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## PREFACE

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Since 1977, the Democratic Party of the County of New York (“The Party”) has conducted a voluntary independent process whereby candidates for county-wide judicial vacancies (Civil Court and Supreme Court) submit themselves for evaluation by a screening panel made up of designated representatives of various bar associations, community-based organizations and law schools. The party's rules were amended in 1977 to specifically include approval by a party-sponsored independent screening panel as a prerequisite for designation and/or nomination by the New York County party leadership.

This unique system was a byproduct of the reform movement of the late 1960's and 1970's which sought to remove back-room politics from the judicial selection process. The basic concept was that an independent panel made up of non paid, non-political representatives designated by local community groups, social services groups, legal groups and law schools would evaluate the qualifications of candidates and approve, or “report out” the three “most highly qualified” candidates for each vacancy.

Since the panels would be voluntary and panel designees could only serve once in a three-year period, the idea was that judicial candidates would be evaluated solely on individual merit without political influence or political interference being a factor.

Once the three most highly qualified candidates were approved, the normal political process would then begin, and the Party could choose to nominate or support any one of the three “approved” candidates.

At the time of its inception, this was a novel approach to judicial selection. No other political organization in the country had ever delegated control of a “merit” screening process for judicial candidates to a truly independent blue ribbon group. To date, in 2008, to my knowledge, no other political organization (or elected official) has yet delegated political control of a merit screening process for judges in the manner that the New York County Party has. Yet for the past 30 years, New York County has successfully conducted independent screening panels each year (sometimes twice a year when there were both Civil Court and Supreme Court vacancies) which have given New York some of its finest jurists. Until December, 2006, two of the seven Court of Appeals judges were former Manhattan Supreme Court justices (George Bundy Smith and Carmen Beauchamp Ciparick) who were products of the independent screening panel process. Fritz Alexander, the late Court of Appeals judge, was a former Manhattan Supreme Court justice.

Countless other New York County judges have later served admirably in Federal Court (George Daniels) or the Appellate Division, First Department (E. Leo Milonas, Richard Wallach, Betty Weinberg Ellerin, Richard Andrias, Milton Williams, Bentley Kassal, David Saxe, Angela Mazzarelli, Eugene Nardelli, Peter Tom), or the Appellate Division, Second Department (Stephen Crane, Miriam Altman). All had been screened and approved by our New York County independent screening panels either at the Civil Court level or the Supreme Court level, and supported by the Party.

Putting together panels each year, with new panel members and new panel administrators, has turned out to be an enormous task, but one worth doing because of the excellent and noteworthy results. One look at the truly excellent, diverse and knowledgeable bench in New York Civil and Supreme

Courts tells us that the effort has been worthwhile. The New York County bench reflects the full diversity of Manhattan - a majority of the Civil and Supreme Court judges in New York County are now women, and New York County Supreme Court is the most diverse bench in the country, with over 40% of the justices being either Black, Latino, Asian or LGBT.

The independent screening panel process has managed to successfully meld a merit selection component to the elective political process, without sacrificing a core commitment to a superbly qualified judiciary. The panel system has proven that judicial excellence can be achieved while espousing progressive, representative elective politics.

We hope this Handbook can help to shed light on our sometimes misunderstood process and give insights into what we believe is a unique and effective system of producing extremely well qualified judicial candidates for nomination and election.

Over the years, many have worked tirelessly to develop, maintain and continue the independent screening panel process. Among those are the dedicated elected district leaders who make up the Judiciary Committee, including current Judiciary Chair Curtis Arluck, Maria Luna, Bob Botfeld, Phyllis Gunther, Frank Wilkinson, April Tyler, Thomas Nooter and many, many others over the years. Additionally, former law chairs Douglas A. Kellner and Frank Hoare, and Treasurer Darrell Paster have all contributed to the smooth operation and integrity of our panels.

Many thanks go to Steven De Castro, the author of the handbook and a former panel administrator who became an astute student and enthusiastic proponent of the panel system and whose tireless efforts culminated in this handbook. Steven's energy, academic excellence and attention to detail have helped to make this handbook an invaluable resource.

Finally, I would like to dedicate this handbook to the longstanding efforts of Robert J. Levinsohn, the co-law chair of the New York County Democratic Committee since 1977. Bob was a pioneer in the reform movement many years ago who worked diligently over the years to hone the panel system for

screening judges and ultimately forced the Party to adopt screening panels and the independent screening panel system into the party rules. Bob has worked for over 50 years to bring about positive change to the judicial selection process and to promote diversity and excellence within the New York County judiciary. His lifelong contributions to improving the judicial selection process are well known amongst legal professionals in New York City. His contributions to the development of this handbook have been immeasurable. He is truly a friend to the Party, a friend to the New York County legal community and a friend to all involved in progressive politics.

Arthur W. Greig  
Co-Law Chair  
New York County Democratic Committee  
January 2008



## **Chapter I**

# **The Panel's Purpose**

## ***Role of the Independent Screening Panel***

**T**he New York State Constitution gives voters of New York County the right to elect their civil court and supreme court judges. The Independent Screening Panel plays a crucial role in the electoral process by ensuring that only the most qualified candidates are eligible for Democratic Party nomination. The screening panel does not choose the nominee. The panel's role is to pare down the potential nominees for a judicial office to the three most highly qualified for each vacancy.

How does one define qualified? Who makes that determination? And will a consideration of candidates' qualifications be tainted by politics, race, gender, or of the temptation to choose judges who agree with our personal views on abortion, mandatory sentencing, or the right to die?

In addressing those questions, New York County Democratic Party has over the years developed the procedures outlined in this handbook; to conduct a screening process every year that attempts as much as possible to insulate the issue of qualifications from the issue of politics.

### **Who applies?**

Candidates apply for screening panel review who seek the nomination of the Democratic Party for county-wide elected judicial office. This includes candidates running for civil court, supreme court, and surrogate court.

### **Why do candidates apply?**

Candidates apply because the County Democratic leadership is prohibited by its rules from nominating judicial candidates who have not been approved by the independent screening panel. It is designed as a gateway to insure that only the most qualified candidates enter the political process.

### **Do all candidates seeking Democratic Party support have to apply?**

No. First of all, this panel is only required to review countywide offices. There are many district civil court positions. As to those local district races, the Democratic political clubs in the districts can use the county panel, form their own panels, or otherwise endorse whomever they want.

## Can a candidate run if she is not approved by this panel?

Yes. The panels only pertain to the County Democratic Party's nomination process. All attorneys residing in New York City who have been admitted to practice in New York for ten years can run for judicial office, and seek the endorsements of other organizations and parties.

In regard to countywide civil court positions, the county Democratic executive committee can endorse a candidate, provided that the candidate has been reported qualified by the screening panel. When it comes to the Democratic nomination, however, the nomination can be contested in a primary. Any attorney admitted to practice in New York and residing in New York City can get on the ballot for the Democratic primary by getting the requisite number of signatures.

In regard to the supreme court under existing law, the Democratic nomination is determined in a judicial nominating convention. Only those candidates who are reported as qualified by the screening panel may be recommended by the county leader for nomination.<sup>1</sup>

## Are there other screening panels?

Different bar associations have established screening panels. In addition, New York State's Office of Court Administration organizes several panels, including the Independent Judicial Election Qualification Commissions<sup>2</sup>, the Housing Court Advisory Council<sup>3</sup>, the screening panels for the Appellate Division<sup>4</sup> and the Court of Appeals<sup>5</sup>. The Mayor maintains the Mayor's Advisory Committee on the Judiciary to screen applicants for New York City's criminal, interim civil, and family courts<sup>6</sup>. Both New York senators also have their independent screening committees to review nominations for federal bench.

