

Proposed Revisions to the Rules of the Commission on Judicial Nomination,
Title 22 N.Y.C.R.R. Sections 7100 - 7101

As revised in response to public comments received after publication of the Commission's original proposal in the August 5, 2009 issue of the New York State Register

7100.0

Preamble.

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

7100.1

Chairperson.

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

counsel as spokesperson in a specific regard. In any event, the confidentiality mandated by section 66(1) of the Judiciary Law will be maintained by all commissioners and staff. The chairperson will have such other functions and duties as may be assigned by the commission, or are customary for the office. The chairperson, and other commissioners, should make reasonable efforts to attend conferences, bar association functions and other meetings that present the opportunity to discuss the judicial selection process for the Court of Appeals.

7100.2

Counsel.

(a) Consistent with section 64(6) of the Judiciary Law, the commission may appoint, and at its pleasure remove, a counsel and such other staff as may be required from time to time, and prescribe their powers and duties. The commission shall fix the compensation of its staff and provide for reimbursement of their expenses within the amounts appropriated by law.

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

(c) The commission's counsel will conduct orientation sessions for newly-appointed commissioners concerning the functions of the commission and the duties of commissioners, including recruiting, evaluating and nominating candidates for the Court of Appeals. All commissioners will be invited to participate in such sessions.

7100.3

Notice of commission vacancy.

Commission membership is governed by section 62 of the Judiciary Law. No later than 60 days prior to the occurrence of a scheduled vacancy on the commission, and as soon as practicable for any other vacancy on the commission, notice will be published on the commission's website, distributed to the media, bar associations throughout the State and other persons and organizations (as registered with the commission under section 7100.11 of these rules), and sent in writing to the relevant appointing authority. This notice will be accompanied by a statement that the ultimate objectives of wide diversity and broad outreach in the nomination of well qualified candidates for the Court of Appeals are best served by a commission that itself reflects the diversity of New York's communities. The statement will further note that, consistent with the commission's own commitment to diversity, as set forth in section 7100.8(e) of these rules, appointing authorities should consider appointing highly qualified individuals from a variety of backgrounds.

7100.4

Meetings.

Meetings of the commission may be called by the chairperson, or a majority of the commissioners, by written or electronic notice to the other commissioners specifying the time and place of meeting. Such notice will be given at least seven days before the time specified, except that a meeting may be held on shorter notice, and by telephone notice, if it is impractical to do otherwise. Notice of meeting may be waived by any commissioner before or after the

meeting, and attendance at a meeting by a commissioner will constitute a waiver of notice. At least one meeting of the commission will be held in every calendar year.

7100.5

Quorum for meetings.

(a) A quorum will consist of at least 10 commissioners, according to section 62(6) of the Judiciary Law. A quorum for any meeting of the commission will be 10 commissioners who may be present either in person, by telephone or by online voice communication services. For the interviewing and nomination of candidates, a quorum must be physically present.

(b) In the event that seven or more commissioners are present in person at a duly called meeting at which a quorum fails to appear, those commissioners who are present at such meeting are constituted as a committee of the commission, and are authorized to conduct all business of the commission and enact resolutions on behalf of the commission, except as to the interviewing and nomination of candidates; provided that the absent commissioners are given prompt notice of any action taken by the committee; and provided that any action taken by that committee is ratified at the next commission meeting at which at least 10 commissioners are present in person or by telephone, or is ratified by a writing, or writings, signed by all the absent commissioners.

7100.6

Solicitation of candidates.

In its solicitation of candidates, the commission's objective is to give well qualified candidates of every background an opportunity to be considered for nomination. The commission will strive to identify candidates who reflect the diversity of the citizenry of the

State of New York and will conduct broad outreach to encourage wide participation in the application process. When the commission has been duly notified that a vacancy on the Court of Appeals has occurred, or is about to occur, the following steps directed to achieving the commission's objective will be taken.

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

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

(c) In order to enhance and supplement the outreach required by subsection (b) of this section, the commission may appoint a search committee, comprised of commissioners, which will solicit recommendations from the legal community.

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

(1) Announce the vacancy to the media.

(2) Announce the vacancy to bar associations in the State of New York (including those groups registered with the commission under section 7100.11 of these rules) urging them to take special efforts to notify their members.

(3) Announce the vacancy to deans of New York law schools, urging them to take special efforts to notify faculty and other eligible candidates.

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

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

(6) Send the notice to the Presiding Justices of the Appellate Divisions, the Administrative Judges for each Judicial District and the Chief Administrative Judge for the State of New York.

