

*“Without public confidence, the
judicial branch could not
function.”*

In re Raab, 100 N.Y.2d 305, 315-316, 763 N.Y.S.2d 213, 218 (2003).

COMMISSION TO PROMOTE PUBLIC CONFIDENCE IN JUDICIAL ELECTIONS

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PREFACE

In December 2002, the Chief Judge of New York State, Judith S. Kaye, asked me to chair a commission to promote public confidence in judicial elections and I agreed. At the time, she was serving as the President of the Conference of Chief Justices. She told me that she was concerned by disturbing trends developing in other states and wanted New York to be out in front of the problems. As we discuss in the Interim Report, much has transpired between her announcement of the Commission in her January 2003 State of the Judiciary Address and our release of this Interim Report.

The Chief Judge appointed 29 Commission members in April 2003 and we began our work immediately. The Commissioners come from every judicial district in New York State and bring to our work many different backgrounds and experiences, including extensive experience in the political processes of the state. We are all grateful to provide a public service toward the end of enhancing public confidence in judicial elections.

This Interim Report represents our views at the midpoint of the Commission's existence. Much remains to be done, of course, as detailed in the Introduction of the Report. However, we thought it important to provide the Chief Judge with this Interim Report containing recommendations that we believe can be promoted in the short term. We expect the final report, in the spring of 2004, will incorporate comments on this Interim Report and include recommendations on issues not discussed here.

For example, we consider our recommendations concerning the establishment of Independent Judicial Election Qualifications Commissions in each of the judicial departments not to be complete. We seek a continued opportunity to engage political and party leaders in New York, as well as citizens more generally throughout the State, in a discussion as to the composition of such commissions so that they represent the diversity of the state. Our final report will reflect the outcome of such discussions and our final recommendations on the subject. Other recommendations, set forth in this Interim Report, need not await a final report. We believe, in some instances, that their adoption would place New York in the forefront of judicial election reform in the country.

The recommendations set forth in this Report follow from public hearings of the Commission in different parts of the state and an exhaustive examination of the subject. We express our gratitude to the witnesses who testified at our public hearings; to the many people who submitted written commentary to the Commission; and to the many organizations in New York State, and elsewhere, which shared the results of their work with us as it pertains to the mission of the Commission. These groups include bar associations, the Fund for Modern Courts and the Constitution Project.

We also acknowledge our enormous debt to the Commission's able counsel, Professor Michael Sweeney of Fordham Law School, and to the many students of Albany Law School, Fordham Law School and Sienna College who have worked under his direction. These students are, at Albany, Lavonda Collins and Kyle McCauley; at Fordham, Beth Hurley, Carol Kim Le, M. David Possick, Adrienne Woods-Blankley, and Elizabeth Ziegler; and at Sienna, Ryan Donovan and Shontell Smith. In addition, we

acknowledge the invaluable assistance of Antonio Galvao, Derek Hackett, Adam Itzkowitz, Daniel McLaughlin, Deepro Mukerjee, Barbara Reed and Jordan Stern.

I wish to single out for special recognition at this time the members of the Commission who chaired our three subcommittees: Helaine Barnett, Nicole Gordon and Professor Patricia Salkin. These subcommittees, which have met often, are responsible for the progress made by the Commission in a relatively short period of time. I thank the members of these subcommittees, all busy professionals, for their dedication to the task given to us by the Chief Judge.

I am very grateful to the institutions that provided the technical assistance and in-kind support that allowed the Commission to function. Each time we turned to them for help, they offered more than we requested. They are Fordham University School of Law, Albany Law School, the American Arbitration Association, the New York County Lawyers' Association, and the Marist Institute for Public Opinion.

I am especially grateful to Dr. Lee M. Miringoff and Dr. Barbara L. Carvalho of the Marist Institute for Public Opinion for undertaking a public opinion poll on behalf of the Commission to determine the views of New York's registered voters on judicial elections. The poll played an important part in enlightened the Commission's work.

Finally, I would like to thank the many groups that provided the Commission with grants to enable us to put in place a staff, initiate a major public opinion poll, and conduct public hearings and research studies. We cannot say enough about their generosity. They are the Carnegie Corporation, the J.M. Kaplan Fund, the Joyce Foundation, the New York Bar Foundation, the New York Community Trust, the Office of Court Administration, the Open Society Institute and the law firm of Skadden, Arps, Slate, Meagher & Flom.

John D. Feerick, Chair
Fordham University School of Law

INTRODUCTION

An independent and impartial judiciary is critical to democratic society. It is the branch of government responsible not only for resolving disputes between private parties fairly, but for resolving disputes between the government and private parties. As such, it is charged with protecting the individual from government overreaching, and holds an important place in New York's constitutional balance of powers. It is the branch that holds the representative branches to their responsibilities.

If the actual independence and impartiality of the judiciary are essential to the successful operation of democracy, so is the public perception that courts provide an independent and impartial tribunal to resolve disputes and provide basic protections to individuals. Without public confidence in the judiciary, its ability to do justice is compromised. Where people do not trust the courts, they will resort to other means to resolve those matters that are properly in the judiciary's realm. While history is replete with examples of judiciaries undone by a lack of public confidence, New York's elected judiciary is not one. It has a long and noble history of integrity, impartiality and independence.

In 2003, Chief Judge Kaye appointed 29 citizens to serve on the Commission and charged them with providing to her a blueprint to foster dignified judicial campaigns and improve voter participation. She asked the Commission to present its recommendations to her in a final report in June 2004. From the outset, the Commission contemplated presenting her with short, medium and long-term recommendations. In June 2003, the Chief Judge addressed the full Commission and asked that we consider presenting an interim report that would include recommendations that could be promoted in the short term.

This document represents that Interim Report. We envision that our final report will focus on the medium and long-term recommendations on how to promote public confidence and voter participation in judicial elections. These interim recommendations focus on what steps the Chief Judge, the Chief Administrator and the Administrative Board can take now to increase public confidence in judicial elections. Commissioners deliberated long over the question of what change is feasible in the short term. Any change will take the cooperation and support of many different parts of New York's political system, and we do not expect that all of our recommendations will be easy to implement.

If initially we were unsure of what could be accomplished, we were heartened by what we heard in public hearings, written testimony, a public poll and private discussions. One clear theme was repeated over and over again: New Yorkers should have confidence in their elected judiciary. We believe that the best way to foster public confidence in judicial elections is to ensure that they produce an impartial, independent and well-qualified judiciary.

Many people have different opinions of what should be done and the Commission tried to listen to as many ideas as people were willing to offer. These interim

recommendations are the product of long deliberation among a politically, geographically, socially and professionally diverse group.

The Commission Process

The Commission's 29 members, at least one from each judicial district, were selected for their professional, political, geographic and social diversity, and they represent a broad spectrum of expertise, interests and experience with respect to judicial selection. They bring with them a wealth of experience from the judiciary, the legislature, the executive branch, academia, private practice and public service. On April 25, 2003, the Commission met for the first time.

Due to the breadth of the Commission's mandate, three subcommittees were formed to deal with the broad subject areas of Candidate Selection, Campaign Oversight, and Campaign Finance and Voter Education. Subcommittee meetings were held between full-commission meetings. In all, each subcommittee met at least 6 times between May and November and each was responsible for formulating recommendations and drafting reports for submission to the Commission. Full commission meetings, which took place in June, October and November, were dedicated to deliberating on subcommittee reports and developing consensus.

The Commission took into consideration information from an array of sources. Commissioners reviewed reports, commentary, court decisions, academic articles and news accounts from around the State and the country. Fifty-six witnesses offered testimony at the Commission's public hearings in Albany, Buffalo and New York City in September (the "Public Hearings", see Appendix A) and many people have submitted written testimony to the Commission. Individual Commissioners held private meetings with interested parties including lawyers, judges, political leaders and law enforcement personnel. The Commission also engaged the Marist College Institute for Public Opinion to conduct a survey designed to measure the perceptions of registered voters in New York State about state judges and judicial elections (the "Marist Poll," see Appendix B). One thousand and three registered voters participated in the survey, making it a significant poll.

The Commission maintains a website in order to make its work publicly available and contribute to the statewide and nationwide dialog on judicial selection. The Commission's website, located at <http://law.fordham.edu/commission/judiciaelections>, contains information about the Commission, reference material, testimony from the Public Hearings and written testimony, and Commission work product, including this Interim Report.

This Interim Report contains recommendations for the short term, *i.e.*, reforms that we believe can be promoted now. The Commission will release a final report in the spring of 2004. At that time we expect to present to the Chief Judge recommendations for medium and long-term reform. Among the issues we will continue to examine are public financing, judicial nominating conventions, non-partisan elections, voter education, retention elections, and enforcement of the judicial conduct rules and election law. We also expect to consider and incorporate comments on the recommendations of this Interim Report where appropriate.

Judicial Elections in New York State: a Brief History

New York State began with an appointive process for judicial selection. That system continued in various forms until the Constitution of 1846. Since that time, most of the judges in the New York State court system (known as the New York State Unified Court System) have been selected through some form of popular election. Having established an elected judiciary, the people of New York have been reluctant to change back to an appointive system, with one important exception. In 1977, voters approved a constitutional amendment that provided for the appointment of Court of Appeals judges.

The change to judicial selection by popular election was born of discontent over the appointive system. Tension between New York's landed aristocracy and tenant farmers in the early 1800s fostered a violent Anti-rent movement. By the middle of the century, the "Jacksonian Democracy" movement was sweeping the nation, and the two movements together provided the catalyst for the Constitutional Convention of 1846. The resulting constitution provided that the judicial appointment system would be replaced with an elective system.

New York has not returned to a system-wide appointive system for judges, despite several opportunities. Voters were presented in 1869 with the question of whether judges of the Court of Appeals, Supreme Court, County Courts and local courts should be elected or appointed, and they decided three to one to retain judicial elections. The Constitutional Conventions of 1915, 1921 and 1938 endorsed the system of judicial elections established by the 1846 Constitution. Commissions established by the governor in 1953 and 1973 and charged with improving the judicial system recommended against abandoning the elective system. No changes in judicial selection were proposed by either the Judiciary Amendment of 1962 or the voter-rejected New York Constitution of 1967.

Voters have approved a return to an appointive system in some circumstances. For instance, in 1949, the voters adopted a constitutional amendment establishing the Court of Claims with judges appointed by the governor and confirmed by the senate. And in 1977 the voters approved a constitutional amendment providing for the appointment of Court of Appeals judges by the governor from candidates recommended by the Commission on Judicial Nomination, subject to confirmation by the Senate. But by and large, New York's judges are elected.

Today, 73% of the state's 1,143 full-time judges are elected, as are all 2,075 Town and Village Justices. In the last major study of New York's elected judiciary, in 1988, the New York State Commission on Government Integrity called for an appointive process for all State judges. But the call has gone unheeded.

Judicial Elections in New York State: the Current Environment

Between Chief Judge Kaye's call for the Commission in her 2003 State of the Judiciary Address and this Interim Report much transpired that affected public confidence in judicial elections. The year included public events that cast judicial elections in a bad light and legal events that have the potential to change the way judges run for office. As the end of the year approaches one thing is clear: public confidence in judicial elections

has suffered in 2003.

Early in the year, New York found itself in the middle of the debate over a state's ability to regulate judicial campaign conduct while respecting the First Amendment to the Federal Constitution. In *Spargo v. N.Y.S. Commission on Judicial Conduct*, a federal district court found that New York State rules preventing a judicial candidate from providing potential voters with drinks and gasoline while campaigning were unconstitutional. Relying on the 2002 U.S. Supreme Court case, *Republican Party of Minnesota v. White*, the court found that significant parts of New York's restrictions on campaign conduct were inconsistent with the First Amendment and that other provisions were unconstitutionally vague.

