



Staff Memorandum

HOUSE OF DELEGATES Agenda Item #10

REQUESTED ACTION: Approval of the report and recommendations of the Task Force on Evaluation of Candidates for Election to Judicial Office.

The Task Force on Evaluation of Candidates for Election to Judicial Office was appointed in 2018 to review the existing methods of vetting judicial candidates and propose best practices, guidelines and minimum standards for review of candidates. Its aim is to assist bar associations, good government groups and others in developing nonpartisan screening and evaluation processes and improving those that already exist. The Task Force distributed its report in connection with the January meeting; it is available online at www.nysba.org/judicialevaluation.

The Task Force notes that at the outset, it had been advised that the Independent Judicial Elections Qualification Commissions (IJEQCs), overseen by the Office of Court Administration, would be disbanded at the end of 2018. Concerns had been expressed that the commissions were not working well and that questions had been raised as to whether it was appropriate for the court system to interject itself into the election process by administering a system of evaluating judicial candidates. Consequently, the Task Force believed it necessary to work quickly to insure the continued availability of screening in 2019.

The Task Force reviewed the background of judicial evaluation in New York and surveyed local, affinity and specialty bar associations as to their thoughts on evaluations, as well as members of the IJEQCs, judges, and political leaders. It found that systems utilized by bar associations vary from county to county, and it concluded that a one-size-fits-all approach for screening would not work for New York State. Where existing reviews are effective, the Task Force urges their continuation; in particular, the Task Force noted that existing systems in place in New York City, on Long Island, and several upstate urban counties – which comprise over three-quarters of the state's population – are currently well served.

For those counties not currently served by existing screening entities, the Task Force recommends the establishment of regional or district screening committees. Underwriting support for these efforts should come from the Office of Court Administration. NYSBA would establish a working group to help implement these panels and create resource guides.

Finally, the Task Force has developed a set of best practices to guide local bar and regional screening committees, addressing composition of the committees; use of questionnaires and the conduct of investigations; evaluation criteria; and rating and appeals processes. NYSBA should work with local bar/regional committees in making ratings known to the public.

At the January meeting, the House adopted a scheduling resolution to govern the submission of comments on the report and consideration of the report at the April 13 meeting. Comments received, as well as the scheduling resolution, are attached. The Task Force has prepared a memorandum outlining its review of the comments and changes made to the report in response, as well as redlined excerpts from the report showing changes the Task Force has made.

Finally, the materials include a resolution offered by the Task Force for your consideration in connection with adoption of the report and recommendations.

Robert L. Haig and Hon. Susan Phillips Read, co-chairs of the Task Force, will present the report at the April 13 meeting.

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

WHEREAS, the New York State Office of Court Administration decided that it was discontinuing the Independent Judicial Election Qualification Commissions (IJEQCs) at the end of 2018; and

WHEREAS, in June 2018, New York State Bar Association President Michael Miller created the Task Force on the Evaluation of Candidates for Election to Judicial Office (Task Force); and

WHEREAS, the Task Force was charged with investigating and reporting on the various vetting structures that exist throughout New York State regarding candidates for election to judicial office with the goal of making recommendations in time for the 2019 election cycle; and

WHEREAS, the Task Force began its work immediately by collecting and examining relevant information; and

WHEREAS, the Task Force drew upon the considerable knowledge of its members; and

WHEREAS, the Task Force reviewed the work of the New York State Commission to Promote Public Confidence in Judicial Elections (the Feerick Commission), IJEQCs, and local, affinity and specialty bar associations that evaluate judicial candidates subject to election; and researched judicial screening in other states; and

WHEREAS, the Task Force undertook outreach and background investigation, including statewide surveys of bar association leaders, judges, political leaders and members of the IJEQCs; and

WHEREAS, the Task Force's work over the course of the last months has encompassed lively and detailed substantive discussions enabling a full examination of the issues regarding this subject matter and leading to the recommendations put forth in the Task Force's Final Report; and

WHEREAS, the Task Force concluded that many bar associations across New York currently engaged in evaluating candidates are doing so in effective ways that optimize resources devoted to their evaluation practices and reflect local considerations; and

WHEREAS, the Task Force recommended a set of best practices to be considered by bar associations; and

WHEREAS, the Task Force co-chairs presented the Informational Report of the Task Force at the January 2019 meeting of the House of Delegates; and

WHEREAS, the Task Force reviewed and took into account comments on the Informational Report submitted to it; and

NOW, THEREFORE, IT IS

RESOLVED, that the New York State Bar Association hereby approves the final report and recommendations of the Task Force on the Evaluation of Candidates for Election to Judicial Office; and it is further

RESOLVED, that the officers of the Association are hereby authorized to take such action as they may deem necessary to implement this resolution.