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<sup>1</sup> The supreme court nomination system has been held constitutional in New York State Board of Elections v. Margarita Lopez Torres, 522 U.S. \_\_\_\_ (2008).

<sup>2</sup> Rules of the Chief Administrator Part 150.

<sup>3</sup> Civil Court Act § 110 (A)(9)(f through i).

<sup>4</sup> Created by executive order.

<sup>5</sup> Commission on Judicial Nomination, created by Judiciary Law § 62.

<sup>6</sup> Mayoral Executive Order No. 8, March 2, 2002.

## ***What are the Qualifications for Judgeship?***

Like the Ten Commandments, the qualities of a great judge are easily stated, but difficult to put into practice. It is fair to say that the screening process is an investigation not simply into whether a candidate can exhibit these qualities, but into whether the candidate's background demonstrate these qualities.

### **American Bar Association's Guidelines for Reviewing Qualifications of Candidates for State Judicial Office**

The New York County Democratic Committee rules do not explicitly set forth candidate qualifications. This manual, however, incorporates the American Bar Association's Guidelines for Reviewing Qualifications of Candidates for State Judicial Office (Judicial Administration Division Lawyers' Conference 1987, Staff: Steven Goldspiel, Chicago, Ill.) These guidelines are summarized below.

#### **1. Integrity**

*A candidate should be of undisputed integrity.*

The integrity of the judge is, in the final analysis, the keystone of the judicial system; for it is integrity which enables a judge to disregard personalities and partisan political influences and enables him or her to base decisions solely on the facts, and the law applicable to those facts. It is, therefore, imperative that a judicial candidate's integrity and character with regard to honesty and truthfulness be above reproach. An individual with the integrity necessary to qualify must be one who is able, among other things, to speak the truth without exaggeration, admit responsibility for mistakes and put aside self-aggrandizement. Other elements demonstrating integrity are intellectual honesty, fairness, impartiality, ability to disregard prejudices, obedience to the law and moral courage.

A candidate's past personal and professional conduct should demonstrate consistent adherence to high ethical standards. The evaluator should make inquiry of judges before whom the candidate has appeared and among other members of the bar as to whether or not a candidate's representations can be relied upon. A candidate's

disciplinary record, if any, should be considered.

Hence, a candidate should waive any privilege of confidentiality, so that the appropriate disciplinary body may make available to the evaluator the record of disciplinary sanctions imposed and the existence of serious pending grievances. The reputation of the candidate for truthfulness and fair dealing in extra-legal contexts should also be considered. Inquiry into a candidate's prejudices that tend to disable or demean others is relevant. However, since no human being is completely free of bias, the important consideration is that of whether or not the candidate can recognize his or her own biases and set them aside.

## **2. Legal Knowledge and Ability**

*A candidate should possess a high degree of knowledge of established legal principles and procedures and have a high degree of ability to interpret and apply them to specific factual situations.*

Legal knowledge may be defined as familiarity with established legal principles and evidentiary and procedural rules. Legal ability is the intellectual capacity to interpret and apply established legal principles to specific factual situations and to communicate, both orally and in writing, the reasoning leading to the legal conclusion. Legal ability connotes also certain kinds of behavior by the judge such as the ability to reach concise decisions promptly once he or she is apprised of sufficient facts, the ability to respond to issues in a reasonably unequivocal manner and to quickly grasp the essence of questions presented.

Legal knowledge and ability are not static qualities, but are acquired and enhanced by experience and the continual learning process involved in keeping abreast of changing concepts through education and study. While a candidate should possess a high level of legal knowledge, and while a ready knowledge of rules of evidence is of importance to judges who will try contested cases, a candidate should not normally be expected to possess expertise in any particular substantive field. More important is the demonstration of an attitude reflective of willingness to learn the new skills and knowledge which will from time to time become essential to a judge's performance and of a willingness to improve judicial procedure and administration.

A review of a candidate's academic record, participation in continuing legal education forums, legal briefs, and other writings and reputation among judges and professional colleagues who have had first-hand dealings with the candidate will be helpful in evaluating knowledge and ability.

### **3. Professional Experience**

*A candidate should be a licensed, experienced lawyer.*

A candidate should be admitted to practice law in the jurisdiction<sup>7</sup>. The length of time that a lawyer has practiced is a valid criterion in screening candidates for judgeships. Such professional experience should be long enough to provide a basis for the evaluation of the candidate's demonstrated performance and long enough to ensure that the candidate has had substantial exposure to legal problems and the judicial process.

It is ordinarily desirable for a candidate to have had substantial trial experience. This is particularly true for a candidate for the trial bench. Trial experience includes the preparation and presentation of matters of proof and legal argument in an adversary setting. The extent and variety of an candidate's experience as a litigator should be considered in light of the nature of the judicial vacancy that is being filled. Although substantial trial experience is desirable, other types of legal experience should also be carefully considered. An analysis of the work performed by the modern trial bench indicates that, in addition to adjudication, many judges perform substantial duties involving administration, discovery, mediation and public relations. A private practitioner who has developed a large clientele, a successful law teacher and writer or a successful corporate, government or public interest attorney all may have experience which will contribute to successful judicial performance. Outstanding persons with such experience should not be deemed unqualified solely because of lack of trial experience. The important consideration is the depth and breadth of the professional experience and the competence with which it has been performed, rather than the candidate's particular type of professional experience.

For a candidate for the appellate bench, professional experience involving scholarly research and the development and expression of

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<sup>7</sup> As noted above, in New York a candidate must have been admitted in the state for at least 10 years.

legal concepts is especially desirable.

#### **4. Judicial Temperament**

*A candidate should possess a judicial temperament, which includes common sense, compassion, decisiveness, firmness, humility, open-mindedness, patience, tact and understanding.*

Judicial temperament is universally regarded as a valid and important criterion in the evaluation of a candidate. There are several indicia of judicial temperament which, while premised upon subjective judgment, are sufficiently understood by lawyers and non-lawyers alike to afford workable guidelines for the evaluator.

Among the qualities which comprise judicial temperament are patience, open-mindedness, courtesy, tact, firmness, understanding, compassion and humility. Judicial temperament entails an ability to deal with counsel, jurors, witnesses and parties calmly and courteously, and the willingness to hear and consider the views of all sides. It requires the ability to be even-tempered, yet firm; open-minded, yet willing and able to reach a decision; confident, yet not egocentric. Because of the range of topics and issues with which a judge may be required to deal, judicial temperament requires a willingness and ability to assimilate data outside the judge's own experience. It requires, moreover, an even disposition, buttressed by a keen sense of justice which creates an intellectual serenity in the approach to complex decisions, and forbearance under provocation. Judicial temperament also implies a mature sense of proportion; reverence for the law, but appreciation that the role of law is not static and unchanging; understanding of the judge's important role in the judicial process, yet recognition that the administration of justice and the rights of the parties transcend the judge's personal desires. Judicial temperament is typified by recognition that there must be compassion as the judge deals with matters put before him or her.