The result of the *Spargo* case was that significant parts of New York's legal regime for controlling judicial candidate campaign conduct were suddenly suspended. The suspension came at a particularly inopportune time. The Commission on Judicial Conduct, the entity charged with enforcing the rules of judicial conduct, reported that in 2002 it had recommended the removal from the bench of almost as many judges as it had in the preceding three years combined.

To make matters worse, new scandals broke in New York City early in 2003. A Brooklyn Supreme Court Justice was arrested in April on charges that he had accepted things of value from attorneys appearing before him in return for favorable treatment. The arrest came on the heels of the sentencing of another Brooklyn Justice for taking bribes. Then in May, a third Brooklyn Supreme Court Justice was removed from the bench for unethical behavior. In response, the Kings County District Attorney empanelled a special grand jury to investigate the judicial selection process in Brooklyn, and in November it indicted the Chairman and the Executive Director of the Kings County Democratic County Committee on charges related to judicial elections. The special grand jury has been extended to sit until April 2004.

By May 2003, the call for reform of the judicial election system had become a clamor taken up by the media. Public officials, including the New York State Governor and Attorney General, non-profit organizations, academics and commentators from around the state have joined in the call for reform.

The current attention on the judicial election system creates an opportunity for change. New York's elective system has served New York well for more than 150 years and produced some of this country's finest jurists. But like any system of selecting judges, it is not perfect. The confluence of voices calling for reform at this time creates an opportunity to build consensus around ideas that will improve the judicial election system.

We offer this Interim Report with a deep appreciation for all the exemplary public servants who serve as judges in New York State and for the long and noble history of the State's judiciary. We recognize that the overwhelming majority of New York's elected judges are well-qualified, hardworking citizens dedicated to high ethical standards. Public confidence can be a product of perception, and perception can be driven by a few unfortunate and unrepresentative examples. Nevertheless, in the current environment, public confidence in judicial elections is sagging. We hope our recommendations will contribute to reversing that course and bring to New York's elected judiciary the continued respect and admiration it is due.

This report reflects the views of a substantial consensus of the Commission, but not every member agreed with every recommendation and some members disagreed with more than one recommendation.

EXECUTIVE SUMMARY

When the Chief Judge of the State of New York, Judith S. Kaye, appointed this Commission, she charged us with promoting public confidence in judicial elections and asked us to provide her with a blueprint to foster dignified judicial campaigns and improve voter participation. Initially, we were to present our report and recommendations in the spring of 2004. But when the Chief Judge addressed the Commission at our June 20 meeting in White Plains, she asked us to consider presenting her with an interim report with recommendations capable of being implemented in the near term.

This Interim Report represents our short-term recommendations. It focuses on recommendations that we believe can be implemented now or in the near future. We avoid calling for legislation or executive action at this time and reserve such recommendations for the final report. Commissioners deliberated at length over the question of what change is feasible in the short term, and we realize that any change will take the cooperation and support of many different parts of New York's political system. We do not expect that all of our recommendations will be easy to implement.

Our interim recommendations cover six areas: candidate selection, the ethics rules governing judicial conduct; promoting ethical campaign activity; campaign finance disclosure; campaign expenditures; and voter education. We believe that improvements in each of these areas are attainable in the short term and will go a long way towards reaffirming the luster of New York's elected judiciary.

RECOMMENDATIONS ON CANDIDATE SELECTION

Concerns over the way judicial candidates gain access to the general election ballot are at the forefront of discussions across New York State. Testimony before the Commission, non-profit organization reports, media accounts and private conversations all suggest that in many parts of the State the general public has no knowledge of the candidate selection process, much less access to the process. According to the Marist Poll, two-thirds of New York's registered voters did not know that New York State Supreme Court Justices are elected to office, and registered voters across the state believe that political parties and campaign contributors have more influence over who becomes a judge than voters.

Ironically, despite the lack of voter understanding, the candidate selection process is critical in much of the State, where becoming a particular party's candidate for a judicial position is tantamount to winning the election. The Commission believes that an effective way to promote confidence in judicial elections is to create independent panels to pre-screen all candidates to ensure they are well qualified. Local politics and the election process would still play a highly important role in selecting among candidates, but the public would have confidence that all the candidates are well qualified to serve. Therefore, we make the following recommendation.

Recommendation: New York State should establish a system of state-sponsored Independent Judicial Election Qualifications Commissions to evaluate the qualifications of candidates for judicial office throughout the state. The commissions should be based on the following principles:

- **Each judicial department should have a commission.**
- **The commission members should reflect the state’s great diversity.**
- **The commissions should actively recruit judicial candidates.**
- **The commissions should publish a list of all candidates found well qualified.**
- **The commissions should apply consistent and public criteria to all candidates.**
- **Member terms should be limited.**
- **Uniform rules should govern commission proceedings and its members’ conduct.**
- **The commissions should have the necessary resources to fulfill their functions.**

We believe that the Independent Judicial Election Qualifications Commissions will promote public confidence in judicial elections by ensuring that all candidates for judicial office are well qualified. Their success will depend on participation from many different segments of society. But if there was one thing that encouraged the Commission’s work over the past six months more than any other, it was the common dedication among everyone we met to the idea that the New York judiciary should be the best it can possibly be. We believe that consensus is possible around the notion of qualifications commissions, and we are currently developing a process to involve political and party leaders and citizens in New York in a discussion on how such commissions are best composed.

RECOMMENDATIONS FOR AMENDING THE RULES OF THE CHIEF ADMINISTRATOR OF THE COURTS GOVERNING JUDICIAL CONDUCT

Judicial campaign activity is one of the most important means by which the public develops its opinions of the judiciary. In New York, such activity is governed by the Rules of the Chief Administrator of the Courts Governing Judicial Conduct (22 NYCRR § 100.0 *et seq.*) (the “Chief Administrator’s Rules”). We believe that changes to the Rules will help maintain the dignity of judicial elections and the integrity, impartiality and independence of the bench, and thereby promote confidence in the judiciary. In particular, we recommend: (1) that the Rules adopt commentary and in some instances give further guidance and clarification; (2) that the Rules’ current restrictions on campaign activity be amended to take into account recent case law dealing with candidates’ First Amendment rights; (3) that the Rules include specific disqualification provisions based on campaign activity and financial contributions; and (4) that the Rules define the integrity, impartiality and independence of the bench, and thereby promote public confidence in the judiciary.

Adopting Commentary to the Rules

Recommendation: The Chief Administrator's Rules should include commentary to give guidance and clarification.

Rules Governing Campaign Activity

Recommendation: The Chief Administrator's Rules' restrictions on judicial candidate speech should be limited to pledges or promises that are inconsistent with the impartial performance of the adjudicative duties of the office and statements that commit the judicial candidate with respect to cases, controversies or issues that are likely to come before the court.

Recommendation: The Chief Administrator's Rules should clarify that its speech restrictions on judicial candidates apply to sitting judges, as well as candidates for judicial office.

Recommendation: The commentary to the Chief Administrator's Rule governing speech restrictions on sitting judges should describe the Rule's significance, further define the contours of the Rules, and make judicial candidates aware of the New York State Advisory Committee on Judicial Ethics.

Recommendation: Commentary to the Chief Administrator's Rules should state that the speech restrictions included in the Rules are indispensable to the maintenance of the integrity, impartiality, and independence of the judiciary.

Recommendation: The Chief Administrator's Rules should include preserving the impartiality of the judiciary as a restriction on political activity.

Rules Governing Disqualification

Recommendation: The Chief Administrator's Rules should require disqualification where a party or counsel's contributions to a judge's campaign exceed a certain threshold.

Recommendation: The Chief Administrator's Rules should require mandatory disqualification where a judge has made a public commitment with respect to an issue or controversy in a current proceeding.

Recommendation: The Chief Administrator’s Rules should make disqualification discretionary where a judge appears to have made a public commitment with respect to an issue or controversy in a current proceeding.

Defining Impartiality, Integrity and Independence

Recommendation: Definitions of impartiality, integrity and independence should be included in the terminology section of the Chief Administrator’s Rules.

RECOMMENDATIONS FOR PROMOTING ETHICAL CAMPAIGN ACTIVITY

Campaigns are by their nature contentious affairs. Judicial candidates must constantly balance activity that will lead to victory with activity that is consistent with the integrity, impartiality and independence of the office. In addition, First Amendment considerations limit placing constraints on judicial candidates. The Commission offers one primary recommendation in this area.

Recommendation: The creation of the New York Judicial Campaign Ethics and Conduct Center.

The Center, based at the Office of Court Administration but independently operated, would have five primary functions.

- **Establish a mechanism under the auspices of the New York State Advisory Committee on Judicial Ethics to issue fast, reliable rulings on campaign conduct.**
- **Become a central resource for press and public inquiry on judicial elections.**
- **Create an electronic-based tool for researching judicial campaign conduct ethics opinions.**
- **Oversee and develop a campaign ethics course for candidates for judicial office.**
- **Make candidates for judicial office aware of bar association judicial campaign oversight committees.**

At the heart of these recommendations is the idea that any serious change in the conduct of judicial candidates—including those candidates who engage in the most offensive conduct and are most difficult to bring under any legitimate accountability system—involves voluntary compliance. While the boundaries are not clear as to what restrictions on judicial campaign conduct are permissible, the best solutions avoid the question. Getting ahead of the conduct, rather than sanctioning and prosecuting bad acts after they occur, is an important way to earn the public’s confidence in judicial elections.

RECOMMENDATIONS ON CAMPAIGN FINANCE DISCLOSURE

New York Election Law requires substantial campaign finance disclosure from judicial candidates. Candidates for New York State Supreme Court generally are required to file their reporting obligations electronically with the New York State Board of Elections (“NYSBOE”). Although this electronic filing by Supreme Court candidates has been a successful experiment, candidates for other levels of judicial office are not required to file electronically or even with the NYSBOE. The current system for these courts, filing paper reports at local boards of election, is essentially one of non-disclosure. Therefore, we make two overall recommendations regarding campaign finance disclosure.

Recommendation: Campaign finance disclosure filings for judicial candidates for all courts should be filed electronically and made publicly available in a searchable electronic format on a timely basis.

Recommendation: The content and format of judicial disclosure filings should be expanded and revised.

Transparency will promote confidence in the campaign finance system and timely public disclosure should be the basis of campaign finance law. It allows voters to evaluate candidates and enhances confidence in the elective system. The current system of nondisclosure is a hurdle to public understanding, and confidence cannot be built on a lack of understanding. New York should be among the leaders of the growing number of jurisdictions around the country that are making campaign finance information available on the Internet in a timely, accessible and inexpensive manner.

RECOMMENDATIONS ON CAMPAIGN EXPENDITURES

The Chief Administrator’s Rules recognize that judicial campaigns cost money to wage and that an array of judicial campaign expenditures is legitimate. Further, although the law generally prohibits judicial candidates from making political contributions of any kind, it includes a limited exception for purchasing tickets to politically sponsored functions. Despite the general prohibition, recent reports across the State allege that judicial campaign expenditures are used to direct money to political parties in return for party support. We recommend revising the rules for campaign expenditures to reassure the public that these expenditures are not channels for prohibited political contributions.

Recommendation: Limit the price that judicial candidates pay to attend political functions to the proportionate cost of attending.

Recommendation: Require that purchases of campaign related goods and services by judicial candidates represent reasonable fair market value.

We believe that allowing judicial candidates to pay only the reasonable fair market value for goods and services provided, whether signs or tickets to political functions,

strikes a fair balance between the need to wage a campaign and the risk that campaign expenditures become a conduit for passing money to political parties.

RECOMMENDATIONS ON VOTER EDUCATION

Voter education is critical to public confidence in judicial elections. Unfortunately, many New Yorkers are not well informed about the state judiciary. If knowledge is fundamental to confidence in the judiciary, New Yorkers' lack of knowledge cannot help but lead to a lack of confidence. The need for voter education about judicial elections in New York is indisputable, and one of the areas of greatest consensus among commentators is that voter guides are an effective way of educating the public about judicial elections. Therefore, we make the following recommendation for immediate action.