M E M O R A N D U M

TO: NYSBA House of Delegates
FROM: Task Force on the Evaluation of Candidates
for Election to Judicial Office
DATE: April 1, 2019
RE: Comments on Task Force Report

The scheduling resolution adopted by NYSBA's House of Delegates on January 18, 2019 provided that "Any comments on the Special Committee's report or particular recommendations contained therein must be submitted in writing to the Secretary of the Association at the Bar Center by March 15, 2019; otherwise they shall not be considered." Now that the deadline for comments has passed, we are writing to discuss the comments that NYSBA has received and to explain the revisions which the Task Force has made to its Report in response to those comments.

We begin by thanking all of the numerous constituencies which have contributed to this project. We are pleased by the compliments and the support that the Task Force's Report has received and by the fact that there has been so little disagreement with the recommendations the Task Force has developed. In light of the very few areas of disagreement between the Task Force's recommendations and the comments NYSBA has received, the Task Force has made a few modest revisions to the Report and is now submitting the final version of the Report for consideration by the House of Delegates.

In this memorandum we will briefly review the comments which NYSBA has received on the Task Force's Report and indicate the Task Force's positions relating to those

comments. NYSBA received comments on the Task Force’s Report from three entities and one individual. The comments are discussed below.

1. New York County Lawyers Association

The New York County Lawyers Association has submitted a letter dated March 14, 2019 stating that “On March 11, 2019, the Board of Directors of the New York County Lawyers Association . . . voted to endorse the Report and encourage its approval by the New York State Bar Association House of Delegates at its April 13, 2019 meeting.” That letter also states that “NYCLA would like to thank its Judicial Section, chaired by Hon. Judith J. Gische, for its time and effort in considering the Report, and adopting a resolution supporting the Report” NYCLA’s letter concludes by stating that “NYCLA commends the work of the Task Force on the Evaluation of Candidates for Election to Judicial Office.” The letter and other materials which NYCLA submitted do not contain any requests for changes in the Task Force’s Report.

2. NYSBA’s Judicial Section

NYSBA’s Judicial Section has submitted a memorandum dated March 15, 2019 which is strongly supportive of the Task Force’s recommendations. For example, the Judicial Section begins its memorandum by stating that “The Judicial Section of the NYSBA (“Judicial Section”) commends the Task Force on the Evaluation of Candidates for Election to Judicial Office (“Task Force”) for its tireless efforts in completing its Report under difficult time constraints, owing to the disbandment of the Independent Judicial Elections Qualification Commissions (“IJEQCs”) at the end of 2018.”

The Judicial Section also states:

At the outset, the Judicial Section embraces the Task Force’s guiding principle that a strong, independent and highly qualified judiciary is vital to the proper functioning of our

democratic system. To this end, we support the view that all candidates for election to judicial office must be effectively screened to determine their qualifications and that information must be conveyed to the voting public.

The Judicial Section states that “The Judicial Section agrees with the Task Force’s conclusion that the primary responsibility for screening candidates for elected judicial office should rest with the attorneys of this State, through the organized Bar Associations (including affinity and specialty Bar Associations), which are uniquely suited to perform this task.” In addition, the Judicial Section states:

The Judicial Section also shares the Task Force’s view that screening systems already in place have historically worked well in many areas of the State. As such, we fully support the Task Force’s practical recommendation that systems that are presently effective should be continued in their current form, under the common sense principle: if it’s not broken, don’t fix it.

The Judicial Section states:

As for those areas of the State where there is currently little or no effective screening, we wholeheartedly endorse the Task Force’s recommendation to eschew a top-down, “one-size-fits-all” approach in favor of a system that better reflects local and regional values, culture and diversity. Specifically, we agree that screening processes that are effective, fair and as non-political as possible should be developed by local Bar Associations, with support and assistance, as needed, from NYSBA and other organizations. To this end, the Task Force’s approach of providing a series of best practices, guidelines and minimum standards for the review of potential candidates by the local bar associations, is an excellent start. In particular, we support the Task Force’s recommendation, as part of its proposed set of best practices, to encourage the use of a standard form questionnaire, which can then be adapted as needed for local use.

The Judicial Section also states:

We concur with the Task Force’s call for the NYSBA, with its substantial resources and exposure, to play a more active role in educating the public about the importance of judicial elections, including through the use of social media. Part of this role should

be to ensure the dissemination of candidate ratings to the voting public.

