

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

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

COMMISSION TO PROMOTE PUBLIC CONFIDENCE IN JUDICIAL ELECTIONS

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PREFACE

The Commission submits this Report to Chief Judge Judith Kaye with additional recommendations for promoting confidence in judicial elections statewide. In our Interim Report, dated December 3, 2003, we offered four basic sets of recommendations. They involved the process by which judges are selected before their names appear on the ballot; the way candidates' campaign for judicial office; the financing of judicial campaigns; and voter education reforms. In the current Report we build on those recommendations. We particularize the structure for the state-sponsored independent judicial qualification commissions we recommended be established in each Judicial Department. We recommend a beginning to a system of public financing of judicial races. We propose a mechanism for oversight of judicial election campaign activities. We recommend the adoption of a feature in judicial elections enabling incumbent judges to seek election to another term in an uncontested retention election. Finally, we advance additional recommendations to increase public awareness of the judiciary and judicial elections.

The Commission had originally contemplated that this would be its final report but we have been unable to conclude our work on the judicial nominating process associated with Supreme Court justices. Accordingly, we request that Chief Judge Kaye continue the life of this Commission until we have done so. During the interim period, the Commission will assess the response to its recommendations and be available for such assistance as may be required with respect to their implementation.

With respect to our recommendations, we believe that some require legislation, some can be acted upon administratively, and some may be done either way. Legislation would be the preferable process for the establishment of independent judicial qualification commissions; however, in the absence of such action, we believe the purpose of such commissions can be accomplished by the Judiciary itself. We believe that the goal of promoting public confidence in judicial elections is important enough to warrant consideration of such a step. This is reinforced by the public opinion poll, public hearings, focus groups, and judicial survey sponsored by the Commission. They made clear that voters lack basic knowledge about judicial candidates and that the need for judicial candidates to seek contributions to run is a threat to the impartial and independent administration of justice in New York State.

The Members of the Commission and its staff express to Chief Judge Kaye their continued gratitude for the opportunity to serve. We applaud the leadership she has given to judicial election reform. I express my deep gratitude to my colleagues on the Commission and the outstanding staff assembled for purposes of this work. This Report, as the Interim Report, reflects an enormous expenditure of time by the members of the Commission, aided by a splendid counsel, Professor Michael Sweeney of Fordham Law School, and a very able group of law students from Albany and Fordham Law Schools. Their names are as follows: Adrienne Woods-Blankley; Ryan Callahan; Lavonda Collins; Beth Hurley; Yehuda Greenfield; C. Kim Le; Kyle McCauley; Claudia Neary; M. David Possick; Joel Waldman; Ralph Wolf; and Elizabeth Zeigler. Several students from undergraduate institutions also contributed to the Commission's work, they are: Robert Ferris; Michael Grosso; and Shontell Smith. We also express heartfelt thanks for the invaluable assistance of Dan Auld, Antonio Galvao, Derek Hackett, Adam Itzkowitz,

Daniel McLaughlin, Deepto Mukerjee, Barbara Reed and Jordan Stern.

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

I am very grateful to the institutions that provided the technical assistance and in-kind support that allowed the Commission to function. Each time we turned to them for help, they offered more than we requested. They are Fordham University School of Law, Albany Law School, the American Arbitration Association, the Fund for Modern Courts, Justice at Stake, the New York County Lawyers' Association, and the Office of Court Administration. The Commission owes special gratitude to the Government Law Center at Albany Law School and to Peggy Healy and Margie Carney for conducting focus groups on behalf of the Commission.

I am especially grateful to Dr. Lee M. Miringoff and Dr. Barbara L. Carvalho of the Marist Institute for Public Opinion and Bill Slate and Ken Eggers of the American Arbitration Association for undertaking surveys on behalf of the Commission to determine the views of New York's registered voters and judges on judicial elections. The surveys played an important part in enlightening the Commission's work.

The work of this Commission would not have been possible without the extraordinarily generous support we have received from a number of organizations. We deeply appreciate their confidence and hope that the results of this work will prove worthy of their confidence. They are the Carnegie Corporation, the Hearst Foundations; the J.M. Kaplan Fund, the Joyce Foundation, the New York Bar Foundation, the New York Community Trust, the Office of Court Administration, the Open Society Institute and the law firm of Skadden, Arps, Slate, Meagher & Flom.

The Commission also owes great gratitude to the many individuals and organizations that took the time to testify before the Commission, submit written commentary, meet with Commissioners, and comment on our Interim Recommendations. Their input was an important part of our deliberations.

As a final note, I would simply add that I have been a participant for a long time in efforts to achieve government ethics reform in New York State. I have never served with a finer or more diligent group than the members of this Commission (including its staff). We can't make reform happen by ourselves. It requires a much larger commitment. We call on our government leaders to make that commitment because protecting and enhancing the Judiciary of New York State is worth it.

John D. Feerick, Chair
Fordham University School of Law

Introduction

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

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

In 2003, Chief Judge Kaye appointed 29 citizens to serve on the Commission to Promote Public Confidence in Judicial Elections and charged them with providing to her a blueprint to foster dignified judicial campaigns and improve voter participation. On December 3, 2003, we presented her with an Interim Report that offered recommendations that we believed could be promoted in the short term.

In this Report we build on our interim recommendations. We further develop some of our interim recommendations by specifying a structure for the state-sponsored independent judicial qualification commissions, expanding our recommendation for judicial voter guides, and recommending the authority we believe should be responsible for the expanded campaign finance disclosure system. We also offer recommendations for public financing of judicial races, retention elections for incumbent judges running for re-election, oversight of judicial election campaign activities, and more effective voter education.

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

A witness told the Commission "The surest way to stop progress is to come out four square in favor of it, but never agree on any one improvement because it is not perfect." Clearly, any change will take the cooperation and support of many different parts of New York's political system. Many people have different opinions of what should be done and the Commission tried to listen to as many ideas as people were willing to offer. Our recommendations are the product of long deliberation among a politically, geographically, socially and professionally diverse group.

The Commission Process

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

Due to the breadth of the Commission's mandate, three subcommittees were formed to deal with the broad subject areas of Candidate Selection, Campaign Oversight, and Campaign Finance and Voter Education. Subcommittee meetings were held between full-commission meetings. Each subcommittee met monthly between May 2003 and May 2004 and each was responsible for formulating recommendations and drafting reports for submission to the Commission. In addition, several smaller working groups met independently of the subcommittees to develop recommendations on particular issues. Full commission meetings, which took place in April, June, October and November of 2003 and March, April and June of 2004, were dedicated to deliberating on subcommittee reports and developing consensus.

The Commission researched judicial elections and public opinion through various means. Commissioners reviewed reports, commentary, court decisions, academic articles and news accounts from around the State and the country. Several organizations lent technical support to the Commission, including research and commentary on specific issues in New York State. In addition to reviewing existing research, the Commission conducted several primary research projects to help inform its work.

During September 2003, the Commission conducted public hearings in Albany, Buffalo and New York City (the "Public Hearings"). Notice was widely disseminated across the state and 56 witnesses offered testimony during three days of Public Hearings. See Appendix B for a copy of the public hearing notice and a list of witnesses. Further, many people submitted written testimony to the Commission. Transcripts from the public hearings and the written testimony are posted on the Commission's website: <http://law.fordham.edu/commission/judicialelections>.

The Marist Institute for Public Opinion conducted a major public opinion poll on behalf of the Commission in October 2003 (the "Marist Poll"). Marist interviewed 1,003 New York State registered voters via telephone to measure the perceptions throughout the state about judges in New York State and the judicial campaign and election process. The results obtained were not just answers from those individuals who responded but more importantly, because of the design and methods by which the data is collected, can be used to generalize to the population as a whole. The full report, Public Opinion and Judicial Elections: A Survey of New York State Registered Voters (December 2003), was published with the Commission's Interim Report to the Chief Judge on December 3, 2003 and it is included with this Report as Appendix C.

The Government Law Center at Albany Law School conducted a series of nine focus groups on behalf of the Commission during March 2004 (the "Commission's Focus Groups"). The focus groups took place in Albany, Clinton, Kings, Monroe, Nassau, New York, Oneida, Onondaga, and Westchester counties, and were designed to elicit citizen

input on the issue of voter participation in judicial elections and the Commission's interim recommendation for state sponsored screening commissions for judicial candidates. In all, 90 citizens participated in the focus groups and provided a wealth of information. The results were submitted to the Commission in the Report to the Commission to Promote Public Confidence in Judicial Elections: Focus Group Results and Recommendations (June 2004) attached as Appendix D.

The American Arbitration Association and the Marist Institute collaborated to conduct a survey of New York State judges in April 2004 (the "Judicial Survey"). The goal of the survey was to measure the perceptions of New York State Judges about judicial elections in the state, and it incorporated some of the same questions asked of registered voters in the public opinion poll. The survey was mailed to 3,200 sitting judges in New York State and 1,129 judges responded for a response rate of over 33%. The survey results are attached as New York State Judges: Mail Survey Results (May 2004), Appendix E.

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

The Commission presented an Interim Report to the Chief Judge of the State of New York on December 3, 2003. It contained recommendations that we believed could be promoted in the short term, including recommendations for the establishment of independent judicial election qualifications commissions to evaluate the qualifications of candidates for judicial office throughout the state; amendments to the Chief Administrator's Rules Governing Judicial Conduct governing campaign speech restrictions, disqualification and campaign expenditures; the creation of a campaign ethics and conduct center; the expansion of judicial campaign finance disclosure; and the establishment of a state-sponsored judicial election voter guide. The interim recommendations are attached as Appendix A.

This Report includes our recommendations for the mid and long term horizons. It expands on some of the interim recommendations and addresses other areas that we had not previously commented upon. In particular, we provide more detail on our interim recommendations for state-sponsored independent judicial election qualifications commissions, for a state sponsored voter guide and an update on our campaign finance disclosure recommendation. The Report also addresses issues of public financing, voter education, retention elections, and the enforcement of the judicial conduct rules.

We had originally contemplated that this would be our final report but we have been unable to conclude our work on the judicial district convention process for Supreme Court justices. Accordingly, we request that the Chief Judge continue the Commission to allow us to address the issue.

Judicial Elections in New York State: a Brief History

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

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

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

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

But by and large, New York's judges are elected. In the last major study of New York's elected judiciary, in 1988, the New York State Commission on Government Integrity called for an appointive process for all State judges. But the call has gone unheeded. Today, 73% of the state's 1,143 full-time judges are elected, as are most of the 2,164 Town and Village Justices.

Judicial Selection in New York State: the Current System

New York's current judicial system is among the most complex in the United States. The constitutional scheme provides for some courts to function statewide, some operate solely in New York City and others exist only outside of New York City. Its appellate structure includes a court of last resort, the Court of Appeals, and an intermediate appellate court, the Appellate Division of the Supreme Court. In addition, in some areas of the state there is an Appellate Term of the Supreme Court that hears appeals from courts of

lesser jurisdiction, and in other areas County Courts act as appellate courts for lower courts. Eleven trial courts feed the appellate courts in New York: one trial court of general jurisdiction, the Supreme Court, and ten others of limited jurisdiction.

New York uses almost as many methods of judicial selection as there are courts. Five bodies of law address judicial selection: the constitution, state election and judiciary laws, and gubernatorial and mayoral executive orders. At the appellate level, judges are selected for the bench in 3 distinct ways: the Governor appoints judges to the Court of Appeals, subject to the advice and consent of the Senate, from a pool nominated by the Commission on Judicial Nomination; the Governor designates justices of the Appellate Division of the Supreme Court from among the elected Supreme Court Justices; and the Chief Administrator of the Courts assigns Appellate Term justices subject to the approval of the presiding justice of the applicable Appellate Division.

Selection to the trial courts is no less complicated. While the constitution requires that electors in a particular judicial district choose the Justices of the Supreme Court, the election law employs a unique party convention system for nominating candidates for the general ballot. Judges of the courts of lesser jurisdiction are generally elected to office through a primary and general election, but there are exceptions even to that rule. Court of Claims judges are appointed by the Governor, subject to the advice and consent of the Senate. Family Court and Criminal Court judges in the City of New York are appointed by the Mayor of the City. Both the Governor and the Mayor employ screening committees established by executive order to evaluate candidates' qualifications. Further, both the Governor and the Mayor have the authority to make interim appointments for vacancies in various benches. For a more detailed discussion of New York's court system see the Working Paper on Judicial Selection in the New York State Court System, attached as Appendix G-1.