Recommendation: New York State should produce and distribute voter guides for judicial elections.

- **Voter Guides should be fully financed by the State and distributed to every household with a registered voter.**
- **Voter Guides should be distributed by mail in print form and available on the Internet.**
- **Voter Guides should serve a dual function of educating the public about the judiciary generally, and about specific judicial candidates.**
- **The voter guides should undergo periodic evaluations after distribution.**

These are our interim recommendations. They focus on what steps the Chief Judge, the Chief Administrator and the Administrative Board can take in the current social, political and economic environment. We have left medium and long-term recommendations on how to promote public confidence and voter participation in judicial elections to our final report. Among the issues we will continue to examine are public financing, judicial nominating conventions, non-partisan elections, voter education, retention elections, and enforcement of the judicial conduct rules and election law. We also expect to consider and incorporate comments on the recommendations of this Interim Report where appropriate.

We believe that the best way to foster public confidence in judicial elections is to ensure that voters participate and that they continue to produce an impartial, independent and well-qualified judiciary. These interim recommendations are the product of long deliberation among a politically, geographically, socially and professionally diverse group. While not every member agreed with every recommendation and some members disagreed with more than one recommendation, this report reflects the views of a substantial consensus of the Commission as to the best way to promote public confidence in judicial elections in the short term.

CANDIDATE SELECTION

Concerns over the way judicial candidates gain access to the general election ballot are at the forefront of discussions across New York State. Many of the witnesses who testified before the Commission addressed the issue of candidate selection. The media, non-profit organizations, politicians, citizens groups, academics and law enforcement agencies have all spoken out on the judicial candidate selection process. They have expressed concerns about many aspects of the process, including political party domination, judicial nominating conventions, cross endorsements, restrictions on campaign activity, and lack of voter participation. Testimony before the Commission, conversations with judges and political leaders, reports from non-profit groups across the political spectrum and media reports all suggest that New York voters have little say in who becomes their political party's candidate for judge.

In much of the State, becoming a particular party's candidate for a judicial position is tantamount to winning the election. Where one party dominates the voting public, which is true in many areas of New York State, candidates that appear on the dominant party ticket all but invariably win the election.

Testimony was given that although the party nod often secures victory, in many cases voters do not choose their party's candidate. For instance, Supreme Court elections do not involve primary elections. Instead, delegates select judicial candidates for the general ballot at a political party nominating convention. Delegates tend to be hand picked by political leaders. Even where primary elections exist, the party-supported candidates often run with little or no real opposition.

The result is that many New York State voters believe that they have little say in who is elected to a judicial seat. According to the Marist Poll, registered voters across the state believe that political parties and campaign contributors have more influence over who becomes a judge than voters. In what can be described as a vicious cycle, the perception of impotence feeds voter apathy. Indeed, two-thirds of New York's registered voters did not know that New York State Supreme Court Justices are elected to office. Judicial elections have exceptionally low participation rates. And even in elections where judicial races appear with executive and legislative races, voters who go to the polls often do not bother voting for judges.

The apathy suggests that either the voting public does not understand or does not respect the political process for selecting judicial candidates. Testimony before the Commission suggested that in many parts of the State that process is hidden from public view. Non-profit organization reports, media accounts and private conversations confirmed that the general public has no knowledge of how the decisions are made, much less access to the process.

Without a meaningful vote and knowledge of the process for selecting judges, the public will not have confidence in judicial elections, a conclusion strongly supported by the Marist Poll. It shows that significant numbers of New York registered voters think that minority populations receive worse treatment than the norm; 83% of the respondents

believe that campaign contributions influence judges' decisions; and 82% believe that political parties influence judges' decisions.

The Commission believes that an effective way to promote confidence in judicial elections is to create independent panels to pre-screen all candidates to ensure they are well qualified. Local politics and the election process would still play a highly important role in selecting among candidates, but the public would have confidence that all the candidates are well qualified to serve.

We heard from many witnesses and commentators who strongly support the idea of independent screening of judicial candidates. While they expressed different preferences on various details of the screening process, a consensus emerged on several characteristics: the screening process must be inclusive, rigorous and publicly known; screening panels themselves must be independent; and political parties must respect the screening process. Based on these principles, we make the following recommendation.

Recommendation: New York State should establish a system of state-sponsored Independent Judicial Election Qualifications Commissions to evaluate the qualifications of candidates for judicial office throughout the state. The commissions should be based on the following principles:

- **Each judicial department should have a commission.**

Each judicial department of the state should have at least one Departmental Independent Judicial Election Qualifications Commission to review judicial candidates. The commissions should have jurisdiction to consider the qualifications of candidates for election to courts of record in the department.

- **The commission members should reflect the state's great diversity.**

In selecting commission members, consideration should be given to the need to achieve broad representations of the community, including geographical, racial, religious, ethnic, political and gender diversity. Each member of a commission should be a resident of or maintain an office in the judicial department in which the member is to serve. In addition, when evaluating candidates for a court with less than statewide jurisdiction, a commission should include residents of the relevant jurisdiction appointed by a local authority. In every case, there should be a reasonable quorum requirement for conducting commission business.

- **The commissions should actively recruit candidates.**

Whenever there is an open judicial position to be filled by election, the commission chair for that department should broadly disseminate: public notice of the vacancy, the commission's procedure for evaluating prospective candidates, and the deadline for applying to the commission for evaluation. At the least, the chair should ensure that notice of the vacancy is given to the electronic and print media, bar associations, and any other persons and organizations that the commission or the chair deems appropriate. Notice should be designed to ensure that well-qualified candidates reflecting a diversity of the jurisdiction involved are encouraged to apply.

- **The commissions should publish a list of all candidates found well qualified.**

Each commission should consider the qualifications of any candidate proposed by any source, provided that the candidate completes a questionnaire, submits to an interview, and satisfies all other requirements of the commission. Commissioners should vote by secret ballot on whether a particular candidate is well qualified and the Commission should report out every candidate that it finds well qualified to serve. Political parties should not nominate or support a candidate for judicial office unless a commission finds that candidate well qualified.

- **The commissions should apply consistent and public criteria to all candidates.**

In considering whether a candidate is well qualified for judicial office, the commissions should strive for candidates with superior professional ability; good character and integrity; independence; reasonable decisiveness; a reputation for fairness, lack of bias and uprightness; good temperament including courtesy and patience; good mental stamina; and consideration for others. In addition, commissions should consider candidates' experience in the practice, administration, or teaching of law.

- **Member terms should be limited.**

Commission members should be eligible to serve for non-consecutive terms of three years in addition to appointment to any interim term of shorter duration, and should be eligible to serve an additional term only after a one-year interim period. The initial terms should be staggered to expire as evenly as possible over the course of the succeeding three calendar years.

- **Uniform rules should govern commission proceedings and its members' conduct.**
- **Commissions should have the necessary resources to fulfill their functions.**

Each commission should have sufficient resources, including paid staff, to enable it to properly carry out its responsibilities.

Perhaps the most important characteristic of any screening body is independence. For the commissions, independence of the members is critical, but so is the independence of the appointing authorities. Any system of appointing members to the panels must be multi or non-partisan, and the commission members must be independent of the appointing authority. Many witnesses and commentators offered suggestions on how to best ensure independence and we incorporate their advice. The authorities that appoint commissioners and the commission members themselves should reflect the diversity of New York State, including geographical, racial, religious, ethnic and gender diversity, and no one source should be able to dominate the commission. Membership terms should be limited.

We expect that the uniform rules will further protect and encourage the independence of the commissioners. At a minimum, the rules should provide that commission members are not appointed as instructed representatives of the appointing authority and are obligated to guard and exercise their independence, and that while serving on the commission, members should not support any candidate for judicial office.

The rules should also provide for the strict confidentiality of all commission business.

The screening process must be inclusive as well as independent. We recommend that the commissions broadly disseminate public notice of any vacancy and that the notice include all the relevant information necessary for applying for evaluation. Further, the commission should actively encourage qualified candidates from a cross-section of the jurisdiction to apply. Members should reach out to their communities and encourage candidates they believe are qualified to apply. Anyone or any organization should be able to propose a candidate, including candidates themselves. The commissions should include guarantees of objective evaluation, such as clear, consistent and public criteria for evaluating candidates and a requirement that commissions report out all well-qualified candidates to encourage non-traditional candidates to apply.

Diversity is critical among commission members as well as candidates, and it will encourage candidates from all sectors of society to apply. Community makeup, including geographical, racial, ethnic, religious, political and gender diversity should be an important factor in appointing commission members. Commissions should include non-lawyers and local members, and every member should live or work in the department in which the commission sits.

Political party participation is necessary for the commissions to succeed. Several political leaders testified before the Commission that they supported the idea of independent screening panels, and one commented that he believed that the best candidates would come out of such a process. Whether in a local or Supreme Court race, political parties should not designate, nominate or support candidates for judicial office that a commission has not found well qualified. To do so would be to allow a candidate that is not qualified to serve as a judge, and party leaders would be violating the trust of their constituency and their responsibility to the judicial institution. In every case, public confidence would suffer.

An effective screening process requires that clear, consistent and public criteria be applied to every candidate. Such criteria will encourage qualified applicants to apply and dispel the notion that candidate selection is an insider's game. The Commission reviewed judicial evaluation criteria used by organizations across the country, and several witnesses testified as to what characteristics are important in a judge. Certain characteristics are consistently used and we believe that the commissions should incorporate them. They include superior professional ability; good character and integrity; independence; reasonable decisiveness; a reputation for fairness, lack of bias and uprightness; good temperament including courtesy and patience; good physical and mental stamina; and consideration for others. In addition, we believe that professional experience is an important factor in evaluating candidates.

The Commission strongly believes that the qualifications commissions should not replace local rating systems. Witnesses at the Public Hearings established that bar associations, civic organizations and local political party ratings help voters choose between well-qualified candidates. Indeed, local groups are in a much better position to determine which candidate would be the best one. The commissions should only be concerned that all candidates appearing on the ballot are well qualified. Therefore, they should employ a single rating system that applies statewide: either a candidate is well

qualified or not. All candidates found well qualified should be reported out and local processes should determine who is the best candidate for that jurisdiction.

Perhaps the greatest consensus among witnesses at the public hearings was that the screening process must be rigorous. We recommend that every commission require candidates to complete and submit a detailed and thorough questionnaire at the outset of the screening process. Several witnesses from bar associations offered excellent questionnaire examples as addenda to their testimony. Commissions should also investigate every candidate, including conducting background and qualifications checks. Finally, every candidate should appear in person before the commission for an interview. Only then would a commission be able to meaningfully evaluate a candidate.

To ensure proper attention to every applicant, each commission should have the necessary resources to carry out its function. Primary among those resources is staff. We recommend that each commission have an executive director who will be responsible for the administration of the commission, including coordinating investigations, ensuring that appointed commissioners met the qualifications, recruiting and administering confidential voting. We also suggest that there be a statewide executive director with responsibilities to coordinate the functions of the departmental commissions.

Finally, the qualifications commissions can serve a vital voter education function. The voter guides called for in this Interim Report should include a description of the commissions' role and process, the criteria they apply to candidates, and the significance of the rating system. As importantly, the voter guides should prominently list the commissions' objective ratings of candidates. Armed with objective evaluations and an understanding of the evaluation process, voters will be able to select candidates well qualified to serve as judge.

We believe that the independent judicial election qualifications commissions will promote public confidence in judicial elections. Their success will depend on participation from many different segments of society. But if there was one thing that encouraged the Commission's work over the past six months more than any other, it was the common dedication among everyone we met to the idea that the New York judiciary should be the best it can possibly be. We believe that people will be able to rally around the notion of qualifications commissions and carry with them the great tide of public opinion.