The Judicial Section concludes its memorandum by stating:

In closing, we wish to emphasize our unwavering commitment to an effective and robust screening system for candidates to elected judicial office, so that all New Yorkers may continue to enjoy the benefits of a strong, independent and highly qualified judiciary. We extend our heartfelt thanks to all members of the Task Force for their tremendous effort in support of this mission and are grateful for the opportunity to participate in this vitally important discussion.

The Judicial Section raises three issues in its memorandum about the Task Force's

Report: (1) the Judicial Section "urge[s] the Task Force to reconsider and clarify part of its recommendation that the NYSBA work with local bar associations to 'establish regional judicial screening committees in 2019' (Report, at p. 39) for those counties not currently served by existing screening entities" because of "the overarching goal of allowing local attorneys to take the lead in screening candidates for election to the courts in which they practice"; (2) the Judicial Section argues that "there should be a rating that identifies a candidate who has chosen not to participate in the process"; and (3) the Judicial Section argues that NYSBA should recommend a three-tier rating system instead of a two-tier rating system.

We first note that we do not believe that there is any disagreement between our Task Force and the Judicial Section as to the implementation of the proposed regional judicial screening committees. It was never the intent of our Task Force that these regional screening committees would take the place of local attorneys and local bar associations. On the contrary, our Task Force Report recommended "that the State Bar work with all local bar associations in those districts [with limited judicial screening] to establish regional screening committees in 2019," that "These regional screening panels should have broad representation from counties in the judicial district," "that it would be valuable to include local officials and representatives of

local bar associations in any working group,” and that “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.” Accordingly, we believe that this issue has been resolved by the addition of one explanatory sentence to our Report confirming that the Task Force recommends regional judicial screening committees only where local bar associations lack the members and other resources necessary to create and support local bar association judicial screening committees and only where local bar associations prefer and affirmatively elect to participate in regional judicial screening (see attached redlined p. 39).

We next turn to the two issues the Judicial Section has raised about ratings for judicial candidates. One primary focus throughout the deliberations of our Task Force was the need to recommend an approach to evaluation of candidates for election to judicial office in which candidates will participate voluntarily. For that reason, and because of the strong personal interest which judges have in the subject matter of our Report, we have added language to the Report discussing the limited revisions which the Judicial Section has requested to the Task Force’s recommendation of a best practice for rating candidates and urging bar associations to give serious consideration to the Judicial Section’s views. We think it will be helpful in future efforts to implement our Report for NYSBA to be able to advise all participants in judicial evaluation processes and procedures that NYSBA’s Report is responsive to the views of NYSBA’s Judicial Section. In this connection, the two issues which the Judicial Section has raised relating to ratings were the subject of considerable debate during our meetings and our final recommendations reflect divided votes. We have therefore amplified our discussion of the Task Force’s proposed best practice for ratings for judicial candidates in the two respects

requested by NYSBA’s Judicial Section to reflect the Section’s views (see attached redlined p. 42).

3. Monroe County Bar Association

Mark J. Moretti, Immediate Past President of the Monroe County Bar Association, has submitted an e-mail dated January 11, 2019 proposing changes to two paragraphs of the Task Force’s Report which relate to the Monroe County Bar Association. In his e-mail, Mr. Moretti states that “we agree with the Task Force conclusions that the system works best when political leaders buy into using the ratings before making their selections” and that “We also agree that each individual county has to deal with its own lay of the land and that the Task Force Report provides a useful starting point and template in doing so.” We believe that the language e which Mr. Moretti has proposed describing activities of the Monroe County Bar Association is uncontroversial and we therefore have included Mr. Moretti’s proposed language, with a few revisions, in the final version of the Report (see attached redlined pp. 8 [footnote], 25-26).

4. A. Vincent Buzard

A. Vincent Buzard has submitted comments to NYSBA relating to the Task Force’s Report. Mr. Buzard begins by stating that “These comments are based upon my experience of over 25 years in judicial evaluations which includes developing a new judicial evaluation system as President of the Monroe County Bar Association” The Monroe County Bar Association has not joined in or supported Mr. Buzard’s comments and it has advised NYSBA that “After an extensive year-long process . . . MCBA decided to suspend judicial evaluations”

Mr. Buzard proposes in his comments that the Task Force “amend report [sic] so that both a three tier and two-tier system can both be considered best practices according to local

determination.” As previously discussed in this memorandum, NYSBA’s Judicial Section has recommended a three-tier rating system and we have responded to the Judicial Section’s recommendation in the manner and for the reasons stated in this memorandum.

