



NEW YORK STATE BAR ASSOCIATION

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**REPORT**  
on  
**THE PROCESS OF SELECTING JUDGES  
FOR THE COURT OF APPEALS**

by  
**THE COMMITTEE ON COURT  
STRUCTURE AND JUDICIAL  
SELECTION**

**JUNE 12, 2009**

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Opinions expressed are those of the Section/Committee preparing this report and do not represent those of the New York State Bar Association unless and until they have been adopted by its House of Delegates or Executive Committee.

# **REPORT BY NYSBA COMMITTEE ON COURT STRUCTURE AND JUDICIAL SELECTION ON THE PROCESS OF SELECTING JUDGES FOR THE COURT OF APPEALS**

## **INTRODUCTION**

On December 31, 2008, Judith S. Kaye retired from an illustrious career on the Court of Appeals of the State of New York, having served ten years as Associate Judge and over 15 years as Chief Judge. Governor David Paterson filled the vacancy by appointing Jonathan Lippman from a list of seven names submitted to him by the Commission on Judicial Nomination. The Governor acknowledged that all seven nominees were “highly qualified,” but was “outraged” that the Commission did not include any women on the list.<sup>1</sup>

President Bernice Leber asked the Committee on Court Structure and Judicial Selection to review whether the current process by which vacancies are filled on the Court of Appeals appropriately considers the diverse background and experiences of the residents of the State. She asked that the issues considered include the following:

- 1) What additional steps should be taken to encourage more candidates to request that the Commission on Judicial Nomination consider his/her qualifications for appointment to the office of Judge of the Court of Appeals;
- 2) Whether it is appropriate to change the procedure established by the Commission on Judicial Nomination to assure that highly-qualified persons are encouraged to be considered as candidates for the office of Judge of the Court of Appeals;
- 3) Whether a different number of candidates (higher or lower) for appointment to the Court of Appeals should be reported by the Commission on Judicial Nomination to the Governor;
- 4) Whether the law should be amended to change the scope of the written report by the Commission on Judicial Nomination to the Governor;

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<sup>1</sup> Headline December 4, 2008 *New York Law Journal*: “Patterson ‘Outraged’ by All-Male Court Picks but Appears Bound.”

5) Whether the law should be amended to assure that members of the Commission on Judicial Nomination reflect the diverse backgrounds and experiences of the residents of the state; and,

6) Whether to increase public access to information about candidates and the process conducted by the Commission on Judicial Nomination.

The Chair of Committee, G. Robert Witmer, Jr., appointed a Subcommittee, various members of which had experience as Associate Judge of the Court of Appeals, Chief Administrative Judge of the State, Dean of Albany Law School, Director of the Government Law Center of Albany Law School, nominees of the Commission, a recognized authority on the issue of judicial selection, Counsel to the Governor, and President of the New York State Bar Association.

The Subcommittee, with the assistance of Ronald Kennedy, NYSBA Director of Governmental Relations, and Richard Rifkin, NYSBA Special Counsel, reviewed the history of the selection of judges for the Court of Appeals and participated in numerous conference calls, including interviews with:

- John O'Mara, former Chair of the Commission;
- Stuart Summit, former Counsel to the Commission;
- John J. Halloran Jr., Deputy Counsel of the Commission;
- David Nocenti, former Counsel to Governor Spitzer; and,
- Luke Bierman, Counsel to the State Comptroller (and author of law review articles on judicial selection and the New York State Court of Appeals).

## **BACKGROUND**

Since its creation by the state Constitutional Convention in 1846, the members of the Court of Appeals were elected by popular vote for over 130 years. By the middle of the twentieth century, many of the elections were uncontested as a result of deals made between the two major political parties, but of those elections that were contested, many were becoming increasingly expensive and bitter. Following the electoral defeat of Harold Stevens, who had

received an interim appointment as the first African-American member of the Court, and a particularly expensive and bitter race between Judges Charles Breitel and Jacob Fuchsberg for the Chief Judgeship, the method of selecting judges to the Court of Appeals was changed by Constitutional Amendment in 1977.

The Commission on Judicial Nomination (“the Commission”) was created by Article 6, Section 2 of the New York State Constitution, which states that “[t]here shall be a commission on judicial nomination to evaluate the qualifications of candidates for appointment to the court of appeals and to prepare a written report and recommend to the governor those persons who by their character, temperament, professional aptitude and experience are well qualified to hold such judicial office. The legislature shall provide by law for the organization and procedure of the judicial nomination commission.” Exhibit 1.

Article 3-A of the Judiciary Law provides the statutory framework for the operation of the Commission. Section 65 of the Judiciary Law provides that “the commission shall adopt, and may amend, written rules of procedure not inconsistent with law.” Exhibit 2. The rules of the Commission are contained in *22 New York Codes, Rules and Regulations*, Subtitle C, Chapter VI. Exhibit 3.

The Commission on Judicial Nomination is a twelve-member, bipartisan body whose members are appointed to four year staggered terms by the Governor (four), the Chief Judge (four) and the legislative leaders (one each). The Commission is charged with recommending in a written report to the governor three to seven names for Associate Judge vacancies and seven names for Chief Judge vacancies of those candidates found to be well qualified.