Factors which indicate a lack of judicial temperament are also identifiable and understandable. Judicial temperament thus implies an absence of arrogance, impatience, pomposity, loquacity, irascibility, arbitrariness or tyranny. Judicial temperament is a quality which is not easily identifiable, but which does not wholly evade discovery. Its absence can usually be fairly ascertained.

Wide-ranging interviews should be undertaken to provide insight

into the temperament of a judicial candidate.

## **5. Diligence**

*A candidate should be diligent and punctual.*

Diligence is defined as a constant and earnest effort to accomplish that which has been undertaken. While diligence is not necessarily the same as industriousness, it does imply the elements of constancy, attentiveness, perseverance, painstakingness and assiduousness. It does imply the possession of good work habits and the ability to set priorities in relation to the importance of the tasks to be accomplished.

Punctuality should be recognized as a complement of diligence. A candidate should be known to meet procedural deadlines in trial work and to keep appointments and commitments. A candidate should be known to respect the time of other lawyers, clients, and judges.

## **6. Health**

*A candidate should be in good physical and mental health.*

Good health embraces a condition of being sound in body and mind and with relative freedom from physical disease or pain. This is one criterion which may be capable of objective consideration. Any history of a past disabling condition or suggestion of a current disabling condition should require further inquiry as to the degree of impairment. Physical handicaps and diseases which do not prevent a person from fully performing judicial duties should not be a cause for rejection of a candidate. However, any serious condition must be considered carefully as to the possible effect it would have on the candidate's ability to perform the duties of a judge. Thus, it is proper for the evaluator to require a candidate to provide a physician's written report of a recent thorough medical examination.

Good health includes the absence of erratic or bizarre behavior which would significantly affect the candidate's functioning as a fair and impartial judge. Addiction to alcohol or other drugs is of such an insidious nature that the evaluator should affirmatively determine that a candidate does not presently suffer from any such disability.

The ability to handle stress effectively is a component of good mental health. A candidate should have developed the ability to

refresh himself or herself occasionally with non-work-related activities and recreations. A candidate should possess a positive perception of his or her own self-worth, in order to be able to withstand the psychological pressures inherent in the task of judging.

The evaluator should give consideration to the age of a candidate as it bears upon the health and upon the number of years of service that the candidate may be able to perform.

## **7. Financial Responsibility**

*A candidate should be financially responsible.*

The demonstrated financial responsibility of a candidate is one of the factors to be considered in predicting the candidate's ability to serve properly. Whether there have been any unsatisfied judgments or bankruptcy proceedings against a candidate and whether the candidate has promptly and properly filed all required tax returns are pertinent to financial responsibility. Financial responsibility demonstrates self-discipline and the ability to withstand pressures that might compromise independence and impartiality.

## **8. Public Service**

*Consideration should be given to a candidate's previous public service activities.*

Participation in public service and pro bono activities adds another dimension to the qualifications of the candidates. The degree of participation in such activities may indicate social consciousness and consideration for others. The degree to which bar association work provides an insight into the qualifications of the candidate varies in each individual. Significant and effective bar association work may be seen as a favorable qualification.

The rich diversity of backgrounds of American judges is one of the strengths of the American judiciary, and a candidate's non-legal experience must be considered together with the candidate's legal experience. Experience which provides an awareness of and a sensitivity to people and their problems may be just as helpful in a decision making process as a knowledge of the law. There is, then, no one career path to the judiciary. A broad, non-legal academic background, supported by varied and extensive non-academic achievements are important parts of a candidate's qualification. Examples of achievements are important parts of a candidate's

qualifications. Examples of such non-legal experience are involvement in community affairs and participation in political activities, including election to public office. The most desirable candidate will have a broad life experience.

There should be no issue-oriented litmus test for selection of a candidate. No candidate should be precluded from consideration because of his or her opinions or activities in regard to controversial public issues. No candidate should be excluded from consideration because of race, creed, sex or marital status.

While interviews of candidates may touch on a wide range of subjects in order to test a candidate's breadth of interests and thoughtfulness, the candidate should not be required to indicate how he or she would decide particular issues that may arise on litigated cases. However, a candidate's judicial philosophy and ideas concerning the role of the judicial system in our scheme of government are relevant subjects of inquiry.

(This concludes the ABA Guidelines)

## Diversity

The Democratic Party rules specify that the screening panel shall affirmatively consider the need for qualified judges of diverse backgrounds, and the need to provide representation on the bench to traditionally underrepresented groups. By enacting this rule, the notion that diversity is in conflict with qualifications is explicitly rejected.

The public has more confidence in a judiciary that reflects the communities it serves. And New York County is one of the most diverse counties in the State<sup>8</sup>:

*African American 20%*

*Asian American 11%*

*Hispanic or Latino (of any race) 27%*

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<sup>8</sup> U.S. Census Bureau: State and County QuickFacts. Data is current for 2004 and is derived from Population Estimates, 2000 Census of Population and Housing, 1990 Census of Population and Housing, Small Area Income and Poverty Estimates, County Business Patterns, 1997 Economic Census, Minority- and Women-Owned Business, Building Permits, Consolidated Federal Funds Report, 1997 Census of Governments. Includes persons reporting only one race. Hispanics may be of any race, so also are included in applicable race categories.

Racial diversity is not the only factor. A background of overcoming discrimination based on gender, sexual orientation, and physical disability also play a role. While supporting a diverse judiciary is important, the panel also values candidates whose professional backgrounds have prepared them to successfully serve a diverse population.

It is impossible to find one candidate who reflects all of Manhattan's diversity at once. The panel's goal, however, is not to find one candidate. Within the group of most highly qualified candidates the panel presents a range of choices for nomination, and in finding that range, diversity is a factor.

## **American Bar Association Guidelines for Judges Seeking Reelection**

In the evaluation of candidates who are competing for nomination for judicial office, the screening panel should apply the guidelines above. When it is called upon to review the qualifications of a judge seeking reelection, the panel should apply the guidelines below. The Democratic county rules provide that incumbent judges completing a full term shall be reported as approved if their performance during their term of office merits continuation in office.

As in many states, incumbent judges are reviewed not in competition with another challenger, but are reviewed on their own record standing alone. The trend toward retention elections elsewhere demonstrates a policy need to protect judicial independence, by insulating sitting judges from the political consequences of unpopular decisions. Accordingly, the panel will report out the incumbent if the judge's performance, according to objective criteria, merits continuation in office.

In 2005, the American Bar Association revised its criteria for the evaluation of judges seeking reelection. These criteria are incorporated below.

### **Guideline 5-1. A judge should be evaluated on his or her legal ability, including the following criteria:**

- 1-1. Legal reasoning ability.
- 1.2. Knowledge of substantive law.
- 1.3. Knowledge of rules of procedure and evidence.
- 1.4. Keeping current on developments in law, procedure, and

evidence.

**Guideline 5-2. A judge should be evaluated on his or her integrity and impartiality, including the following criteria:**

-2.1. Avoidance of impropriety and the appearance of impropriety.

-2.2. Treating all people with dignity and respect.

-2.3. Absence of favor or disfavor toward anyone, including but not limited to favor or disfavor based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status.

-2.4. Acting fairly by giving people individual consideration.

-2.5. Consideration of both sides of an argument before rendering a decision.

-2.6. Basing decisions on the law and the facts without regard to the identity of the parties or counsel, and with an open mind in considering all issues.

-2.7. Ability to make difficult or unpopular decisions.