Mr. Buzard states in his comments that he “strongly recommend[s] that the standard of review in any appeals process not be de novo.” The basis for Mr. Buzard’s recommendation is that “my experience is that the more governing boards become involved in judicial evaluation the more subjective and inappropriate influences can come into play” and that “while you recommend great care to be taken in the appointment of the judiciary committee, there are no such limitations on the governing board.” Mr. Buzard also states that appellate decisions by governing boards of bar associations “can be based on second-guessing the judiciary committee, personal concerns for the candidate found unqualified, political concerns or other irrelevant factors.”

Our Task Force recommended “that individual bar associations should establish their own understandable and transparent policies that would govern [this issue as well as certain] other issues in the appeals process.” The standard of review on appeal which is appropriate for one bar association may not be appropriate for another bar association. In particular, the relationship between the judiciary committee and the governing board of one bar association may not be the same as the relationship between these entities in another bar association. We do not think that NYSBA should tell bar associations how to structure and regulate the relationships among their internal components. We also do not think that NYSBA should adopt Mr. Buzard’s views about the factors which may motivate appellate decisionmaking by governing boards of bar associations.

Mr. Buzard also argues that ratings should use the terms “qualified” or “not qualified” instead of “approved” or “not approved” which in his view “is not strong.” We see no reason to revise the detailed discussion of this issue and the Task Force’s conclusion on pages 42-43 of the Report.

Mr. Buzard states that he “would give more guidance as to what constitutes an appropriate investigation.” The guidance which Mr. Buzard recommends includes “extensive interviewing,” “surveys of lawyers,” “call[ing] lawyers who have had cases with and preferably against the candidate and lawyers who have appeared in front of sitting judges seeking re-election or higher judicial office,” and “requiring the candidate to submit samples of written work product” which “should be carefully reviewed by the subcommittee.” Our concern about including such extensive and detailed “guidance” in our Report is that some bar associations might reject as unrealistic and unduly onerous not only this recommendation but also other recommendations if we ask them to do more than their resources permit.

Finally, Mr. Buzard states that he has “also found that voting by the screening committee is best done by secret ballot.” We see arguments on both sides of this issue and therefore do not see any need to revise the Task Force’s Report in this regard.

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 County¹ 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.

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 ~~no longer screens judicial candidates. A longstanding feud between one of the political leaders and the bar association escalated to a point where more than a year ago, the association decided to end judicial screening~~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 public 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 ~~ten~~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.

~~13~~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

These regional screening panels should have broad representation from 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.⁸⁸⁸⁹ While the Task Force was able to 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

⁸⁸⁸⁹ 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.

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.



JUDICIAL SECTION

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MEMORANDUM

To: Robert L. Haig and Hon. Susan Phillips Read, co-chairs of the Task Force on the Evaluation of Candidates for Election to Judicial Office

From: Judicial Section of the NYSBA

Date: March 15, 2019

Re: Judicial Section Comments on Informational Report of the Task Force on the Evaluation of Candidates for Election to Judicial Office

Dear Mr. Haig and Judge Read:

The Judicial Section of the NYSBA ("Judicial Section") commends the Task Force on the Evaluation of Candidates for Election to Judicial Office ("Task Force") for its tireless efforts in completing its Report under difficult time constraints, owing to the disbandment of the Independent Judicial Elections Qualification Commissions ("IJEQCs") at the end of 2018.

At the outset, the Judicial Section embraces the Task Force's guiding principle that a strong, independent and highly qualified judiciary is vital to the proper functioning of our democratic system. To this end, we support the view that all candidates for election to judicial office must be effectively screened to determine their qualifications and that information must be conveyed to the voting public.

For the reasons outlined in the Report, the IJEQC system, despite initial high hopes, was unable, in practice, to encourage widespread participation by judicial candidates in its voluntary screening process, or to effectively inform voters of the results of the judicial screening process. The Judicial Section agrees with the Task Force's conclusion that the primary responsibility for screening candidates for elected judicial office should rest with the attorneys of this State, through the organized Bar Associations (including affinity and specialty Bar Associations), which are uniquely suited to perform this task.

The Judicial Section also shares the Task Force's view that screening systems already in place have historically worked well in many areas of the State. As such, we fully support the Task Force's practical recommendation that systems that are presently effective should be continued in their current form, under the common sense principle: if it's not broken, don't fix it.