Upon notification of a vacancy on the Court, the Commission encourages the submission of applications by various means, including the publication of public notice. Judiciary Law 64(1) and 22 NYCRR 7100.5. Any person whose name is submitted to the Governor must be personally interviewed by a quorum of the Commission [Judiciary Law 63(4) and 62(6)], must file a financial statement, and must be supported by at least eight members of the Commission. Judiciary Law 63(3). With limited exceptions, all communications, proceedings, applications, correspondence, interviews, transcripts, reports, etc. are confidential and privileged. Judiciary Law 66(1).

## **DISCUSSION**

The Governor's criticism of the Commission was that the names submitted to him lack gender diversity. This issue must be viewed within a broad context. The Court of Appeals of New York is one of the strongest and most respected state courts in the nation, and the selection process for its judges must ensure that they be highly qualified. Although the Commission members are appointed by the leaders of our three branches of government, the selection process must not weaken, in practice or perception, the independence of the judicial branch which is one of the foundations upon which our system of government is grounded. More specifically, the intent of the Constitution is that the Commission function independently from the Governor as the appointing authority or the Senate as the confirming authority, in order to provide balance or serve as a check on the Executive's power to influence the composition of the Court of Appeals.

Diversity, although not stated explicitly in the qualifications enumerated in New York's Constitution or statute, is an important component of those qualifications. Diversity is not restricted to gender, but also encompasses race, religion, sexual orientation, and legal,

community and geographical experience, among other factors. Furthermore, diversity should not be attained simplistically by reserving to any particular group or interest a quota of members of the court or of the list of nominees submitted to the Governor. Consistent with the constitutional intent of maintaining the independence of the Judiciary, the goal of diversity should best be achieved by seeking a large and diversified pool of highly qualified candidates, and by encouraging diversity within the ranks of the members of the Commission. In the final analysis, the most important signal in support of diversity is sent by the actual makeup of the Court of Appeals.

During the course of our interviews and research, we were provided data regarding the two criteria of gender and race. Of the 53 members appointed to the Commission since its creation in 1978, 22 (41.5%) have been women and eight (15.1%) have been minorities. Exhibit 4 (Commission on Judicial Nomination Commissioners and Demographic Information). Also, of the 24 appointments to the Court under the current system, seven have been women and three have been minorities. If one looks at the eight appointments made since the turn of this century, four have been women and one has been a minority, resulting in a current bench of three women and one minority. Exhibit 5 (Commission on Nomination Candidates Nominated for Appointment to the New York State Court of Appeals).

Although the Commission has tried to develop a strong, deep and diverse pool of candidates, we think that more attention should be devoted to this part of its charge. For example, of the total number of candidates who applied for the last ten vacancies, 58 (18%) were women and 47 (15%) were minorities. Exhibit 6 (Letter dated March 25, 2009 from Chairperson O'Mara and the attached Commission on Judicial Nomination Data on New York Court of Appeals Applicants, 1997-2008).

The current system of selecting judges for the Court of Appeals has produced a bench that is both highly qualified and diverse. However, we think that more can and should be done to encourage a diverse, qualified pool of applicants, and therefore we make the following suggestions:

1. The current maximum limit of seven candidates to be reported out by the Commission to the Governor should be maintained. We found no evidence in the preparation of this report that increasing the number of candidates reported out would enhance the Court's diversity. However, a larger number of nominees reported out by the Commission would change the function of the Commission from one of "nominating" to "screening." By no longer winnowing the best from among the qualified candidates, the contribution of the Commission would be diluted, the power of the Governor would be increased and the independence of the Judiciary could be impaired.
2. A larger pool of candidates should be developed by
  - a. Enhancing the current methods of providing notice of vacancies on the Court and increasing the effort to identify and actively encourage applicants. The Commission, with possible assistance from the organized bar, should publicize the process for filling vacancies as they occur on the Court, and should specifically mention diversity as one of the criteria. Clear rules or guidelines should be promulgated to ensure systematic, diversity-focused recruitment of well-qualified candidates.

- b. Extending the Commission's recruitment efforts to the entire bar. For example, the Commission should provide notice of vacancies to the organized bar associations and solicit opinions on possible barriers inherent in the current application system.
  - c. Simplifying the initial application. A more detailed application can be required from those who pass an initial screening.
  - d. Providing training programs for commissioners to be effective recruiters and nominators.
3. Encourage diversity in the makeup of the members of the Commission by
- a. Encouraging the appointing authorities to consider diversity as a factor in making their appointments.
  - b. Encouraging the appointing authorities to consider the benefits of appointing new members to the Commission.
  - c. Publishing notice of the expiration of the terms of Commissioners.
4. Expand the format of the statutory report from the Commission to the Governor, consistent with the December 17, 2008 letter of Chairperson John F. O'Mara to the Governor. Exhibit 7.
5. Encourage the Commission to continue its efforts to provide public access to information through its web site. < <http://www.nysegov.com/cjn/>>
6. Encourage the Commission to publish an annual report including its efforts to inform diverse candidates about the opportunity to serve on the Court.



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**\* Member of Subcommittee on Selection of Judges for the Court of Appeals**