Judicial Elections in New York State: the Current Environment

New York's judicial election system has suffered criticism at various times in its history, but recent events have heavily taxed public confidence in judicial elections. Public accounts of undignified campaign activity in local judicial elections around the state, connections drawn between campaign contributions and judicial decision making, and attacks on political party control of judicial elections have combined to cast judicial elections in a bad light. The public criticism is confounded by a populace largely uninformed about its elected judiciary and disconnected from courts and judges. Our research over the past 14 months makes one thing clear: public confidence in judicial elections has suffered.

The call for reform of the judicial election system has become a clamor. Public officials statewide have called for change. There are ongoing criminal investigations into the way judicial elections are conducted. Bills calling for change have been introduced into the Legislature. Citizens are challenging fundamental parts of the system in civil litigation. Non-profit organizations, academics and commentators from around the state are demanding improvement. The media in several parts of the state has taken up the cry, ensuring that the public is not deaf to the call for reform.

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

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

EXECUTIVE SUMMARY

When the Chief Judge of the State of New York, Judith S. Kaye, appointed this Commission, she charged us with promoting public confidence in judicial elections and asked us to provide her with a blueprint to foster dignified judicial campaigns and improve voter participation. On December 3, 2003, we presented the Chief Judge with interim recommendations we believed capable of being implemented in the near term. The recommendations covered six areas: candidate selection, the ethics rules governing judicial conduct; promoting ethical campaign activity; campaign finance disclosure; campaign expenditures; and voter education.

This Report presents our recommendations for the mid and longer term. In it we further develop some of our interim recommendations by specifying the structure for the state-sponsored independent judicial qualification commissions, expanding our recommendation for judicial voter guides, and recommending the authority we believe should be responsible for the expanded campaign finance disclosure system. We also offer recommendations for public financing of judicial races, retention elections for incumbent judges running for re-election, oversight of judicial election campaign activities, and more effective voter education. We believe that these recommendations, if implemented, will go a long way towards reaffirming the luster of New York's elected judiciary.

RECOMMENDATIONS ON CANDIDATE SELECTION

When we discussed the issue of judicial candidate selection in our Interim Report, we noted statewide concern over the way judicial candidates are selected and over the voter's role in that process. Witnesses at our public hearings, the media, non-profit organizations, judges, politicians, citizens groups, academics, litigants and law enforcement agencies expressed concern over voter disenfranchisement in the selection of judicial candidates. As a result, we recommended the establishment of independent screening commissions to ensure that every judicial candidate is qualified to serve the bench.

As a result of the Commission's work since the Interim Report, we have further developed our interim recommendation for independent screening commissions. We offer the following recommendation as a fair, credible and realistic plan to promote confidence in judicial elections based on our substantial research and deliberation.

New York State should establish a system of state-sponsored Independent Judicial Election Qualifications Commissions (the "IJEQCs") with the following characteristics to evaluate the qualifications of candidates for judicial office throughout the state:

- **Each judicial district should have a commission;**
- **The commission members should reflect the state's great diversity;**
- **The commissions should actively recruit judicial candidates;**
- **The commissions should publish a list of all candidates found well qualified;**
- **The commissions should apply consistent and public criteria to all candidates;**

- **Member terms should be limited;**
- **Uniform rules should govern commission proceedings and its members' conduct;**
- **The commissions should have the necessary resources to fulfill their functions; and**
- **The Chief Administrator's Rules Governing Judicial Conduct should require all judicial candidates to participate in the IJEQC process.**

We believe that the IJEQCs will promote public confidence and informed voter participation in judicial elections in New York State. Through independent screening, the commissions assure the public that candidates for judicial office are qualified to serve on the bench. They also promote confidence in New York's elected judiciary generally by preventing unqualified candidates from gaining judicial office. The choice between candidates remains with the voter, but the commissions help voters make informed choices about candidates, educating them about particular candidates and providing objective criteria on which to make decisions. As importantly, by encouraging diversity on the bench the commissions will foster public confidence in all communities.

RECOMMENDATIONS ON PUBLIC FINANCING OF JUDICIAL ELECTIONS

Campaign contributions present a potentially serious obstacle to maintaining the appearance of impartiality that is critical to the judicial function. Simply put, some people find it hard to believe that a judge will not favor a litigant who has contributed generously to his or her campaign over a litigant who has not. Public financing of judicial elections can help break any perceived connection between campaign contributions and judicial impartiality.

We acknowledge that there are significant challenges to implementing a public financing program in New York. Nevertheless, we believe that such challenges can and must be overcome, especially at a time when interest in judicial reform is high. While public financing on a statewide basis may not be feasible as a first step, much can be accomplished and learned by establishing smaller "pilot" programs, which will also be less expensive to run and fund. Therefore, we make the following recommendation.

We recommend that New York State:

- **Adopt voluntary pilot public financing programs for the Surrogate's Court statewide and for all courts within targeted competitive districts;**
- **Adopt enabling legislation for local public financing programs for judicial campaigns; and**
- **Establish a temporary commission to study the feasibility of a statewide public financing program for judicial campaigns.**

Over the long term, we believe the most effective way to address the public concern over the effect of campaign contributions on judicial impartiality is to eliminate private contributions as much as possible and replace them with public money.

Substituting public money for private money removes any concern that there is a connection between contributions and judicial decision-making. Instead, a judge depends for campaign financing on exactly the people he or she serves—all the people that the judge serves. Public financing also serves to open the door to qualified candidates of diverse backgrounds and those not comfortable with raising money.

RECOMMENDATIONS ON RETENTION ELECTIONS

Many of the challenges to public confidence in judicial elections are particularly acute when a judge is running for re-election. Raising campaign finances, soliciting political party support, and engaging in a politically charged election threaten public confidence in judicial impartiality and independence. The threat is greatest when a sitting judge is involved in such activities. Accordingly, we make the following recommendation.

We recommend that New York State adopt a system of non-competitive, non-partisan retention elections for qualified incumbent judges running for re-election

We believe that retention elections coupled with judicial screening is the best way to ensure judicial integrity and independence where an incumbent judge is running for reelection.

RECOMMENDATIONS ON VOTER EDUCATION

In our Interim Report, we discussed the importance of voter education to public confidence in judicial elections. We said that knowledge is fundamental to confidence in the judiciary and we noted that New Yorkers are not well informed about their state judiciary. Our research since we released the Interim Report has only reinforced the nexus between voter education and public confidence in judicial elections. Therefore, we present the following recommendations.

We recommend that:

- **New York State produce and distribute voter guides for judicial elections;**
- **Information regarding voter education efforts be centrally coordinated;**
- **OCA establish a multi-media awareness campaign about the judiciary;**
- **The Chief Judge of the State of New York work to build partnerships with existing organizations working on voter education issues.**

We believe that these recommendations will lead to an increase in informed voter participation in judicial elections. Voter guides are an efficient and cost-effective to engage voters in judicial elections, and centralizing and expanding existing information reaches out to the community at large, encouraging an understanding and appreciation of the judiciary and judicial elections.

RECOMMENDATIONS ON CAMPAIGN CONDUCT

Judicial campaign activity has tremendous potential to influence the public perception of judicial elections. Campaigns are public affairs and by their nature they reach out to citizens. Campaigns for judicial office are different from those for other offices because a judicial candidate's public activities must respect the impartiality and independence of the office. Recognizing this, New York State has established rules governing judicial campaign conduct. Witnesses testified at the public hearings, however, that the existing enforcement regime is often not an effective deterrent to inappropriate campaign activity. Acknowledging this enforcement gap, we offer the following recommendation.

We recommend the establishment of Judicial Campaign Practice Committees in each Appellate Department in the State

We believe that these Committees will serve a valuable role as ombudsman for the judiciary, ensuring that inappropriate judicial campaign conduct is addressed both expeditiously and irrespective of whether a candidate wins or loses the election. We think that the Committees strike the right balance between providing candidates with sufficient process to protect their interests and serving the larger goal of preserving the dignity of the judicial office.

RECOMMENDATIONS ON CAMPAIGN FINANCE DISCLOSURE

In our Interim Report, we recommended that campaign finance disclosure filings for judicial candidates for all courts should be filed electronically and made publicly available in a searchable electronic format on a timely basis. In addition, the content and format of judicial disclosure filings should be expanded and revised. We urged that transparency in judicial campaign finance disclosure will promote confidence in the campaign finance system as well as in the judicial elective system. We reaffirm our interim recommendations and add the following recommendation.

We recommend that the Office of Court Administration be responsible for receiving and publicly reporting judicial campaign finance disclosures

These are our final recommendations with one exception. The Commission did not reach a conclusion on the issue of judicial nominating conventions, and we recommend that the Commission remain constituted in order to produce a report and recommendation on the judicial district convention system upon the call of the Chair. In the meantime, the Commission will continue its study of the issue and learn from the various reform efforts that are currently underway.

We believe that the best way to foster public confidence in judicial elections is to ensure that voters participate and that they continue to produce an impartial, independent and well-qualified judiciary. These recommendations are the product of long deliberation among a politically, geographically, socially and professionally diverse group. They reflect the views of a substantial consensus of the Commission as to the best way to promote public confidence in judicial elections.

Challenges to Public Confidence in Judicial Elections

A judge's role in our society makes judicial elections different from elections for other branches of government. We expect judges to apply the law as it is written, impartially and independent of outside influences. We do not require the same impartiality or independence of legislators or executives. The demands of impartiality and independence mean that although judicial candidates rely on the support of others for election, they cannot acknowledge that support as judges. Although candidates compete for office, they must be careful not to campaign in a way that erodes confidence in their impartiality.

Impartiality and independence are so critical to the judicial role that even the appearance of partiality or improper influence degrades a judicial system. The justice system is founded on public confidence and if people do not believe in the impartiality and independence of the judiciary, they will resort to other means to resolve those matters that are properly in the judiciary's realm. A former administrative judge expressed the idea when he was quoted as saying that if the public does not have faith in the judiciary, "people won't go to court, but to the streets or to a gun dealer." This Commission is charged with promoting public confidence in judicial elections. Our mandate requires us to look at those aspects of judicial elections that raise questions about impartiality and independence.

Public confidence in judicial elections is not a uniquely New York concern. Thirty-two states elect trial court judges and all experience challenges to public confidence. National, state and local organizations across the country have sought to address concerns over the effects of campaign conduct, campaign finance issues, political party influence, voter participation and a lack of diversity in judicial elections. We recognize that inappropriate campaign conduct in judicial elections is a threat to public confidence in judicial impartiality, and states protect public confidence through rules that restrict candidates' campaign activity. For instance, the way judicial campaigns are financed can pose a serious threat to public confidence. According to *Justice for Hire*, a 2002 report by the Committee for Economic Development, there has been an "explosion of interest in, and financial contributions to, judicial campaigns." The ABA Commission on the 21st Century Judiciary claims that one result is less diversity on the bench, which in turn fuels a lack of confidence in the court system among many minority communities. Increased campaign costs flag the attendant problem that judicial candidates are "forced to raise funds and accept donations from law firms or special interest groups that might someday appear before them," fueling an increasing public perception that judges are influenced by their contributors. Despite the increasing cost of campaigning across the country, there is often a dearth of impartial public information on judicial candidates, leaving the public uninformed. The lack of knowledge leads to voter apathy.

Every part of New York State is experiencing some of these threats to public confidence in judicial elections. It is not in one county or one part of the State, as some suggest. The Commission conducted extensive primary research in New York, including public hearings, a public opinion poll, focus groups, a survey of judges and countless private interviews. In each case, we made special efforts to ensure that the research was conducted statewide. Public hearings took place in Albany, Buffalo and New York City;

geographic diversity was a statistically significant factor in the public opinion poll, and the focus groups took place in nine locations from Plattsburgh to Brooklyn and from Rochester to Albany. In addition, more than a third of the sitting judges in New York State responded to the Judges Survey, and Commissioners conducted private interviews with leaders in legal, political and civic communities throughout the state. Commissioners also considered government and media accounts from every judicial district. *See Working Paper on New York State Judicial Districts: Selected Issues and Statistics (2004)*, attached as Appendix G-2. Although the challenges may manifest in different ways depending on local culture, one message was clear: the threat to public confidence in judicial elections is alive and well in every part of New York.

Our research leads us to focus on five aspects of New York's current system of judicial elections that threaten public confidence: campaign activity, campaign finance, candidate selection, voter participation and candidate diversity.

