their own history. They may have limited resources. As a rule, they are the best judges of what evaluation procedures work best in their communities. Rather, the “best practices” are designed to provide direction and a course to set for the future of judicial screening.

1. Judiciary Committee

The bar association should establish a separate judiciary committee which would be charged with the duty of investigating and evaluating candidates for judgeships. The members of the judiciary committee should be appointed either by the board of directors or the executive committee of the bar association or by the president of the association. The committee should be constituted in a manner to avoid the appearance of any political partisanship or domination. The determinations of the judiciary committee should stand on their own as independent valid decisions and should not merely be considered as recommendations to the governing board of the bar association.⁹¹

2. Terms of Committee Members

The Task Force would encourage and recommend as a best practice that judiciary committees consider and establish term limits for members of the committee to ensure members with diverse perspectives and opinions. The Task Force believed that it was a worthy goal to have a blend of both experienced and new members on the judiciary committee. To that end, the Task Force’s position is that: (a) members of the judiciary committee should serve specific terms,⁹² (b) the terms of members should be staggered and (c) members should be term-limited. The members who are term-limited should be obliged to wait a minimum period of time (likely a year) before being able to rejoin the judiciary committee. In selecting committee members, bar associations should take into consideration different practice areas, and seek to have committee membership which is representative of the population of the State and the local region.

3. Questionnaire

The Task Force believed that the questionnaire used by the City Bar to evaluate candidates should be used as a suggested model for other bar associations in conducting evaluations. The City Bar questionnaire is comprehensive but not overtaxing. Bar associations that believe that questionnaire to be unduly burdensome would be free to omit some of the City Bar questions,

⁹¹ A discussion was held by the Task Force on the question of whether it might be preferable if the governing board of the bar association actually issued the rating to candidates based upon the recommendation of the judiciary committee.

⁹² The Task Force, having reviewed information gathered from various bar associations, found that the length of the term of judiciary committee members varies, but many have terms lasting approximately three years.

or adopt questionnaires more suitable to their needs and procedures.⁹³ The use of a single questionnaire in each respective judicial district would prevent candidates for judicial office from being subject to the potentially superfluous filing of multitudinous forms.

4. Investigations and Meetings

The members of the judiciary committee, or a subcommittee of the judiciary committee, would conduct investigations of the candidates for the judiciary. The results of these investigations would be reported at a meeting of the judiciary committee. Candidates for judicial office would also be afforded an opportunity to meet with the judiciary committee.⁹⁴ A member of the judiciary committee should be required to vote on the qualifications of all candidates who are competing for the same judicial position.⁹⁵

5. Criteria for Evaluation

The subject of what criteria should be used to evaluate judicial candidates drew considerable discussion from the Task Force. The potential for the inclusion of a smorgasbord of criteria that would rival the Girl Scout and Boy Scout laws in length was not found to be a desirable ideal for a screening commission. Instead, the Task Force believed that the criteria should contain a basic statement of core judicial attributes. The basic six criteria would be integrity, independence, intellect, judgment, temperament, and experience. Individual bar associations would be free to add additional criteria, but these six standards should serve as best practices at the heart of the evaluation process.

6. Ratings⁹⁶

The Task Force first debated whether to have two or three ratings for judicial candidates. Under the two-tiered rating system, candidates would be either rated as “Not Approved/Qualified” or “Approved/Qualified.” The three-tiered rating system would add a third category. Candidates would be rated as “Not Approved/Qualified,” “Approved/Qualified,” or “Highly Approved/Qualified.” The advocates for the three-tiered rating system argued that if the goal of the evaluation system was to select the most highly qualified judicial candidates and to retain the best judges, then a three-tiered system which specifically rated top candidates as “Highly Approved/Qualified” would be the best way to achieve this goal. The advocates for the two-tiered system were concerned that some candidates might not participate in the process if they

⁹³ Some of the questions on the questionnaire may raise complex issues that are beyond the scope of this report, including questions concerning the mental and physical health of applicants.

⁹⁴ The issue was raised as to whether a candidate, who submits a questionnaire but who, for whatever reason, is unable to appear for an interview, should be rated “Not Approved” as a candidate. This best practice affords the candidate an opportunity for an interview. It leaves full flexibility to bar associations to determine the candidate’s rating. Bar associations are not being advised that they must find a candidate “Not Approved” based on the failure to appear in person for an interview.

⁹⁵ For example, if there are three candidates vying for a position on the supreme court, a judiciary committee member should vote on the qualifications of all three candidates.