**Guideline 5-3. A judge should be evaluated on his or her communication skills, including the following criteria:**

-3.1. Clear and logical oral communication while in court.

-3.2. Clear and logical written decisions.

**Guideline 5-4. A judge should be evaluated on his or her professionalism and temperament, including the following criteria:**

-4.1. Acting in a dignified manner.

-4.2. Treating people with courtesy.

-4.3. Acting with patience and self-control.

-4.4. Dealing with pro se litigants and litigation fairly and effectively.

-4.5. Participating and providing leadership to an appropriate degree in professional development activities and in jurisdiction-wide and

statewide court improvement and judicial education activities.

-4.6. Promoting public understanding of and confidence in the courts.

**Guideline 5-5. A judge should be evaluated on his or her administrative capacity, including the following criteria:**

-5.1. Punctuality and preparation for court.

-5.2. Maintaining control over the courtroom.

-5.3. Appropriate enforcement of court rules, orders, and deadlines.

-5.4. Making decisions and rulings in a prompt, timely manner.

-5.5. Managing his or her calendar efficiently.

-5.6. Using settlement conferences and alternative dispute resolution mechanisms as appropriate.

-5.7. Demonstrating appropriate innovation in using technology to improve the administration of justice.

-5.8. Fostering a productive work environment with other judges and court staff.

-5.9. Utilizing recruitment, hiring, and promotion policies and practices to ensure that the pool of qualified applicants for court employment is broad and diverse.

-5.10. Acting to ensure that disabilities and linguistic and cultural differences do not limit access to the justice system.

**Guideline 5-6. Additional criteria should be developed reflective of jurisdiction (specialized versus general) and level of court (trial versus appellate).**

-6.1. A specialized court judge should be evaluated according to whether he or she demonstrates the knowledge and skills necessary.

-6.2. An appellate court judge should be evaluated on the quality of his or her preparation for and participation in oral argument and on his or her effectiveness in working with other judges of the court.

(This concludes the ABA guidelines)



## **Chapter II**

# **Forming the Panel**

**T**he most important feature of the Independent Screening Panel is that the panel is formed anew and disbanded every year.

Experience teaches that panelists who serve for several years tend to have a disproportionate influence in the process. By contrast, there is a much more even level of participation among panelists when they are all brought together on the same footing for the same limited time period.

With the advantage of limited terms come challenges. There is, of course, the challenge of continuity; making sure that the panelists conform with the rules of the Democratic Party county committee, the evolving ethics rules, and the best practices of the screening panel. This chapter describes how those challenges are met.

## ***Role of the Judiciary Committee***

The Judiciary Committee is a regular standing committee of the New York County Democratic Party. It is responsible for forming the independent screening panel. The term, “Independent” signifies that the committee does not appoint the panelists, and the panel’s actual deliberations are free of outside influence. As such, the Judiciary Committee’s role is limited to forming the screening panel and occasionally assisting the panel administrator in enforcing the rules.

It is important to note that neither the Judiciary Committee nor the party leadership has the power to appoint voting members to the screening panel. Rather, the Judiciary Committee meets and formulates a list of community organizations, law schools and bar associations. Each organization is then invited to designate a panelist. The committee receives the designations, and compiles the names and contact information of the panelists into a list.

As stated before, the panel has no standing members. Further, no panelist may serve as a voting member for more than one year in any consecutive three-year period.

The Judiciary Committee appoints a panel administrator, who is a nonvoting member of the panel and is the only officer. The panel administrator has several crucial duties, which are set forth later on.

The Judiciary Committee provides publicity to inform all potential candidates of the application deadlines. The committee receives 25 copies of each application, which are brought to the first meeting of the panel.

At the first panel meeting, representatives of the Judiciary Committee review the guidelines and the timetables to the newly-formed panel.

## ***Role of the Designating Organization***

The chief executive officer of an invited organization will receive an invitation in the mail, requesting that the officer choose -- on behalf of the organization or acting in his or her individual capacity if there is any inhibition against acting on behalf of the organization -- a panelist to serve on the Independent Screening Panel.

If the chief executive officer has a relationship with someone who is likely to come before the panel, the officer is disqualified from making the designation. In such a situation, the organization must delegate the appointing power to someone else who does not have such a relationship. Further, the appointing officer has no power to designate himself/herself to the panel.

A judge makes decisions that profoundly affect people's property, their freedom, and possibly their very lives. Accordingly, those who are involved in judicial screening carry a heavy responsibility to insure that the candidate they screen is capable of handling those crucial decisions. Thus, the designating officer must emphasize to the potential panelist that their appointment carries great responsibilities, and a significant time commitment. Panelists generally attend two meetings a week for almost a two-month period, check references, confer with other panelists, maintain confidentiality, and take great care in avoiding any improprieties. It is advisable for a potential panelist to confer with those who have previously served on the independent screening panel to get a sense of the commitment.

The appointing authority must insure that the panelist they select is eligible to serve. The panelist chosen does not have to be an attorney. The guidelines for selection of panelists are listed in the next section. If the selected panelist does not meet the guidelines, the panelist will be removed, and the organization will be asked to select a replacement.

## ***Role of the Panelist***

### **Who qualifies as a panelist?**

No person shall serve as a panel member if such person reasonably believes that he or she is a relative, partner, associate, employer or employee or has a business, financial or close personal relationship with any person who may appear before the panel. If, after the panel convenes, any member learns of such relationship, such member shall disclose such relationship to the panel administrator, and shall be removed or disqualified from voting.

No person can serve on the independent screening panel who:

- ✓ Is an officer or executive board member of a political club or who held such office during the three years preceding the year of panel service;
- ✓ Was a candidate for or who held elective party office (including delegate to a judicial district convention) or public office, other than the office of County Committee member, during the three years preceding the year of panel service, or who will do so during that year, or who was reported out of a judicial screening panel or was a candidate for judicial office in a primary election during the five years preceding the year of panel service, or during that year;
- ✓ Is an employee of the courts;
- ✓ Is a government employee or appointee who holds employment or appointment at the pleasure of an elected official;
- ✓ Is a government employee or appointee, whether compensated or not, who holds his employment or appointment for a term of years, except for community board members;
- ✓ Has solicited support for or supported a candidate for any judicial vacancy to be filled during the election year in question, or was actively involved in the primary election campaign of a candidate for judicial office during the preceding three years;
- ✓ Has been found guilty of or is presently subject to a proceeding involving professional misconduct (other than a civil action for damages) or of a class B misdemeanor or more serious crime (or the

equivalent under the law of any other jurisdiction).

## **What are the panelist's duties?**

As is clear from the outline of the screening process in the next chapter, the panelists conduct the investigation of the candidates' qualifications, deliberate, and decide who are the most qualified. The panelists are to follow the guidelines set out in this manual, to limit communication with outside parties, and to consider only what the guidelines allow them to consider.

This process works primarily on the basis of the panelist's good faith. When in panel deliberations a panelist is giving his or her opinion about a candidate, the process works best when the panel feels comfortable that the opinion is motivated by an honest interpretation of the facts, and not by political or personal considerations. The panelist who communicates with outside parties and injects political motives into the process on the basis that "everybody does it," loses credibility with the other panelists, and may ultimately be removed.

## ***Role of the Panel Administrator***

The only officer of the panel is the panel administrator, who is a respected leader, part-time referee of the panel's guidelines, part-time calendar clerk. A panel administrator is chosen because he or she is an attorney of recognized integrity and high standing at the bar, who would otherwise be qualified to be a member of the panel.