Campaign Activity

Judicial campaign activity is an important means by which the public develops its opinions of the judiciary. Candidates for judicial office publicly campaign; they advertise their candidacy, raise funds, speak to voters, and attend political functions. Because a judge's role is significantly different from that of people elected to the executive and legislative branches, conduct that might be appropriate in other types of campaigns is inappropriate in judicial elections. For this reason, to ensure campaigns are carried out in a way that maintains public confidence in the integrity, impartiality and independence of the judicial office, New York's Chief Administrator of the Courts promulgated rules (the "Rules") that place restrictions on judicial candidates' campaign activity. The Rules, for example, prohibit judicial candidates from personally soliciting campaign contributions and from making pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office. *See 22 NYCRR § 100.5*.

Despite the Rules, campaign activity that threatens public confidence in the judiciary persists in New York. Several recent cases have attracted national attention including the *Raab* case on Long Island, the *Watson* case in Lockport, and the *Spargo* case in Albany. In each case, judicial candidates campaigned in ways that raised questions about their impartiality and independence. Several witnesses testified at the Commission's public hearings about how campaign conduct can bring down public confidence and instances where it has. The threat of such conduct is prevalent enough that the New York State Bar Association has helped develop local judicial campaign conduct committees to control inappropriate behavior.

Inappropriate campaign activity affects public confidence in judicial elections. Respondents to the Marist Poll chose being "turned off by the way the candidates run campaigns" as the second most common reason why they would not vote in a judicial election, behind a lack of information about candidates. Judging from the level of New York's voter participation in judicial elections, sometimes as low as 17% of registered voters, it seems that the behavior noted by the press and bar has affected public confidence.

Campaign Finance

The current campaign finance system for judicial elections in New York can raise questions about the impartiality so critical to public confidence in the judiciary. Several witnesses testified before the Commission that lawyers are the most common campaign contributors to judicial elections, and that the lawyers who contribute are typically ones that appear before the particular bench. When a judge accepts contributions from people with an interest in the judge's decisions, a threat to impartiality exists. Recent reports by the Commission on Fiduciary Appointments and the Special Inspector General for Fiduciary Appointments on New York's fiduciary appointment system illustrate the threat by documenting a significant correlation between judicial fiduciary appointments and campaign contributions. Although many judges make an effort not to know who contributes to their campaign, several witnesses testified before the Commission that judicial candidates cannot help but know the identities of at least some of the contributors. The testimony was confirmed by almost 70% of the 1,129 judges that responded to the Commission's survey who believe that judicial candidates know who some, most or all of their campaign contributors are.

The public perceives a tension between campaign contributions and impartiality. Even though 71% of the Marist Poll respondents agree that judges as a whole are fair and impartial, many respondents believe that a judge will favor someone who has contributed to his or her campaign over someone who has not. Of the registered voters participating in the Marist Poll, 83% think that campaign contributions have some or a great deal of influence on judicial decisions and 11% more believe the contributions have a little influence. When asked if a judge should hear or rule in a case involving a campaign contributor, 87% of registered voters said no. Criticism of campaign contributions also arose in the focus groups where participants claimed that money in judicial elections has led to an elitist system. For them, the result is a mistrust of the system.

Many judges share voters' perception that campaign contributions can adversely affect judicial impartiality. Of the 1,129 sitting judges in New York that responded to the Commission's survey, 27% believe that campaign contributions influence judicial decisions some or a great deal, and another 18% believe that contributions have a little influence. More than 40% of the judges believe that *any* campaign contribution raises a reasonable question about a judge's impartiality if a contributor appears before the judge and 19% more think that some level of contributions raise a question. In fact, only 19% of the judges surveyed believe that campaign contributions categorically do not raise a reasonable question about a judge's impartiality.

If campaign contributions to judicial candidates in their current form can raise reasonable questions about impartiality, they threaten public confidence in judicial elections. The evidence before the Commission strongly suggests that they do.

Political Party Influence

In New York, local political leaders have a strong influence on who becomes a judge. The uncontested evidence before the Commission is that across the state, the system for selecting candidates for the Supreme Court vests almost total control in the hands of local political leaders. Even in judicial primaries, political party leaders typically

control who becomes the party's candidate. And in many parts of the State, being on the dominant party's slate is tantamount to winning the elections. For instance, only four of the State's twelve judicial districts can be considered competitive. In the other eight, the dominant party candidate almost invariably prevails. *See Working Paper on New York State Judicial Districts: Selected Issues and Statistics (2004)*, attached as Appendix G-2.

Focusing the power to determine who becomes a judge in a few hands presents a threat to judicial independence. Evidence shows that the overwhelming majority of registered voters are concerned with the influence of campaign contributions on judicial independence, and campaign contributions can come in many forms. Witnesses testified that a political leader's support in a campaign is often far more valuable than even a large campaign contribution. Whether in return for political support or not, evidence shows that some candidates have directed thousands of dollars or more to political parties through political fundraisers and paying exorbitant prices for goods or services. *See Working Paper on Judicial Campaign Finance Expenditures*, attached as Appendix G-3. Reviews of public records by the Commission on Fiduciary Appointments and the Special Inspector General for Fiduciary Appointments confirmed accounts documenting judges assigning a disproportionately large number of fiduciary appointments received by high-level political party officials. *See Reports by the Commission on Fiduciary Appointments and the Special Inspector General for Fiduciary Appointments*. The threat to judicial independence is piqued when a sitting judge has to run for re-election. In the Judicial Survey, 42% of judges acknowledged that having to run for re-election has some or great deal of influence on judicial decisions, a perception shared by almost 80% of registered voters. Where party leaders control who wins an election, the risk that a judge's independence can be compromised increases.

The perception that political leaders wield substantial influence in selecting judges decays public confidence in judicial independence. The Marist Poll and Judicial Survey show that 90% of voters and judges agree that a judge's independence from political party leaders is important or very important. But in the same surveys, voters and judges indicate that political party leaders have more influence over who becomes a judge than voters do, and the Marist Poll indicates that 80% of registered voters believe political parties have some or a great deal of influence on judicial decisions. Witnesses at all of the Commission's public hearings raised concern over political influence over sitting judges and its effect on public confidence in the judiciary. Almost every focus group expressed concern with the role of political parties in the judicial election process.

Voter Participation in Judicial Elections

Informed voting is a critical part of the judicial election process. An educated, voting public promotes public confidence in many ways. It allows the public to make informed decisions as to who should serve them as judges; it checks the accumulation of political power in a few hands; and it is a principal part of the system of holding public officials accountable for their actions. Unfortunately, voter participation in New York judicial elections is discouragingly low. Only 17% of registered voters cast a ballot for judge in some areas of the State. Without a high profile executive or legislative race to draw voters, voter turnout at judicial elections is typically among the lowest. But even when voters do go to the polls, many do not bother to cast a ballot for judicial candidates,

they simply vote in the more familiar races. This phenomenon, known as voter roll off, reaches as much as 41% in parts of the state.

Voter education is essential in promoting voter participation. In the Marist Poll, registered voters chose a lack of information about candidates as the main reason they would not vote in a judicial election. The sentiment was shared by every focus group. One participant summed it up, “Citizens will not vote without sufficient information about candidates.” Judges agree with the citizen evaluation. The Judicial Survey shows that 33% of New York State judges believe that a lack of knowledge is the primary reason for low voter participation, and 43% attributed the low participation to apathy, which is often driven by ignorance.

New Yorkers are poorly educated about judicial elections. They lack both a fundamental understanding of the system of judicial election and knowledge about individual candidates. The Marist Poll showed that 65% of New York’s registered voters did not know that Supreme Court Justices are elected, and 48% did not know that judges of the Court of Appeals are appointed. Even when the voters participate in selecting judges, they are often not well informed about the specific candidates. A majority suggested that a lack of knowledge about the candidates drives low voter turnout, and in another survey, 75% of New York voters could not recall the judges they had voted for as they left the polling area. Half of the judges surveyed believe that the public has little or no information about judicial candidates.

The lack of knowledge drives low public confidence in the elected judiciary. The majority of registered voters polled showed that more voters believe that elected judges are doing a “just fair” or poor job than believe they are doing a good or excellent job. They lack confidence in fundamental aspects of the judicial election system: the overwhelming majority of voters are concerned that campaign contributions can affect a judge’s impartiality and that political parties influence judicial decisions.

Diversity

Many witnesses testified to the importance of diversity to public confidence in judicial elections. It was described as the principle that consideration of a broad range of views is the surest path to sound governance and a foundation of democracy. The testimony established that diversity on the bench promotes confidence in judges in many ways. As one witness said “I think that when you come before the bar of justice, and you see from time to time people reflective of your background and experience . . . it engenders confidence that one can get a fair shake.” Diversity promotes participation and confidence in the justice system by involving communities. It promotes confidence by taking into account different perspectives. As a witness said, “Diversity allows justice to see.” Focus participants also were concerned with diversity and all nine groups agreed that diversity is important in the judicial selection process. Several groups remarked on the importance of diversity as a way to increase voter participation and confidence in the judiciary.

New York’s judiciary does not reflect the diversity of the community that it serves. Many of the witnesses before the Commission, at each public hearing, talked about the lack of diversity in the judiciary. Data for New York’s courts of record shows that 18% of New York’s population describes itself as African American compared to only 9% of

judges. The lack of diversity among other groups is even greater: 16% of New Yorkers describe themselves as Hispanic or Latino compared to only 4% of judges; 3% of New Yorkers are Asian compared to 1% of judges; and 52% of New Yorkers are women compared to only 27.6% of judges. While the judiciary as a whole lacks diversity, the bench upstate is significantly less diverse than downstate. Further, the Judicial Survey suggests that New York's Town and Village Court justices lack diversity even more. Of the respondents to the survey, 98% described themselves as white or Caucasian, and 87% were men.

The lack of diversity threatens public confidence in the judiciary. According to the Marist Poll, registered voters believed that treatment by judges depends on factors like your race, ethnicity, gender, wealth and language skills. Many believe that poor people, some racial minorities and non-English speaking litigants receive worse treatment by judges, and they overwhelmingly believed that wealthy people had an advantage over all others. The lack of confidence is even greater within segments of society. For instance, African American, Latino and poor voters all are significantly more inclined to believe that they receive worse treatment by the judiciary, and African American and Latino voters also perceive the poor as subject to judicial discrimination. Results of the focus groups bore that out, participants singled out the lack of diversity as a cause of deteriorating confidence in the judiciary and voter apathy. While we understand that a lack of diversity is endemic in the legal profession in general, it clearly has a negative effect on public confidence in the judiciary.

With these challenges in mind, the Commission offers the following recommendations, in addition to those offered in our Interim Report.

Candidate Selection

When we discussed the issue of judicial candidate selection in our Interim Report (pp. 12-16), we noted statewide concern over the way judicial candidates are selected and over the voters' role in that process. Witnesses at our public hearings, the media, non-profit organizations, judges, politicians, citizens groups, academics, litigants and law enforcement agencies expressed concern over voter disenfranchisement when it comes to in the selection of judicial candidates. The result, they claim, is judicial candidates being placed on the ballot based primarily on their allegiance to a political party or their ability to raise campaign funds, rather than for their skills as jurists.

We heard from many witnesses and commentators who strongly support the idea of independent screening of judicial candidates. Several witnesses testified that independent screening promotes a more diverse pool of candidates and ultimately, a more diverse bench. While people expressed different preferences about various details of the screening process, a consensus emerged on several characteristics: the screening process must be inclusive, rigorous and publicly known; screening panels themselves must be independent; and political parties must respect the screening process.

Based on these principles, the Commission in its Interim Report offered Independent Judicial Election Qualifications Commissions ("IJEQCs") as an effective way to promote confidence in judicial elections. The concept is to pre-screen all judicial candidates to ensure they are qualified. IJEQCs are not designed to supplant local screening processes but to ensure that uniform, independent screening is performed throughout New York State. The role of local politics and the election process would not be altered, but the public would at least be assured that that all the candidates are qualified to serve on the bench.

By design our interim recommendation did not include the details of how commissioners for the IJEQCs should be selected or how the IJEQCs should function. We believed then, and continue to believe now, that consensus is possible around the notion of independent screening commissions. Indeed, many of the organizations that submitted comments on the Commission's interim recommendations expressly supported the idea of independent screening of candidates for courts of record. None opposed the idea.

Rather than present a detailed plan prematurely, we promised in our Interim Report to engage legal and political leaders and citizens in a discussion on how such commissions are best composed. To fulfill that promise, the Commission developed a working group of commissioners to reach out to local leaders (the "Working Group"). In addition, we sponsored a series of nine focus groups around the state to meet with citizens of many different backgrounds.