⁹⁶ See footnote 4, *supra*.

feared they would not receive the “Highly Approved/Qualified” rating. (The candidates might fear that the failure to obtain a “Highly Approved/Qualified” rating might affect their opportunities for advancement in the court system.) They also feared that adding the “Highly Approved/Qualified” rating would unduly place the judiciary committee in the position of putting a thumb on the judicial selection process scale by unduly favoring selected candidates. Backers of the two-tiered system also believed that the goal of the judiciary committee was simply to determine which candidates were qualified. Some advocates for the two-tiered rating system also contended that multi-tiered systems undercut the success that two-tiered systems have had, both downstate and upstate, in saying “no” to very weak attorney candidates, who frequently withdraw their candidacies after a “Not Approved/Qualified” review.

The majority of the Task Force determined that, on balance, the two-tiered rating system was preferable; however, the Task Force does not mean to suggest that local bar associations with established and successful three (or more)-tiered systems should change. When considering which rating system best serves the needs of their individual communities, local bar associations may also wish to take into consideration the views of the Judicial Section of the NYSBA, which strongly disfavors a two-tiered system. In its comments on the Informational Report, the Judicial Section advocated “a ratings distinction between a candidate with exceptional qualifications and attributes versus a candidate who only meets the minimum standards.” The Judicial Section expressed a concern that a two-tiered rating system unfairly disadvantages incumbent judges running for reelection in a contested election. In particular, an excellent incumbent judge would be rated the same as someone who lacks judicial experience, but is nonetheless minimally qualified to serve as a judge. The Task Force also acknowledges the Judicial Section’s view that, so long as participation in judicial screening remains voluntary, there should be a rating to identify a candidate who has chosen not to participate in the evaluation process.

The Task Force also debated the issue of whether the rating given to candidates should be that of either “Qualified” or “Approved.” This particular debate was further complicated by the related issue of whether the rating given candidates who were found not to be “Approved/Qualified” should be a simple “Not Approved/Qualified” or a the more provisory “Not Approved/Qualified *at this Time*” rating.

Advocates for the “Qualified” grade believed that use of this term would be beneficial in trying to attain the best qualified candidates for the judiciary. A “Qualified” judiciary should not be diluted by the idea of an “Approved” Judiciary. They also believed that the use of the word “Approved” gave the appearance that the judiciary committee had endorsed a candidate.

On the other hand, the advocates for the “Approved” grade believed that an “Approved” grade realistically established that the candidate had been found to have affirmatively demonstrated the necessary qualifications for the performance of the office that he or she was seeking. Thus, there was no reason to find that the “Approved” grade had in any manner been diluted. They similarly did not believe that the use of the term “Approved” established that the judiciary committee had endorsed any candidates. The advocates for the “Approved” grade also believed that the use of “Not Qualified” as a grade for candidates might be interpreted as pejorative and excessively

demeaning to candidates, and would unnecessarily encourage appeals from candidates wanting to remove such a negative finding from the record.

On the issue of whether to use “Not Approved/Qualified” rating or the “Not Approved/Qualified *at this Time*” rating, the supporters of the “Not Approved/Qualified *at this Time*” standard believed that by seeming less demeaning, it prevented disappointed candidates from appealing the ratings. The backers of the “Not Approved/Qualified” rating believed that it forced more candidates into participating in the bar association evaluation process because candidates otherwise did not see that receiving a “Not Approved/Qualified *at this Time*” rating hurt their candidacy.

The Task Force determined to use the “Approved” and “Not Approved” grading system. The Task Force did not approve the use of the “Not Approved *at this Time*” or “Not Qualified” standards.

7. Voting Procedures

In many ways, the Task Force debate on whether a super-majority (assumedly a two-thirds vote) would be needed to secure an “Approved” rating, echoed the debate on the issue of the tiered ratings. Some members believed that the goal of a high-quality judiciary would be best secured by the requirement of a super-majority vote. The Task Force took the position that where a bar association offered only two ratings to candidates, a majority vote would be needed to secure an “Approved” rating. In bar associations offering three ratings, a super-majority would be proper to secure a “Highly Approved” rating.

8. Reconsideration

The members of the Task Force believed that candidates who received the “Not Approved” rating should be entitled to petition the judiciary committee to reconsider its evaluation. The Task Force adopted the approach of the City Bar and took the position that reconsideration should be determined at the discretion of the chair of the judiciary committee.

9. Appeals Process

The Task Force agreed that an appeals process was a necessary feature of a judicial evaluation process.⁹⁷ The appeal would be to the board of the bar association that created the judiciary committee. Appeals would need to be taken swiftly after the judiciary committee had issued a “Not Approved” rating. There are questions over whether the appellate board should directly overrule the decision of the judiciary committee or whether the board should refer the decision back to the judiciary committee for reevaluation. The Task Force believed that this was a decision best left to the local bar association.

