
Women's Bar

OF THE STATE



Association

OF NEW YORK

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December 22, 2004

Michael Colodner, Esq.
Counsel
Office of Court Administration
25 Beaver Street
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Re: Proposed Rule Amendments Arising from the Final Report of the
Commission to Promote Confidence in Judicial Elections

Dear Mr. Colodner:

On behalf of the Women's Bar Association of the State of New York, I am writing to support the concepts contained in the proposed changes to the Chief Administrator's Rules Governing Judicial Conduct that were recently announced concerning the selection and conduct of candidates for judicial office and related matters.

The Women's Bar Association of the State of New York ("WBASNY") is the largest bar association in the country specifically dedicated to promoting the advancement of women in society and in the legal profession. WBASNY is known for addressing difficult legal issues and for promoting the fair and equal administration of justice, including in society, in the profession and within the judiciary. WBASNY is comprised of sixteen women's bar associations across the State and has more than 3,200 members. Our membership includes attorneys from all fields, law professors and government leaders, as well as appellate and trial court judges on both the state and federal benches.*

WBASNY commends the Office of Court Administration and the Commission to Promote Confidence in Judicial Elections for seeking to address the important issue of public confidence in the judiciary in general and particularly with respect to the selection of judges. We particularly pleased that the Commission duly considered WBASNY's written recommendations and concerns about its initial report and addressed virtually every one of the issues we raised before issuing its final report.

* Please note that our judicial members abstained from voting on WBASNY's positions herein.

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WBASNY has extensive experience with the issue of the selection of candidates for judicial office. As a statewide bar association, WBASNY has participated in the review of nominees for the New York Court of Appeals, and its member associations have extensive experience participating in local independent judicial screening committees and with their own Judiciary Committees, which directly screen and rate candidates for judicial office. As discussed further below, these Judiciary Committees have similar rules and conduct their reviews in a similar manner to the Independent Judicial Election Qualification Commissions that are proposed under the revised rules.

Based on our review of the proposed amendments to Part 100 of the Chief Administrator's Rules Governing Judicial Conduct and the newly proposed Part 150, we believe that the Office of Court Administration has once again demonstrated its commitment to ensuring that we have the best possible judiciary and that the process for selection judges is fair and inclusive. That said, we believe that certain of the proposals need clarification or revision. Specifically, this letter examines:

- The ability of the Office of Court Administration to enact the rules without legislative changes or the approval of the U.S. Department of Justice under the Voting Rights Act.
- The potential impact of the “and other functions” language in Part 100, §100.5(A)(2)(v) and the presumptive amount specified therein.
- The substance of the “education program” specified in Part 100, §100.5(A)(4)(e) and the ability for appropriate organizations to review or have input into such program(s).
- The application of the Rules of Judicial Conduct to non-judge positions
- The composition of the “Independent Election Qualification Commission” that is proposed in new Part 150, the process for appointment of commissioners to this body, and the qualifications of such commissioners.
- The language in §§150.3(c) and (d) relating to:
 - The appointment of a replacement commissioner to “serve on an interim basis for the remainder of the term” in the event that a commissioner is unable to complete his or her appointed term, and
 - The importance of establishing a process to ensure that OCA is actually able to provide “written notification” of such vacancies to the “appointing authority” – and specifically to the *appropriate* designee of the appointing authority, and for ensuring that such notice is provided in a timely manner so as to avoid having vacancies filled by someone other than the appointing authority.
- The process for ensuring the confidentiality of the proceedings and deliberations of the Commission, including the importance of establishing that any records of the Commissions or its work (other than its final ratings) not be subject to disclosure under the Freedom of Information Law, “open meetings” requirements, or other legal or ethical strictures.

