



PROMOTING “MERIT” *in* MERIT SELECTION

A BEST PRACTICES GUIDE *to* COMMISSION-BASED JUDICIAL SELECTION



Released by the U.S. Chamber Institute for Legal Reform, October 2009

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he quality of justice in our state courts is of critical importance to the entire business community.

For this reason, the U.S. Chamber Institute for Legal Reform seeks to contribute to the judicial selection discussion by focusing on an area that should not be overlooked: the “best practices” for nominating and appointing judges in merit selection states.

Missouri put the first merit selection system in place in 1940 in response to charges of corruption and machine politics in the selection of judges in that state. Merit selection, sometimes even referred to as “the Missouri Plan,” is a process whereby a commission (hereafter the Commission), gubernatorially appointed and ideally recommended by a committee independent of the governor or his office, evaluates potential judicial candidates and makes recommendations to an appointing authority, usually the governor. Merit selection advocates stress the method’s emphasis on professional qualifications rather than political influence. Yet, the Missouri Plan has shown over time that it is far from immune to becoming politicized. As a Missouri judge noted in a 1997 article in the *Missouri Law Review*, “the partial failing of the Missouri Plan as it currently exists arises from a selection and retention method that can be exclusive, secretive and political.” Hon. Jay A. Daugherty, *The Missouri Non-Partisan Court Plan: A Dinosaur on the Edge of Extinction or a Survivor in a Changing Socio-Legal Environment?*, *Missouri Law Review*, p. 11, Spring 1997.

The U.S. Chamber Institute for Legal Reform examined the various state merit selection practices for fairness, effectiveness and independence. Arizona leads the nation with the procedures it has put in place to fulfill the promise of true nonpartisan “merit” selection. This document describes what we believe are the “best practices” that have come from the writings of legal experts in this area and from the real-world Arizona experience.

The best practices for appointing judges to a state’s supreme and intermediate appellate courts suggested in this document are largely drawn from the sources listed below. Where no attribution appears, the content should be attributed to the U.S. Chamber Institute for Legal Reform.

- Arizona Judicial Selection System as it applies to its five-seat Supreme Court and its two Courts of Appeals, as described in the Arizona Constitution, Article 6; *Arizona Uniform Rules of Procedure for Commission on Appellate and Trial Court Appointments*; and *Arizona’s Merit Selection System: Improving Public Participation and Increasing Transparency* by Hon. Ruth V. McGregor, *Syracuse Law Review*, (2009). (AZ)
- American Judicature Society, *Model Judicial Selection Provisions* (2008). (AJS)
- American Bar Association, *Standards on State Judicial Selection*, July (2000). (ABA)
- *Massachusetts Judicial Selection Code of Conduct* as found in Massachusetts Executive Order 470 (No. 03-3) February 3, 2006. (MA)

PREAMBLE

Millions of Americans turn to or are drawn into U.S. courts every year. According to the National Center for State Courts, 97 percent of the cases are handled by state judges. The procedures that determine how state judges are selected and placed on the bench, particularly those in the highest courts, are central to the ultimate quality of justice in our courts. Every American has a stake in the way state judges are chosen. Some states that select their judges through a commission-based appointive system have been criticized for the absence of public input into the process, lack of transparency, secretiveness in their procedures, and the political cronyism that can occur when commissions and the governor operate in what is essentially a closed system. Other commission-based appointive states have adopted practices that address these criticisms. They are characterized by transparency, diverse participation in the Commission, and opportunities for the public at large to provide input into the process.

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BEST PRACTICES *for the* SELECTION PROCESS

I. THE COMMISSION: SELECTION *of* MEMBERS, SIZE, COMPOSITION *and* ADMINISTRATION

- The process for declaring an interest in serving on a Commission should be open and accessible. (AJS) Vacancies and opportunities to serve on the Commission should be widely publicized.
- Lawyer members should be nominated by the executive board of the state bar and presented to the governor for his appointment. These nominations should be public. (AZ)
- Non-lawyer members should be appointed by the governor with the advice and consent of the state senate through a sizable (e.g., nine-member) non-attorney committee (no more than half-plus-one of the membership being from either political party). This committee should accept and solicit candidates, review their qualifications and advance the names of all applicants with the committee's recommendations to the governor. Again, the names and recommendations should be public. (AZ)