As for those areas of the State where there is currently little or no effective screening, we wholeheartedly endorse the Task Force's recommendation to eschew a top-down, "one-size-fits-all" approach in favor of a system that better reflects local and regional values, culture and diversity. Specifically, we agree that screening processes that are effective, fair and as non-political as possible should be developed by local Bar Associations, with support and assistance, as needed, from NYSBA and other organizations. To this end, the Task Force's approach of providing a series of best practices, guidelines and minimum standards for the review of potential candidates by the local bar associations, is an excellent start. In particular, we support the Task Force's recommendation, as part of its proposed set of best practices, to encourage the use of a standard form questionnaire, which can then be adapted as needed for local use.

That being said, we would urge the Task Force to reconsider and clarify part of its recommendation that the NYSBA work with local bar associations to "establish regional judicial screening committees in 2019" (Report, at p. 39) for those counties not currently served by existing screening entities. The recommendation seems at odds with the overarching goal of allowing local attorneys to take the lead in screening candidates for election to the courts in which they practice. While NYSBA can, and should, reach out to local Bar Associations and offer assistance and support wherever needed, it should not be creating a new system of regional panels.

An important criticism of the IJEQC system, as well as current local review panels, is the failure to effectively inform voters of the results of the judicial screening process. We concur with the Task Force's call for the NYSBA, with its substantial resources and exposure, to play a more active role in educating the public about the importance of judicial elections, including through the use of social media. Part of this role should be to ensure the dissemination of candidate ratings to the voting public. Relatedly, as long as participation in the judicial screening process remains voluntary, there should be a rating that identifies a candidate who has chosen not to participate in the process.

While we appreciate the Task Force's rationale for recommending a two-tier rating system, the Judicial Section strongly disagrees with this recommendation. As seen from the materials in the Appendix, many Bar Associations successfully make use of three, or even four, potential ratings. Notably, the American Bar Association uses a three-tier rating system for candidates to the Federal bench.

The end product of any effective screening process should be to provide voters with useful, actionable information to assist them in making an informed choice among candidates for judicial office. To this end, it seems essential that there should be a ratings distinction between a candidate with exceptional qualifications and attributes versus a candidate who only meets the minimum standards. A two-tier, "Approved" or "Not Approved" rating system fails to meet the primary objective of encouraging judicial excellence.

Among other things, a two-tiered rating system works to the distinct disadvantage of judges who are running for reelection. In other words, a judge who is running for

reelection could be rated the same as someone who has no prior judicial experience, but is qualified to serve as a judge. A three-tiered rating system can properly account for relevant judicial experience, particularly in contested elections. This is significant because a number highly qualified and experienced judges have lost contested elections.¹

In closing, we wish to emphasize our unwavering commitment to an effective and robust screening system for candidates to elected judicial office, so that all New Yorkers may continue to enjoy the benefits of a strong, independent and highly qualified judiciary. We extend our heartfelt thanks to all members of the Task Force for their tremendous effort in support of this mission and are grateful for the opportunity to participate in this vitally important discussion.

¹ Further, while we understand that the subject of retention elections is beyond the scope of the Report, the Judicial Section hopes that the NYSBA will, in the near future, study whether New York should institute a system of retention elections. The NYSBA has, in the past, endorsed the use of retention elections. As an example of a retention election system, Pennsylvania provides that after a judge has won an initial partisan election, subsequent terms are attained through retention elections, in which judges do not compete against another candidate, but voters are given a "yes" or "no" choice whether to keep the judge in office for another term. If the candidate receives more yes votes than no votes, he or she is successfully retained. If not, the candidate is not retained and the vacancy created at the expiration of that term will be filled through a partisan election.

COMMENTS BY A VINCENT BUZARD on the Report of the Task Force on the
Evaluation of Candidates for Election to Judicial Office
March 15, 2019

These comments are based upon my experience of over 25 years in judicial evaluations which includes developing a new judicial evaluation system as President of the Monroe County Bar Association, serving for many years on the Governor's Judicial Screening Commission for the Fourth Department, chairing and serving as a member of the State Bar Judicial Screening Committee, serving as the first chair of the Independent Screening Commission for the Seventh Judicial District by appointment of Judge Kaye for the maximum two terms.

As I said at the January House of Delegates meeting the co-chairs and members of the Task Force are to be congratulated for preparing an exhaustive report in a short period of time. The report and our deliberations and conclusions are critical to one of the core missions of the State Bar which is to assure that we have the best possible judiciary.

The Appeal Should Not Be Reviewed De novo

I completely agree with the recommendation that the determinations of the judiciary committees should stand on their own and not be considered merely recommendations to the governing board. My experience is that the more governing boards become involved in judicial evaluation the more subjective and inappropriate influences can come into play. While you recommend great care to be taken in the appointment of the judiciary committee, there are no such limitations on the governing board.