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A. Efficacy of the Proposed Rule Changes

As a threshold matter, we note with interest the comments of the New York County Lawyer's Association ("NYCLA") on the issue of whether the proposed rules can be enacted without approval of the United States Department of Justice in light of the Voting Rights Act of 1965, 42 U.S.C. §§ 1971, 1973 *et seq.*, and particularly in light of the continued oversight of the Justice Department over voting rights issues in Manhattan, Brooklyn and the Bronx. *See* Submission of New York County Lawyer's Association, December 13, 2004.

We also note that in the last term the New York State Assembly passed bills numbered A11456 and A11457 (bill summary and text available at <http://assembly.state.ny.us/leg/?bn=A11456> and <http://assembly.state.ny.us/leg/?bn=A11457>), which were sponsored by Member of the Assembly Helene Weinstein and include some of the same issues concerning selection of judicial candidates and the "impartial performance of the adjudicative duties" by judges that the present rules seek to address. While these bills were not passed by the New York State Senate, we understand that they will be reintroduced in the next term and are going to be subject to serious consideration by both houses of the Legislature. Several commentators have questioned whether OCA can enact the proposed rules directly or whether the subject matter of the rules may be enacted only by statute.

While we acknowledge that these are serious issues, since none of us want rules to be enacted that will be unenforceable or subject to challenge, we believe that it is important for the Office of Court Administration to act to enhance the fair and equal administration of justice and to ensure a fair and impartial judiciary. We trust that the Counsel's Office will provide appropriate guidance on whether the rules require additional approvals or a legislative mandate, or alternatively whether they need to be tailored to address the concerns that have been raised concerning the viability of the proposed Rules. On the other hand, we agree with NYCLA that the proposed rules, while apparently elegant in their simplicity, will require careful consideration and considerable effort to effectuate. Accordingly, OCA should consider carefully both the effective date of the proposed rule amendments and the process for implementing them. OCA should also be sure to allocate sufficient time and resources to this effort.

B. Judicial Candidates' Attendance at Politically Sponsored Functions - §100.5(A)(2)(v)

1. Attendance at "politically sponsored dinners *or other functions*"

In §100.5(A)(2)(v), OCA proposes that candidates for judicial office may:

purchase two tickets to, and attend, politically sponsored dinners and *other functions*, provided that the cost of the ticket to such dinner or other functions shall not exceed the proportionate cost of the dinner or function. The cost of the ticket shall be deemed to constitute the proportionate cost of the dinner or function if the cost of the ticket is \$250 or less. (Emphasis added.)

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We believe that a minor change to this section – changing “politically sponsored dinners and other functions” to “politically sponsored functions” will clear up a potential ambiguity in the language and have the added benefit of streamlining the section.

As we discussed in our previous submission to OCA concerning the initial report of the Commission to Promote Confidence in Judicial Elections, we are concerned that the phrase “politically sponsored dinners *or other functions*” does not make it absolutely clear that by “other functions” OCA means only those functions that are “politically sponsored.” Strictly speaking, an event sponsored by a bar association or legitimate charity (such as a bar association installation dinner or a breast cancer walk) that occurred within the “Window Period” could be interpreted to be an “other function” to which the restrictions apply, and we do not believe that is OCA’s intent. Accordingly, we recommend that this portion of §100.5(A)(2)(v) be revised to indicate that candidates for judicial office may:

purchase two tickets to, and attend, politically sponsored ~~dinners and other~~ functions, provided that the cost of the ticket to such ~~dinners and other~~ functions shall not exceed the proportionate cost of the ~~dinners and~~ function. The cost of the ticket shall be deemed to constitute the proportionate cost of the ~~dinners and~~ function if the cost of the ticket is \$250 or less. A candidate may not pay more than \$250 for a ticket unless he or she obtains a statement from the sponsor of the ~~dinners and~~ function that the amount paid represents the proportionate cost of the ~~dinners and~~ function.

We respectfully recommend this change to OCA because we believe that the substance and intent of the recommendation proposed by the Commission to Promote Confidence in Judicial Elections is fully captured in this version, while any potential ambiguities in the current language are eliminated.