(7) Send the notice to civic and public interest organizations that are registered with the commission under section 7100.11 of these rules.

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

(f) Prior to the commencement of the initial screening process for a vacancy, the commission, through subcommittees as appointed by the chairperson, may convene an informational meeting, open to the public, in each of the four Judicial Departments of the State. To the extent practicable, there should be at least two informational meetings, at least one of which will be in New York City. The date, time and place of the informational meeting will be published on the commission's website and distributed to the media as part of the notice of the vacancy or in a separate public notice. At the informational meeting, the commission will discuss the requirements for the position and the commission's procedures and rules for submitting recommendations of qualified candidates; copies of the commission's rules also will be made available. At that time, the public may be heard (orally or in writing) about community needs, the general qualifications for judicial office and the nominating process.

(g) The commission's website will provide answers to frequently asked questions about the requirements for the position and the commission's procedures for the public to bring qualified candidates to its attention.

7100.7

Investigation of candidates.

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

(b) Counsel will cause such inquiry to be made as to the background and qualifications of a candidate as is necessary to determine that all statutory or constitutional criteria for appointment to the Court of Appeals are met, and to ensure that the commission will have the fullest possible information available for its deliberations with respect to the candidate.

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

(d) In the event that the chairperson, counsel or any commissioner believes that the power granted by section 64(2) of the Judiciary Law to administer oaths or affirmations, or to subpoena witnesses or documents, should be utilized, they shall request the authority to do so from the commission at a duly constituted meeting; except that, in the event the chairperson believes that any such power should be utilized on an emergency basis, the chairperson may do so pursuant to

the agreement of a majority of the commission given by telephone or in writing. Subpoenas, or other process, issued on behalf of the commission will be signed by the chairperson or, if unavailable, by counsel; and the chairperson (or a commissioner designated by the chairperson) and counsel are hereby empowered to administer oaths or affirmations on behalf of the commission.

7100.8

Consideration of candidates.

(a) Commissioner impartiality.

(1) A commissioner will consider each applicant in an impartial, objective manner, and disclose to the commission any relationship with an applicant that has or may reasonably appear to have a bearing on the nomination process.

(2) A commissioner will not be influenced other than by facts or opinion that are relevant to the judicial qualifications of the applicants, and will promptly report to the chairperson any attempt to influence a commissioner other than by fact or opinion.

(3) A commissioner will not individually communicate, directly or indirectly, orally or in writing, with an applicant about the application or the process, from the time the application is submitted until completion of the final vote on the nominations.

(b) Initial screening procedures.

(1) The commission will establish a date by which questionnaires must be filed for a particular vacancy, and after that date the procedures for initial screening of candidates will commence. If the number of applications submitted by potentially well qualified individuals

appears to the commission to be inadequate, the commission may extend the deadline for submission of applications and conduct further public outreach.

(2) Each commissioner will be furnished a copy of each application received, together with any further necessary background information, and the chairperson will request each commissioner to provide prompt written advice as to the names of those candidates that the commissioner believes merit further consideration as part of the final nomination process. The chairperson's request will indicate the date by which the commissioners should submit such names. Candidates whose names have not been submitted to the chairperson by at least two commissioners shall not be given further consideration for the particular vacancy unless the commission determines otherwise.

(3) The chairperson will call a meeting of the commission, for a date following the date by which the commissioners are to have proposed candidates who merit further consideration, to assess the relative merits of the remaining candidates and to determine the procedures to be followed for their further consideration. The commission thereafter will meet to determine which candidates will be interviewed by the commission as part of the nomination procedures described in subdivision (c) of this section. Each candidate to be interviewed will be asked to file with the commission, prior to the interview, a sworn financial statement in a form supplied by the commission.

(4) Notwithstanding the above, the commission may employ a two-step application procedure in which a candidate's initial submission consists of a short-form questionnaire, including a resume, a statement setting forth the candidate's qualifications and interest in seeking nomination and any other materials the candidate wishes to include. Each commissioner will be furnished with a copy of each initial submission received, together with any further background

information that may be pertinent, and the chairperson will request each commissioner to provide prompt advice as to the names of those candidates that the commissioner believes merit an interview as part of the final nomination process. The chairperson's request will indicate the date by which the commissioners should submit such names. If two or more commissioners determine that a candidate merits an interview by the full commission, that candidate will be asked to submit a full questionnaire, unless the commission determines otherwise. Screening of the candidate would then proceed as set forth above. The commission presumably will employ this two-step application procedure for all vacancies; however, circumstances may arise, such as the timing of the vacancy and deadlines for completion of the process, that will make use of the two-step process impracticable.