CAMPAIGN ACTIVITY

Judicial elections nationwide have grown more contentious and partisan. New York has been fortunate to date not to have experienced some of the problems prevalent in other states, but it has seen its own share of problems arising out of judicial elections. In many parts of the state, judicial campaign conduct that erodes public confidence in an impartial and independent judiciary.

Judicial campaign activity is an important means by which the public develops its opinions of the judiciary. Candidates for judicial office publicly campaign; they advertise their candidacy, raise funds, speak to voters, and attend political functions. All of these activities are subject to public scrutiny and should be carried out in a way that maintains public confidence in the integrity, impartiality and independence of the judicial office.

The Commission sees two areas in which changes to judicial candidate campaign activity can help promote public confidence in judicial elections: enhancing the rules governing judicial conduct taking into account recent case law involving the First Amendment and dealing with the role of financial contributions, and promoting campaign activity that fosters confidence in the judiciary. We recommend amending the Rules of the Chief Administrator of the Courts that govern judicial conduct (22 NYCRR § 100.0 *et seq.*) (the “Chief Administrator’s Rules”), and expanding existing resources to help promote judicial campaign conduct consistent with the integrity, impartiality and independence of the office.

AMENDING THE RULES GOVERNING JUDICIAL CONDUCT

In New York, the Chief Administrator’s Rules govern judicial campaign activity. Rule 100.5(A) directly applies to all candidates for election to judicial office, whether the candidate is an incumbent judge, lawyer or layperson, and other sections apply indirectly to campaign activity. We recommend changes to the Rules that we believe will help maintain the dignity of judicial elections and the integrity, impartiality and independence of the bench. In particular, we recommend (1) that the Chief Administrator’s Rules include commentary that clarifies and gives guidance; (2) that the Rules’ restrictions on campaign activity be amended to reflect the balance that the Supreme Court struck in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002); (3) that the Rules include strong disqualification provisions based on campaign activity and financial contributions to help dispel the appearance of partiality; and (4) that the Rules define the integrity, impartiality and independence so essential to the judiciary. Appendix C to this Report includes a more complete version of the rules that we propose to change.

Adopting Commentary to the Rules

Recommendation: The Chief Administrator’s Rules should include commentary to give guidance and clarification.

Commentary to the Chief Administrator's Rules will clarify certain Rules and provide greater guidance to judicial candidates. For example, the commentary to Rule 100.2, which broadly proscribes that a judge shall avoid impropriety and the appearance of impropriety in all activities, would now include examples of such proscribed activities. Additionally, including commentary in the Rules is not a new notion. The New York Code of Judicial Conduct adopted by the New York State Bar Association includes commentary, as does the ABA Model Code of Judicial Conduct. And many states include commentary along with their rules of judicial conduct. New York's Lawyer's Code of Professional Responsibility embraces the use of commentary through its ethical considerations.

The commentary accompanying the Code of Judicial Conduct adopted by the New York State Bar Association should be the basis for the commentary to the Chief Administrator's Rules. See McKinney's Judiciary Law, Book 29, Code of Judicial Conduct 2003 Pocket Part. The Commission's recommendations suggest certain revisions to that commentary.

Rules Governing Campaign Activity

Since the U.S. Supreme Court decision in *White*, states have had to change their notions of what restrictions on judicial campaign activity are consistent with the First Amendment to the U.S. Constitution. The Court in *White* addressed the balance between free speech and states' interest in an independent and impartial judiciary. While the Court's decision did not reach New York's Rules on judicial campaign conduct specifically, it clearly raised questions as to whether they would withstand strict scrutiny. We reviewed the existing restrictions in light of the *White* decision.

The Commission appreciates that there is a healthy balance between protected speech and New York's interest in the integrity, independence and impartiality of its judiciary. The Supreme Court's message is that judicial candidates' political speech enjoys strong protection under the federal constitution. And the New York Court of Appeals pointed out in two recent decisions that New York has a compelling interest in an impartial and independent judiciary. See *In re Raab*, 793 N.E.2d 1287, 763 N.Y.S.2d 213 (2003), and *In re Watson*, 794 N.E.2d 1, 763 N.Y.S.2d 219 (2003). The American Bar Association recently adopted changes to its Model Code of Judicial Conduct in an attempt to strike the proper balance, and several states followed suit by amending their own codes. Several witnesses and commentators testified at the Public Hearings regarding where the balance between free speech and New York's interest should lie. Even the most zealous advocates for free speech, however, recognized that allowing judicial candidates the unfettered ability to make pledges or promises regarding issues and controversies that they may hear as a judge would impair public confidence in the impartiality and independence of the judiciary.

Recommendation: The Chief Administrator’s Rules’ restrictions on judicial candidate speech should be limited to pledges or promises that are inconsistent with the impartial performance of the adjudicative duties of the office and statements that commit the judicial candidate with respect to cases, controversies or issues that are likely to come before the court.

Although the *White* decision dealt with a clause not included in the Chief Administrator’s Rules, the Supreme Court’s concerns affect the Rules’ speech restrictions. The Minnesota “announce clause” prohibited candidates from announcing their views on disputed legal or political issues. The New York Rules do not include the announce clause, but Rules 100.5(A)(4)(d)(i) and (ii) do restrict judicial candidates’ speech. While the Court in *White* did not address these provisions, commonly known as the pledges and promises clause and the commit clause, it did express concern over the breadth of candidate speech restrictions. In that light, the Chief Administrator’s Rules should be only as broad as is necessary to protect the state interest in the integrity, impartiality, and independence of the judiciary. Therefore, we recommend that Rule 100.5(A)(4)(d)(i) and (ii) be revised to read as follows.

(4) A judge or a non-judge who is a candidate for public election to judicial office:

* * * *

(d) shall not

(i) make pledges or promises of conduct in office that are inconsistent with the impartial performance of the adjudicative duties of the office;

(ii) make statements that commit the candidate with respect to cases, controversies or issues that are likely to come before the court;

The Commission’s recommendations with respect to Rule 100.5(A)(4)(d)(i) and (ii) track closely the language that the ABA adopted earlier this year for its Model Code of Judicial Conduct. The ABA Committees’ Report to the House of Delegates that accompanied the recommendations provides the rationale behind the changes.

The new wording of the provision provides a clear enumeration of the restricted speech (“with respect to cases, controversies or issues that are likely to come before the court”) and a clear statement of what is being protected by the restriction of this speech (“inconsistent with the impartial performance of the adjudicative duties of the office”).

This form of the Rule accords with the Supreme Court’s decision in *White* by clarifying the restrictions. No longer is a judge or judicial candidate’s speech restricted by

the vague category of statements that *appear* to commit. Only those statements that *actually* commit a judge or candidate with respect to cases, controversies or issues that are likely to come before the court are prohibited. Our language deviates slightly from the ABA-adopted language in that we recommend that the pledges and promises clause and the commit clause be set forth in separate subsections. We believe that both will withstand strict scrutiny, but should they be challenged, keeping them in separate clauses requires that each be analyzed separately.

The adopted commentary to Rule 100.5(A)(4)(d) currently cross-references Rule 100.3(B)(9). If the Commission's recommendations are adopted, the commentary reference should read as follows.

See also Sections 3(B)(8) and (9), the general rules on public comment by judges.

The Commission recommends that the Chief Administrator adopt a new Rule 100.3(B)(9) that addresses judges' ability to speak on certain matters. To be consistent, that Rule should be included in the commentary to Rule 100.5(A)(4)(d) that references restrictions on sitting judges' speech.

Recommendation: The Chief Administrator's Rules should clarify that its speech restrictions on judicial candidates apply to sitting judges, as well as candidates for judicial office.

The speech restrictions that the Chief Administrator's Rules impose on judicial candidates serve to maintain the integrity, impartiality and independence of the judiciary and it is critical that they apply to both sitting judges and candidates. The Supreme Court in *White* expressed concern that restrictions on the speech of judicial candidates only are a "woefully underinclusive" remedy. The Court was concerned that the restrictions Minnesota placed on judicial candidates did not apply to a candidate before the candidacy period, even if that candidate was a sitting judge running for re-election or another bench. Therefore, we recommend that the following addition become the new Rule 100.3(B)(9) and the remainder of Rule 100.3(B) be re-sequenced.

(9) A judge shall not:

(a) make pledges or promises of conduct in office that are inconsistent with the impartial performance of the adjudicative duties of the office;

(b) make statements that commit the judge with respect to cases, controversies or issues that are likely to come before the court.

The recommended addition to the Rules makes explicit what was implicit before,

that the Rule restricting judicial candidates from making inappropriate pledges, promises and commitments applies to sitting judges as well. The language mirrors the speech restriction on candidates embodied in the revised Rule 100.5(A)(4) and is substantially similar to the 2003 ABA amendments to the Model Code of Judicial Conduct.

Recommendation: The commentary to the Chief Administrator’s Rules governing speech restrictions on sitting judges should describe the Rule’s significance, further define the contours of the Rules, and make judicial candidates aware of the New York State Advisory Committee on Judicial Ethics.

We recommend that the adopted commentary to Sections 100.3(B)(8) and (9) be revised to read as follows.

The restrictions in paragraphs (B)(8) and (9), like all other provisions of this Code, are essential to the maintenance of the integrity, impartiality, and independence of the judiciary. A pending proceeding is one that has begun but not yet reached its final disposition. An impending proceeding is one that is reasonably foreseeable but has not yet been commenced. The requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition. *However, the New York State Advisory Committee on Judicial Ethics has opined that a judge within the confines of a college or university classroom, while teaching a regular class to students who are part of a regular course of study in criminal justice, may comment on a relevant case mentioned in published textual course materials that is pending outside of the Judge’s general jurisdiction in another state (Op. 95-105). A judge also may participate as a panelist at a judicial seminar open only to judges and comment on “issues that are being discussed [that] may soon come before a judge” (Op. 01-41). There are of course many other educational fora in which comment on pending or impending cases by judges might be expected. While such comment may be appropriate in some limited instances, as non-public comment in nature and effect, judges contemplating participation as speakers in such venues would be best advised to consult with the Advisory Committee on Judicial Ethics (Unified Court System, 25 Beaver Street, NY, NY 10004) before engaging in such speaking activities. Having done so, the actions taken by a judge who follows the Committee’s written advice “shall be presumed proper for the purposes of any subsequent investigation by the state commission on judicial conduct” (Judiciary Law, Sec. 212{1})*

{iv}). A judge should not be influenced by the potential for personal publicity when making decisions in pending cases. Release of decisions to the media or notifying the media that the decision is available before counsel for the parties have been notified may be embarrassing or prejudicial to the private rights of the litigants. Filing an opinion with the clerk's office does not constitute release of the decision to the media. Paragraphs (B)(8) and (9) do not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity, but in cases such as a writ of mandamus where the judge is a litigant in an official capacity, the judge must not comment publicly. The conduct of lawyers relating to trial publicity is governed by DR 7-107 of the Code of Professional Responsibility.

The revisions to the commentary serve several functions. The first sentence makes clear that Rule 100.3(B)'s restrictions on speech are necessary for the compelling state interest of maintaining the integrity, impartiality and independence of the judiciary. Making the statement the first sentence in the commentary reaffirms the importance of the notion that the restrictions are essential. The second and third sentences clearly define the types of proceedings covered by Rule 100.3(B)(8). These additions are substantially the same as those adopted by the ABA in its 2003 amendments to the Model Code of Judicial Conduct, although in the interest of greater clarity we recommend a definition of impending proceeding that uses a reasonably foreseeable standard.