For that reason, I strongly recommend that the standard of review in any appeals process not be de novo. Unless there is a standard such as "clearly erroneous", "arbitrary and capricious" or other similar standard of review, members of the board can and sometimes will substitute their judgment for the committees without finding any error on the part of the committee reversing the judiciary committee. That decision can be based on second-guessing the judiciary committee, personal concerns for the candidate found unqualified, political concerns or other irrelevant factors.

Further, a properly functioning judiciary committee will have put hours into the rating while the board does not have the time to devote to the subject. In other words all of the time-consuming work of the judiciary committee can simply be set aside because the board would have made a different decision. I ask that the report and recommendations be amended to discuss the importance of making clear that the appeal is subject to a de novo but rather subject to a higher specified standard of the local bars choosing.

A Two-Tier and Three-Tier Rating System Should Both Be as a Best Practice Depending upon Local all will will

Best practices should not be limited to a qualified or not qualified rating. My experience is that a judiciary committee will be confronted with a range of candidates from those who barely meet the minimum standards but must be found qualified to those who are highly qualified and the

caliber of person we want to have on the bench. Under a two-tier system the committee must tell the public that both candidates have the same rating so that the voter can vote with equal confidence in either which is not the actual case. Whether the candidate will be an excellent judge or a minimally adequate judge is not readily apparent to the voters. Our duty is to tell the voters the difference where possible.

The State Bar Association should not be on record that the sole best practice is to only tell the public which candidates meet minimum standards but not identify those candidates who are highly qualified. The Association has a long history of advocating for the best quality judiciary possible and that tradition should not be abandoned now by telling local bar associations that the best practice is to not identify candidates who are highly qualified.

A three-tier rating system including distinguishing between qualified and highly or well qualified candidates can be done because it is being done. A candidate for appointment by the Governor to vacancies in the lower courts and the Appellate Division must be found to be highly qualified by the Governor's Judicial Screening Commission to be forwarded to the governor for appointment. The Governor's Commission for Court of Appeals nominees forwards the names of only those candidates who are determined to be highly qualified. The State Bar screens candidates for appointment to the Court of Appeals using a three-tier rating system with well-qualified being the highest.

According to the Task Force report five of the nine larger bar associations doing evaluations have a rating for highly qualified or highly recommended candidates. Three of the smaller Bar Association's have a rating of three or more tiers with only one with two tiers.

Apparently the Task Force is concerned about lack of participation with multiple tiers but the actual practice of the bars prove that a multiple tier system can work. There is no evidence in the report that all these bars are failing for lack of participation. Furthermore the State Bar Association should not say to each of these bars with multiple tier systems that they should change their system so that they are not identifying highly qualified or highly recommended candidates.

A solution is to amend report so that both a three tier and two-tier system can both be considered best practices according to local determination. The language in the recommendations and in the list of best practices could read as follows:

"If a bar Association finds that it can only do a two-tier ranking because of an unacceptable number of candidates choosing not to participate then a two-tier system under the circumstances can be deemed to be a best practice. If a bar association finds that it can establish an evaluation that determines whether a candidate is unqualified, qualified or highly qualified and not have an unacceptable level of nonparticipation by candidates then the best practice is to have a three-tier system using whatever rating terms they may choose".

Such language would accommodate concerns about unacceptable levels of nonparticipation but would also provide for identifying highly qualified candidates where possible.

Local Bar Should Be Given A Broader Choice of Ratings Terminology

On the issue of ratings, my view is that “approved “ or “not approved “ is not strong and the clearest ratings are “highly qualified,” “qualified” and “not qualified”. However, I believe that reasonable people can differ and if the purpose of the best practices is to not recommend a one-size-fits-all then the report could specify the various acceptable options for ratings and let local bar associations decide rather than saying only one set of terms constitutes a best practice.

Guidance On Investigations Should Be Provided

Under investigations and meetings, I would give more guidance as to what constitutes an appropriate investigation. The investigation in my experience should include requiring the candidate to submit samples of written work product. A surprising number of practicing lawyers are unable to submit work product other than demand letters or other writings but have never written a brief. All writings should be carefully reviewed by the subcommittee. The subcommittee should also call lawyers who have had cases with and preferably against the candidate and lawyers who have appeared in front of sitting judges seeking reelection or higher judicial office. Calls should not be limited to people whom the candidate identifies as references which will be predictably favorable interviews of the candidates is necessary and can be helpful. However, I have found many times that a candidate who interviews well maybe a person who absolutely should not be on the bench or continue on the bench. Only by extensive interviewing can those distinctions be validly made. This may seem self-evident, but I have served on screening panels where none of this was done and sole reliance was on the application and the interview which was certainly not a best practice.