(c) Interview and nomination procedures.

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

(2) The interview will be conducted by a quorum of the commission, meeting in person, at a time and place convenient to both the candidate and commission. The interview will be confidential as required by section 66 of the Judiciary Law. At the interview, the candidate will be invited to make an opening statement, and thereafter, the commissioners and counsel may ask questions bearing on the candidate's qualifications for the position of Chief Judge or Associate Judge of the Court of Appeals, as the case may be.

(3) Following completion of all interviews, the commission will meet and discuss the relative merits of the remaining candidates and attempt to reach the concurrence of eight or more commissioners that a particular candidate or candidates should be nominated. In the event that the concurrence of eight or more commissioners is not reached as to all nominations, the balloting procedure described in Appendix I will commence.

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

- (i) to ensure that the commission thoroughly considers and evaluates each candidate;
- (ii) to ensure that the commission is impartial in its deliberations;
- (iii) to promote consensus in the selection of nominees; and
- (iv) to ensure that each nominee receives at least eight affirmative votes from the commissioners, as required by section 63(3) of the Judiciary Law.

(5) All votes taken with respect to nominations will be by secret ballot. The commission's counsel will collect each ballot, tally the votes and determine which, if any, candidates were nominated through voting. Regardless of the result of a round of voting, after tallying the votes, counsel will inform the commissioners of the outcome.

(6) Pursuant to section 65(4) of the Judiciary Law, upon the completion by the commission of its consideration and evaluation of the qualifications of a candidate, there will be no reconsideration of that candidate for the vacancy for which the candidate was considered, except with the concurrence of nine commissioners. For this purpose, the commission will not be considered to have completed its consideration and evaluation of the qualifications of a candidate until the conclusion of the meeting at which the candidate was nominated or eliminated for the particular vacancy.

(d) Consideration of the qualifications of a candidate.

In considering and evaluating each candidate's qualifications for the Court of Appeals, the commission will consider criteria and standards including character, temperament, professional aptitude and experience. Commissioners and commission staff will not discriminate against any candidate on the basis of any legally impermissible factor.

(e) Commitment to diversity.

The commission is committed to considering nominees for the Court of Appeals with outstanding personal and professional qualifications who reflect the diversity of New York's communities including, but not limited to, diversity in race, ethnicity, gender, religion, sexual orientation, community service, nature of legal practice or professional background and geography. A diverse Judiciary ensures that a broad array of perspectives and experiences are brought to the bench; reinforces public trust and confidence in the fairness of the justice system and the administration of justice; and ultimately enhances the delivery of justice and the Judiciary's credibility and moral authority.

7100.9

Report to the Governor.

Following the conclusion of the meeting of the commission at which the nomination procedure has been concluded, the chairperson and counsel will prepare, in consultation with the commission, and the chairperson will sign, a single written report to the Governor or Governor-elect, as the case may be, which will contain the commission's nominations, in conformance with section 63(3) of the Judiciary Law. The report will set forth (a) the relevant accomplishments of each nominee, and include major legal matters in which the nominee participated, as well as

other notable professional qualities that the commission considered important in determining that each was well qualified and fit to serve as the Chief or an Associate Judge of the Court of Appeals, as the case may be; and (b) the efforts made by the commission and counsel to publicize each vacancy and to solicit applications from the broadest group of well qualified candidates. However, the report will not compromise the confidentiality of commission proceedings, as mandated by section 66 of the Judiciary Law. In order to enhance participation in the selection process, the report will also encourage the public to submit comments concerning the nominees to the Governor prior to the Governor's appointment of a nominee, in accordance with Section 68 of the Judiciary Law.

7100.10

Amendment or waiver of rules.

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

7100.11

Website.

The commission will maintain a website for the purpose of communicating with the public and to aid in soliciting candidates pursuant to section 7100.6 of these rules. At a minimum, the website will contain: contact information for the commission's counsel; an overview of the commission; frequently asked questions and answers concerning the commission and its process; a compilation of the commission's statutory authority and its rules; sample

ballots and examples of balloting; and a directory of current commissioners. The website will also contain a record of recent commission press releases, a list of past nominees and other non-confidential information of interest to the public. Additionally, the website will set forth the procedure by which members of the public may (a) bring qualified candidates for vacancies on the Court of Appeals to the attention of the commission; and (b) sign up to receive commission press releases and notices by email. The commission will encourage members of the public, bar associations, civic groups and others throughout the State to register to receive commission press releases by email. The website will be maintained by commission staff at the direction of the chairperson. Access to the commission's internet security and privacy policy will be clearly posted on the website, and all information posted to the website will comply with the confidentiality requirements mandated by section 66 of the Judiciary Law.