The Task Force also took the position that individual bar associations should establish their own understandable and transparent policies that would govern the other issues involved in the appeals process. These issues would include: (a) Is there a requirement that there must be a

⁹⁷ In the case of the regional screening panels suggested in this report, there would of necessity be no appeal, and the candidates would need to ask the screening panel for reconsideration.

sufficient number of dissents to the determination at the judiciary committee in order for a candidate to have a right to appeal?; (b) Should the appellate board hear the appeal de novo, or should it give the judiciary committee's decision a degree of deference?; and (c) Should the candidate be entitled to legal representation at the meeting of the appellate board?

10. Conflicts Policy

The Task Force believed that the judiciary committees should implement exclusion and recusal provisions to address actual or perceived conflicts of interest. Best practices for a conflicts policy should include the following: (1) Elected officials and judicial office holders should not be a part of the judiciary committee. (2) Recusal from evaluation of a candidate should occur when there is a conflict of interest or appearance of one. Recusal will exclude a committee member from participating in investigation, deliberation and vote on a particular candidate, and all other candidates for the same office under the following circumstances: (a) a committee member or a close family member or business associate is involved in a candidate's nomination process, including, but not limited to, political contribution in cash or in kind at any time during the election cycle, or work on a candidate's election committee; (b) a candidate is associated with the committee member's law firm or practice; and (c) a committee member has family, employment or business affiliation or other relationship with a candidate that is so close or adversarial that the committee member's participation in the evaluation would present an actual conflict of interest or the perception of one.

Few issues before the Task Force prompted more debate than the issue of establishing a conflict-of-interest policy for members of judiciary committees. Several upstate members of the Task Force were concerned that a blanket ban on public officials serving on judiciary committees would unduly restrict the number of knowledgeable potential members of judiciary committees. Some Task Force members believed that the conflicts specified in (2) should result in an exclusion from the judiciary committee and not merely a recusal. There were issues over the definition to be given the term "family," and the meaning of an "election cycle." Questions were raised over whether law firm political contributions to candidates should trigger recusals with a majority of the Task Force of the opinion that a firm's contribution should require the recusal of a judiciary committee member. The minority view noted that many firms give to all candidates, making such a rule unnecessary and unduly-limiting.

11. Candidate Waiver of Confidentiality Forms

The Task Force discussed the importance of judiciary committees obtaining information on candidates from the New York State Commission on Judicial Conduct and from Department or local attorney disciplinary/grievance committees. Many local bar associations have historically required candidates for elective judicial office to sign waivers of confidentiality protections, and the bar associations have obtained relevant information from these governmental or bar association agencies. Task Force members noted that the IJEQCs had developed excellent standardized waiver forms covering: (a) the State Commission on Judicial Conduct, and (b) all local attorney grievance committees. Several local bar associations have been convinced to use the IJEQC waiver forms for the convenience of candidates on a regional basis. The Task Force

suggests the utilization of these IJQEC forms as models because they are easily adapted for future local or regional use.⁹⁸

12. Diversity

Task Force members believed that membership on the judiciary committees should reflect the state and region's diversity in order to promote public confidence in the court system. As such, the committees should promote and advance the full and equal participation of attorneys of color and other diverse attorneys in the assessment of the qualifications of judicial candidates.

Diversity in gender, race, color, ethnic origin, national origin, religion, sexual orientation, age and disability offers an opportunity for judiciary committees to evaluate candidates through the benefit of various perspectives.⁹⁹ NYSBA has a long history of encouraging and promoting diversity and inclusion and elimination of bias in the legal profession as well as in our society. In keeping with that history, bar associations and other judiciary committees should work to ensure diversity of their members.

13. Non-Lawyer Members on the Judiciary Committee

Task Force members were divided on the issue of whether non-lawyers should be part of the judiciary committees. On the one hand, the screening committees in other states created by state laws or constitutions generally have non-lawyer members, and non-lawyer members could increase diversity and bring greater public credibility to the screening process. The Commission on Judicial Nomination — established to evaluate Court of Appeals candidates — has non-lawyer members. So do the screening committees established by the Governor's Executive Order on judicial nominations. Nonetheless, the bar associations do not name any of the non-lawyer members to these state-created commissions. It could hardly be expected that a bar association would name to a judiciary committee someone who was not a member of the bar association. The Task Force took the position that bar associations should consider the possibility of naming non-lawyers to the judiciary committees.

14. Confidentiality

The Task Force believed that entire operation of the judicial screening system must be held in the highest confidentiality.

15. Withdrawal by Candidates

The Task Force believed that a candidate who receives a "Not Approved" rating and who expeditiously withdraw his/her candidacy for judicial office should not have his/her rating publicized in any manner.

16. Feedback to Candidates

⁹⁸ The IJEQC waiver forms are included in Appendix I to this report.