Discussing New York State Advisory Committee on Judicial Ethics opinions in the commentary highlights both the contours of Rule 100.3(B)(8) and the role of the Advisory Committee. The Advisory Committee has opined that a judge may be able to comment on pending or impending cases not before her or him in certain circumstances. Giving examples in the commentary helps judicial candidates understand the limits of the Rule. The Commentary also informs judicial candidates that the Advisory Committee stands ready to assist them if they are unsure of their responsibilities under the Chief Administrator's Rules and that the Committee's opinions offer the judge some protection from discipline. Equally important, the Commission's availability to offer guidance and interpretation to judges and candidates in specific situations should make the rules much less vulnerable to constitutional attack on the grounds of vagueness.

Recommendation: Commentary to Chief Administrator's Rules should state that the speech restrictions included in the Rules are indispensable to the maintenance of the integrity, impartiality, and independence of the judiciary.

Rule 100.2(A) provides that "a judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." At least one court has found that the provisions in Rule 100.2 are unduly vague. See *Spargo v. Commission*, 224 F. Supp. 2d 72 (N.D.N.Y. 2003).

Therefore, we recommend the following addition to the first paragraph of the commentary to Rule 100.2.

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. Examples are the restrictions on judicial speech imposed by Rules 100.3(B)(8) and (9) that are indispensable to the maintenance of the integrity, impartiality, and independence of the judiciary.

The addition to the commentary clarifies the rule. Adding a specific example of what restrictions Rule 100.2(A) contemplates gives candidates guidance as to what is permissible and impermissible conduct. It also makes clear that the speech restrictions in 100.3(B)(8) and (9) serve to promote the integrity, impartiality and independence of the judiciary and public confidence in it. The recommended language is substantially the same as adopted by the ABA in its 2003 amendments to the Model Code of Judicial Conduct.

Recommendation: The Chief Administrator's Rules should include preserving the impartiality of the judiciary as a restriction on political activity.

The current Rule 100.5(A)(4)(a) properly includes preserving the integrity and independence of the judiciary as restrictions on a judicial candidate's campaign activity. Judicial integrity and independence are compelling state interests and should act as restrictions on a judicial candidate. As the New York Court of Appeals pointed out in *In re Watson*, 794 N.E.2d 1, 763 N.Y.S.2d 219 (2003), impartiality is a compelling state interest too. It also should act as a restriction on judicial candidates' campaign activity. Therefore, we recommend that Rule 100.5(A)(4)(a) be revised as follows:

(4) A judge or a non-judge who is a candidate for public election to judicial office:

a) shall maintain the dignity appropriate to judicial office and act in a manner consistent with the *impartiality*, integrity and independence of the judiciary, and shall encourage members of the candidate's family to adhere to the same standards of political conduct in support of the candidate as apply to the candidate;

Rules Governing Disqualification

The current Rules require disqualification of a judge from a particular matter whenever the judge's impartiality may be reasonably questioned. Rule 100.3(E)(1). It is important to note that the Rule's objective standard emphasizes the importance of the appearance of impartiality. A candidate's activity, including campaign activity, can give rise to reasonable questions about his or her impartiality once the judge takes the bench. In particular, certain campaign contributions and speech may raise reasonable questions about a judge's ability to carry out judicial responsibilities impartially. Therefore, we recommend that the Rules be amended to require a judge's disqualification from a case based on campaign contributions and speech.

Recommendation: The Chief Administrator's Rules should require disqualification where a party or counsel's contributions to a judge's campaign exceed \$500.

One of the most problematic areas for public confidence in judicial elections is campaign contributions. Several witnesses at the Public Hearings testified to the problematic nature of having judges raise money from the lawyers that appear before them. Commentators around the country attribute the erosion of public confidence in elected judiciary to campaign contributions. The Marist Poll strongly supports these opinions. It indicates that 87% of the registered voters in New York State believe that a judge should not be allowed to hear or rule in cases when one of the parties has given money to the judge's campaign. Further, 83% of the respondents thought that campaign contributions had some or a great deal of influence on judges' decisions. These results are consistent with polls conducted across the country both on state and national levels.

To address this problem, the full scope of which we continue to study, the Commission recommends at this time the adoption of a new Rule 100.3(E)(3) that would require a judge's disqualification where a party or its counsel has made campaign contributions to the judge during the immediately preceding 5 years of more than \$500.

(3) Pursuant to 22 NYCRR 1200.45(e), immediately upon assignment of a matter to a judge, the parties and their counsel shall disclose any campaign contributions made to the judge. In the event that contributions in excess of \$500 have been made in the past five years to the judge's campaign by a party or counsel to the party, the judge shall disqualify himself or herself upon timely application made by a party who has made no contribution to the campaign. This subdivision shall not preclude disqualification based on Rule 100.3(E)(1) with respect to contributions less than \$500 in amount or made more than five years before the assignment of the matter to the judge.

The Commission also recommends the adoption of the following commentary to the new Rule 100.3(E)(3).

Campaign contributions are an unavoidable aspect of our system of judicial elections. This subdivision acknowledges that fact, while requiring first, that full disclosure be made of any campaign contributions and secondly, requiring recusal in the event of campaign contributions in excess of a certain threshold. To avoid abuse of this section, it is intended that only the party that has not made a campaign contribution may make a disqualification application. Nothing in this rule speaks to the question of attribution of contributions by individual members of an entity, nor does the Rule prevent a party from bringing a disqualification motion for any other reason, including campaign activity by a lawyer or party on behalf of a judge as a judicial candidate.

In conjunction with the new Rule 100.3(E)(3) governing judicial conduct, the Commission recommends the adoption of a new attorney disciplinary rule.

22 NYCRR 1200.45: Avoiding even the appearance of impropriety.

* * * *

(e): A lawyer shall disclose to all parties to a proceeding any contributions the lawyer or the lawyer's firm has made and any contributions that the lawyer knows the client has made to a judge's campaign immediately upon the assignment of a matter to the judge. See 22 NYCRR 100.3(E)(3). The lawyer shall be liable for any costs and fees, including attorneys' fees, that result from the lack of timely disclosure.

While campaign contributions are an integral part of running for elected judicial office, the Commission recognizes that there is a point at which a campaign contribution to a judge may create an appearance of impropriety in the public eye. The new rule requires mandatory disqualification where, in the preceding five years, a party or lawyer has contributed to the judge's campaign in excess of \$500. The rule cannot be used offensively, *i.e.*, a party cannot move for disqualification on the basis of his or her own contribution. Litigants may still move for a judge's disqualification under the existing rule 100.3(E)(1) regardless of the amount or timing of a campaign contribution or activity. Under that rule, a judge is required to disqualify him or herself whenever the judge's impartiality might reasonably be questioned.

Disclosure of campaign contributions is an important element of the proposed new rule. Elsewhere the Commission recommends making all campaign finance disclosures,

including campaign contributions, publicly available on the Internet. Such disclosure would allow lawyers and parties to quickly discover who has made campaign contributions, for example, to a judge's most recent campaign. The Commission further recommends the adoption of an attorney disciplinary rule that requires lawyers to immediately disclose campaign contributions when they appear before a judge. Attorneys who violate the rule would be subject to professional discipline and liable for any costs and fees resulting from their violation. The burden of disclosure should not fall on judges. Judges are not permitted to solicit campaign contributions personally and many judges are careful to remain uninformed about who contributes to their campaigns. Requiring a judge to disclose campaign contributions would force the judge to discover and repeatedly revisit who contributed and in what amount, and that is a practice that itself could adversely affect public confidence.

Recommendation: The Chief Administrator's Rules should require mandatory disqualification where a judge has made a public commitment with respect to an issue or controversy in a current proceeding.

When a judge publicly commits him or herself with regard to an issue or controversy, the judge's impartiality is called into question when that issue or controversy later comes before that judge. Such a prior statement suggests that the judge has predetermined the issue or controversy. No matter how the judge rules, the specter of the prior statement will raise a question of his or her ability to be impartial in the proceeding—if the judge is consistent with the prior statement, the public may well suspect the judge predetermined the issue and if the judge changes his or her position, the public may well suspect that the judge did so to dispel any questions of impartiality. Additionally, where a judge publicly commits on an issue and later changes his or her position, the public may believe that the original statement was disingenuous and that the judge lacks the integrity required of the office. Therefore, we recommend the following addition become Rule 100.3(E)(1)(f) and the remainder of Rule 100.3(E)(1) be re-sequenced.

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

* * * *

(f) the judge, while a judge or while a candidate for judicial office, has made a public statement not in the judge's adjudicative capacity that commits the judge with respect to

(i) an issue in the proceeding; or

(ii) the controversy in the proceeding.

To avoid the appearance of partiality, this new rule requires disqualification where a judge's prior speech has committed the judge to a position on an issue or controversy in a particular proceeding. We modeled the Rule's language on the disqualification standard

adopted in the 2003 ABA amendments to the Model Code of Judicial Conduct. Additional language makes clear that a judge's public statements made in an adjudicatory capacity are not subject to this rule.

Recommendation: The Chief Administrator's Rules should make disqualification discretionary where a judge appears to have made a public commitment with respect to an issue or controversy in a current proceeding.

The previous recommendation addresses when a judge has publicly committed with respect to an issue or controversy that comes before the judge. Many of the same concerns arise even when a judge only appears to have committed him or herself with respect to a controversy or issue in a proceeding before the judge. Therefore, we recommend the following addition become Rule 100.3(E)(2) and the remainder of Rule 100.3(E) be re-sequenced.

(2) Upon application by a party or attorney for a party, a judge may disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, where the judge has made statements that appear to commit the judge, under the same circumstances and with respect to the same matters, as set forth in subdivisions (E)(1)(f)(i) & (ii).

When a judge only appears to commit on an issue or controversy the challenge to the judge's ability to be impartial is less clear, and so is the balance between a judge's duty to hear a case and the duty to disqualify him or herself. As importantly, an "appears to commit" standard may be vague. To avoid unnecessary disqualifications and a vague standard, the new rule gives a judge discretion to disqualify him or herself from a proceeding where a prior statement only appears to commit the judge.

Defining Impartiality, Integrity and Independence

Recommendation: Definitions of impartiality, integrity and independence should be included in the terminology section of the Chief Administrator's Rules.

Impartiality, integrity and independence are terms used throughout the Chief Administrator's Rules, and Rule 100.0, the terminology section, should include clear definitions of them. In *White*, the U.S. Supreme Court noted that the term "impartiality" as defined in the Minnesota Code of Judicial Conduct was ambiguous. The Court offered several possibilities but did not know which one the Code intended. Impartiality should be defined in the Rules so that no such confusion exists about New York's interest in judicial impartiality, integrity and independence. Therefore, we recommend the addition of the

following definitions to Chief Administrator's Rule 100.0, the Terminology section.

“Impartiality” denotes absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge.

An “Independent” judiciary is one free of inappropriate outside influences or control.

“Integrity” denotes probity, fairness, honesty, uprightness and soundness of character. “Integrity” also includes a firm adherence to this Code and its standard of values.

Further, we recommend the additions of the definitions of integrity and independence to the commentary to Chief Administrator's Rule 100.1.

Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depends in turn upon their acting without fear or favor. *The term integrity as applied to the judiciary refers to judges known for their probity, fairness, honesty, uprightness, and soundness of character. An independent judiciary is one free of inappropriate outside influences or control.* Although judges should be independent, they must comply with the law, including the provisions of this Code. Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violation of this Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law.

Although integrity and independence are currently discussed in the commentary to New York's Code of Judicial Conduct, the definitions should be in the Rules' Terminology section. The language that the Commission recommends is the same as that which the ABA recently adopted for its Model Code of Judicial Conduct. We believe that the language is narrowly tailored to meet New York's compelling state interest in an impartial and independent judiciary. The definitions also belong in the commentary to Rule 100.1, “A Judge Shall Uphold the Integrity and Independence of the Judiciary.” Incorporating them into the commentary reiterates that the concepts of integrity and independence are critical to a judiciary that fosters public confidence. Again, the Commission's recommendation is consistent with the recommendation adopted by the ABA in 2003 for its Model Code of Judicial Conduct.