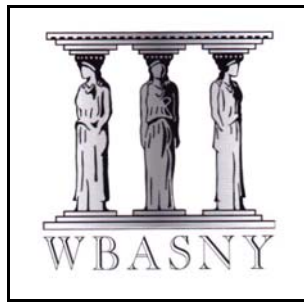
2. The Dollar Limit for the “Proportionate Cost” of Politically Sponsored Functions”

The current proposal states, “The cost of the ticket shall be deemed to constitute the proportionate cost of the dinner or function if the cost of the ticket is \$250 or less.” We note that NYCLA disagrees with the dollar figure in this section and recommends that it be lowered to \$125. We agree with OCA’s proposed valuation as articulated in proposed §100.5(A)(2)(v) and strongly recommend that it not be lowered.

Recently, we had the opportunity to celebrate WBASNY’s 25th Anniversary with a dinner at the New York Botanical Garden that honored Hon. Betty Weinberg Ellerin for her more than 50 years of leadership and scholarship and her extraordinary work a mentor to lawyers and judges not only in New York but across the country. The event was a huge success, but the cost to our organization for the space, catering, invitations, etc., was well over \$150 per person. We do not believe that it is practical to expect that any organization will be able to put on a dinner in New York City for the \$125

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per person proposed by NYCLA, much less that an organization could charge that little for an event that will clearly cost it considerably more than that. Further, if the threshold were lowered, the rule would put a substantial burden not only on candidates, but also on sponsoring organizations to provide certifications as to the actual costs of events.

It may be that NYCLA's proposal is meant to address the reality in other locations in New York State it is possible to hold an event for less cost than in New York City or certain other large metropolitan areas. Should that be the case, the alternative would be to set a lower amount across the state, but leave the amount at \$250 in "metropolitan areas with a population of more than X." We believe that such a proposal would be unwieldy, however, and believe that the current proposal is adequate.

Further, we believe that in setting the amount in the proposed rule that OCA recognizes that it does not want to be changing its rules on a regular basis to adjust to the inevitable inflation that occurs in the costs of putting on an event in a major city in New York. Accordingly, we believe that the \$250 value contained in the rule places an appropriate lid on the amounts that candidates can be charged to attend an event without further proof that they received in kind goods or services.

C. The "Education Program" Specified in §100.5(A)(4)(e)

WBASNY has no objection to the concept of requiring candidates for judicial office to attend or participate in an appropriate educational program. §100.5(A)(4)(e). We are concerned, however, that the subject matter of the educational program has not been specified in any way in the proposed rule. We assume that the program will cover issues related to the ethical and legal rules that apply to judicial candidates, but the failure to specify the nature of the "education" that candidates will receive is troubling. Further, we recommend that OCA include bar leaders or others to participate either in the development of the educational program and/or the program itself. We look forward to supporting OCA in this regard and hope that appropriate organizations such as WBASNY would have the opportunity to review or have input to the substance of such a program.

D. The application of the Rules of Judicial Conduct to non-judge positions - §100.6(E)

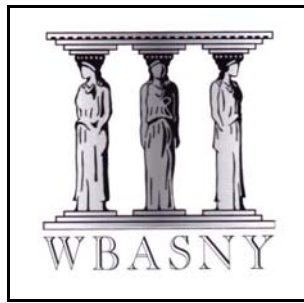
We concur in the concerns addressed by NYCLA concerning the application of the full panoply of the Rules on Judicial Conduct not only to attorneys who are candidates for judicial office, but also to non-judge candidates. We believe that §100.6(E) should be revised to make it clear that only the rules relating to campaign activities and ensuring impartiality and fairness should apply to candidates for other than elected judicial offices.