The Working Group reached out to political and legal community leaders across the state to discuss the Commission's work, particularly the concept of judicial screening. We found a general agreement that a formal qualifications review of judicial candidates on a local level would help strengthen what leaders statewide viewed as sagging public confidence in judicial elections. Some non-lawyer political leaders said that screening would help them identify qualified candidates. Despite this general sentiment, there is no formal screening process in many areas of the state, particularly upstate. Indeed, many

leaders knowledgeable about their local candidate selection processes admit that these focus less on a candidate's legal skills than on the applicant's political activity and ability to raise money. While local bar associations perform a screening function in some areas, nowhere is the bar association rating binding. Even where local political leaders have informally agreed to respect bar association ratings there are recent examples of the agreement being dishonored. With few exceptions, there was a general feeling that the influence of bar association ratings is waning.

In a separate project, the Commission asked citizens if they support state-sponsored screening commissions. In a series of nine focus groups around the state, the response was a resounding yes. *See Focus Group Report, Appendix D.* More than 80% of the participants supported the concept of independent screening and only 10% opposed the idea (10% did not express an opinion). As reasons for their support, they noted that screening commissions create a more representative process, that it would "open the judicial candidate door to diverse communities," and that it would promote judicial competency. Participants considered independence, impartiality, integrity, high moral standards, knowledge of the judicial and legal systems, and community involvement to be important characteristics of screening panel members. Almost all the participants believed that lay people should be involved in the screening process. And they expressed concern that screening is done locally.

Diversity was of critical importance to participants in all nine focus groups. There was consensus that screening panel membership should reflect the diversity of the community that the court system is serving, including gender, race, ethnicity, age, geographic, political affiliation, professional, gender orientation, religion, language and physical ability. Participants also suggested that a broad spectrum of organizations and authorities be involved in selecting panelists, such as representatives of the legal community and judiciary, non-profit organizations, academics and representatives of the executive and legislative branches of government.

As a result of the Commission's work since the Interim Report, we have further developed our interim recommendation for IJEQCs. We offer the following recommendation as a fair, credible and realistic plan to promote confidence in judicial elections based on our substantial research and deliberation. While we contemplate that much detail will develop through implementation and practice, we offer the following specific elements of the Independent Judicial Election Qualifications Commissions.

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

- **Each judicial district should have a commission;**
- **The commission members should reflect the state's great diversity;**
- **The commissions should actively recruit judicial candidates;**
- **The commissions should publish a list of all candidates found well qualified;**
- **The commissions should apply consistent and public criteria to all candidates;**
- **Member terms should be limited;**

- **Uniform rules should govern commission proceedings and its members' conduct;**
- **The commissions should have the necessary resources to fulfill their functions; and**
- **The Chief Administrator's Rules Governing Judicial Conduct should require all judicial candidates to participate in the IJEQC process.**

IJEQC should be established in each of New York's 12 judicial districts

The IJEQCs should be charged with reviewing the qualifications of each and every candidate for election to the state Supreme Court, the County Court, the Surrogate's Court, the Family Court, and the Civil, District, and City Courts.

Each IJEQC should have 15 members selected as follows:

- **The Governor will select two members, one of whom shall be a non-lawyer;**
- **The Temporary President of the Senate, the Minority Leader of the Senate, the Speaker of the Assembly, and the Minority Leader of the Assembly will each select one member;**
- **The Chief Judge of the State of New York will select two members, one of whom shall be a non-lawyer;**
- **The Presiding Justice of the appellate division which includes the appropriate district commission will select two members, one of whom shall be a non-lawyer;**
- **The President of the New York State Bar Association will select one member; and**
- **Four local bar associations, located within the appropriate judicial district and designated by the presiding justice of the appellate division of the appropriate district, will each select one member.**

The Chief Judge of the State of New York will designate the chair of each commission from the full membership. The Chief Judge will also fill a vacancy if any other authority fails to make their allotted appointment within a reasonable time (*e.g.*, 30 days). In addition to the 15 regular members, when the office at issue is a court of a county or other lesser jurisdiction, the commission will have an additional member selected by the elected chief executive officer for the county containing the court. The additional member will be a county resident and will participate in the deliberations and voting of the commission for the sole purpose of determining whether candidates for the local court are qualified.

Commissioner Terms Should Be Limited

Each commissioner should be entitled to serve for a single term of three years and should be eligible to serve an additional term only after a one-year interim period. If a commissioner cannot complete the appointed term, the authority that appointed that

commissioner will appoint someone to serve on an interim basis for the remainder of the term. If a commissioner is appointed to an interim term, he or she is eligible for appointment to a full term without a one-year hiatus. The initial terms should be staggered to expire as evenly as possible over the course of the succeeding three calendar years. Anyone professionally disciplined by the court or convicted of a felony should be ineligible to be a commissioner.

Commission Membership Should Reflect the State's Great Diversity

The extraordinary importance of diversity in promoting public confidence in New York's judiciary was a theme repeated in the Commission's public hearings, public opinion poll, focus groups and conversations with judges, lawyers, politicians and citizens around the state. An important reason for our recommendation is testimony establishing that screening increases the pool and diversity of qualified candidates for judicial office. Every consideration should be given to achieve broad representation of the community including but not limited to, geographic, racial, ethnic and gender diversity. Every appointing authority should keep in mind the tremendous importance of diversity in selecting commissioners. The provision for four local bar associations selecting members is particularly designed to provide for the participation of minority bar associations within the judicial districts. In every case, commissioners must be residents of or have a place of business in the judicial district in which they are to serve.

IJEQCs Should Apply Consistent and Public Criteria to All Candidates

The criteria should include superior professional ability; good character, independence and integrity; reasonable decisiveness; reputation for uprightness, fairness and lack of bias; good temperament, including courtesy and patience; and good physical and mental stamina. Any candidate must have substantial legal practice, administrative or academic experience corresponding to the responsibilities of the office sought. The criteria for evaluation should be made public and should be consistently applied. No candidate may be found qualified for judicial office if there is good cause to believe that the candidate is materially deficient in one or more of the criteria or if the candidate has been found by the court to have violated the standards of professional conduct or is presently subject to a court proceeding involving professional misconduct, or has been found guilty of a misdemeanor or a more serious crime. Further, no candidate may be found qualified that that has not met the application procedures required by the IJEQC.

Two-thirds of the quorum's vote is required to find a candidate qualified, with two-thirds of the members of the full commission constituting a quorum for the purpose of conducting any business. All votes should be by secret ballot.

IJEQCs Should Publish a List of All Candidates Found Qualified

The IJEQC will publish an alphabetical listing of the names of all candidates that it finds qualified for election. Reporting out all qualified candidates has at least two benefits: it leaves the selection of an appropriate candidate to local processes, and it encourages diversity. Local considerations, including political processes and ratings by local organizations, should determine which candidate is proper for that community. IJEQCs

are not charged with selecting which candidates are best, only with screening out unqualified candidates. Indeed, experience shows that an open screening process broadens the pool of candidates. The opportunity to achieve an objective rating regardless of political activity or ability to raise funds encourages participation by all qualified applicants. We expect that a broader range of qualified candidates will lead to a more diverse bench.

IJEQCs Should Actively Recruit Judicial Candidates

The chair of each IJEQC is charged with disseminating public notice whenever an open judicial position to be filled by election occurs in the Supreme Court, the County Court, the Surrogate's Court, the Family Court, and the Civil, District, or City Courts located anywhere within an IJEQC's jurisdiction, whether the vacancy exists, is about to occur or is scheduled to be filled at the next general election. The chair will broadly disseminate notice of the vacancy, the procedure prospective candidates must follow to be considered by the commission, and the deadline for submission of completed applications. The chair should encourage qualified candidates from a cross-section of the jurisdiction to apply by using all reasonable means to give public notice to any appropriate media, bar associations, persons and organizations. The chair and individual commissioners are charged with encouraging qualified applicants from all of the district's diverse communities.

IJEQCs Should Apply a Rigorous Process to All Candidates that Apply for Screening

Candidates for evaluation will be required to complete and submit a written application on a form prescribed by the IJEQC rules on or before February 1 of the year of the election. The individual commissions will promulgate rules for open judicial positions to be filled by elections that arise after February 1. The commission will consider the qualifications of any candidate that applies for screening, whether proposed by a political party, a member of the commission, or by any other group or person, including a prospective candidate, provided that the candidate completes a questionnaire and submits to an interview.

An IJEQC may designate subcommittees to investigate the background and qualifications of an applicant and to conduct interviews of specific applicants and make findings for the full commission. The subcommittee's findings shall not be final until the full commission either adopts or rejects them. An IJEQC may not find any candidate qualified until after the candidate has followed the application procedures required by the commission, the commission and its staff or a subcommittee has made a thorough inquiry, and the full commission has conducted an interview of the candidate.

IJEQC Proceedings and Its Members Should Be Governed by Uniform Rules

The Administrative Board of the Courts should establish uniform rules to govern the proceedings of the twelve IJEQCs and commission members' conduct as commissioners. We expect that the uniform rules will further protect and encourage the independence of the commissioners. At a minimum, they should make clear that commission members are obligated to guard and exercise their independence and are not

appointed as instructed representatives of the appointing authority. The rules should provide that members should not support any candidate for judicial office while serving on an IJEQC. The rules should also provide for the strict confidentiality of all commission business.

IJEQCs Should Have the Necessary Resources to Fulfill Their Functions

Commission members should serve without compensation, but each independent judicial qualifications commission should have sufficient resources, including paid staff, to enable it to properly carry out its responsibilities, including adequate investigations into all matters relevant to the qualifications of judicial candidates.

All Judicial Candidates Should Be Required to Participate in the IJEQC Process

We recommend that Rule 100.5 of the Rules of the Chief Administrator of the Courts Governing Judicial Conduct require judicial candidates for courts of record in New York State to participate in the IJEQC independent evaluation process. Judicial candidates that do not participate should be subject to discipline under the Chief Administrator's Rules and, by incorporation under the Disciplinary Rules of the Code of Professional Responsibility, 22 NYCRR 1200.44. While participation in the independent evaluation process would be mandatory, candidates would be free to run for office and political parties free to support them irrespective of the IJEQC finding.

We believe that the IJEQCs will promote public confidence and informed voter participation in judicial elections in New York State. Through independent screening, the commissions assure the public that candidates for judicial office are qualified to serve on the bench. They also promote confidence in New York's elected judiciary generally by preventing unqualified candidates from gaining judicial office. The choice between candidates remains with the voter, but the commissions help voters make informed choices about candidates, educating them about particular candidates and providing objective criteria on which to make decisions. As importantly, by encouraging diversity on the bench the commissions will foster public confidence in all communities.

We recognize that legislation has been introduced in one house of the New York State Legislature to establish independent screening for candidates for election to the Supreme Court. We applaud the scope and substance of the legislation. We also believe that the Chief Judge should implement independent evaluation by rule unless a plan that meets the principles incorporated in this recommendation becomes law in New York State.

Public Financing

In a nation governed by the rule of law, judges occupy a uniquely important and difficult position: they must apply the law as it is written, whether the law is popular or unpopular, and they must apply it impartially. Moreover, they must at all times be careful to avoid even the appearance of partiality, for if the people cease to believe that their judges are applying the law in a manner that is free from the taint of outside influence, the system will fail, whether or not the suspicions are justified.

The other branches of government, the executive and legislative, need not operate in so insular a fashion. Rather, as representatives of the people, it is their role to ascertain and reflect the concerns of their constituents. It is their job not to shun outside influence, but to reflect and refine it. Executives and legislators are expected to champion the views and opinions of the constituents that elect them. Judges cannot and must not. Judicial elections present unique difficulties because of these differences between judges, legislators and executives.

Campaign contributions present a potentially serious obstacle to maintaining the appearance of impartiality that is critical to the judicial function. Simply put, some people find it hard to believe that a judge will not favor a litigant who has contributed generously to his or her campaign over a litigant who has not. The Marist Poll shows that the public suspects that judges can be influenced by campaign contributions. The Marist Poll shows that 38% of registered voters in New York think that campaign contributions have a great deal of influence on judicial decisions and 45% think that campaign contributions have some influence on judicial decisions. Further, 87% of voters participating in the Marist Poll thought that a judge should not be put in the position of ruling on a case where one side has contributed to the judge's campaign. Many judges agree. Of the 1,129 sitting judges in New York that responded to the Commission's survey, 27% believe that campaign contributions influence judicial decisions some or a great deal and 18% more believe that contributions have a little influence. Further, more than 40% of the judges surveyed believe that any campaign contribution raises a reasonable question about a judge's impartiality when the contributing party or lawyer appears before the judge. Indeed, only 19% of the judges believe that campaign contributions categorically do not raise a reasonable question about a judge's impartiality. While the Marist Poll also reflects that 71% of New Yorkers nevertheless agree or strongly agree that judges are fair and impartial, the perception that campaign contributions may influence judicial decisions is legitimately of concern. If there is any area in which every reasonable effort should be made to eliminate concerns about the influence of campaign contributions, it is with respect to the judiciary.