The administrator is a neutral facilitator of the panel proceedings and the making of its report. The administrator does not vote, nor does she take a position on the merits of any candidates. The neutral status, however, should not imply that the panel administrator's role is a passive one; quite the opposite. The administrator presides over a panel whose members are highly articulate, experienced community leaders. Further, judicial candidates – mostly experienced trial lawyers or judges of lower courts -- would not be running for judge if they themselves were not highly confident in their communication abilities. And panelists as well as candidates tend to associate with well-known politicians, judges and community leaders who may attempt to influence the process. The panel administrator is the vigilant umpire who enforces the rules, to prevent

inappropriate influence, and to keep any powerful personalities on the panel in balance.

The panel administrator sets the tone. The conduct of the panel administrator will determine whether the panelists take their responsibilities seriously, whether the public believes in the panel's integrity, and whether the voters will have faith in the panel's report.

The panel administrator's duties include:

### **Enforce and interpret the guidelines.**

The panel administrator is to facilitate the panel proceedings in accordance with the panel guidelines and the New York County Democratic Party rules. The administrator vigilantly guards against possible breaches of the rules.

One of the chief jobs of the panel administrator is to receive complaints from panelists, candidates, and other interested parties. The receipt of a complaint, and the fashioning of a wise response, establish the integrity of the process. While complaints containing prejudicial matter are addressed discreetly, complaints or questions of a policy nature are resolved before the whole panel. Some panel administrators seek the input of the panelists before resolving a complaint.

Where there exists an ambiguity, the panel administrator has the authority to interpret the rules. Complaints regarding the panel administrator's conduct of the panel can be raised either with the panel administrator, or with the law chairs of the county committee.

One word of caution regarding the enforcement of guidelines. The panel administrator must instruct the panel while not causing any prejudice to any candidate. For example, if a candidate makes a good faith complaint that a panelist should be removed because of her recent involvement in a political campaign, the panel administrator must resolve the issue in a manner which attempts to prevent the other panelists from holding a grudge against the candidate.

Another potential for backlash occurs when the panel becomes aware that supporters for a candidate are "lobbying" the panelists. Panelists are required to report any outside contacts to the panel administrator, and are supposed to disregard such lobbying activities. While such activity should be disregarded, some panelists may suspect that such activity implies that the candidate is doing something unethical. The panel administrator

should advise the panel that most of these lobbying efforts are ethically permissible,<sup>9</sup> and that they imply nothing negative about the candidate who is the subject of the lobbying.

### **Ensure consistent treatment of candidates.**

Panel administrators safeguard against inconsistencies in the consideration of candidates. Example of such inconsistencies include the following:

- The first candidate to be interviewed in an evening meeting is questioned for 45 minutes. Because the interviews run overtime, the last candidate of the evening is questioned for less than 10 minutes.
- 15 panelists are present during one meeting, while only 8 panelists are present in another meeting, giving a possible 7-vote advantage to candidates who are interviewed at the well-attended meeting.
- Two candidates ask for the names of the panelists who are on their subcommittees. One subcommittee gives the names; the other does not.
- During a meeting, a panelist stands up and gives a 5-minute speech in favor of one candidate. The rules do not prohibit such speeches, because after all, some candidates will be exceptionally qualified. The panelist, however, is not to use outside information, and other panelists are instructed to themselves be vigilant against possible organizational bias.

Of course, even the need for consistency should not go too far. Although the candidates are to be treated evenly during interviews, some candidates will receive much greater attention on the deliberation day, while some may not be mentioned in the final discussions at all.

### **Represent the panel to outside parties.**

The panel administrator is the interface between the panel and the candidates, the Judiciary Committee, and any outside party that has legitimate grounds to communicate with the panel or make inquiries regarding the panel's activities. On the other hand, the administrator must

<sup>9</sup> Advisory Committee on Judicial Ethics Op. 97-99. It is not impermissible for a judge to seek support from attorneys during an evaluation by a bar association, as long as any solicited statements of approval or support should not be given to the judge but must be provided directly and exclusively to the Screening Committee.

safeguard the confidentiality of the process, and when one candidate receives information, the administrator makes sure that information is made available consistently to all candidates.

## ***Confidentiality and Transparency***

All proceedings of the panel are to be kept in confidence by the panelists and panel administrator. In the event of a leak, the guidelines specify that the panel administrator must discharge the panelist. But just as important as confidentiality is the transparency, that is, the panel's willingness to be accountable to decisionmakers by making all the panel's procedural information available. The balance between the candidate's right to privacy and the voters' need to trust in the process must be struck in every screening panel. Confidentiality applies to *proceedings*. Transparency applies to *procedures*.

Confidentiality is the responsibility to hold secret any statements, documents, or information gathered during the screening process that pertains to an individual candidate. Further, confidentiality applies to any procedure or piece of information that could give an unfair advantage to any candidate. In this very intensive screening process, highly qualified candidates entrust the panelists to keep their privacy sacred. If not, few people would apply. More importantly, the dissemination of private information to unauthorized parties may be a violation of federal or state law.

Confidentiality is the hallmark of a legitimate screening process. If confidentiality is interpreted too broadly, however, the danger is that the screening process becomes mired in secrecy, making it less accountable to the candidates and to the voters. Thus, the legitimacy of the process also depends on a policy of transparency.

Transparency is the responsibility of the panel administrator to make procedural information available both to the panel and to outside parties, to the extent that they have a legitimate need for it. As stated before, the deliberations are secret, but the mechanics of the screening process and the progress of the panel are not. Candidates are entitled to a clear understanding of the screening process. Those who rely on the panel's findings are entitled to know that the process is, in practice, thorough and fair. It should not be a mystery as to how to obtain a nomination for judge in New York County.

The responsibility of disclosure falls chiefly on the panel administrator, but panelists are sometimes delegated disclosure responsibilities. For example, subcommittee chairs are often in contact with candidates for scheduling of interviews. During those contacts, candidates naturally ask the chairs questions regarding the names of the panelists who will attend the interview, the duration of the interview, the nature of the questions, etc. Panelists can refer the more substantial of these inquiries to the panel administrator, who not only can respond, but will assure consistency by alerting the other panelists how the question is to be addressed for other candidates.

What is Confidential and What is to be Disclosed?	
Disclosed	Confidential
OTHER PARTIES may be told the mechanics of the process, the deadlines, the date the panel expects to complete its report, and may see the application form used.	The names of candidates before the panel are secret, unless the candidate denies having applied.
PANELISTS are to be informed as to panel administrator's method of assigning subcommittees and other sundry administrative details that could affect the fairness of the process.	PANELISTS are not to use or disseminate information from outside sources unless it has first been cleared by the panel administrator.
CANDIDATES can ask what will be the duration of their upcoming interview, and the number of people at the interview, and even the names of the interviewers IF the information is available to all candidates consistently.	No one may be given the questions to be asked at the interview, especially model questions.
Panelists can be asked, "What stage have you reached in the process?"	All documents, forms, emails or any other information gathered in the screening process are secret.

### **Manage all logistics.**

The panel administrator must be highly adept at making sure that all attending parties are apprised of the time and place of all meetings, far in advance. Oral notice is generally not enough; it must be followed up with notice by memo and/or email.

