PO BOX 9404, DENVER, COLORADO 80209 | 303–292–1212 | www.LAWWEEKONLINE.com VOL. 12 | NO. 36 | $6 | SEPTEMBER 8,2014

LAW WEEK COLORADO

Best Practices For Judicial Appointments

By **Tony Flesor**
LAW WEEK COLORADO

A LOCAL NONPROFIT published a report late last month that outlines the merits of using a nominating commission to name state supreme court justices. IAALS released its report after the O'Connor Judicial Selection Plan, which was created with U.S. Supreme Court Justice Sandra Day O'Connor.

The nominating commissions are the front-end of the judicial selection plan, and according to Malia Reddick, a consultant for the Quality Judges Initiative, they are the component that makes the O'Connor method work. Reddick was the lead author on the judicial nominating commission report, with IAALS' executive director Rebecca Love Kourlis.

REBECCA LOVE KOURLIS

Judicial nominating commissions were created as a politically neutral alternative to elections. They were introduced in 1940 when Missouri created its own "Missouri Plan" to break free from the Democratic party's control over judicial appointments. According to IAALS' report, between 1918 and 1941, only two sitting supreme court justices were reelected in Missouri.

Other states followed suit through the 1970s as they all sought remedies for their own corruption problems. Now, 30 states use a judicial nominating system in some way to choose supreme court justices.

"We think it's a preferable alternative to choosing justices from elections," Reddick said. "Justices are different from other public officials. They're not like governors or legislators who are expected to respond to the will of the people. Judges don't have constituents."

A handful of states are considering moving to a merit-based selection process. Since the 1970s, Nevada has flirted with the idea of using a nominating commission, and most recently, the state put it to a public vote after a Los Angeles Times investigation showed judges throughout the state played favorites or were underqualified. In 2010, voters rejected full merit selection but agreed to continue using nominating commissions for interim vacancies.

Likewise, there have been judicial corruption scandals in Pennsylvania, and several groups have pushed for judicial selection reform but the state hasn't made any changes yet.

Reddick said some states haven't had judicial scandals like others that have adopted merit-based selection processes but are considering making the change in order to prevent future problems. She said she's heard from people in Minnesota who half-wish there would be a scandal in the state to move the process along.

Some states are looking for other alternatives. Common complaints about nominating commissions include that they put a small group in control of naming judges or justices, or that they involve too much secrecy and too little public input.

States have a range of requirements for the makeup of their nominating commissions. They can involve a state's supreme court chief justice as an ex officio chair and any combination of lawyers and nonlawyers. Regardless of the makeup, states can improve the public's confidence in the system by making the process more transparent, and there has been a movement to do so, Reddick said.

That might involve anything from giving public access to the commissioners themselves or providing more information about the candidates at various stages of the process or making interviews with the candidates open to the public.

The downside with complete transparency is that many lawyers don't want their candidacy made public unless they have a good chance of getting the judicial appointment. And attorneys might fear that they could lose clients if they thought the attorney could "jump ship" for a judgeship rather than continuing to represent them, Reddick said.

Best practices for states include making sure the commission's rules are made public along with information on the commissioners, the names of likely candidates and the names of any candidates selected by the commission and recommended for appointment.

Reddick said Colorado has done a good job of appointing judges, though there might be some room to improve the process.

Although Colorado doesn't make all candidates' names public, judicial nomination commissions do announce the final three recommended for appointment by the governor. The state also doesn't make interviews open to the public, and that is a choice by the Supreme Court, she said.

"If it ever came under attack, opening it up might be a good step to take," she said. That might mean making the candidates' names and the interviews public as well.

There is no perfect system, though. Reddick recognized that while commissions need to have checks and balances for transparency, there's also a need to balance any confidentiality interests that candidates may have.

It's also important to have a variety of professional backgrounds on the commissions and that there are multiple appointing authorities so that any one party doesn't have control over who gets a judgeship, she said.

The O'Connor Plan also outlines a four-part process that involves commission screening and nomination, appointment by governor, judicial performance evaluation and retention elections. •

— Tony Flesor, TFlesor@CircuitMedia.com