For many decades the Monroe County Bar Association conducted a survey of lawyers in the community which was highly successful. I still believe surveys of lawyers should be encouraged but that may be more of a job that some bars can undertake. That option could certainly be discussed in the report.

Secret Ballots should be recommended

I have also found that voting by the screening committee is best done by secret ballot. That is a practice on the State Bar screening committee, and a number of the bar association's. People do not want to be afraid that their unfavorable vote will be reported to the candidate. I also have observed that with oral votes people attempt to talk the people voting unqualified out of their position and some will cave to pressure,

I hope the members of the Task Force and the House find these comments useful. If you wish to discuss them I can be reached at 585-586-1929 or email at avincentbuzard@gmail.com

Proposed Changes to the Informational Report of the NYSBA Task Force on the Evaluation of Candidates for Judicial Office

I. Executive Summary, top p. 8

Drop the sentence that reads: “Nearly three-quarters of the state’s population is currently being well served by the work of the local bar associations.”

Alternatively, insert the following before that sentence: “In Monroe County, the bar association has sought with some success to achieve at least the public information goal of judicial evaluations in other ways.” This addition probably necessitates a change in the percentage of the state’s population that “is currently being well served by the work of the local bar associations.”

II. Subsection (d), p. 25

Replace the existing language with:

“After an extensive year-long process led by a task force of the MCBA comprised of representatives of the political parties, lawyers and retired judges, MCBA decided to suspend judicial evaluations to examine how to effectively communicate with and educate the public about judicial candidates. The process had caused controversy and friction between the judiciary and the Bar, and was not effective in achieving its goal of informing the public, as candidates that were rated Not Qualified were repeatedly elected. Over the last two election cycles, MCBA 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. MCBA continues to evaluate and explore how to best serve its members and the public by effectively informing and educating the public about the qualifications of judicial candidates.”

March 14, 2019

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Michael J. McNamara

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Stephen C. Lessard

Vice President
Vincent T. Chang

Secretary
Asha Smith

Treasurer
Adrienne B. Koch

**Immediate
Past President**
Carol A. Sigmond

New York State Bar Association
House of Delegates
c/o Michael Miller, President
One Elk Street
Albany, New York 12207

**re: NYSBA Report of the Task Force on the Evaluation of Candidates for
Election to Judicial Office (“Report”)**

To the New York State Bar Association House of Delegates:

On March 11, 2019, the Board of Directors of the New York County Lawyers Association discussed the Report following a presentation from Robert L. Haig, Co-Chair of the New York State Bar Association Task Force on the Evaluation of Candidates for Election to Judicial Office. At this meeting the Board voted to endorse the Report and encourage its approval by the New York State Bar Association House of Delegates at its April 13, 2019 meeting.

NYCLA would like to thank its Judicial Section, chaired by Hon. Judith J. Gische, for its time and effort in considering the Report, and adopting a resolution supporting the Report at its January 10, 2019 meeting with an accompanying letter to the President, a copy of which is attached as *Annex A*.

NYCLA commends the work of the Task Force on the Evaluation of Candidates for Election to Judicial Office.

Sincerely,



Michael J. McNamara
President

cc: Mr. Robert L. Haig, *Co-Chair*, NYSBA Task Force on the Evaluation of Candidates for Election to Judicial Office
Hon. Susan Phillips Read, *Co-Chair*, NYSBA Task Force on the Evaluation of Candidates for Election to Judicial Office
Hon. Judith J. Gische, *Chair*, NYCLA Judicial Section
Ms. Kathy Baxter, *General Counsel*, New York State Bar Association

ANNEX A



*Supreme Court Appellate Division
First Department*

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Judith J. Gische
Associate Justice

Michael J. McNamara, Esq.
President
NYCLA
14 Vesey Street
New York, NY 10007

Via e-mail

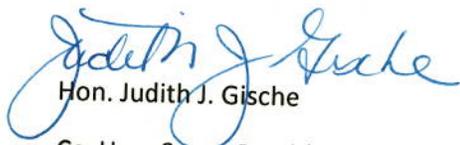
January 22, 2019

Dear Mr. McNamara:

As chair of the Judicial Section at NYCLA I am enclosing a recent resolution adopted by the section at its last regularly scheduled meeting. The resolution supports NYCLA voting at the next House of Delegates meeting in favor of any resolution adopting the Informational Report and Recommendations made by the New York State Bar Association's Task Force on the Evaluation of Candidates. A copy of the resolution is attached. The co-chairs of the Task Force met with the section on January 10, 2019. Before that meeting the report was made available to the members of my section. A motion was made at the meeting to adopt a resolution supporting the report. It was approved by all those members present.

