

MODEL CODE OF CONDUCT

FOR JUDICIAL NOMINATING COMMISSIONERS



Members of judicial nominating commissions hold positions of **PUBLIC TRUST**. Commission members shall conduct themselves in a manner that reflects positively upon the judicial selection process and shall avoid partisanship or and shall avoid partisanship or partiality in the consideration of applicants. Commission members shall consider each applicant in an **IMPARTIAL** and **OBJECTIVE** manner. Commission members shall not be influenced other than by facts or opinion relevant to the judicial qualifications of applicants. At any commission meeting where the **QUALIFICATIONS** of judicial applicants will be considered, commission members shall **DISCLOSE** to the commission any relationship with an applicant. Commission members shall also disclose any other possible cause for conflict of interest, bias, or prejudice. Commission members shall display **COURTESY** and **RESPECT** to all applicants and those commenting on applicants, as well as to other commission members. No commission member or immediate family of a commission member shall accept a gift or anything of value from or on behalf of any applicant. A commission member shall **RECUSE** himself or herself if s/he might be unable to consider an applicant impartially and objectively. Commission



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Quality Judges is an initiative of IAALS dedicated to advancing empirically informed models for choosing, evaluating, and retaining judges that preserve impartiality and accountability. Through comprehensive analysis of existing practices and the collaborative development of recommended models, the *Quality Judges Initiative* empowers, encourages, and enables continuous improvement in processes for choosing, evaluating, and retaining judges.

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Model Code of Conduct for Judicial Nominating Commissioners

In 33 states and the District of Columbia, judicial nominating commissions screen applicants for judicial vacancies and recommend the best-qualified candidates to the governor for appointment. Commission-based appointment of judges has the potential to offer important benefits to the state judiciary. First and foremost, it can create a climate of quality by encouraging highly qualified attorneys to apply, providing the governor with the names of highly qualified applicants from which to choose, and ensuring the selection of highly qualified judges. But the value of a commission-based gubernatorial appointment process can extend beyond the judiciary as well, by fostering public confidence in courts and judges and securing support for the judicial branch from the legislative and executive branches.

Judicial nominating commissions, and the attorney and public members who serve on them, are the key to the judicial merit selection process. To reap the benefits of a commission-based appointment process, the members of these commissions must hold themselves to the highest ethical standards in their work—and the public, the other two branches, and potential judicial applicants must trust that this is the case.

Many states include provisions in the rules of procedure for their nominating commissions that address members' ethical obligations; however, some of these may fall short of covering all of the ethical issues with which members may be faced. Based on our support for commission-based appointment as a component of the O'Connor Judicial Selection Plan,¹ and in consultation with a working group composed of state court judges, former and current attorney and non-attorney members of judicial nominating commissions, and government employees who administer and assist such commissions, IAALS developed this model code of conduct for judicial nominating commissioners. The members of the working group included the following:

Hon. Rebecca White Berch

Chief Justice (Ret.), Supreme Court of Arizona

Susanne DiPietro

Executive Director, Alaska Judicial Council

Emery Gainey

Former Non-Attorney Member, 8th Judicial Circuit Nominating Commission, Florida

Marilyn Lyng O'Connell

Former Executive Director, Massachusetts Judicial Nominating Commission

Hon. Randall Skanchy

Judge, Third Judicial District of Utah

Shannon Stevenson

Attorney Member, Colorado Supreme Court Nominating Commission

Robin Sweet

Director and State Court Administrator, Administrative Office of the Nevada Courts

Katherine Yarger

Member, U.S. Senator Cory Gardner's Judicial Evaluation Committee

With this model code, we offer a comprehensive set of rules, drawn from the constitutional and statutory provisions and rules of procedure that govern nominating commissions around the country, to guide the behavior of those who perform this important role in choosing our judges. We also offer commentary that addresses existing practices around the country and identifies options and alternatives relevant to each rule. We envision that this code of conduct would be incorporated in a judicial nominating commission's rules of procedure and thus be enforceable in the same manner.

1 Sandra Day O'Connor and IAALS, THE O'CONNOR JUDICIAL SELECTION PLAN (2014), <http://iaals.du.edu/quality-judges/projects/oconnor-judicial-selection-plan>.

COMMISSIONER RESPONSIBILITIES

Rule 1.1

Members of judicial nominating commissions hold positions of public trust. Commission members shall conduct themselves in a manner that reflects positively upon the judicial selection process and shall avoid partisanship or partiality in the consideration of applicants. Commission members shall not be influenced other than by facts or opinion relevant to the judicial qualifications of applicants. No commission member or immediate family of a commission member shall accept a gift or anything of value from or on behalf of any applicant. Commission members shall display courtesy and respect to all applicants and those commenting on applicants, as well as to other commission members.