Counteracting any concerns that arise from financial contributions to judicial campaigns has been one of the principal tasks of this Commission. Toward that end, the Commission made interim recommendations that include, among other things, a more open campaign finance disclosure regime, limits on campaign expenditures, and disqualification provisions based on campaign contributions to judicial campaigns. The interim recommendations focused on steps that the judiciary could take now to increase public confidence in judicial elections.

Over the long term, perhaps the most effective way to remove the source of the

perception is to eliminate private contributions as much as possible and replace them with public money. Public financing of judicial elections can help break any perceived connection between campaign contributions and judicial impartiality. Substituting public money for private money removes any concern that there is a connection between campaign contributions and judicial decision-making. Instead, a judge depends on exactly the people he or she serves—all the citizens of New York State, for campaign financing. By breaking that connection, public financing would alleviate the need for some of the Commission’s interim recommendations.

Public financing of judicial campaigns arguably carries with it benefits beyond the impact on public perception. Most judges and prospective judges are not comfortable with raising money. The raising of campaign contributions exposes successful candidates to uncomfortable conflicts and public suspicion, and excludes undoubtedly qualified candidates from participating in a process that they find distasteful. Another concern about a system that relies solely on private contributions is the way it favors those with substantial financial resources over those with little or no such resources. Public financing may serve to open the door to a greater number of highly qualified candidates of diverse backgrounds, such as minority candidates, women and attorneys who have spent their careers in public service.

The Commission also recognizes that some consider public financing of judicial campaigns problematic. One concern is that public financing is somehow antithetical to the electoral process as it has developed in the United States, representing (1) an unwarranted intrusion in a realm more properly regulated by market forces and (2) an impermissible restriction of First Amendment rights. As to the first concern, whatever may be said about the propriety of market forces in a typical political election, the election of judges who are supposed to operate on a level unaffected by “market forces” surely should not be regulated solely by such forces. As to the First Amendment, it is the Commission’s understanding that public financing programs coupled with voluntary spending limits are entirely consistent with First Amendment rights, as indicated in the Supreme Court case of *Buckley v. Valeo*. So long as candidates choose freely to participate in the public financing program or to reject public financing and spend without limit, the voluntary spending limits that are associated with public financing programs are constitutional. *See* Report of the Commission on Public Financing of Judicial Campaigns, American Bar Association (February 2002) at 31-32.

Another concern raised by those skeptical of public financing arises from the fear that shutting down direct contributions to candidates will only cause the contributors to take their funds and pursue other means of supporting the candidate, for example launching independent ad campaigns. This phenomenon occurs almost uniquely in jurisdictions that elect their appellate bench, which is not the case in New York State. Even if this were to occur in some instances in New York, it is nonetheless preferable from the viewpoint of public perception than the alternative.

A final concern focuses on the critical question of whether it is possible to successfully implement and administer a public financing program in New York State. The Commission acknowledges that there are significant challenges to implementing a public financing program in this State, as described below in Section I. Nevertheless, the Commission believes that the benefits of public financing are such that the effort should be

made to establish pilot programs and a commission to conduct further research on these issues, as set forth in Section II.

Despite the strong policy reasons for publicly financing judicial campaigns, there are numerous practical challenges to the introduction of public financing into judicial elections in New York State. One of the most obvious is the number of races for judicial office in this state. There are 911 seats determined by the election process in the courts of record and an additional 2,300 seats in town and village justice courts. These numbers pose an administrative challenge to any public financing program that attempts to cover all judicial elections—especially when consideration is given to the differing practices that precede the general election for different courts in different districts. In an average year in New York State, there are 27 Supreme Court races and 65 races for courts of lesser jurisdiction, including City Court, Civil Court, County Court, District Court, Family Court and Surrogate’s Court. That number varies widely from year to year. Over the past seven years, the number of races statewide has varied from 46 in 1996 to 119 in 2003. *See Working Paper on Judicial Elections in New York State: 1996-2003*, attached as Appendix G-4. The logistical challenge of creating a system that could adequately and fairly disburse public funds in all such races from year to year is a serious one.

To this essentially logistical concern about coordinating funding for many different races must be added the cost of providing public financing for all these races. The Commission has conducted research on the cost of races across the state and the cost of individual races varies widely. For example, focusing on the Supreme Court races, in 2002, 30 seats were open on the New York Supreme Court bench, 108 people declared candidacy and raised a total of \$3,840,423. Sixty-six candidates raised under \$10,000 for their campaigns; 33 of those 66 candidates did not raise any money at all. The amount raised varied by district, but the average amount was \$25,663.

Because of the sheer number and cost of judicial races, because of the variations between districts, and because of the different timetables and practices that precede the general elections for these races, it would be extremely difficult to develop a “one size fits all” system. It should be noted that there are many and varied sources of public financing. *See Working Paper on Sources of Public Funding*, attached as Appendix G-5. It is difficult to predict, however, how well those sources will cover the costs of any public financing program.

There are other practical challenges to introducing public financing into judicial elections in New York State that may be equally difficult to overcome. States across the country continue to grapple with budget shortfalls this year and New York is no exception; in his address to the Legislature on January 20, 2004 presenting his proposed 2004/05 spending plan, the Governor outlined plans for closing the State’s estimated deficit of \$5.1 billion. Public monies for judicial campaigns will thus have to compete with other core government programs in an extremely difficult fiscal climate.

The Commission believes that such challenges can and must be overcome, especially at a time when interest in judicial reform is high. As suggested in our recommendations, while public financing on a statewide basis may not be feasible as a first step, much can be accomplished, and much can be learned, by establishing smaller “pilot” programs, which will also be less expensive to run and fund.

We recommend that New York State adopt voluntary public financing programs for the Surrogate’s Court statewide and for all courts within targeted competitive districts

Recognizing the compelling reasons for publicly financing judicial campaigns and the challenges to implementing a statewide program in New York, the Commission recommends that New York State adopt legislation providing for pilot public financing programs and use the experience gained from those programs to develop an appropriate statewide program in the future. Specifically, we recommend that New York adopt voluntary public financing programs for the Surrogate’s Court statewide and for all courts within targeted competitive districts. Further, the Commission recommends that legislation be put in place that enables localities to establish voluntary local public financing programs on their own initiative. Finally, the Commission recommends that a temporary commission be established to study the desirability and feasibility of a program for voluntary public financing of judicial races across New York State. The temporary commission, building on the information received through the pilot programs, could refine the parameters suggested in this report, provide estimates of the costs of the program, and expand the pilots into a statewide system.

The Commission considered many different forms of public financing, including “in-kind benefits” such as publicly funded and reduced cost media and mailing opportunities; monetary benefits to contributors such as tax advantages or refunds to those who contribute to judicial campaigns; and monetary benefits to candidates such as full or partial financing of campaigns. While all the alternatives offer benefits, we believe that full public financing of judicial campaigns best addresses the twin goals of eliminating judicial candidates’ dependence on campaign contributors and opening campaigns to a broader diversity of candidates. Accordingly, we recommend that any public financing program provide full funding of judicial campaigns.

Although we believe that full public financing is the best option, we recognize that a matching funds program may be a viable alternative. Under a matching funds program, candidates raise funds and those contributions are matched by public funding. Matching funds do not eliminate the need for judicial candidates to raise money, but reasonable contribution and expenditure limits can go a long way toward addressing any public concern over money’s influence over judicial decisions. Further, utilizing a matching funds program rather than full financing reduces the amount of money needed for a public finance system because the candidates themselves bear the burden of raising a percentage of their campaign funds.

The U.S. Constitution prohibits a state from requiring that all candidates for public office participate in a public financing program. Every candidate has the right to use his or her own resources or to raise money independently of a public program. Therefore, any public financing program that New York State establishes must be voluntary. Because a program must be voluntary, it must be a viable alternative to a privately funded campaign. Any successful program must offer sufficient funding for candidates to run a competitive campaign and include provisions to offset excessive spending by a non-participating candidate.

We recommend that New York State establish pilot public financing programs

As outlined above, New York presents numerous challenges to a public financing program for judicial campaigns. Judges are elected to more than 900 seats on courts of record around the state, and many campaigns require significant spending. Public financing for every judicial election is not a task or an expense that can be lightly undertaken. New York does not have experience publicly financing judicial campaigns, and without a track record, the full Legislature may be hesitant to support a statewide public financing program in the near term. Pilot programs can limit the expense of public financing of judicial races while developing the experience needed to determine if a statewide program is feasible and desirable and to establish the right program for all of New York's many different judicial elections.

1. Surrogate's Court Pilot Program

The Surrogate's Court is an excellent candidate for a pilot public financing program for several reasons. First, the Surrogate's Court has suffered criticism in the past for showing favoritism to campaign contributors. Campaigns for Surrogate have historically attracted a significant amount of campaign money in many parts of the state. The influx of so much money combined with the Surrogate's control over a significant number of lucrative fiduciary appointments has led to speculation of perceived judicial favoritism to campaign contributors. Indeed, several authorities, including the Inspector General's office and the Commission on Fiduciary Appointments, have suggested a link between campaign contributions and fiduciary appointments in New York.

Second, publicly financing Surrogate's Court campaigns each year would require substantially less in public funds than many other benches because only a few races occur each year. From 1999 through 2003, there were three races each year on average, with six in the most active year. Although the races attract large amounts of contributions in some parts of the state, the total amount of funding needed is small compared to Supreme, County, Civil, or Family Court races. It should be noted that this recommendation applies to Surrogate's Court judgeships only, and not to the so-called "double-hat" or "triple hat" judges who function as surrogate as well as county and/or family judges in certain jurisdictions.

Third, a public financing program for Surrogate's Court campaigns would be less administratively complex than a program for other benches. Administering a program for three to six Surrogate's Court races per year would require minimal expense compared to a program for other benches. Further, the Surrogate's Court election process, with petitions, primaries and general elections, is more akin to existing campaign finance models than the Supreme Court process, which involves party conventions and the selection of delegates. A program for Surrogate's Court could build on the experience of existing public financing programs in New York and other states.

Finally, the Surrogate's Court is one of the least diverse benches in the State. While this may be due in part to the specialized nature of the court, the fact remains that here are few racial minorities or women on the Surrogate bench in New York. Public funding may help attract a more diverse bench by allowing non-traditional candidates to run for the office.

Accordingly, the Commission recommends that the Legislature establish a pilot program to offer public financing for all Surrogate's Court campaigns in New York State.

2. Pilot Public Financing Programs in Competitive and Geographically Diverse Jurisdictions

Public financing of judicial campaigns will be most effective and most challenging in competitive jurisdictions. Candidates typically raise the most campaign contributions in jurisdictions where elections are competitive because the competition escalates candidate spending. The threat that contributions present to judicial independence and impartiality is at its apex where candidates have to rely heavily on campaign contributors to run a successful campaign. Public financing in competitive districts would eliminate candidates' dependence on campaign contributors and minimize the threat to independence or impartiality created by private funds. In non-competitive jurisdictions—where party supported candidates are not typically challenged or candidates are cross endorsed—public financing will have little practical effect. Non-competitive races typically do not require significant campaign expenditures so the candidates' need to raise money is limited and the accompanying threat to judicial independence and impartiality is likewise limited. Indeed, injecting unneeded public monies into such a setting could produce unwanted side effects.

Furthermore, we will learn more about a public financing program and its suitability for New York from a pilot program in a competitive jurisdiction than in a non-competitive jurisdiction. The demands in a competitive jurisdiction will be greater, both from the perspectives of providing resources and of monitoring candidates' expenditures and activities. While non-competitive jurisdictions will raise their own challenges, they will not be of the same magnitude as those in competitive jurisdictions.

Competitive history, geographic diversity and the various election processes should be important factors in choosing jurisdictions for a pilot program. Programs should be limited to jurisdictions with a history of competitive elections. As political cultures vary greatly across the State, jurisdictions should be chosen to reflect geographic diversity.