The panel administrator tracks the progress of the subcommittees, and schedules the full panel interviews of each candidate to coincide with the expected completion of the subcommittee's review. The administrator faxes each candidate a confirmation of her interview time slot.

Since the panel administrator is responsible for ensuring a consistent level of attendance at interviews, the administrator is to be kept apprised of which panelists will be absent at any given meeting, and make an attendance record for each interview. The administrator, however, is not allowed to maintain minutes of the proceedings.

The administrator walks a fine line. The administrator acts like a judge instructing a jury during the course of a trial. The administrator has to enforce the rules against certain types of activity, but must do so while not appearing to favor or disfavor particular candidates or panelists. The administrator is the only member of the panel who will not cast a vote for anyone. Instead, the administrator's role throughout the proceedings is to advocate for the integrity of the process itself.



## Chapter III

# The Screening Process

## ***The Initial Meeting***

**T**he panel begins in earnest in the initial meeting. The initial meeting is generally the only meeting between the panel and members of the Judiciary Committee.

In this meeting, the panelists are introduced to the panel administrator, and they get their first impression of the process. Panelists then receive the candidates' applications, are assigned subcommittees, and get to work.

A large amount of administrative business must be finished at the initial meeting, and so it is imperative that it be run efficiently.

### **Orientation of the rules and guidelines**

Members of the Judiciary Committee will introduce the panel administrator and review the highlights of the Democratic Party rules and guidelines. The Judiciary Committee members will then hand the rest of the administrative responsibilities to the panel administrator, who will facilitate the rest of the proceedings for the entire process. At this point, the Judiciary Committee members will exit the meeting. Thereafter, no persons besides panelists and candidates being interviewed are allowed to be present during panel meetings.

### **Disclosures and disqualifications.**

One of the goals of the initial meeting is to confirm that all persons designated to be panelists are in fact eligible to serve. Each panelist is given a disclosure statement to sign, in which they affirm that they meet all the necessary criteria (see the eligibility guidelines in the previous chapter, "Role of the Panelist"). At this time, panelists often make disclosures regarding their backgrounds and ask the panel administrator whether, based on their disclosure, they are eligible to serve. For example, a panelist may state that she is an employee of the transit authority and asks whether her employment makes her ineligible under the guidelines for public employees. Some panelists will feel more comfortable approaching the panel administrator during a break to make their disclosures confidentially.

The panel administrator will remove the panelists who turn out to be ineligible and inform the Judiciary Committee of the removals. Later, the Judiciary Committee will contact the organizations who designated the removed persons, and request new designations.

Once the disqualifications are made, the first decision of the panel is to set the date of the mandatory voting meeting.

## **Setting the date of the mandatory voting meeting.**

The mandatory voting meeting of the panel is the last meeting in the screening process. No votes or polls are taken prior to that meeting. It is mandatory because there is, quite literally, no reason for a person to be a panelist if one were to miss the opportunity to vote. (Proxies are not allowed.) Thus, the date is established early to insure that all panelists clear their schedules far in advance.

If an organization's designee was disqualified (see previous), the Judiciary Committee must make clear to the organization that the new designee must be able to attend the mandatory voting meeting.

## **Assignment of subcommittees**

The panel is divided into subcommittees of no less than two members. The panel administrator pre-determines the number of subcommittees, based on her assessment of the workload. The panelists are assigned to subcommittees at random, in full view of the panel. These assignments may be shuffled later, according to scheduling constraints, conflicts or other administrative reasons. The first person assigned to the subcommittee is considered the chair of the subcommittee.

## **Assignment of candidates to subcommittees.**

Each candidate is assigned to a subcommittee, which will scrutinize the application, call references, interview the candidate and prepare a report to the full panel. Similar to the assignment of panelists, the assignment of candidates is done at random in full view of the panel, with adjustments allowed for various administrative reasons.

## **Calendar of full panel meetings.**

The last item of business is to agree on a calendar for the full panel meetings. It is almost impossible for a sizeable panel to set its calendar so that everyone makes every meeting. Instead, the panel puts together a calendar in which (a) no one meeting is sparsely attended relative to the other meetings, and (b) no panelist misses more than two meetings.

## ***Investigation***

After the initial meeting, the subcommittees work independently to complete their investigations of the candidates in a timely fashion.

### **Disciplinary Investigation**

Each candidate fills out a release, authorizing the panel to make written inquiries to any disciplinary body, such as the Advisory Committee on Judicial Ethics or the attorney disciplinary committees of the appellate division. Thus, the subcommittee sends a written request to the appropriate bodies to establish whether a candidate is the subject of any investigations, sanctions or reprimands. An administrative judge may respond, in writing or otherwise, to an inquiry from a screening panel regarding a judge's reappointment.<sup>10</sup>

### **Review of the Application**

The subcommittee is responsible for a detailed review of the candidate's application. An application should be neat, however, it cannot be afforded greater weight because it is better presented or better organized than another application. Within reason, handwritten applications are allowed. In reviewing a judicial candidate, there are no extra points for presentation.

The subcommittee members will note the strengths of the application, as well as any incomplete answers, holes in the work chronology, or any other point of interest, to be explored in the subcommittee meeting with the candidate.

### **Checking References**

As with any job interview, a subcommittee checks the references as provided in the application, especially the lawyers and judges on the last ten cases that the candidate has tried. These references are the most likely to give the most inciteful, objective information. These references checks are generally done by telephone, because phone conversations yield the most candid appraisals of a candidate. Written references tend to be formulaic and uninformative.

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<sup>10</sup> Advisory Committee on Judicial Ethics Opinion 98-123. See also 00-124. Judges are still prohibited from writing a letter, on their own initiative, on behalf of a judge seeking reappointment.

## Subcommittee Interview

When possible, the entire subcommittee should be present for the candidate's interview. In any event, there should be no less than two subcommittee members present. The purpose of the interview is to explore any areas of concern to be brought to the full panel. In addition, the interview is a means of alerting the candidate regarding particular concerns that he may have to address before the full panel. Although there is an element of surprise in the full panel interview, there is no harm in alerting the candidate that the panel will have questions regarding a particular decision the candidate decided three years ago, or a particular line in the tax return, etc.

## Pitfalls

As with all aspects of the screening, the greatest challenge is that of consistency. For example, if a subcommittee member gets a report from a colleague that a candidate acted inappropriately at a bar association New Year's Eve party ten years ago, the subcommittee may consider excluding this information if it has no way of knowing whether other candidates had acted similarly. The problem with doing an independent investigation is that there is the possibility that the resulting information may cause the candidate to appear in an overly negative or positive light compared to the other candidates, simply because the other candidates were not subject to the same scrutiny. Thus, while it is prudent to explore all areas of concern raised in an application, the subcommittee must always keep in mind the consistency problem. And of course, the subcommittee can refer an issue to the panel administrator for guidance.

A further pitfall is for a subcommittee to begin comparing the candidates to each other. The problem with a subcommittee making comparisons is that the subcommittee is assigned only a small number of the candidates, who may be exceptionally stellar or exceptionally unqualified. The proper comparison is to compare each candidate after hearing all the other candidates in the full panel.

## Preparing the Subcommittee Report

After the interview, the subcommittee investigation is complete when all questions are answered and the subcommittee formulates impressions of how the candidate's background, training and experience relate to the qualifications described in the first chapter of this manual. The panelist most involved with the investigation delivers these findings in an oral report to the full panel when the candidate is about to be interviewed.