PROMOTING ETHICAL CAMPAIGN ACTIVITY

Campaigns are by their nature contentious affairs. Judicial candidates constantly must balance activity that will lead to victory with activity that is consistent with the integrity, impartiality and independence of the office. In addition there are important First Amendment considerations that limit placing government mandated constraints on judicial candidates.

Recommendation: The creation of the New York Judicial Campaign Ethics and Conduct Center.

The Commission offers the recommendation that the New York Judicial Campaign Ethics and Conduct Resource Center (the “Center”) be created. This Center would address two fundamental and pressing needs in our aim to improve public perception regarding the election of judges in New York State.

This Center would allow for one-stop shopping for all judicial candidates who want to be assured that their conduct is within the bounds of the spirit and letter of the law as defined by the Chief Administrator’s Rules. Fast and predictable non-partisan advice would be easily available during judicial election season utilizing the resources of the Unified Court System (“UCS”), and specifically the Advisory Committee on Judicial Ethics (the “Advisory Committee”). Since 1987, the Advisory Committee has provided over 3000 written opinions to judges and judicial candidates on what campaign activity is permissible under the Chief Administrator’s Rules. The Center should be associated with the UCS, which should provide sufficient funding and personnel so that the Center is assured the resources necessary to fulfill its mandate.

As importantly, the Center would be a place for the public, the press and others to get basic questions answered about the judicial election process. It is important that the Center be seen as independent in its thinking about judicial elections, and, in fact, have involved with it, committed, creative lawyers and non-lawyers who are knowledgeable and informed about the judicial process.

To accomplish this mandate we suggest that the Center have an Advisory Board that is comprised of 10 members, appointed by the Chief Judge of the State of New York. These members should be a cross section of business leaders, academics, and individuals familiar with communities across the State, and should include retired judges and at least one member of the working press. The Board would be responsible for choosing, subject to the advice and consent of UCS, an executive director responsible for managing the Center and working with the Advisory Committee on Judicial Ethics. While the executive director should be an employee of the UCS, the Board should have oversight of the executive director’s work.

Specifically, the Commission recommends that the Unified Court System establish this Center and that its functions should include the following:

- Publicize the importance of high standards in judicial campaign conduct.

- Provide information regarding judicial elections to the candidates, public, media and educators.
 - Disseminate information regarding the Center's role.
 - Distribute ethics information to all candidates for judicial offices.
 - Publish an ethics newsletter.
 - Develop and present seminars to judicial candidates on campaign ethics.
 - Maintain a statewide toll-free hotline to immediately respond to candidate questions regarding their own campaign activity.
 - Establish and maintain a Subcommittee of the existing Advisory Committee to give written responses, within 48 hours, to questions that the hotline cannot answer.
 - Create and maintain a website of all published opinions of the Advisory Committee.
- **The Center should establish a mechanism under the auspices of the New York State Advisory Committee on Judicial Ethics to issue fast, reliable rulings on campaign conduct.**

The first goal of the Center is to provide quick and effective guidance under the auspices of the Advisory Committee to judicial candidates on their campaign conduct. The Center's candidate response function has two dimensions. The first is a statewide toll-free hotline staffed with people available to answer judicial candidates' campaign activity questions. Year-round staffing for the Center would be necessary to maintain the hotline but the Center would also need additional staffing during judicial campaign periods. The goal of the hotline staff would be to respond to each caller having an ethics question. Responses would include 1) permissible, including Advisory Committee on Judicial Ethics opinion citations where available, 2) impermissible, again including citations where available, or 3) unsettled legal issue. Staff would maintain a log identifying the caller, setting forth the question and the answer, and fax a copy of the log entry to the caller at the conclusion of the call.

The second dimension of the candidate response function would be a newly formed Conduct Subcommittee that would have the ability to respond to judicial candidate questions where the hotline response is that the legal issue is unsettled. The Advisory Committee should appoint five Subcommittee members. The Subcommittee would be charged with responding within 48 hours to questions referred to it, and three of the five members could act on a request. Where an applicant follows the Subcommittee advice, there should be a rebuttable presumption that protects the individual caller from professional discipline, but the advice should not have precedential value. Only Advisory Committee opinions should establish precedent. (22 NYCRR Part 101.3 should be amended and updated to reflect the Committee's current practice, including the practice that the Committee provides advisory opinions to all judicial candidates, not just to judges

and justices.)

The second goal of the Center is presenting its services to judicial candidates and publicizing ethical judicial campaign practices and their importance to candidates, the press, educators and others. We suggest several ways that the Center can meet this goal. It should broadly disseminate information about its role and resources, including to all boards of election, political party chairs and sitting judges across the state. The Center should distribute packets that include information about its role to every judicial candidate, the Advisory Committee's Judicial Campaign Ethics Handbook and a guide to researching judicial ethics opinions (to be developed). The Center should also develop an ethics newsletter and circulate electronic updates to the judiciary and judicial candidates. Furthermore, the Center should develop and present seminars to judicial candidates on campaign ethics.

At the heart of this proposal is the idea that any serious change in the conduct of judicial candidates—including those candidates who engage in the most offensive conduct and are most difficult to bring under any legitimate accountability system—involves voluntary compliance. Although the boundaries are not clear as to what state restrictions on judicial campaign conduct are permissible, the best solutions avoid the question. The Center provides a resource for all judicial candidates and the public to understand what constitutes ethical campaign activity and why it is important. Getting ahead of the conduct and allowing the marketplace of ideas to work, rather than sanctioning and prosecuting bad acts after they occur, is a better way to regain the public's confidence in judicial elections.

- **The Center should create an electronic-based tool for researching judicial campaign conduct ethics opinions.**

The Center under the direction of the Executive Director should be charged with developing a website and electronic database that hold all 3000 plus opinions of the Advisory Committee. These opinions encompass a broad variety of topics, including opinions on judicial campaign conduct, and have the potential of providing important guidance on ethical issues. Although the campaign activity conduct opinions are a discrete and easily identifiable sub-class within the Advisory Committee's opinions, the opinions are difficult to access and to search. The goal of this recommendation is to produce a user-friendly, high-tech tool for researching the Advisory Committee's opinions addressing judicial campaign activity. The Advisory Committee recently made a major step in this direction by publishing a judicial campaign conduct handbook that summarizes its opinions on frequently asked questions. We believe that a permanent research tool should be created so candidates for judicial office can easily access all opinions, including new ones. Accordingly, we recommend the creation of a user-friendly, high-tech tool for researching the Advisory Committee's ethics opinions regarding judicial campaign conduct. The tool should include the following features.

- It should be available both electronically and in hard copy.
- It should be available via the Internet and CourtNet (the UCS Intranet).
- It should include a separate index system for judicial ethics opinions involving judicial campaign conduct.

- It should be updated and maintained by the Center.

Categories for the index should be based on Section 100.5 of the Chief Administrator's Rules. Category titles should reflect straightforward concepts, *e.g.*, campaign literature and attending political functions; and next to each category the index should indicate the rule from which the category was derived. The number of categories should be limited to 15 with a maximum of 40 subcategories. The Advisory Committee on Judicial Ethics or the Judicial Campaign Ethics and Conduct Center should develop the index and it should be no more than five pages in length.

We recommend that the web-based research tool be premised on this index. The tool should be available on CourtNet and the Internet. It should present the index with links under each category to a list of all opinions in that category, listed by subcategory and including short descriptions of the opinions' holdings. The tool should divide the descriptions into "permissible actions" and "impermissible actions" categories. Each description should include the opinion's year and number highlighted (multiple opinions with the same holding should be listed under one description). The highlighted year and number should have a link to the full opinion. Further, the index page should include a search engine that permits a user to search for a specific opinion by title or opinion year and number.

Although the research tool should be web-based, we appreciate the need for versions in other formats as well. We recommend that the entire tool be available in hard copy and the index and descriptions be available in a CD version that provides links from the ethics opinion description to the full opinion on the CourtNet and Internet site and to the hard copy volume citation. Additionally, the CD version should indicate that a user can call the Judicial Campaign Ethics and Conduct Center to obtain copies of opinions.

Once developed, a copy of the CD version of the index should be provided to all boards of election and all judicial candidates. The research tool and CD should be updated yearly and all versions of the research tool should make multiple references to the Center and Advisory Committee on Judicial Ethics, indicating that candidates can address judicial campaign ethics questions to the Center via a toll-free telephone number.

- **The Center should oversee and develop campaign ethics courses for candidates for judicial office.**

Another role of the Center will be administering a required ethics course for candidates for judicial office. An important part of running an ethical campaign is knowing what ethical campaign activity is. With all the pressures of a political campaign, candidates may not be fully aware of their obligations under the Rules. Therefore, we recommend that the following rule be added to the Chief Administrator's Rules as Rule 100.5(A)(4)(f).

(4) A judge or a non-judge who is a candidate for public election to judicial office:

* * * *

(f) shall complete an educational program, either in person or by videotape or by internet correspondence course, developed or approved by the judicial campaign ethics and conduct resource center within 14 days after receiving the nomination or 90 days prior to receiving the nomination for judicial office. The date of nomination for candidates running in a primary election shall be the date upon which the candidate files a designating petition with the Board of Elections. This provision shall only apply to candidates seeking selection for or retention in public office by election for a full time judgeship in the Unified Court System.

Requiring a course in judicial campaign ethics ensures that every candidate understands what constitutes ethical behavior and why it is important. Testimony before the Commission and private discussions suggested that judicial candidates want to abide by ethical campaign standards. We expect that informing candidates as to what those standards are and why they are important will go a long way toward preventing ethical violations. The courses can promote ethical campaign conduct by ensuring that candidates for judicial office understand the importance of the role of judicial ethics, their ethical obligations under the Rules of Judicial Conduct, their campaign finance disclosure obligations, what resources are available to them with respect to campaign conduct issues, the existence of the Commission on Judicial Conduct and its authority to discipline a successful candidate for ethical violations during the campaign, and that the New York Lawyers Code of Professional Responsibility requires lawyers running for judicial office to comply with both the Code of Judicial Conduct and the Chief Administrator's Rules with respect to judicial campaign activity.

The judicial campaign ethics and conduct center should have the responsibility for designing and conducting the course. The Center's mandate and its close working relationship with the Advisory Committee make it uniquely able to provide the most up-to-date and comprehensive information available. Courses should be available in live, electronic and video formats so that candidates from around the state can easily complete them, and the course should be open to all candidates for any judicial office in the state. As an incentive for lawyer candidates, the completion of the course should earn continuing legal education credits.

- **The Center should make candidates for judicial office aware of bar association judicial campaign oversight committees.**

Based on testimony at the public hearings, the Commission continues to consider whether there is a need for a state-sponsored judicial campaign oversight authority. We recommend, at the least, that the Unified Court System make candidates for judicial office aware of existing bar association judicial campaign oversight committees that review complaints about campaign activity in judicial races and privately mediate resolutions to controversies. Although local committees are not available in every part of the state, we note that the New York State Bar Association has created a Special Committee on Judicial

Campaign Monitoring to address areas not presently covered by local committees. We plan to continue to study ways that the bar association judicial campaign oversight committees may be more uniform and effective.

CAMPAIGN FINANCE

Running for judge in New York State can be an expensive undertaking. A single Surrogate Court race in 2000 involved more than a half million dollars in campaign funds and between 1999 and 2001, one candidate for Supreme Court raised more than \$223,000 and nine others raised more than \$150,000. Many factors go into the high cost of judicial campaigns. For instance, in judicial districts covering large geographic areas, expensive television advertising is considered the most effective way to campaign, and any campaign can incur substantial costs through direct mailing, hiring political consultants, printing costs and many other ways. While campaigning incurs legitimate costs, the presence of so much money can raise the opportunity for corruption.