- The governor should make the appointments to the Commission with the advice and consent of the state senate. In making appointments to the Commission, the governor, the senate and the state bar should endeavor to see that geographic distribution and demographic diversity are achieved. (AZ)
- The Commission should be comprised of either 12 or 15 members, two-thirds of them non-lawyers. The chief justice of the state supreme court should also be a member (that is, a 13th or 16th member), serving as chair but voting only to break a tie. The Commission should be bi-partisan, no more than half (or half plus one) of either the lawyer members or the non-lawyer members being of the same party. Members other than the chief justice should serve staggered four-year terms. (AZ)
- All resources necessary to carrying out the Commission's official duties should be provided, including: staff, equipment and materials, and orientation and continuing education of members. (AJS)

“...it is imperative that merit selection systems not simply hide the politics behind the closed doors of a Commission but drive out destructive influence through a system that is transparent and accessible to the public.”

COMMENTARY: The original purpose of using a commission-based merit selection system was to reduce the politicization of the judiciary system. As such, it is imperative that merit selection systems not simply hide the politics behind the closed doors of a Commission but drive out destructive influence through a system that is transparent and accessible to the public. The Commission should be a credible, deliberative, bi-partisan body. (ABA)
Credibility is crucial. The components of credibility consist of a process for appointing commissioners that is above political

partisanship, a carefully considered proportion of lawyer members to non-lawyer members, balanced representation of the political parties, geographic and demographic diversity, published criteria and procedures by which merit will be determined and assurances that the deliberative body will be independent. (ABA)

Retired U.S. Supreme Court Justice Sandra Day O'Connor, who began her judicial career in the state of Arizona, emphasizes that her home state has worked hard to ensure a cross-section of participants in its selection process by carefully choosing an independent process focused on bipartisanship and diversity. Further, O'Connor notes the requirement that more than half of Arizona's Commission members are non-lawyers. (See Sandra Day O'Connor, RonNell Andersen Jones, *Reflections on Arizona's Judicial Selection Process*, *Arizona Law Review*, p. 7, 2009.) Substantial non-lawyer participation in a Commission is central to its effectiveness. The American Judicature Society has addressed this issue in some detail: "Requiring more non-lawyers than lawyers enhances public participation in the process. Lay members represent the public and have useful links to the community when screening and investigating applicants, and their non-legal perspective lends the process credibility and legitimacy in the eyes of the public." (AJS, p. 2)

If a Commission is to fulfill its mandate, essential services must be made available. These services should include: necessary staff support for screening and investigating applicants; staff to coordinate Commission travel, meetings, conference calls and candidate interviews; office services; and any other necessary support that assures the Commission receives timely assistance. (AJS)

II. CODE *of* CONDUCT *for* COMMISSIONERS

- The Commission should have written ethical and procedural rules. A copy of the rules should be given to all judicial applicants and made available to the public. (AJS)
- Having Commission members take an oath of office should be considered. (AJS)
- Commission members, or “commissioners,” should disclose to the Commission all current or past personal and business relationships with a prospective applicant. In addition to disclosure, commissioners should recuse themselves from the room during discussions concerning any applicant who is their current business or law partner, and any applicants whom the commissioners believe they are incapable of considering impartially. They should refrain from voting on any such applicants. (MA)
- A Commission should not act unless a quorum exists. (AJS)
- After the Commission transmits to the governor the names of the applicants it is nominating, no commissioner should attempt, directly or indirectly, to influence the decision of the governor or the governor’s advisory staff. (MA)

“The Commission should have written ethical and procedural rules.”

COMMENTARY: The use of written, uniform rules reassures the public and potential applicants that the process is designed to treat all applicants equally and to nominate the best qualified persons. (AJS) The Commission rules should explicitly address, for example, situations that pose a conflict of interest to a commissioner. (AJS) In light of the importance of the Commission's role in judicial selection, more than a simple majority of Commission members should participate in the Commission's deliberations and decision making. (AJS) (In 2006 Massachusetts Governor Mitt Romney issued Executive Order 470 (No. 03-3) containing a code of conduct for members of the Massachusetts Judicial Nominating Commission that implemented several of the provisions described above.)

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III. EDUCATION *of* COMMISSIONERS

- Upon becoming a member of the Commission, each new member should receive a formal orientation to include written and oral briefings.
- Every two or three years, there should be an educational program for commissioners in which the mission of the Commission and its policies and procedures are thoroughly reviewed.