⁹⁹ Members of the Task Force also believed that diversity in fields of practice as well as diversity in practice setting (e.g. sizes of firms, employment in not-for-profit organization and government employment) would be of value in the selection of membership on a judiciary committee.

The Task Force believed that local bar associations should consider, without revealing confidential information, providing informal feedback to candidates about their performance. The feedback could be provided at approximately the same time as the screening or as part of a separate process. On the whole, the members of the Task Force believed that informal feedback could provide opportunities to improve judicial and/or legal performance. Concerns were voiced by other Task Force members that candidates might not be pleased to receive negative feedback, and there were fears that dissatisfied candidates could conceivably retaliate against judiciary committee members.

17. The Duration of the Judicial Rating

The Task Force believed that local bar associations should establish policies that would determine for how many years a rating for a judicial applicant would be valid. That rating would only be valid for the particular judicial office for which the applicant was a candidate. It was also acknowledged and suggested that there be a mechanism established that should there be a change of circumstance during the period in which the rating is valid, the rating could be altered or potentially withdrawn. As such, bar associations should consider those factors that would be considered a change of circumstances and identify same to all candidates prior to the interview process. Such potential change in circumstances might include: criminal activity, judicial or attorney discipline, or a pending or open investigation of judicial or attorney complaints.

The bar associations should also provide guidance to candidates on how they might utilize and advertise these ratings as well as how a change in circumstance might be considered and addressed by the judicial screening committee.

18. Timing of the Ratings Process

The Task Force noted that the usefulness and impact of local bar association ratings can be influenced by their timing in the nominating/election process. It was the Task Force's view that ratings should be conducted at the earliest possible point in the election cycle, ideally before a candidate has been endorsed by his/her county committee, and well-before his/her formal nomination, whether by party endorsement, primary, or convention nomination. By rating candidates at an early stage, the local bar association will increase the potential that its ratings will influence the nominating process, while also making it less likely that the local bar screening process will be seen as politically influenced. The Task Force recognized that in some counties, political realities may prevent the ratings process from occurring at the earliest stages, but it found that holding the ratings process as early in the election cycle as possible was the best practice.

C. Outreach and Publicity of Ratings

The Task Force took the position that the State Bar should work with the local bar associations in making the ratings of judicial candidates known to the public. Where the local bar association does not want added publicity for its ratings, or where the local bar association does not seek State Bar involvement, the State Bar should not be involved in distributing the results of the ratings. This should be a local bar association choice.

Where, however, the local bar association does seek State Bar involvement, the State Bar should work to maximize the public distribution and exposure of the candidate ratings. The State Bar should share the ratings with other public news media outlets, and use its own social media capacities to make the ratings available to the general public. The State Bar needs to ensure that judicial ratings are well publicized and should encourage local bar associations to seek appropriate publicity for their ratings.

The State Bar should also use its resources to make sure that the gubernatorial screening committees and other judicial screening committees are made aware of the candidate ratings made by the local bar associations.

D. Aspirational Goals

The Task Force remains committed to the goal of a well-administered comprehensive public screening system for the review of judicial candidates. The Task Force — absent political concerns — would favor mandatory screening for all judicial candidates and would suggest that any mandatory screening requirement be accompanied by a program that would provide campaign seed money to candidates whom the screening committees find to be “Qualified.” The availability of public campaign funds might help encourage qualified candidates and also make it more likely that there would be competitive elections in districts often considered to be safe for one political party.

Finally, the Task Force believes that the State Bar should continue its efforts to educate the public about judicial elections. The Task Force understands that this has always been a most difficult task. The rise of social media — and the concomitant decline in the influence of traditional public news sources — has only made this task more difficult. Nonetheless, a well-informed public that understands the importance of the judiciary in maintaining the rule of law is a necessity in a working democracy. The State Bar must continue to devote efforts to educating the public about judicial elections.

VI Resolution for House of Delegates Consideration

[to be drafted]

VII Appendices

- A. Association of the Bar of the City of New York Uniform Questionnaire for Judicial Candidates
- B. Association of the Bar of the City of New York Handbook for Evaluating Judicial Candidates
- C. Select Judiciary Committee Bylaws from Bar Associations in New York State
- D. National Center for State Courts Survey of Judicial Evaluation Systems
- E. Task Force Survey and Responses from Local, Affinity and Specialty Bar Associations – Summary by Robert T. Schofield, IV, Esq.
- F. Task Force Survey and Responses from Members of IJEQCs – Summary by Elena DeFio Kean, Esq., and Daniel Kornstein, Esq.
- G. Task Force Survey and Responses from Judges – Summary by Alan Mansfield, Esq., and Michael J. McNamara, Esq.
- H. Task Force Survey and Responses from County Political Leaders – Summary by Lawrence A. Mandelker, Esq.
- I. Candidate Waiver of Confidentiality Forms used by the IJEQCs