E. The Independent Election Qualifications Commissions Contemplated under Part 150.

We believe that the concept of the "Independent Election Qualification Commission" is an important one, and we salute the Commission to Promote Confidence in Judicial Elections and OCA on

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including this concept in the proposed Rules. In addition to the concerns address above about whether some of the Rules being proposed by OCA require a legislative mandate, we have some concerns with the process for selecting members of the Commissions, the constitution and qualifications of the Commission and its membership, the importance of addressing additional potential conflicts of interest, and the process for appointment of replacement commissioners in the event that the original appointee cannot serve out his or her entire term.

We understand that some commentators are concerned that judges of the New York Supreme Court and certain other courts are currently elected rather than appointed. This debate is for another forum and another day, however, since clearly OCA cannot unilaterally change the fundamental method by which judges on these courts are selected. Given these constraints, we believe that the appointment of a truly independent and professional screening process to help determine the qualifications of candidates for judicial office is a great step in the right direction. Indeed, WBASNY has conducted independent screenings of candidates for the New York Court of Appeals, and the vast majority of its member associations have standing Judiciary Committees to evaluate candidates within their judicial districts that have rules and processes that are very similar to the proposals contained in Part 150.

1. Political Appointments

We remain concerned that such a large percentage of the appointments to the Independent Election Qualifications Commissions (the “Independent Commissions”) are of a “political” nature, coming from the Governor and the leaders of the Assembly and Senate. While we are not endorsing the specific construct recommended by NYCLA, we agree that the current proposal is too heavily weighted in favor of political appointments, which does little to assuage the concerns that are regularly raised in the current system that the selection of judges is too political. We believe that having one appointment from each of these leaders rather than two makes more sense and will provide the public with a greater sense of the Independent Commissions’ actual “independence.”

2. The Size of the Commissions

Our members have tremendous experience with judicial screenings. We are concerned that the proposed number of commissioners is not adequate to for the Commissions to perform their duties. As the president of one of our chapters recently pointed out in a letter to the New York Law Journal,

We acknowledge and appreciate the significant time required both for judges who appear before judiciary committees, and for the attorneys who serve on them, but for all of us, it is a necessary obligation. It is through this vetting process that the bench and bar together seek candidates who show the ‘intrinsic qualities of ... fairness and sensitivity’ in dispensing justice. (New York Law Journal, October 25, 2004, p. 2.)

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The process of reviewing the qualifications of candidates for judicial office is very time consuming. Not only must each candidate's credentials be scrutinized and each candidate interviewed, but writing samples must be reviewed, people who have either appeared before a candidate or with whom a candidate has appeared as co-counsel or opposing counsel must be interviewed, and any issues or concerns must be investigated. We are concerned that in large counties that have many candidates for judicial office most years that 15 commissioners may not be sufficient to handle the duties and time commitment that is required. One alternative would be to designate in the Rules a larger Commission membership in proportion to the relative population of the judicial districts.

3. Bar Association Representation on the Independent Commissions

We note with pride that the proposed legislation that was passed by the Assembly earlier this year specifically acknowledges the important role that WBASNY plays in ensuring the fair and equal administration of justice in New York State. Specifically, in A11456, § 140-C, the bill states that judicial screening panels shall include a representative of "the largest women's bar association within the judicial district...." Similarly, in § 140-E, the bill states that one of the Governor's appointees to the "New York Judicial Qualifications Board" (which is analogous to the "Independent Commissions" provided for in the proposed Rules) shall be appointed by the governor upon the recommendation of the Women's Bar Association of the State of New York...."

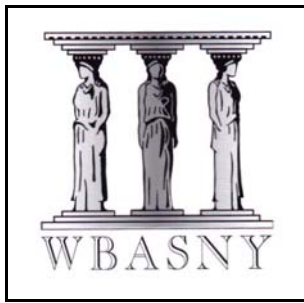
WBASNY and its chapters across the State represent the broad spectrum of issues and provide a particular sensitivity and sophistication when it comes to equal justice under the law. Our members come from every walk of life, including every practice area, and every ethnicity, gender, sexual orientation, ability and disability. We believe that, as was recognized by the Legislature, the proposed rules should be amended to provide that one of the bar associations representatives to each Commission should be designated by the President of the local chapter of the Women's Bar Association of the State of New York that is located within the judicial district where the Independent Commissions would serve.