Due consideration must also be given to the way judges are elected to different benches. For instance, Supreme Court candidates are elected by delegates at nominating conventions in each judicial district. This unique system presents particularly difficult issues with respect to campaign financing, as candidates are nominated, and thus officially identified, in late September, leaving only six weeks to campaign for office. As a result, much of the campaign spending occurs before the candidate is nominated because the campaign must be ready to start immediately upon nomination. For instance, campaign expenditures for preparing advertising often are incurred prior to nomination. Any campaign financing program for such races would be set up very differently from a program for races that proceed first to a primary and then a general election. At the outset, therefore, we would recommend that the pilot programs not cover races for Supreme Court openings, and that additional analysis and research be conducted before attempting to include such races.

3. Incorporation of Judicial Races into Existing Public Financing Programs

The Commission recommends that judicial races be incorporated into existing public financing programs wherever possible. A good example of an existing program is the public financing program run by the New York City Campaign Finance Board (“NYCCFB”). The program currently offers public financing for campaigns for the offices of mayor, public advocate, comptroller, borough president and city council member in the City of New York. We recommend that its program be extended to serve the City’s elected judicial seats.¹ The NYCCFB program is widely considered to be successful. Incorporating judicial campaigns into the program allows a pilot program to take advantage of the NYCCFB’s infrastructure, experience and expertise.

We recommend that New York State adopt enabling legislation for local public financing programs for judicial campaigns

The Commission recommends that the State Legislature pass enabling legislation that allows localities to create and implement programs for publicly financing local judicial campaigns, in addition to establishing pilot programs. The legislation should allow local jurisdictions to determine which judicial offices are included in the public financing program, the amount of public financing for each office, contribution and expenditure limits, and the method of funding public financing.

We recommend that New York State establish a temporary commission to study the feasibility of a statewide public financing program for judicial campaigns

The Commission to Promote Public Confidence in Judicial Elections cannot fully address all the issues surrounding the implementation of a statewide public financing program for judicial elections. The State’s current experience with public financing of judicial campaigns is too limited to provide the information necessary to make considered and informed decisions for a long-term program. Further, the current judicial campaign finance disclosure regime makes studying campaign contributions and expenditures for races other than the Supreme Court extraordinarily time consuming and expensive.

Therefore, we recommend that a temporary commission be established to study the feasibility of statewide public financing for judicial campaigns and to make recommendations to the Legislature for the implementation of an appropriate program for the future. We anticipate that several of this Commission’s recommendations will provide information critical to such a study. For instance, the recommended pilot programs should provide a wealth of data about public financing for judicial campaigns. Also, the Commission recommended in its Interim Report that judicial campaign finance disclosure be made more complete, timely and accessible. The recommendation, if adopted, will provide the temporary commission with important information that will help it make recommendations regarding campaign financing for jurisdictions beyond those involved in the pilot programs. While it makes sense at this stage to focus on the competitive jurisdictions, as noted above, consideration should be given as well to the issues presented by non-competitive jurisdictions.

¹ We have not sought the reaction of the NYCCFB with respect to this recommendation, and Nicole Gordon, a member of the Commission, recused herself from this section of the report.

Parameters for a Public Financing Program for Judicial Elections

Implementing legislation for a public financing program must address certain fundamental issues. Primary among them are the sources of funding for the program, the oversight authority, and the operation of the program, including candidate qualifications, reporting requirements, and spending and contribution limits. While many of the details of a public financing program will be developed as New York gains experience with public financing, the Commission believes that what follows are necessary aspects of any public financing program. For a more detailed account of possible funding sources, *see* Working Paper on Sources of Public Funding, attached as Appendix G-5; and for an analysis of public funding programs in other jurisdictions, *see* Working Paper on Public Funding of Judicial Elections Among the States, attached as Appendix G-6.

A. Sources of Funding

A public financing program should have several different sources of funding. An advantage to using several sources is that together they provide a broader base from which to pool monies. If any single source does not provide the expected revenues, other sources can make up for the shortfall. Using multiple sources also insulates against a fall off in any one source and it avoids the challenge of finding a single source sufficient to provide revenues for the entire program. Although some programs rely on a single source of funding, many states with existing and proposed public financing programs for judicial elections employ multiple sources. Among them are Arizona, Illinois, Idaho, North Carolina, Texas and Wisconsin.

A recent study by the Center on Governmental Studies identified four categories of potential revenue sources for a public financing program: new revenue sources; dedication or reallocation of existing state revenues; tax credits; and government mandated private in-kind contributions. New revenue sources are created and employed for the express purpose of funding campaigns. For example, North Carolina's existing public financing program for judicial campaigns depends in part on voluntary contributions solicited from attorneys with their annual license invoice, and Illinois' proposed program requires attorneys to contribute to a fund financing judicial campaigns. Creating new funding sources for judicial system programs is not new in New York State. For instance, the Legislature created the New York State Interest on Lawyer Account Fund (IOLA) to support civil legal service organizations threatened by federal budget cuts.

New York State also could dedicate existing revenues to a public financing program. For instance, the legislation establishing public financing of judicial campaigns could provide that any unexpended amounts distributed under the program and any fines collected for violations of the legislation be returned to the program. An example of dedicating existing revenues to a public financing program is the New York City Campaign Finance Board. Campaigns for the office of mayor, public advocate, comptroller, borough president and city council member in the City of New York are funded entirely from existing tax revenues.

Tax credits are a potential source of public financing for judicial campaigns. Under a tax credit program, a taxpayer's contribution to a public financing program would reduce the amount of taxes he or she owes. Credits should be available to individuals and organizations for qualifying contributions to candidates and for contributions directly to a

public financing fund. Further, credits can be provided for a percentage of a contribution rather than the entire amount, or credits can be given for combinations of contributions. For example, Oregon provides a 100% tax credit for taxpayers who voluntarily contribute to a political campaign or candidate and who make a contribution of equal or greater value to the Public Campaign Finance Trust Fund.

Finally, in certain circumstances, the State may mandate private in-kind contributions. These contributions would provide public funding for campaigns without cost to the taxpayers. For example, federal law permits local franchising authorities to require cable television companies to set aside channel capacity for speech originated and controlled by members of the public, educational institutions, or local governments. This option could provide judicial candidates with free time on cable television “access channels” to present their views to the public.

In considering sources of funding for a public financing program, New York should take note of other states’ experience. Several judicial campaign public financing models have been attempted or proposed around the country, *see* Working Paper on Sources of Funding, attached as Appendix G-5. We note in particular North Carolina’s recent experience. The North Carolina program relies predominately on taxpayer Public through a tax return check off and voluntary contributions by attorneys. In its first year, the program appears not to have raised the full amount needed to fully fund the program. It may well be that the only way to be certain of adequate funding is to couple a careful study of anticipated costs with a general allocation of state funds, which could be reduced if alternate sources of funding prove successful.

B. Oversight Authority

The Commission recommends that a board be created to oversee the program. The oversight board should be independent and non-partisan and its mandate should be clear. The make-up of the board should be broad based to ensure a balance of interests. Its members should have experience in administering funds and enjoy a reputation for impartiality, independence and integrity. In addition to public financing of judicial campaigns, the board’s mandate could be expanded to include public financing of other offices where appropriate.

The oversight board also should have sanctioning authority. The implementing legislation should provide penalties for violations of the public financing limitations. Civil penalties would be appropriate for unintentional violations of the legislation. For example, where a candidate negligently accepts contributions above the prescribed contribution limits, the candidate should be required to return the funds distributed plus interest. In some cases the candidate should incur a monetary sanction. Criminal sanctions would be appropriate where violations are intentional. If a candidate participating in the public financing program knowingly spends public monies in a prohibited way, the candidate should be subject to monetary sanctions or, in certain cases, prison. Any monetary fines, returned funds and interest should be returned back to the public financing fund.

C. Funds Provided

Public financing programs must be voluntary. Therefore a program's success depends on its attractiveness to candidates. Any program should provide sufficient funds to run a competitive campaign in the jurisdiction at issue and legislation implementing a public financing program for judicial campaigns should clearly describe the maximum amounts of funding available to candidates. The figures should address both primary and general elections and regular and rescue funds.

1. Regular Funds

Regular funds are those available to all candidates regardless of expenditures by opponents. Implementing legislation should indicate the maximum amount of regular funds available to participating candidates for both primary and general elections. We recommend that the maximum amount of regular funds available be based on the historical cost of running a successful campaign in a given jurisdiction. We caution, however, that an effort be made to distinguish actual costs of running an election from expenditures that may not be proper use of public funds. In our Interim Report we discussed the reported use of judicial campaign funds to pay inflated prices for goods and services and purchase tickets to fundraising events at prices well beyond the cost of attendance. Such payments should not occur in any case, but would be a strictly prohibited use of public funds. A historical analysis of campaign costs should discount any such practices.

Depending on many factors, the expense of running a campaign can vary greatly across jurisdictions. For instance, a primary election may be significantly more expensive than a general election in a jurisdiction where a single party dominates the registered voters because victory is ensured once the candidate gains a place on the party slate. A general election may be the more expensive to run in a jurisdiction where registered voters are evenly spread among the parties. Therefore, we recommend that the amount of funds available be determined on a jurisdiction-by-jurisdiction basis, using historical costs as guidelines. The figures should be revised on a regular basis as information becomes available for recent campaigns.

Although historical information on the cost of running a successful campaign in a particular jurisdiction is not readily available at this time, it should not be difficult in the near future. As the Commission noted in its Interim Report, campaign finance disclosure for courts other than Supreme Court is very difficult to compile in New York State. Candidates file disclosure on paper with 63 local boards of election. Obtaining the information is costly and tremendously time consuming, and the information is not always complete. Therefore, the Commission encourages the adoption of its interim recommendations for a new electronic disclosure regime. Such a regime will make developing historical information much easier, timely and cost effective.

2. Rescue Funds

The implementing legislation should make rescue funds available to participating candidates in addition to regular funds. These funds are triggered by a non-participating opponent's campaign expenditures or contributions over a certain threshold, usually the limits imposed on participating candidates by the program. For instance, where a non-participating opponent spends over the expenditure limits applicable to participating

candidates, the public financing program should provide additional funds and allow the participating candidate to match some percentage of the excessive spending. If participating candidates do not have access to rescue funds, they could be disadvantaged when facing a non-participating opponent with access to extraordinary campaign funds. Under those circumstances candidates would be reluctant to participate in a public finance program.

A public financing program cannot guarantee rescue funds at every level. The legislation should recognize that excess spending becomes marginally effective at some point and rescue funds for participating candidates become less important. For instance, additional funds might be available on a dollar-for-dollar basis for the first \$10,000 spent over the expenditure limit, on a \$.75 on the dollar basis for the next \$20,000, on a \$.50 on the dollar basis for the next \$50,000, and the rescue funds would max out at \$80,000.

D. Qualification Requirements

The implementing legislation should clearly set out requirements that a candidate must meet to participate in the public finance program. Qualification requirements ensure that people participating in the program are serious candidates, that they understand the program requirements and that they are committed to following the program rules. The requirements should include the following.

- 1. Filing of a declaration of intent to participate*

Every participating candidate should be required to file a declaration of intent to participate in public financing and a sworn statement that the candidate has read and understands all the program requirements and agrees to comply with them.

- 2. Pre-certification spending limits*

The implementing legislation should set limits on candidate spending prior to participation in the public financing program, and provide that any candidate applying for public financing must not have exceeded those limits.

- 3. Qualifying Contributions*

Candidates applying for public financing should have to show that they have received a certain amount of qualifying contributions, that is contributions of a minimal amount of money from a minimum number of residents in the office's jurisdiction within a certain period of time ("qualifying period"). For instance, to qualify for the program, a candidate may have to raise contributions in a small amount, such as \$10, from 500 residents in the relevant jurisdiction within two months of declaring candidacy. Care would have to be taken in establishing this qualification requirement, so as not to encourage frivolous candidates or candidates seeking to act only as a "spoiler".

- 4. Existence of an Opponent*

Public financing should be limited to those races in which a candidate has an opponent. A candidate seeking public financing should have to establish that an opponent has met the formal requirements to run for the office on the ballot. For instance, a candidate could be required to show that the opponent has declared candidacy, registered

with the board of elections, collected the required amount of signatures, and taken whatever other official acts are required to appear on the ballot. Even where an opponent exists, public financing should not be available in full unless the opponent has raised a significant amount of money. A candidate should receive only a percentage of the available funds until she can show that her opponent has raised a threshold amount of money.

E. Spending Limits

The implementing legislation should specify limits on candidate campaign spending. The limits should include limits on total expenditures, on the use of funds, and on the timeframe in which the funds may be spent. Further, any spending should be limited to races in which the candidate has an opponent.