## Agreeing to Disagree

It is common in a subcommittee for one panelist to have a strong opinion of a candidate, while the majority holds the opposite view. In such a situation, it is appropriate for the dissenting panelist to also be heard during the oral report to the full panel.

## *The Interview*

Most veterans of the screening panel would agree that the single most important factor in their vote is the candidate's answers at the full panel interview.

The purpose of the interview is to:

- allow the candidate to relate his or her background to the requirements of judicial office,
- compare a candidate to others vying for the same office,
- test the candidate's temperament under stress,
- clarify any answers given in the application.

Although similar to any job interview, an interview of a judicial candidate has many unique aspects. First, the candidate must demonstrate the mental acuity of a judge. Second, a number of candidates are generally so highly qualified that there comes a point where it may be difficult to distinguish them. Third, the panel should always ask about a candidate's judicial philosophy, but must avoid imposing a litmus test, i.e., forcing the candidate to commit to issues that come before the court.

### **Consistency**

The panel interviews take place over several weeks. The panel administrator must meet the challenge of insuring consistency among all candidates, while at the same time recognizing that the candidates' differences emerge during the interviews.

One principle to be followed is that of equal time. Every stage of the interview should follow the same minimum and maximum time length. Allowing an interview to end substantially shorter or longer than the others can lead to accusations of unfairness, and such mistakes are impossible to undo (For example, if the third interview of the evening runs fifteen

minutes overtime, it will not be feasible to recall the other candidates for an extra 15 minutes each).

## **Before the Interview**

Immediately prior to the interview, the subcommittee delivers a report about the candidate. This report usually includes the highlights of the application, interesting comments from references, and impressions from the candidate's subcommittee interview. Panelists may have some questions or comments regarding the report. The report is to be brief, because the panel will be discussing the candidate after the panel interview.

## **During the Interview**

### **Introduction**

In the beginning, the panel administrator welcomes the candidate to the panel and advises the candidate to keep the questions asked confidential until the last day of interviewing.

### **Model questions**

The first questions in the interview are usually model questions -- that is, uniform questions which are posed to all candidates.

There are pros and cons to the use of model questions. Many panelists prefer model questions because they provide a baseline by which the candidates can be compared. Some experienced interviewers, however, dislike model questions, because they may generate uninformative generic answers, and take time away from inquiring into the unique aspects of the candidates' backgrounds.

Generally a balance is struck between these positions. The interview begins with two or three model questions from the panel administrator, followed by questions from the panelists. Further, the administrator avoids hackneyed answers by carefully designing the model questions to be challenging and unpredictable.

### **Wrap Up**

At the end of the interview, the candidates may be asked whether they have questions of the panelists. The administrator then thanks the candidate for coming, and tells the candidate on what date the vote will be taken.

## After the Interview

Immediately after the interview, the panel conducts a debriefing. Having reviewed the application, heard the subcommittee, and concluded the panel interview, the panel rounds up its impressions of the candidate.

## What Questions to Ask

Questions like, “Why do you want to be a judge?” are likely to produce canned answers. The question is just as likely to serve as a test of the smoothness of a candidate’s delivery as it is to elicit valuable information.

The best interview questions will either elucidate the candidate’s strengths or challenge the candidate to address potential weaknesses that could manifest on the bench. A prosecutor is asked, “what can you point to in your background that prepares you to be fair to the criminal defendant?” A court attorney is asked, “Tell us what you think it is like for a private attorney appearing in your judge’s court.” The house counsel is asked “What is your experience in settling cases?” And the tort lawyer is asked “What is your experience in supervising a staff?”

Rich material for questions are found when, as is often the case, the applicant is already a judge seeking reelection, or higher judicial office. The panel uses reference checks in tandem with the interview to examine the practices and policies that have already evolved in the judge’s courtroom. A judge can be asked, “what would the attorneys who appear in your court say about your settlement style?” A criminal court judge seeking supreme court nomination can be asked “What prepares you to make the transition to civil law?”

## Hypotheticals

One of the best tests of a candidate’s fluency with courtroom situations is to present a hypothetical problem similar to those judges regularly encounter.

You are a judge in an automobile accident case where liability is assumed. The plaintiff is a child. The attorneys have fashioned a settlement which they believe is fair. However, you believe that the child’s disabilities are severe enough that the settlement will be insufficient to pay the child’s expenses. Your court attorney advises you that the verdict reports for similar cases are far higher than the settlement amount. The attorneys on both sides both want to quickly settle the case. How would you handle it? What is your role? What questions would you ask?

In response, the candidate demonstrates her ability to think on her feet. One problem with a hypothetical question, however, is that an articulate candidate will easily give a perfect answer of what he would do in a given situation, without evidence that the candidate would actually respond in that way.

As an alternative to the hypothetical question, panelists will often pose a behavioral question. In a behavioral question, the panel explores the way that a candidate has demonstrated relevant problem-solving skills in the past. “How have you dealt with belligerent adversaries?” “Give us an example of a time when you have had to follow the law even when it conflicted with your moral beliefs.” In behavioral questions, not only does the panel discover how a candidate approaches problems, but it also gets a sense of the candidate’s ability to learn from her own experiences.

## Questions Not to Ask

### **Avoiding Litmus Tests**

An interview of a judicial candidate is a briar patch of ethical pitfalls. Although the process has to be challenging and incisive, it must shield the candidate from being forced to make statements that would be unethical to make.

Candidates for judicial office are a special kind of candidate, one that cannot promise the voters that they will decide a case this way or that way, but can only promise the voters that, when the time comes for them to decide, they will be fair. Here a judicial candidate runs on qualifications, character and judicial philosophy, because unlike a politician, the judicial candidate is generally not allowed to make promises of what they would do in office.

Pursuant to Canon 5 of the Code of Judicial Conduct, judges and judicial candidates shall not:

- I. make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;
- II. make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.

Code of Judicial Conduct, Canon 5(a)(4)(d); Rules of the

Chief Administrator of the Courts, 22 NYCRR §  
100.5(a)(4)(d).<sup>11</sup>

These guidelines govern the candidates' answers in screening panels.<sup>12</sup> Thus in the interview it will not be appropriate to ask, "How would you rule if you are presented with a case similar to that of Terry Schiavo?" Such a question would be applying a litmus test in which the primary interest is in whether the candidate would rule in a way with which the questioner would agree.

News reporters raise the specter of litmus tests when senators confront judicial nominees with issues like the death penalty, *Roe v. Wade*, gay rights or Rockefeller drug laws. In the context of the screening panel, litmus tests are just as inappropriate for issues which are less sensational, such as zoning, tort liability and election law. Asking, "Should a variance have been granted in this land use context?" is not appropriate.

There are exceptions, and the reader is referred to the Code of Judicial Conduct and the ethics opinions for particular cases. According to the New York State Bar Association, Canon 5 does not prohibit a candidate from making pledges or promises respecting improvements in court administration.<sup>13</sup> Thus it follows that a candidate can be asked "What would you do to improve the courts?" or "What is your position on the community courts initiative?"

The prohibition under Canon 5 was further narrowed as the Court of Appeals applied the United States Supreme Court's decision in *Republican Party of Minnesota v. White*<sup>14</sup>, which invalidated a Minnesota statute barring judicial candidates from announcing their views on disputed legal or political issues. Eventually, the *White* ruling was applied to New York's statutes<sup>15</sup>. In *Watson v. State Commission on Judicial Conduct*<sup>16</sup>, the New York

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<sup>11</sup> NYSBA Commentary 5.9: "This Section applies to any statement made in the process of securing judicial office, such as statements to commissions charged with judicial selection and tenure and legislative bodies confirming an appointment. See also DR 8-103(A) of the Code of Professional Responsibility."