We hope that the NYCLA Board will favorably consider our resolution.

Very truly yours,


Hon. Judith J. Gische

Cc: Hon. Susan Read (via email reads@gtlaw.com)

Robert Haig, Esq. (via email RHaig@kelleyDrye.com)

NYCLA

Judicial Section Resolution

January 17, 2019

Wherefore in December 2018 the New York State Bar Association Task Force on the Evaluation of Candidates for Election to Judicial Office published an informational report (Informational Report and Recommendation) containing: results of surveys undertaken by it from interested parties, analysis of current judicial screening practices across New York State, practices in other states, and recommendations, including recommendations on best practices for Bar Association Evaluation Committees,

And

Wherefore on January 10, 2019 at a regularly scheduled meeting of the Judicial Section, Task Force co-chairs Hon. Susan Read and Robert Haig, Esq. came to further discuss and answer questions about the Informational Report and Recommendations,

Now on motion

It is hereby resolved that the Judicial Section supports NYCLA voting in support of a resolution adopting the Informational Report and Recommendations at the next New York State Bar Association meeting of the House of Delegates.



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April 2, 2019

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Kevin M. Kerwin, Esq.
New York State Bar Association
1 Elk Street
Albany, NY 12207

Dear Mr. Kerwin:

The Nassau County Bar Association (NCBA) Judicial Section recently received the report of the New York State Bar Association Task Force on the Evaluation of Candidates for Election to Judicial Office for comment. Upon review by the members of the Judicial Section, and approved by the NCBA Board of Directors on March 14, the following comments are offered by the Nassau County Bar Association for the Task Force's consideration:

The Judicial Section applauds the efforts undertaken by the distinguished task force in preparing this comprehensive report. It is noteworthy that the report is the result of public hearings, surveys of bar associations, members of the Independent Judicial Elections Qualification Commissions, judges and political leaders.

In Nassau County, the NCBA Judiciary Committee assumes the task of reviewing candidates and responded to the survey with an outline detailing their procedures and methodology. Fortunately, those NCBA procedures were compatible with the Report's final Recommendations.

The Judicial Section anticipates that the NCBA will continue to keep their current practices and be mindful of the Report recommendations.

Should you have any questions, feel free to contact NCBA Judicial Section Chair Gary Knobel at gknobel@nycourts.gov or Vice-Chair Elizabeth Pessala at epessala@courts.state.ny.us.

Sincerely,

ELIZABETH POST
NCBA Executive Director

**RESOLUTION ADOPTED BY HOUSE OF DELEGATES
JANUARY 18, 2019
TO GOVERN CONSIDERATION OF THE REPORT AND
RECOMMENDATIONS OF THE TASK FORCE ON
EVALUATION OF CANDIDATES FOR ELECTION TO JUDICIAL OFFICE**

RESOLVED, that the House of Delegates hereby adopts the following procedures to govern consideration at the April 13, 2019 meeting of the House, and any subsequent meetings as may be necessary, of the report and recommendations of the Task Force on Evaluation of Candidates for Election to Judicial Office:

1. The report and recommendations of the Task Force will be circulated to members of the House, sections and committees, county and local bar associations, and other interested parties.
2. **Comments on report and recommendations:** Any comments on the Special Committee's report or particular recommendations contained therein must be submitted in writing to the Secretary of the Association at the Bar Center by March 15, 2019; otherwise they shall not be considered. All comments complying with this procedure shall be distributed to the members of the House in advance of the April 13, 2019 meeting.
3. **Consideration of the report and recommendations at the April 13, 2019 meeting and any subsequent meetings:** The report and recommendations will be scheduled for formal debate and vote at the April 13, 2019 meeting and considered in the following manner:
 - a. The Task Force shall be given an opportunity to present its report and recommendations.
 - b. All those wishing to speak with regard to the report and recommendations may do so only once for no more than three minutes.
 - c. The Task Force may respond to questions and comments as appropriate.
 - d. Procedural motions shall be considered out of order until debate on substantive issues is concluded.
 - e. A vote on the report and recommendations shall be taken at the conclusion of the debate.