4. Availability and Impartiality of Commissioners

We believe that the qualifications and independence of the members of each Independent Commission, along with the importance of ensuring that its members represent the broad spectrum of society is paramount to ensuring that the public has confidence in the qualifications, impartiality and integrity of the judicial candidates whom these commissions find qualified. We submit that it is essential that any commissioners affirmatively represent that they have the time to do the work of the Commission and they will make all necessary steps to ensure that they can attend its meetings and deliberations. We also believe that, in addition to the criteria listed in the Rules (§ 150.9), the membership should not include a) members of the Commission to Promote Confidence in Judicial Elections, b) members of the Judicial Conduct Commission (which is an investigatory body and must be able to maintain its independence), c) registered lobbyists or members of their firm, d) employees of the courts, e) anyone who has been found guilty or is currently the subject of a proceeding involving a

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felony or professional misconduct, f) anyone who is a member of another judicial screening panel, committee or commission.

5. Appointment of Replacement Commissioners

In §§150.3(c) and (d), the proposed rules include a process for the appointment by “the appointing authority” of a replacement commissioner to “serve on an interim basis” in the event that a commissioner is unable to complete his or her appointed term, and that if such appointment is not made by the appointing authority within 30 days, that the vacant position shall be filled by the Chief Judge. We have no quarrel with these provisions in principle, but we are concerned about the process for providing notice to the “appointing authority,” and the term “on an interim basis.”

a. Appointment of Replacement Commissioners “on an Interim Basis”

We believe that the phrase “on an interim basis” does not belong in §150.3(c) of the proposed Rules. There should be no question that a commissioner who replaces one who is unable to serve is in every regard a full-fledged member of the Independent Commission. We recommend that the rule read:

(c) If a commissioner does not complete the appointed term, the appointing authority shall appoint someone to serve ~~on an interim basis~~ for the remainder of the term.

b. Notice to the “Appointing Authority” and the Timing of “within 30 days”

We cannot overstate the importance of establishing a process to ensure that OCA is able to provide written notification of any vacancies on an Independent Commission to the actual “appointing authority” – and specifically to the *appropriate* designee of the appointing authority. Most bar associations elect new presidents every one or two years. Historically, there have been some problems with ensuring that OCA is aware of the name and official contact information for each local bar association. While the process does not necessarily have to be spelled out in Part 150, we believe that the process for ensuring that notice of a vacancy is actually provided to the appointing authority is essential.

F. Confidentiality of Proceedings Before the Independent Commissions

Finally, we note that the Rules intend that the proceedings and all aspects of the work of the Independent Commissions should be confidential; only the final ratings that are released will be in the public record. We believe that this section needs to be strengthened. Specifically, it needs to be clear that the records and deliberations of the Independent Commissions are not subject to disclosure under the Freedom of Information Law, “open meetings” requirements or other provisions of law or regulation. It is imperative that OCA ensure that the confidentiality of the proceedings can be assured

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and that the records and deliberations of the Commission can be protected from disclosure under FOIL and other provisions of law prior to enactment and implementation.

G. Conclusion

In conclusion, we believe that there has never been a more important time for clear and direct channels of communications between the bench and the bar and for the process for selecting judicial candidates to be more open and inclusive. Concerns about the fairness and efficiency of our judicial system are expressed often these days. It is incumbent upon us to focus on bringing the most talented and fair-minded among us to serve on the judiciary. The clarification of the rules of judicial conduct and the establishment of a process to ensure that candidates for judicial office present themselves for interviews by a professional and truly independent body that represent all aspects of society is an important way to ensure the public that efforts will continue to make sure that we have the highest quality of justice possible.

Respectfully,

Mindy R. Zlotogura, Esq.
President, WBASNY