Commentary

Commission members must be mindful that the integrity of the judicial selection process, both in appearance and in fact, rests largely on their shoulders, and they must hold themselves to the highest ethical standards at all times. (For a more thorough delineation of the ethical responsibilities of nominating commissioners, see the commission rules of procedure for Hawaii² and Massachusetts.³)

A few states require members of judicial nominating commissions to take an oath of office that summarizes their ethical responsibilities. Examples include the oaths required of commission members in Missouri⁴ and Nebraska.⁵ States like Alaska, Idaho, New Mexico, and Rhode Island require that commissioners take the same oath of office that other state officeholders take.

2 Judicial Selection Commission Rules, Supreme Court of the State of Hawaii, http://www.courts.state.hi.us/docs/court_rules/rules/jsr.pdf (last visited March 1, 2016).

3 Gov. Charles D. Baker, Exec. Order No. 558 (February 5, 2015), <http://www.mass.gov/governor/docs/jnc/eo-558.pdf> (last visited March 1, 2016).

4 Supreme Court Rules, 10.05(b), <http://www.courts.mo.gov/courts/ClerkHandbooksP2RulesOnly.nsf/c0c6ffa99df4993f86256ba50057dcb8/de8fd1eb53e09ca786256ca600521271?OpenDocument> (last visited March 1, 2016).

5 Commissioner's Manual, Oath of Understanding, <https://supremecourt.nebraska.gov/sites/supremecourt.ne.gov/files/misc/JNC/jnc-manual-oath.pdf> (last visited March 1, 2016).

Rule 1.2

Commission members shall attend all regular commission meetings unless excused by the chair for good cause. Commission members shall complete all necessary preparation for each meeting.

Commentary

Particularly in states where all judges are appointed through a commission-based process, quality service on a judicial nominating commission entails a substantial volume of work and requires a significant dedication of time and effort. The workload for individual commission members is also greater where

members are charged with performing due diligence on judicial applicants. Implicit in a commission member's acceptance of appointment is a commitment to conscientiously and effectively performing one's responsibilities, including attending all commission meetings and being thoroughly prepared for such meetings.

In a few states, commission members may be removed from office for poor meeting attendance—e.g., missing two consecutive meetings without cause in Alaska,⁶ failing to attend at least half of the commission's meetings in Maryland,⁷ missing more than two meetings in a given year in Tennessee.⁸

To maximize meeting attendance, commissions may wish to schedule meetings for the same day and time at regular intervals, schedule meetings well in advance to allow members to plan accordingly, or involve all commission members in determining the meeting schedule.

6 Alaska Judicial Council Bylaws, Art. II, §5(B), <http://www.ajc.state.ak.us/about/bylaws> (last visited March 1, 2016).

7 Gov. Lawrence J. Hogan, Jr., Exec. Order No. 01.01.2015.09 (January 1, 2015), <https://governor.maryland.gov/wp-content/uploads/2015/02/EO0101201509.pdf> (last visited March 1, 2016).

8 Gov. Bill Haslam, Exec. Order No. 41 (November 6, 2014), <https://www.tn.gov/sos/pub/execorders/exec-orders-haslam41.pdf> (last visited March 1, 2016).

Rule 1.3

Newly appointed commission members shall complete a training program or orientation session that addresses commissioner responsibilities and reviews the commission's rules of procedure.

Commentary

Some states provide nominating commissioners with a manual or handbook to guide their work. The Florida⁹ manual also includes background on the structure of the state courts, how judges are selected and disciplined, and case law impacting the nominating commission's work. Nebraska¹⁰ and Utah¹¹ offer additional examples.

One appropriate topic for a training program or orientation session is the importance of judicial diversity and the vital role judicial nominating commissioners play in influencing the composition of the bench. The Brennan Center for Justice's *Building a Diverse Bench: A Guide for Judicial Nominating Commissioners* (expected release May 2016) explains the value of judicial diversity and provides concrete recommendations for ways commissioners can most effectively consider diversity in their recruitment, evaluation, and recommendation of candidates. One obstacle to achieving diversity can be the influence of implicit biases, which can be addressed in part by a training program discussing the potential for implicit biases to affect commissioner decisions and ways to mitigate such biases.

9 Florida Judicial Nominating Commissioner 2015 Manual, http://www.flgov.com/wp-content/uploads/pdfs/2015_JNC_Manual.pdf (last visited March 1, 2016).