<sup>12</sup> Opinion 93-106, Advisory Committee on Judicial Ethics.

<sup>13</sup> *Id.*

<sup>14</sup> *Republican Party of Minnesota v. White*, 536 U.S. 765 [2002]

<sup>15</sup> Rules Governing Judicial Conduct 22 NYCRR § 100.5(a)(4)(d)(i), prohibiting a judicial candidate from "making pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office."

<sup>16</sup> *Matter of Watson v. State Commission on Judicial Conduct*, 100 N.Y.2d 290 (2003); 2003 N.Y. Slip. Op. 14807. *Contra Spargo v. N.Y. State Comm'n on Judicial Conduct*, 244 F.Supp. 2d 72 (N.D.N.Y. 2003), *rev'd*, 351 F. 3d 65 [2nd Cir. 2003], *cert. denied* 124 S. Ct. 2812 (June 2004.))

Court of Appeals declared that the New York statute is valid, because unlike the Minnesota statute, the New York statute only prohibits pledges and promises of conduct in office and “does not prohibit a candidate from articulating their views on legal issues.”

Candidates may articulate their views, as long as their comments cannot be construed as a pledge or promise to decide cases in a certain way or to the benefit of a particular party. Keep in mind that “candidates need not preface their comments with the phrase ‘I promise’ before their remarks may be reasonably interpreted by the public as a pledge to act or rule in a particular way if elected.”<sup>17</sup>

Taking these rules into account, the panel can and should gain an understanding of the candidate’s judicial philosophy, courtroom practice, and negotiation skill. Thus, the candidate can be asked, “How do you view the role of the courts in relation to the legislature?” Rather than “How would you rule?” the panel should pose other hypothetical questions, based on challenging negotiations, administrative headaches, and cultural misunderstandings that commonly arise in the courtroom.

There is certainly room for disagreement as to what questions are likely to solicit answers which are impermissible. Yet the legal disputes over what pledges and views a candidate is allowed to make can distract panelists from the purpose of the interview, which is to evaluate whether a candidate is qualified according to the guidelines<sup>18</sup>. These guidelines have very little to do with a candidate’s pledges, promises, or viewpoints. Rather, background, experience and character are more relevant to the determination of whether a judge is qualified. Perhaps by committing itself to the restrictions of Canon 5, the Independent Screening Panel helps to set an example for judicial candidates to follow when they bring their campaigns directly to the voters.

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<sup>17</sup> *Id.*

<sup>18</sup> See Chapter I.



## Chapter IV

# The Panel's Report

## **Reporting**

**T**he ultimate goal of the panel is to make a report of the candidates they found qualified for judicial office. Rules govern the specific number of candidates to be reported.

### **Three for Each Vacancy**

The panel is to report the names of “not more than three, not less than two” of the most qualified candidates for each vacancy. If the panel feels that there are not enough qualified candidates to meet that target number, it must affirmatively state in its report that no other qualified candidates are before the panel.

Here again, diversity is an important consideration. The panel rules specifically mandate that the panelists are to consider the need for qualified judges of diverse backgrounds, as well as the need to provide representation on the bench of traditionally underrepresented groups.

### **Incumbents**

As stated in Chapter I, the panel, like most screening systems, does not compare an incumbent with other candidates, but measures the incumbent against his own record, applying the ABA guidelines. The panel will report out the incumbent if the judge’s performance during his or her term merits continuation in office.

### **The Supreme Court 2-4 Rule**

Yet another permutation of the rules exist for supreme court candidates, known as the “2-4 Rule.” Candidates for supreme court in New York County are customarily selected from the existing pool of civil court and criminal court judges. Thus, they tend to be highly qualified, often with several years of experience serving in limited jurisdiction courts. As a result, the Democratic Party has evolved a rule to avoid multiple applications over the years. If the supreme court screening panel has reported out a candidate twice in a four-year period, that candidate is eligible for nomination for the next four years in which vacancies exist. Rules of the New York County Democratic Committee, Art. III, § 7(a)(ii)(3).

## Voting

The panel generally gets a final opportunity to discuss the merits of the candidates on the day of voting. When the panel feels deliberation is complete, it can prepare to vote.

The panel administrator explains the voting procedure to the last detail, and answers any questions the panelists have. When all panelists understand the procedure, the ballots are distributed.

Any voting procedure is acceptable as long as it meets acceptable standards of fairness. As the voting results must be known at the end of the meeting, the procedure should be simple and easy to implement. All vote-counting is conducted in view of the whole panel and the results are verified and reported at the end of each ballot.

Three methods are listed below, each with its strengths and weaknesses.

### Multiple Ballot Non-Cumulative Voting

- 1) Each panelist gets to vote for a maximum of candidates equal to the target number of candidates to be reported out. *Example: since there is one vacancy, the goal is to report three candidates. Therefore, each panelist gets three votes.*
- 2) A panelist cannot cast more than one vote for any candidate during the same round. *Panel administrator invalidates a ballot because the panelist attempted to record 2 votes for candidate Smith.*
- 3) After the votes are tallied, any candidate who fails to receive a vote from the majority of panelists will be excluded from the next round. The panel will engage in successive rounds of voting until the target number is reached. *The panel has 15 members. Therefore, any candidate who fails to garner 8 votes will be dropped from the next ballot.*
- 4) If, in later ballots, the candidates have not been whittled down to the target number, panelists can move to eliminate the candidate or candidates who have garnered the lowest number of votes. *In this example, the ballot is down to five candidates, but they all have at least 8 votes. Panelist Jones makes a motion to eliminate the two lowest vote-getting candidates. After discussion, the motion is granted.*

## Cumulative Voting

Cumulative voting has been implemented in many cities and counties in the United States, and is frequently included in the settlement of voting rights lawsuits. As in the previous system, panelists get three votes each, assuming that they have to report out three candidates. The votes, however, can be allocated in any manner the panelists choose. Thus, a panelist with three votes may cast one, two, or all three votes for the same candidate.

## Choice Voting

Commonly used in community board elections in New York City, the advantage of the choice voting system is that it prevents two similar candidates from splitting each other's votes. In this system, the panelists are asked to list as many candidates as they wish, but must rank their preference in numerical order. This ballot is known as a transferable ballot. Should a panelist's first choice fail to win, the panelist's vote is transferred to the second choice, and so on.

Regardless of the system, any ballot that is illegible or does not substantially conform to the instructions must be eliminated. The official tally of votes is to be kept confidential within the panel, because the candidates who are reported out are not to be ranked.

After the ballots have been counted and recounted, the panel administrator addresses any objections to the count, and moves that the panel report be adopted by voice acclamation.

The report will include the names of all winning candidates in alphabetical order. The Panel presents the report directly to the Law Chairs of the New York County Democratic Party. The Law Chairs or the County Leader will have the duty of disclosing the results to the candidates themselves.

The New York County Democratic Party appreciates the confidence of the candidates, the panelists, and the voters who, over the years, have placed their faith in the procedures of the New York County Independent Screening Panel. As these procedures evolve, the Democratic Party will continue to commit itself to a qualified, experienced, and diverse judiciary.