COMMENTARY: It is important that commissioners have the opportunity periodically to step back from their work to assess what they are doing and how they are doing it. (AJS)

IV. QUALIFICATIONS *of* JUDICIAL CANDIDATES

“A candidate’s merit should be the primary criterion for selection.”

- A candidate’s merit should be the primary criterion for selection. Judicial selection criteria should include experience, integrity, professional competence, judicial temperament and service to the law. (ABA) Candidates should also have respect for the rule of law.
- Geographic and demographic diversity should be considered. (AZ)
- The selection criteria should be disclosed to the public. (ABA)
- The state should adopt age, residency and bar membership requirements for judicial candidates.
- The Commission may recruit qualified individuals to apply for judicial appointment. The Commission should carefully review the applications and investigate the applicants’ qualifications. It should interview candidates whom it might nominate. (AJS)
- A minimum of three candidates should be nominated to the governor. If only three candidates are nominated, no more than two may be of the same political party. If more than three are nominated, no more than 60 percent may be of the same political party. (AZ)

COMMENTARY: Disclosure of selection criteria is essential; it familiarizes the citizenry with the judicial selection procedure and thus diminishes the perception of personal or political bias in the selection of judges. (ABA)

V. TRANSPARENCY *and* PUBLIC PARTICIPATION

- An open process is essential. The Commission should hold at least two public meetings to consider applicants for any vacancy. At the first of these meetings, the Commission should select a group of applicants to interview, and at the second meeting it should conduct interviews. The Commission should invite public comment about the applicants, either positive or negative, at the beginning of each session. The public should be welcome to remain and observe both the applicant interviews and the discussion of the applicants by Commission members. The portion of the meeting at which the Commission votes for those applicants whose names will be sent to the governor should also be open to the public. (AZ)
- Information provided to the Commission by applicants or third parties should be available to the public as appropriate.
- All applications for a judicial vacancy should be posted on the court's website. (AZ)
- Although the Commission may go into executive session to promote "open and frank discussion," two-thirds of the Commission members should be required to vote in favor of holding an executive session. (AZ)

"Hearings should be open and accessible to the public."

COMMENTARY: The judicial branch is one of three co-equal branches of government, and hearings should be open and

accessible to the public, as they are frequently in the other two branches. According to the American Bar Association, “The most important constituency to be served by a judicial selection method is the American public.” (ABA, p. 2) For this reason, the general public should be permitted to learn who the candidates are and how they are evaluated. The public should also have the right to provide input.

VI. PRESENTATION *and* SELECTION *of* CANDIDATES

- The Commission should submit nominations to the governor within 60 days of the occurrence of the vacancy. (AZ)
- The governor must appoint one of the candidates received from the Commission. If the governor fails to appoint within 60 days of the nomination of candidates, the chief justice must appoint one of the nominees. (AZ)

COMMENTARY: Longstanding judicial vacancies can result in excessive caseloads for those who are on the bench, resulting often in inordinate delays. It is important to incorporate into any judicial selection process procedures that assure that vacancies will be filled in a prompt and appropriate way.

TOPICS FOR ADDITIONAL CONSIDERATION

Judicial performance evaluations, retention elections and judicial education play important roles in creating and sustaining a competent and impartial judiciary. In addition to materials that describe the Arizona system of performance evaluation and retention election, the Institute for the Advancement of the American Legal System (IAALS) has developed very useful materials suggesting methods for evaluating the performance of judges and for conducting retention elections. Information is available at www.du.edu/legalinstitute. See also the National Center for State Courts: www.ncsconline.org/WC/CourTopics/ResourceGuide.asp?topic=JudPer and the American Bar Association at www.abanet.org/jd/lawyersconf/pdf/jpec_final.pdf.

The Northwestern Law School Judicial Education Program and the National Judicial College in Reno, Nevada are important resources for the education of state judges: <http://www.law.northwestern.edu/searlecenter/program-areas/index.cfm> and at <http://www.judge.org>.

SOURCES

ABA Standards on State Judicial Selection (2000).

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U.S. CHAMBER INSTITUTE FOR LEGAL REFORM

1615 H Street, N.W.

Washington D.C. 20062-2000

Phone: 202-463-5724 | Fax: 202-463-5302

InstituteForLegalReform.com