F. Contribution Limits

The implementing legislation should set clear limits on permissible contributions. There should be clear limits on what, if any, private contributions are allowed. Limits should address contributions to candidates both prior to joining the public financing program and during the campaign itself, and they should apply to personal contributions by the candidates themselves. Any personal contributions must be within the program's limits, and limits should distinguish between contributions to individual candidates and those directly to the public financing fund.

Contribution limits should also apply to loans. Although candidates should not be prohibited from using loans to finance a campaign, the loans should be subject to the same requirements that apply to other contributions. For instance, any loans combined with contributions cannot exceed the aggregate contribution limitations and repayment must be subject to the limitations on individual contributions. Further, loans should not count towards qualifying contributions.

G. Candidate Reporting Requirements

The implementing legislation should set out a reporting regime for participating candidates. Reporting should be timely and comprehensive and reports should be sworn statements to the overseeing authority. They should include all contributions and expenditures; all qualifying contributions and seed money; and the names, addresses and occupation of all contributors. The reporting requirements should be coordinated as much as possible with existing campaign finance disclosure requirements, but because public funds are at issue, reporting to the public financing oversight authority should not be limited by current requirements.

Retention Elections

Many of the challenges to public confidence in judicial elections are particularly acute when a judge is running for re-election. Raising campaign finances, soliciting political party support, and engaging in a politically charged election threaten public confidence in judicial impartiality and independence, and the threat is greatest when a sitting judge is involved in such activities. We believe that a retention election system in which incumbent judges running for re-election to courts of record are subject to non-competitive, non-partisan elections the year before their terms expire will strengthen public confidence in judicial elections.

Public concern about the effect of campaign contributions on judicial impartiality is at its apex when an incumbent judge campaigns for re-election. The Commission's research shows that the voting public and judges are concerned with the effect of campaign contributions on judicial impartiality. *See* Section __ *supra*. The overwhelming majority of voters and more than a quarter of sitting judges believe that campaign contributions influence judicial decisions some or a great deal. Similarly, almost 90% of voters believe that a judge should not hear a case involving a campaign contributor, and 43% of judges believe that a campaign contribution of *any amount* raises a reasonable question about a judge's impartiality in a case.

Nevertheless, judicial candidates rely on contributions for election and incumbents are forced to raise that money even while sitting on the bench. Lawyers are the most common campaign contributors to judicial elections, and the lawyers that contribute often appear before the very judge to whom they have contributed. While many judges make an effort not to know who contributes, several witnesses testified before the Commission that judges cannot help but know the identities of at least some of the contributors. Indeed, 68% of the 1,129 judges that responded to the Judicial Survey believe that judicial candidates know who some, most or all of their campaign contributors are. The risk that contributions will affect decisions is highest when a judge seeking to retain a seat on the bench must rely on money from those appearing before him or her. Clearly, the risk that campaign contributions pose to public confidence in judicial impartiality is at its height when an incumbent runs for re-election.

Similarly, the fact that an incumbent judge must marshal local political party support for re-election heightens public concerns over judicial independence. In New York's partisan election system, local political party leaders exercise substantial control over who a party nominates as its judicial candidate, and in many areas of the State, winning the dominant political party nomination is tantamount to winning the general elections. A judge running for re-election must seek party leader support because without it the candidate often has little chance of success. When a judge runs for re-election, a balance must be struck between the need to obtain political support and judicial independence. Judicial independence is critical to public confidence in the judiciary. More than 90% of both voters and judges surveyed in the Marist Poll and Judicial Survey said that independence from political party leaders is an important aspect of judicial independence. Even New York's Rules Governing Judicial Conduct requires sitting judges to remain politically aloof while in office. Maintaining an appropriate balance between the two concepts, independence from and reliance on political leaders, is always

difficult; but it is particularly so where a sitting judge has no choice but to seek local political party support for re-election. The risk to judicial independence and public confidence at that point is grave.

In addition to the concerns over raising money and soliciting political party support, a judge's participation in the give and take of a campaign can erode public confidence. Campaigns are by their nature public events, and the way in which some political campaigns are run is inconsistent with the dignity of the judicial office. Indeed, registered voters listed campaign conduct as the second most important reason that they would not vote in a judicial campaign, after a lack of information about candidates. It is particularly important that sitting judges do not compromise their impartiality, real and perceived. Forcing them into the fray of a competitive election risks inappropriate campaign activity.

The uniquely high risk to public confidence posed by judges running for re-election leads us to believe that retention elections coupled with judicial screening is the best way to ensure judicial integrity and independence. Retention elections pose less of a risk to public confidence in judicial elections while (1) minimizing the need for judges to campaign and raise money; (2) promoting a high rate of retention for qualified judges; (3) attracting qualified candidates to the bench by eliminating the prospect of repeated competitive campaigns; and (4) increasing judicial accountability by allowing voters to remove judges based on their performance on the bench.

We recommend that New York State adopt a system of non-competitive, non-partisan retention elections for qualified incumbent judges running for re-election

Only incumbent judges who initially won election to a full term should be considered incumbents for purposes of retention elections. Any incumbent judge seeking re-election to a court of record should be required to apply to appear on the ballot for retention the year before his or her term of office expires. To appear on the ballot, an incumbent should be required to participate in the Independent Judicial Election Qualification Commission process and be found qualified. If the incumbent is found qualified, the incumbent's name should be submitted to the electors, separately and without party designation, at the next general election under a proposition substantially similar to "Shall Judge/Justice _____ be retained in the office of _____?" If the candidate receives a majority vote of those voting on the proposition, he or she would be retained for the next term of office. If the incumbent judge is not re-elected in a retention election, the office should be considered vacant and the judge would be free to run for the office in a partisan, competitive election at the expiration of his or her term in the following year.

The Commission considered the concern that retention elections may slow the diversification of New York's judiciary by ensconcing a non-diverse bench in some parts of the state. We found that while a danger in theory, incumbents almost invariably win re-election when they run in contested elections in New York. Therefore, retention elections do little to change the outcome of re-election, but dispense with the need for incumbents to raise money and campaign. A study of Supreme Court races since 2000 showed that 32 incumbents ran in 129 seats up for election and the incumbents were successfully re-

elected in 31 of 32 cases. In addition, the Commission's survey of sitting judges in New York showed that only 4% of elections for judicial office involved a race in which the incumbents did not win. With incumbent success rates so high, the Commission believes that the threat to diversification is outweighed by the gains in judicial independence.

Accordingly, we believe that retention elections coupled with judicial screening is the best way to ensure judicial integrity and independence where an incumbent judge is running for reelection.

(For a more detailed discussion of retention elections, see the Working Paper on Retention Elections, attached as Appendix G-7.)

Voter Education

In our Interim Report (pp. 44-46), we discussed the importance of voter education to public confidence in judicial elections. We said that knowledge is fundamental to confidence in the judiciary and we noted that New Yorkers are not well informed about their state judiciary. Ignorance rarely inspires confidence in elected officials, including elected judges. The Marist Poll showed that more voters believe that elected judges are doing a “just fair” or poor job than believe they are doing a good or excellent job. Voters lack confidence in fundamental aspects of the judiciary: 83% believe that campaign contributions have some or a great deal of influence on judges’ decisions, and voters believe that political leaders and campaign contributors have more influence over who becomes a judge than they do. The Marist Poll indicated that the lack of education and public confidence is a core reason that voter participation in judicial elections is even lower than the participation in other races: the main reason almost 60% of New York’s voters would not vote in a judicial election is a lack of information. Even when people go to the polls, many do not bother to cast a ballot for a judicial candidate. In some areas of the state only 17% of registered voters participate in judicial elections.

Our research since we released the Interim Report has only reinforced the nexus between voter education and public confidence in judicial elections. Our survey of judges showed that 33% of New York State judges believed that a lack of knowledge was the primary reason for low voter participation, and 43% attributed the low participation to apathy, which is often driven by ignorance. Voter participation in judicial elections was one of the primary focuses of the Commission’s focus group study. *See* Focus Group Report, attached as Appendix D. The focus group facilitator asked each group what is helping voter participation, what is hindering it, and what can be done to improve it; voter education played a dominant role in the responses. An overwhelming majority of focus group participants across the state identified voter education as supporting voter participation, citing programs like candidate forums, media coverage, voter guides and youth activities. As importantly, all of the focus groups identified the lack of information about the judicial system and judicial candidates as the greatest hindrance to voter participation. And voter education programs played the dominant role in the participants’ recommendations for improving voter participation. They called for media awareness campaigns and educational programs in schools, and they recommended that judges themselves and court personnel play an integral role in voter education to address what they characterized as a disconnect between the judicial system and ordinary citizens.

The Commission presents a series of recommendations in this Final Report to address voter education that fall into two categories. First, we build on our interim recommendation for state sponsored voter guides for judicial elections. Second, we recommend an increase in voter education efforts across the state, including media awareness programs, coordination of existing voter education programs, and collaboration and partnership between organizations working on the issue.

I. VOTER GUIDES

Voter guides should be considered a primary tool to educate voters about judicial elections. They are recognized as efficient and cost-effective and having the potential to “dramatically increase the quantity and quality of voter participation.” A guide addresses two important aspects of voter education: familiarizing voters with the office and with the candidates. Thirteen states distribute statewide voter guides and their experience is telling. Public surveys in these states show overwhelming support for voter guides. For example, 85% of Utah voters read all or part of the voter guide, and the state-sponsored voter guide is the most important source of election information for 70% of Californian voters and 64% of Oregon voters.

The Commission’s research shows strong support for a state sponsored voter guide in New York. The Marist Poll indicated that 88% of New York’s registered voters believe that voter guides are a useful way to educate the public about judicial elections. Focus groups confirmed the support with more than 80% of the focus group participants supporting guides. They believe that voter guides are a good idea because they decrease the mystique around candidates, provide more information than just the names of candidates and provide ready access to information otherwise difficult to collect. New York State judges agreed: almost 80% of those surveyed said that a voter guide would be useful, very useful or extremely useful in informing voters about candidates in judicial races.

In our Interim Report, we made the following recommendation:

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

We also reserved the ability to add to the recommendation in our Final Report and we offer additional recommendations now.

We recommend that a Web-based voter guide be established immediately

While a Web-based voter guide is not an optimal solution, we recognize that securing funding and establishing the framework for a printed guide may require some time. In the meantime, a Web-based version can disseminate valuable information to voters. It can be developed more quickly and requires fewer resources than a printed version because it does not require printing, distribution or mailing. Moreover, it can provide valuable experience because many of the administrative aspects of a Web-based voter guide are the same for a printed version. Developing procedures for collecting candidate information, establishing a calendar and creating an editorial process will expedite the printed version.

We recommend that the voter guide provide a general overview of the court system

A voter guide should describe the role of judges (including the importance of fairness and impartiality), the difference between the appointive and the elective process, retention elections, the various judicial seats, and the Independent Judicial Election Qualifications Commissions (“IJEQC”). It should also provide information about terms of office, salary, and other relevant data. The guide should explain the difference between judicial campaigns and other political campaigns and the ethical restrictions on judicial candidates.

We recommend that the voter guide include specific information about candidates

The information should include the office sought, the candidate’s name, current occupation, years of practice (or date of admission to the Bar), educational background, professional/legal background, judicial experience (if any), any community or volunteer service, and a personal, unedited statement from the candidate, in conformity with any applicable requirements.

We recommend that the voter guide include the results of IJEQC screening process

The IJEQC screening results should be the only screening results included as a matter of course, but candidates should be able to refer to other screening results, such as bar association screening, in their personal statements.

We recommend that that a voter guide task force be established

The task force should consist of members of the legal community, judiciary, civic and community organizations, scholars in this subject, and members of the executive and legislative branches. The actual implementation of voter guides is beyond the scope of the Commission’s authority, but we believe that the Task Force should continue the work begun by this Commission by studying, evaluating and expediting the implementation of the recommended voter guide.

II. VOTER EDUCATION EFFORTS

In the broadest sense, voter education about judicial elections includes any information about the judiciary that will help people make more meaningful choices when voting for judicial candidates. Given the public’s significant information gap about the judicial system, most types of educational activities about the judiciary would help create a more informed citizenry. Such existing activities include judges and other court personnel who engage with the community and speak at schools and civic organizations, bar associations that act as a conduit between the legal profession and the public, civic education leaders and organizations who are actively engaged in educating and nurturing our young citizens of tomorrow, and many civic, community and non-profit organizations concerned about democratic participation.