Part 7100 Appendix I

Voting procedures.

(a) Statement of Purpose.

(1) The commission considered what voting process would best serve the constitutional and statutory mandate to carefully evaluate and then nominate to the Governor well qualified candidates for the Court of Appeals. Under the leadership of the late Columbia Law School Professor Herbert Wechsler, the commission implemented, and has since successfully used, a voting process that both encourages consensus among the commissioners and promotes a thorough consideration of each candidate. Voting for candidates through successive ballots fosters open discussion of candidates among the commissioners and a deliberative process. This depth of discussion helps ensure that each commissioner's perspective is heard and that the commissioners have ample information to enable them to compare candidates and select those well qualified for the Court of Appeals.

(2) The commission carefully and thoroughly tested the voting procedures described below. A voting system in which each commissioner ranks a finite number of candidates and assigns the highest number of points to his or her most preferred candidate makes it extremely difficult to manipulate the voting and greatly reduces the possibility of bloc voting.

(b) Overview.

(1) Pursuant to section 63(3) of the Judiciary Law, a recommendation of a candidate to the Governor requires the concurrence of at least eight commissioners. During the voting process, the concurrence of at least eight commissioners is established through the requirement that a candidate receive at least eight "affirmative votes" to be nominated. An affirmative vote is

a vote by a commissioner that ranks a candidate high enough on that individual commissioner's ballot to place that candidate within the number of candidates remaining to be nominated.

(2) If the commission has not nominated any candidates through the concurrence of eight or more members pursuant to section 7100.8(c)(3) of these rules, each commissioner present during the nomination process will vote for 15 candidates he or she considers well qualified for the Court of Appeals. A candidate is considered nominated if eight or more commissioners affirmatively vote for that candidate and if he or she receives the highest number of points. (A candidate's "points" refers to the aggregate of the ranking each candidate receives during a round of voting.)

(3) If the candidate or candidates receiving the highest number of points are nominated, then, if the candidate or candidates receiving the second greatest number of points also received the affirmative vote of at least eight commissioners, that candidate(s) will also be nominated in this round of voting. This process will be repeated with regard to the candidate(s) receiving the next highest point total until the candidate with the greatest point total among candidates not already nominated in that round of voting fails to receive the affirmative vote of at least eight commissioners. At that point, the round of voting ends.

(4) If there is a tie for the highest number of points, all of the tied candidates receiving the affirmative votes of at least eight commissioners will be nominated. However, if not all of the tied candidates received at least eight affirmative votes, then, after the nomination of those candidates receiving at least eight affirmative votes, that round of voting ends.

(5) Additional rounds of balloting will be conducted if the first round of balloting does not yield the required number of candidates. All candidates who are not nominated or dropped from consideration are included on subsequent ballots. The results of voting from prior rounds

are not included when tabulating subsequent voting; all candidates start each round of voting with zero points and zero affirmative votes.

(6) If a round of voting ends and the number of candidates nominated is not the maximum number specified in section 63(2)(b) or (c) of the Judiciary Law, any commissioner may call for further discussion of candidates not previously nominated. During this discussion, candidates may be nominated with the concurrence of at least eight commissioners. If, at the end of discussion, the number of candidates nominated is less than required by section 63(2)(b) or (c) of the Judiciary Law, the voting process will continue.

(7) At any time following the completion of the first ballot, in the case of a vacancy in the office of Associate Judge, a member may offer a resolution reducing the number of candidates to be nominated, within the range stated in section 63(2)(b) or (c) of the Judiciary Law. The concurrence of at least eight commissioners will be required to pass such a resolution.

(8) At any time during the voting process, a candidate may be dropped from consideration on the concurrence of at least eight commissioners so long as the number of remaining candidates plus the number of candidates already nominated is within the range specified in section 63(2)(b) or (c) of the Judiciary Law.

(c) Illustration of voting process.

To illustrate the voting process, the commission will place on its website sample ballots and examples of the balloting process.

Section 7101.4

Location.

Records shall be available for public inspection at:

State of New York Commission on Judicial Nomination

c/o Stephen P. Younger, Esq.

1133 Avenue of the Americas

New York, NY 10036-6710

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

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