Raising and spending money in judicial campaigns can have an adverse effect on public confidence in judicial elections. The need to raise substantial amounts of money breeds concerns about a judge's independence from campaign contributors. According to the Marist Poll, 83% of New York registered voters believe that campaign contributions have some or a great deal of influence on judges' decisions. Further, in New York where political party support is crucial to a successful campaign, campaign money flowing from a judicial candidate to political parties raises concerns about a quid pro quo. Allegations that campaign money is being used to buy political support have been on the rise recently. Perhaps driven by those accounts, registered voters believe political leaders and campaign contributors have more influence on who becomes a judge than voters do.

The Commission offers recommendations that we believe will promote public confidence in two areas of campaign financing, and consequently promote confidence in the judicial election system. First, we recommend more open, accessible and timely campaign finance disclosure. Second, we recommend tightening the restrictions on campaign expenditures by judicial candidates.

CAMPAIGN FINANCE DISCLOSURE

New York Election Law requires substantial campaign finance disclosure from judicial candidate campaign committees. Committees typically do the reporting because judicial candidates themselves may not personally solicit campaign contributions, they must form committees to raise campaign funds. The committees must file at least three reports for each election and have to report separately any extraordinary contributions or loans received late in the election cycle. In addition to the election reports, the committee must file semi-annual disclosure reports throughout its existence. All receipts, disbursements and loans must be disclosed with detailed documentation. Additionally, committees must continue to report all loans so long as they remain outstanding and report repayments.

Candidates for New York State Supreme Court generally are required to file their reporting obligations electronically with the New York State Board of Elections ('NYSBOE'). NYSBOE makes the information available on its website as soon as practicable and the public has access to it via a database posted on the NYSBOE website. The website allows the public to do limited searches for specific information. For

instance, the public can search for disclosure statements by selecting the Supreme Court candidate, and then the candidate's authorized committee, the statement filed, and the schedule.

Candidates for other levels of judicial office are not required to file electronically or with the NYSBOE. Of the judicial seats filled by election in New York State, 85% are required to file their disclosure statements on paper with their local boards of elections. They are required to file on the same forms, and provide the same disclosure, as Supreme Court candidates, but they do so on paper forms in most of the 63 local boards of elections in New York State. Of those local boards, the Commission knows of only one that allows judicial candidates to file their financial disclosure statements electronically and permits limited public search access online. That program is voluntary and few candidates participate.

The electronic filing of campaign finance reports by Supreme Court candidates has been a successful experiment. Despite the limitations of the NYSBOE database, the Commission found the ability to research campaign finance disclosure information fast and efficient compared to the paper filing system in effect before 1997. Witnesses at the Commission's public hearings testified that access to campaign finance information on the Internet in a searchable format has simplified what had been a time consuming and difficult process. Unfortunately, the paper filing system lingers for candidates for judicial office other than the Supreme Court. The Commission believes that a transparent and accessible campaign finance disclosure system will promote public confidence in judicial elections. Indeed, according to the Marist Poll, 65% of New York's registered voters agree. Therefore, we make the following recommendations.

Recommendation: Campaign finance disclosure filings for judicial candidates for all courts should be filed electronically and made publicly available in a searchable electronic format on a timely basis.

Filing judicial campaign finance disclosures on paper in local boards of election makes access to the information unnecessarily difficult. At the Commission's request, the Committee for Modern Courts sent interns to local county boards of election to assess the accessibility of campaign finance information. They found a lack of uniformity in the access to candidate campaign finance disclosure filings. Moreover, requesting and reviewing the filings was a cumbersome process. For example, although some filings were submitted electronically, the interns were unable to review those filings through a computer. Instead, the process involved filling out a form pursuant to the Freedom of Information Law (FOIL) to request paper files. Furthermore, in some instances the interns were informed that they could only request and review one candidate's file at a time. Other times they had to await the presence of an observer before they could review files. Their complete findings are contained in the Committee for Modern Courts September 2, 2003 Memorandum to the Commission, attached as Appendix D. It suggests that the present system is essentially one of non-disclosure.

Public hearing witnesses highlighted the irony that the judicial races that are often the most visible—those for local seats—are the ones for which the information is the most difficult to unearth. Obtaining paper filings for local judicial races is typically much more confusing and time consuming than for a Supreme Court race. Often filings at local boards of election are in disarray or missing important disclosure statements, and trying to cross reference contributions and contributors can be almost impossible. While the information may be at the local board, all the disclosure in the world is worthless unless people can get to it.

The Commission believes that electronic filing will benefit candidates and others required to file; the public and press; and aid the audit and enforcement functions; academic study and evaluative research. Electronic filing is a boon from the perspective of an entity or person required to file. Properly administered electronic filing requires a single filing that can be posted to the appropriate website or e-mailed to the proper authority from a computer anywhere. Under the current system, filers may need to file several copies of the same disclosure report in several locations. For example, county committees must file with their respective county boards of elections, but they must also file a copy of any reports showing support for a candidate for Justice of the Supreme Court with the NYSBOE. Given the serious penalties and consequences for failing to file required financial disclosure statements, being required to make a single filing can avoid trouble. Further, a sophisticated software program, like that used by the New York City Campaign Finance Board, allows candidates to keep track of contributors and can alert the filer when contribution limits have been exceeded.

The public and the press also benefit from electronic filing. The Committee for Modern Courts Memorandum and testimony from newspaper editors made clear that the current system discourages even persistent interns and reporters from obtaining information. Beyond the need to physically visit a local board of election, members of the public must wait for the relevant files to be located and produced. In some cases, only one candidate's file was available at a time. Many filings were in disarray, incomplete or illegible. Copies of files require written requests and can be expensive, and some offices lacked adequate table space or chairs to view statements on premises. Requiring electronic filing and timely posting the information on the Internet would cure many of these problems by allowing the public and media to access information immediately from their homes or offices and download the information that they need for free.

Electronic filing will allow for effective auditing and enforcement of judicial campaign finance disclosure. The New York State Comptroller's Office recently expressed concern over potentially serious enforcement lapses at the local boards of election and recommended requiring local campaign committees to electronically file their financial disclosure data at the state level. Unfortunately, the NYSBOE does not believe it currently has the authority to require such filing, even though it acknowledges that establishing a single source for all campaign financial disclosure would provide "truly meaningful" financial disclosure. Given the NYSBOE limitations, we believe that the Office of Court Administration or some entity answerable to the OCA should be the destination for electronic campaign finance disclosure and the authority responsible for making the information publicly available over the Internet. The Commission stands ready to help identify an acceptable process.

Electronic filing promotes meaningful academic study and evaluative research. Academics and researchers report that among the major obstacles in compiling judicial campaign finance information is erratic record keeping by state agencies. In describing an effective disclosure system, researchers focus on timing, accessibility, cost and format. Unfortunately, New York is not among the forerunners in this area—our disclosure ranked 25th in a 50-state ranking by the California-based California Citizens Voter Foundation. Electronic filing can vastly improve our position by providing inexpensive, timely, effective, and accessible information.

Electronic filing of judicial campaign finance disclosure has great potential but it must be thoughtfully done. Several witnesses noted that information in electronic format can be inaccessible too. Indeed, the current electronic filing system for Supreme Court races is better than paper filing in local boards of election, but it could be greatly improved. It is limited by both the format of the information provided and the content of the database. The current database construction has limited searching ability. Much of the information is stored in a non-searchable format, hence viewing expenditures across a single candidate or multiple candidates is cumbersome and the contribution information search function is inflexible. Further, the information storage method makes downloading information difficult. The database is also limited by the information it does not contain. For instance, it does not provide the occupation or the name of the employer for any contributor or information on “intermediaries” (those who deliver the contribution of others to the candidate). Therefore, the Commission makes the following recommendation.

Recommendation: The content and format of judicial disclosure filings should be expanded and revised and Internet access should be improved.

- Judicial disclosure filings should provide the occupation and the name of the employer for any contributor, as well as information on intermediaries;
- The user should be able to download disclosure information for a particular candidate, rather than having to download all disclosures filed for the desired period;
- The disclosure information should be readily accessible and searchable by computer over the Internet in a wide variety of ways;
- Contribution information should be searchable by date or range of dates, rather than by an entire filing year;
- Contributions should be searchable by particular amounts specified by the user, rather than by a predetermined range of amounts;
- The public should be able to search by subcategories of type of contributor, for example, family, candidate, spouse, candidate committee, political party committee, political action committee, limited liability company, or union;
- The database should be able to sort contributions by transaction date, or across candidates and contributors;
- There should be the ability to search expenditures by payee (*e.g.*, by consultant or

publicist), by purpose code (*e.g.*, radio ads) across candidates or committees, or by subcontractor;

- There should be a summary report for each candidate or committee that provides a running total for the year of contributions and expenditures, rather than requiring the user to add up each category every time a report is filed;
- There should be a capability by the agency to aggregate data for enforcement purposes.

Transparency will promote confidence in the campaign finance system. Timely, public disclosure should be the basis of campaign finance law. It allows voters to evaluate candidates and gives them confidence in the elective system. One witness before the Commission characterized the current inaccessibility of campaign finance information as a hurdle to public understanding. Confidence cannot be built on a lack of understanding. New York should be among the leaders of the growing number of jurisdictions around the country that are putting campaign finance information on the Internet where it is timely, accessible and inexpensive part of a meaningful enforcement scheme.

CAMPAIGN EXPENDITURES

A reality of any election system is that competing costs money. Judicial candidates are required to make campaign expenditures to inform voters of their qualifications and why they deserve a vote. The current rules recognize this and allow judicial campaign expenditures for media advertisements, brochures, mailings and candidate forums and other means not prohibited by law. 22 NYCRR § 100.5(A)(5). Although the law generally prohibits judicial candidates from making political contributions of any kind, it includes a limited exception for purchasing tickets to and attending politically sponsored dinners and other functions.

Recent reports have dealt a blow to public confidence in judicial elections by alleging that judicial candidates are using campaign expenditures to direct money to political parties in turn for party support. We recommend revising the rules for campaign expenditures to reassure the public that these expenditures are not channels for prohibited political contributions.

Attending Political Functions

New York has a general rule that judicial candidates cannot contribute money or any thing of value to a political organization or candidate other than him or herself. New York Election Law explicitly prohibits judicial candidates from directly or indirectly making political contributions. N.Y. Elec. Law § 17-162. The current Rules of the Chief Administrator of the New York Courts also prohibit a judge or non-judge candidate for judicial office from “making a contribution to a political organization or candidate,” other than in support of one’s own candidacy for judicial office. 22 NYCRR § 100.5(A)(1)(h). The New York Court of Appeals explained the reason for the prohibition:

The contribution limitation is intended to ensure that political parties cannot extract contributions from persons seeking nomination for judicial office in exchange for a party endorsement . . . It also diminishes the likelihood that a contribution, innocently made and received, will be perceived by the public as having had such an effect.

In re Raab, 100 N.Y. 2d 305, 315-316, 763 N.Y.S.2d 213, 218 (2003).

As an exception to the general prohibition against political contributions, a judge or non-judge who is a candidate for public election to judicial office may currently purchase two tickets to politically sponsored events. The “two-ticket” exception is limited to the judicial candidate’s election cycle or “Window Period” as defined in Chief Administrator’s Rules, 22 NYCRR § 100.0(Q).

During the Window Period . . . a judge or non-judge who is a candidate for public election to judicial office, except as prohibited by law, may . . . (v) purchase two tickets to, and attend, politically sponsored dinners and other functions, even where the cost of the ticket to such dinner or other function exceeds the proportionate cost of the dinner or function.