Our voter guide recommendation is only one way to educate the public about judicial elections. Indeed, the lack of voter awareness about the judiciary calls for more than just voter guides; it speaks to a profound disconnect between the populace and the judicial system generally. How to bridge that information gap is one of the central challenges we face today. Citizens are the fabric of our society, but studies suggest that the gap in voter awareness of judicial elections becomes even wider for citizens the more marginalized they are as voters, whether by virtue of economics, age, gender, language access, race, or cultural background. Accordingly, there is an even more pressing need to disseminate information about judicial elections to those sectors of society.

Voter education is already taking place throughout the state by various people and organizations in legal, civic and education communities. A major concern is whether these efforts are being coordinated and communicated in such a way as to increase public perception and confidence in judicial elections. Many of the Commission's recommendations on voter education are concerned with communication, outreach and coordination of efforts, and how to maximize the work already underway in a manner that will promote public confidence in judicial elections. Our recommendations fall into three categories: coordination of information regarding voter education efforts, multi-media awareness campaigns, and partnership and collaboration.

A. Coordination of Information Regarding Voter Education Efforts

Many voter education resources for judicial elections have been developed; the grass roots community, state or local government, the Office of Court Administration, bar associations, and schools all sponsor programs. But information about the resources and programs is scattered and there is no centralized place to find out about these activities and resources. The lack of access to information is an obstacle to reaching the voting public and it undermines the effectiveness of the various educational endeavors. Thus, on the most basic level, centralizing information in an accessible manner will help make voter education about judicial elections more effective and allow an overview and assessment of judicial and voter education efforts. We recommend several ways that the information can be gathered and disseminated.

We recommend the establishment of a Voter Education Directory

The directory should include information on law-related voter and civic education organizations and individuals throughout the state, including educators, judges, bar associations, civic and non-profit organizations, community groups and the Office of Court Administration. The information should include names and contact information as well as a brief description of each organization or person's relevant educational activity. It is important that the Directory is publicly available, both on-line and in print, for use as resource for the legal and educational community as well as the general public.

We recommend the development of a Web site designed for the general population

This Website should be user friendly attractive, and easy to access. It should include, among other things, the Voter Education Directory and contain an up-to-date calendar of voter education events throughout the state, as well as links to other related

web sites. It should be a collaborative effort between the many different organizations involved in voter education with the goal of disseminating information to the public and fostering an ongoing relationship between the judiciary and organizations and individuals involved in voter education.

We recommend that a State Judicial Directory be established

Almost every focus group attributed low voter turn out to a “disconnect” between the judiciary and the public, and the Marist Poll reinforced the sentiment, suggesting that a lack of information is a prevalent reason for not voting. A State Judicial Directory would help establish a connection between the judiciary and the public by helping them understand who the people are that make up the state’s judiciary. Indeed, such a directory exists for other public servants, including federal judges and members of New York State’s Legislature. The directory should provide background information about state court judges, including the judge’s name, date and place of birth, education, current judicial seat, prior judicial service, information on the judge’s professional career, and diversity information.

We recommend that the Office of Court Administration (OCA) play an active role in supporting individual judicial education activities

The Commission’s survey of New York State judges showed that 85% of judges believe that their participation in public education programs about the judiciary are important or very important, but more than half do not participate in programs on a regular basis and only 10% participate in two or more programs in an average month. While OCA performs extensive community outreach at the administrative level, because of the unique relationship between OCA and the judges over whom it has administrative control, many of the community and educational volunteer efforts of individual judges go unnoticed. The wealth of experience from the individual efforts goes largely unappreciated because there is no office within OCA charged with centralizing or coordinating the information.

We recommend that the OCA charge a particular office with supporting voter education about the judiciary

The Office of Public Affairs oversees many of OCA’s voter outreach on an administrative level and should be commended for its work, but there is still much that OCA can do to promote public education about the judiciary. For example, regular compilation and dissemination of information about judges’ and local court activities would help coordinate voter education efforts. This would acknowledge OCA’s achievements, be an effective public relations tool, and allow regular evaluation of efforts to increase public awareness and confidence in the judiciary. Some of the functions a centralized voter education office might perform include:

- Serve as a resource for judges and non-judicial staff engaged in educational efforts in communities and schools;
- Provide linkages and coordinate with other non-judicial groups involved in civic education and increasing civic participation;
- Develop a tool kit and curricula for judges and non-judicial staff to use in speaking

engagements;

- Participate in the annual training of judges and court attorneys with the goal of encouraging involvement with voter education efforts;
- Produce quarterly updates about local educational and community activities related to the courts;
- Maintain a user friendly, easy to access website to support voter education about the judiciary; and
- Produce an Annual Report on voter education efforts.

We recommend that the OCA establish a multi-media awareness campaign about the judiciary

A program to educate voters about the judiciary should be a well thought-out and strategic campaign to educate the public about the importance of voting, the court system, and the citizen's role in judicial elections. It should involve the participation of community, civic, and voter registration groups, and it should be coordinated with different types of multi-media outreach efforts. In designing the campaign, it is important to think creatively. An example of a recent innovative public outreach effort was a series of radio announcements sponsored by the New York State Bar Association's Committee on Public Relations to improve the reputation of the legal profession. Further, target audiences should be broad and include existing and future voters. Targeting youth is particularly important in light of demonstrated problems with young people and civic participation. Focusing on youth not only prepares a new generation of voters but students who are taught about civic education and voting can also involve their parents, who might not have access to the information made available to students.

We recommend that the Chief Judge of the State of New York convene a conference on voter education

An impressive synergy already exists between various organizations involved in partnerships on a variety of voter education issues. These efforts should not be duplicated, but should be augmented to provide additional support to the legal, civic and educational communities. Bringing together the various organizations already involved in voter education issues would facilitate the sharing of information and the development of a statewide agenda around voter education issues.

We recommend that a working group on voter education about the judiciary be established

The working group should enjoy a broad membership including educators, civic and community organizations, politicians, and members of the legal profession, judiciary, and the New York State Board of Regents. This diverse group should be charged with studying and promoting voter education about the judiciary. We expect that such a working group would be a natural by-product of the conference on voter education.

(For a more detailed discussion of retention elections, see the Working Paper on Voter Education, attached as Appendix G-8.)

Judicial Campaign Practice Committees

Judicial campaign activity has tremendous potential to influence the public perception of judicial elections. Campaigns are public affairs and by their nature they reach out to citizens. Campaigns for judicial office are different from those for other offices because a judicial candidate's public activities must respect the impartiality and independence of the office. Recognizing this, New York State tries to ensure that judicial campaigns are conducted in ways that maintain public confidence in the impartiality and independence of the judiciary by establishing Rules that restrict campaign activity, *i.e.*, the Rules of the Chief Administrator of the Courts Governing Judicial Conduct, 22 NYCRR 100 ("Judicial Conduct Rules"). The Judicial Conduct Rules directly govern judges running for office, and because candidates for courts of record in New York State must be members of the bar, the Judicial Conduct Rules also govern these candidates via the Disciplinary Rules of the Code of Professional Responsibility, 22 NYCRR 1200.44. The Commission on Judicial Conduct enforces the Judicial Conduct Rules with respect to judicial conduct, and attorney grievance or disciplinary committees established in the four judicial departments enforce the Disciplinary Rules with respect to lawyers. Despite the enforcement regime, some candidates persist in conducting campaigns that undermine public confidence in the judiciary.

Witnesses testified at the public hearings that the existing enforcement regime is not well designed for election campaigns. Sanctions for violating the Judicial Conduct Rules range from private admonishment to removal in the most serious cases. According to several witnesses, in the heat of a campaign, some judicial candidates are willing to risk sanction in order to gain an advantage. If a candidate wins, he or she typically suffers a sanction short of removal. If the candidate loses, the transgression is often forgotten. Therefore, the current system does not sufficiently discourage violations of the Rules—a candidate who wins by virtue of a violation typically remains on the bench and a candidate who loses may suffer no harm. Acknowledging this enforcement gap, we offer the following recommendation to ensure an effective response to violations of the Judicial Conduct Rules during judicial campaigns.

We recommend the establishment of Judicial Campaign Practice Committees in each Appellate Department in the State

The Chief Administrator of the Courts, in consultation with the appropriate Presiding Justice of the Appellate Division, should establish and adopt rules for the operation of a separate Judicial Campaign Practice Committee (the "Committee") for each grievance or attorney disciplinary committee in an Appellate Division. *See* Proposed Rules for Judicial Campaign Practice Committees, attached as Appendix G-9.

Committees should be charged with receiving and evaluating complaints relating to campaign activity from candidates for election to judicial office. They should be composed of no less than five members and include both attorneys and non-attorneys appointed for a four-year term. The Chief Administrator consulting with the appropriate Presiding Justice should determine the total number of members of each Committee and appoint a chair to each for a one-year term. No one should serve longer than one four-year term.

Committees should receive only written complaints and the respondent, *i.e.*, the candidate complained of must receive notice of the complaint. All complaints must include particularized facts and circumstances alleging a violation of a specific provision of the Judicial Conduct Rules. The respondent should be provided with two business days to respond to the Committee.

Committees should issue their determinations no later than seven business days after receiving the complaint and may request any supplemental materials deemed necessary in making its decision. If a majority determines that there is no violation of the Judicial Conduct Rules, the Committee should dismiss the complaint and notify the parties that the matter is closed. If a majority determines that there has been a violation, the Committee should refer the complaint immediately after the date of the general election to the Commission on Judicial Conduct if the respondent has won the election or the appropriate attorney discipline or grievance committee of the Appellate Division if the respondent has lost. Committee business, including any complaints and determinations, should be confidential and should not be disclosed to anyone other than to the parties to the complaint.

We believe that these Committees will serve a valuable role as ombudsman for the judiciary, ensuring that inappropriate judicial campaign conduct is addressed both expeditiously and irrespective of whether a candidate wins or loses the election. We think that the Committees strike the right balance between providing candidates with sufficient process to protect their interests and serving the larger goal of preserving the dignity of the judicial office.

Campaign Finance Disclosure

In its Interim Report (pp. 35-39), the Commission reviewed the current campaign finance disclosure requirements for judicial campaigns in New York. The Commission recommended that campaign finance disclosure filings for judicial candidates for all courts should be filed electronically and made publicly available in a searchable electronic format on a timely basis. In addition, the content and format of judicial disclosure filings should be expanded and revised. For example, the requirements for judicial disclosure filings should be expanded to provide the occupation and the name of the employer for any contributor, as well as information on intermediaries and the disclosure information should be more readily accessible and searchable by computer over the Internet in a variety of ways. Transparency in judicial campaign finance disclosure, the Interim Report urged, will promote confidence in the campaign finance system as well as in the judicial elective system.

The Commission reaffirms its recommendations contained in the Interim Report and notes the critical importance of timely and adequate judicial campaign finance disclosure to public confidence in judicial elections and to the successful implementation of other of the Commission's recommendations.

Since the Interim Report was published, the Office of Court Administrations (OCA) has been made aware of the Commission's recommendations regarding campaign finance disclosure, including the recommendation that OCA (or an entity responsible to OCA) should be the destination for electronic campaign finance disclosures and serve as the authority responsible for making the information publicly available over the Internet. It is the Commission's strong hope that OCA will be able to absorb this crucial function.

Finally, the Commission notes that the campaign finance disclosure function must be accompanied by strong enforcement in order to be meaningful.

(For a more detailed discussion of campaign finance disclosure, see the Working Paper on Campaign Finance Disclosure attached as Appendix G-10; and Committee for Modern Courts September 2, 2003 Memorandum to the Commission, attached as Appendix F.)

CONCLUSION

There is one issue that we have not addressed yet. New York State employs a system of judicial district conventions to select candidates for its court of general jurisdiction that is not only unique among states, but also is unique within the state. The judicial convention system has been the subject of controversy since its inception in 1911, and debate over the value of the system is as heated today as at any time in the system's history. Strong arguments continue to be offered for and against the system, as they have for almost a century, and opinions often vary depending on geography. In the midst of the debate several reform efforts are afoot independent of the Commission's work.

Many of the recommendations in this Report address issues at the core of the debate over the judicial district convention system, but the Commission did not reach a conclusion on whether or how to reform the system itself. We would like to fashion a solution to the debate over the merits of judicial district conventions, but it will not come easily. The effort will take more time than we were initially allotted. Therefore, we recommend that the Commission remain constituted in order to produce a report and recommendation on the judicial district convention system upon the call of the Chair. In the meantime, the Commission will continue its study of the issue and learn from the various reform efforts that are currently underway.

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