22 NYCRR § 100.5(A)(2)(v).

While seemingly innocuous, this exception has been identified as a loophole that could defeat the purposes of the contribution limit rules. In effect, it allows judicial campaigns to serve as channels for money to flow to political parties and their favored candidates, thereby greatly diminishing confidence in the elected judiciary (see Marist Poll, Appendix B).

The wisdom of allowing judicial candidates to purchase tickets to political fundraisers has been publicly challenged for at least three decades. The last major study of judicial elections in New York State, the 1988 *Becoming a Judge Report* of the New York State Commission on Government Integrity, found that the exception was being used to channel large sums of money to political organizations, and some judges felt pressured to buy tickets and believed that the practice was linked to the political party support that was critical to gaining office. Recent media accounts from across the state detail judicial candidates directing large amounts of money to political fundraisers for organizations and candidates. The Commission compared public campaign financing records with selected media accounts and found the reports to be credible and not limited to a single part of the state. Further, several witnesses at the public hearing suggested that the two-ticket exception is problematic around the state because it acts to pressure judges into buying tickets to political functions. Based on this information, the Commission makes the following recommendation.

Recommendation: Limit the price that judicial candidates pay to attend political functions to the proportionate cost of attending.

During the Window Period . . . a judge or non-judge who is a candidate for public election to judicial office, except as prohibited by law, may:

(v) purchase two tickets to, and attend, politically sponsored dinners and other functions, provided that the cost of the ticket to such dinner or other function 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 \$125 or less. A candidate may not pay more than \$125 for a ticket unless he or she obtains a statement from the sponsor of the dinner or function that the amount paid represents the proportionate cost of the dinner or function.

The Commission recognizes that attendance at political events is a legitimate campaign activity for judicial candidates. It is at such functions that judicial candidates are able to meet and discuss their candidacies and qualifications with political leaders, party committee members and political activists who can be influential supporters and important resources for the judicial campaign. Depriving judicial candidates of these opportunities would significantly impair the legitimate efforts of judicial candidates to garner support and may even run afoul of their constitutional rights as political candidates.

At the same time, a review of selected races throughout the State and a study of media reports indicate that there is reason to believe that judicial campaigns in New York State are often perceived as conduits, passing donations from lawyers and the candidates themselves into the coffers of political parties or their selected candidates. The two-ticket exception can be a vehicle through which this occurs because it allows judicial candidates to contribute to political parties and other candidates through the purchase of fundraiser tickets, a practice that would be impermissible but for the exception.

We feel strongly that any solution to the problems raised by the two-ticket exception should not create additional difficulties for those candidates who seek judicial office without the blessing of party leaders. For instance, prohibiting judicial candidates and their campaigns from purchasing tickets to political dinners, thereby allowing them to attend such events only as guests of the sponsor, could disadvantage certain candidates. Such a provision would empower political leaders to provide an advantage to their favored candidates by inviting only the favored candidates to an event. Non-favored candidates would be at a distinct disadvantage, not having the same access to meet, and possibly to gain support from, the party officials, committee members and activists who attend the event.

The solution must focus on the problem, *i.e.*, the potential use of politically

sponsored dinners and other functions to pass judicial campaign funds to political parties. Although the current two-ticket limitation addresses this problem by limiting a candidate to purchasing two tickets to any event, its effect can be easily defeated. The rule allows judicial candidates to purchase tickets to multiple events benefiting either the same or related political organizations, and in some cases, ticket prices can run more than \$1,000. Further, in those parts of the state where the nomination of a political party is tantamount to election, the present rule does not prohibit judicial candidates from raising funds and attending such events after they have received the nomination.

We believe that our recommended rule strikes a balance between allowing judicial candidates to seek support at political functions and preventing the exception from swallowing the general rule that judicial candidates cannot contribute to political organizations. Maintaining the two-ticket exception allows judicial candidates to seek the political support necessary to run for office because it allows candidates and their designees to attend political dinners or other functions so long as they do not pay more than the cost of their attendance. As long as the price a candidate can pay is restricted to the cost of attending, there is no threat that the two-ticket exception will be used for otherwise illegal contributions to a political organization or candidate. The rule recognizes the multitude of local, casual political functions that many candidates attend during the Window Period by requiring sponsors to verify that the ticket price represents the proportionate cost of the attendance only when candidates pay more than \$125 for a ticket.

Expenditures for Campaign Services

A variety of sources, including law enforcement, allege that political consultants have billed judicial candidates for work they never did and that candidates have been pressured to use a party's preferred purveyor. The Commission is not in a position to independently verify the accuracy of the reports but finds troubling that the basis for the claims are sometimes statements of the candidates themselves. Because such allegations can diminish public confidence in the elective process, we make the following recommendation.

Recommendation: Require that purchases of campaign-related goods and services by judicial candidates represent reasonable fair market value.

- **The Chief Administrator's Rules should be amended to clarify that no candidate for public election to judicial office may permit the use of campaign contributions or personal funds to pay for campaign-related goods or services for which fair value was not received.**
- **The restriction should be supported by a prohibition on the payment for any campaign-related goods or services of more than \$500 except on the basis of a written statement from the provider identifying the goods or services provided and attesting that the amount charged represents the reasonable fair market value of the goods or services provided.**

Running for elective office requires expenditures and judicial office is no

exception. The cost of organizing and maintaining an election campaign can be significant and includes expenditures for television and radio advertising, mailing, travel, forums, press releases, printed materials and myriad other details. The Commission heard testimony that an effective campaign can cost from \$125,000 to \$200,000 in some parts of the State. Many of the campaign expenditures are legitimate expenses that go to service providers such as political consultants, printers, and mailing houses. Further, we understand that the reasonable fair market value of goods and services varies depending on many circumstances.

We believe that requiring individuals or organizations to certify that the amount they charge judicial candidates for goods or services represents reasonable fair market value will help promote public confidence in judicial elections. A written statement is an unobtrusive way of reminding candidates and goods and service providers of the limitations on judicial campaign expenditures.

VOTER EDUCATION

Voter education is critical to public confidence in judicial elections. Knowledge about the specific candidates and judiciary in general gives people the information they need to make informed choices between candidates.

Unfortunately, many New Yorkers are not well informed about the state judiciary. Whatever the cause, even New York registered voters lack fundamental knowledge about the court system and the selection of judges. The Marist Poll showed that 65% of New York's registered voters did not know that Supreme Court Justices are elected, and 48% did not know that judges of the Court of Appeals are appointed. Even when the voters participate in selecting judges, they are often not well informed about the specific candidates. In the same poll, 58% of registered voters listed a lack of knowledge about the candidates as the main reason they would not vote in a judicial election. According to another survey, 75% of New York voters could not recall the judges they had voted for as they left the polling area.

Knowledge is fundamental to confidence in the judiciary, and New Yorkers' lack of knowledge cannot help but lead to a lack of confidence. Registered voters in New York believe that campaign contributors and political leaders have more influence on who becomes a judge than voters. According to the Marist Poll, 83% of voters think campaign contributions have some or a great deal of influence on judges decisions, and voters think that political leaders and campaign contributors have more influence over who becomes a judge than voters do. The same poll shows that more voters think elected judges are doing a "just fair" or poor job than are doing a good or excellent job.

Another manifestation of the lack of confidence is borne out in low voter participation in judicial elections. While voter participation in New York is low, it hits its lowest point in judicial elections, with only 17% of registered voters casting a ballot for judge in some areas of the State. Without a high profile executive or legislative race to draw voters, voter turnout at judicial elections is typically among the lowest. Even when voters do go to the polls, many do not bother to cast a ballot for judicial candidates, they simply vote in the more familiar races. The phenomenon, known as voter roll off, reaches as much as 41% in parts of the state.

The need for voter education about judicial elections in New York is indisputable. Lawyers, academics, non-profit representatives and lay witnesses at the Public Hearings all concurred that voter education is a critical part of fostering public confidence and voter participation. They expressed concerns that voters lack the necessary information to make intelligent choices and referred to both voters' and judges' concern with the vacuum. Academic literature and reports from non-profit organizations and government groups consistently call for voter education efforts to promote confidence and participation in judicial elections.

One of the areas of greatest consensus among commentators is that voter guides are an effective way of educating the public about judicial elections. Many witnesses at the Public Hearings strongly supported the idea of voter guides as a way of increasing voter participation. The Marist Poll showed 88% of New York voters believed that voter guides

are a useful way to inform them about judicial elections, and surveys from states already providing voter guides show that voters value the guides and use them. While voter guides inform the public about individual candidates, they are also valuable sources of information about the judiciary and the court system. An educated public is more likely to vote in judicial races because they will understand the importance of judicial elections and be able to distinguish between candidates. Therefore, we make the following recommendation.

Recommendation: New York State should produce and distribute voter guides for judicial elections.

- **Voter Guides should be fully financed by the State and distributed to every household with a registered voter.**
- **Voter Guides should be distributed by mail in print form and be available on the Internet.**
- **Voter Guides should serve a dual function of educating the public about the judiciary, generally, and about specific judicial candidates.**
- **The voter guides should undergo periodic evaluations after distribution.**

New York State should fully finance voter guide production and distribution. State funding ensures that sufficient resources are available to produce and distribute the voter guides every election cycle. The cost of producing and administering a guide is not prohibitive—thirteen states already produce and distribute guides. Although additional costs are involved, they are a small price to pay to ensure confidence of the people in their judiciary. State sponsorship of the voter guides is also important because it carries the imprimatur of impartiality and neutrality. Further, New York already dedicates resources to developing the information that should be included in a judicial voter guide, such as general information about the judiciary, maps, sample ballots, etc., and state sponsorship would insure that work is not duplicated. While the State should guarantee funding, it should also investigate cost saving measures such as a federal franking privilege and the availability of federal monies to subsidize the cost of the guide.

Every registered voter's household should receive a voter guide in print form via the U.S. mail. Mailing is the best way to ensure that all registered voters receive the guides. In addition, mailings should be supplemented by additional forms of distribution that are coordinated with bar associations, community groups and other governmental offices for maximum outreach. The voter guides should be available on the Internet. Even though a significant portion of the population does not yet have access to the Internet, on-line voter guides are an inexpensive way to disseminate information. In all cases, voter guides should be available in other languages to meet the minimum requirements of the Voting Rights Act.

Voter Guides will serve a dual function of educating the public about the judiciary generally and about specific judicial candidates. They are an excellent opportunity to inform registered voters about the court system in New York State, including the role of

the judiciary, the judicial selection processes, terms of office, and other relevant data. Of course, guides should include information about individual candidates, such as educational and occupational background, party affiliation, professional background and any community service. We also strongly recommend that personal, unedited statements from the candidates be solicited.

We recognize that significant questions about voter guide implementation remain unanswered. For instance, whether the guides should include non-judicial candidates, what kinds of information should be included, and the geographic breakdowns for guide versions. The Commission can address these questions during the course of its mandate, but measures should be put in place to take over that function once the Commission's work is done. Part of that function should be periodically evaluating the voter guides.

CONCLUSION

This is the Commission's Interim Report, representing what we believe is the best way forward in the short term. Our work is ongoing and we will continue to examine issues such as public financing, judicial nominating conventions, non-partisan elections, voter education, retention elections, and enforcement of the judicial conduct rules and election law. In our final report, we expect to present medium and long-term recommendations and to incorporate comments on the recommendations of this Interim Report where appropriate.

The membership of this Commission is large, representing every judicial district in the State. We all share one thing in common and that is admiration for the judiciary of New York State—its important role, its long and noble history, and for the thousands of men and women who serve it faithfully with the utmost of integrity. They serve as judges, full-time and part-time, as court employees and in administrative positions. We also share in common the view that we can never let up in our efforts to protect and enhance the judiciary, be it state or federal. Our recommendations today are designed to do precisely that, to anticipate and avoid problems, promote greater understanding of the courts and assure that candidates for judicial positions are always well qualified and that the processes from which they come operate in a way that promotes public confidence.