10 Judicial Nominating Commissioner's Manual, <https://supremecourt.nebraska.gov/5843/judicial-nominating-commissioners-manual> (last visited March 1, 2016).

11 Manual of Procedures for Justice Court Nominating Commissions, Utah State Courts, https://www.utcourts.gov/resources/rules/ucja/append/a_nomcom/appa.pdf (last visited March 1, 2016).

COMMISSIONER IMPARTIALITY AND CONFLICTS OF INTEREST

Rule 2.1

At any commission meeting where the qualifications of judicial applicants will be considered, commission members shall disclose to the commission any relationship with an applicant (business, personal, attorney-client). Commission members shall also disclose any other possible cause for conflict of interest, bias, or prejudice. A commission member shall recuse himself or herself if his or her ability to consider an applicant impartially and objectively might reasonably be questioned.

Commentary

Commission members should avoid conflicts of interest, both actual and apparent, with respect to judicial applicants. The following are examples of personal and professional relationships that may pose such a conflict: a relationship by blood, marriage, or family within the third degree of consanguinity; a law partner, associate, employer, employee, or other co-worker as an applicant; a direct pecuniary or monetary interest with an applicant; an attorney-client relationship with an applicant; a relationship where the commissioner shared a residence with an applicant in the previous five years. To preserve the integrity of the nominating process in particular, and the judiciary as a whole, commission members should thoughtfully and carefully consider disqualifying themselves when an individual with whom they have such a relationship applies for a judgeship.

In the event of a potential conflict of interest, a number of considerations may influence the decision as to when, and to what extent, a commission member's recusal is required. One such factor is the size of the jurisdiction for which the commission is responsible. In smaller counties, circuits, or districts, it is far more likely that commissioners will have professional and/or personal relationships with judicial applicants. In these circumstances, a more narrow definition of "conflict of interest" may be warranted.

In addition, nominating commissions for state supreme courts range in size from 6 to 16 members. Recusal of members of a smaller commission may have a detrimental impact on the commission's work (including the ability to achieve a quorum), while on a larger commission, recusal of a few members is less likely to interfere with the commission's work. Thus the size of the commission may also influence the strictness of the recusal standard.

In terms of the extent of a commission member's recusal, nominating commissions around the country vary in terms of whether members who recuse themselves because of a conflict of interest are barred from participating in screening, interviewing, deliberating, and/or voting on the applicant in question, or whether they must sit out the entire nomination process. One relevant factor here is the voting procedure that the commission uses to identify the final list of nominees, and in particular, whether commission members vote on individual applicants or for a "pool" of applicants.

Finally, where individual commission members are required to perform due diligence on, or vet, individual applicants, the commission should be prepared to address the question of whether a commission member who has recused himself or herself may serve as a reference for the judicial applicant in question, and for other applicants.

In some states, the decision whether to recuse is left to the individual commission member (e.g., Alaska,¹² Arizona,¹³ Idaho,¹⁴ Missouri¹⁵), while in others, the chair may make the determination (e.g., Minnesota¹⁶). In a handful of states, upon a motion by another commission member, the entire commission may vote on whether a member's recusal is appropriate (e.g., Florida,¹⁷ Nebraska,¹⁸ Utah,¹⁹ Vermont²⁰).

Regardless of how each commission addresses these issues, all aspects of the recusal process should be clearly laid out in the commission's rules of procedure. Commissions should also document and maintain a record of all disclosures and recusals. In Nebraska,²¹ for example, when a commission member's impartiality is challenged and a vote of the full commission is taken, that decision must be included in the information forwarded to the governor and in the report submitted to the state court administrator.

- 12 Alaska Judicial Council Bylaws, Art. V, §2, <http://www.ajc.state.ak.us/about/bylaws> (last visited March 1, 2016).
- 13 Uniform Rules of Procedure, Arizona Judicial Branch, Rule 4, <http://www.azcourts.gov/jnc/Uniform-Rules-of-Procedure> (last visited March 1, 2016).
- 14 Rules of Procedure, Idaho Judicial Council, Rule 13, http://www.judicialcouncil.idaho.gov/IJC_General_Rules_of_Procedure_11-18-15.pdf (last visited March 1, 2016).
- 15 Supreme Court Rules, 10.32(e), <http://www.courts.mo.gov/courts/ClerkHandbooksP2RulesOnly.nsf/c0c6ffa99df4993f86256ba50057dcb8/595b5620b675390586256ca600521285?OpenDocument> (last visited March 1, 2016).
- 16 Application Procedures for District Court Judge, https://mn.gov/governor/assets/district_judge_application_procedures.pdf_tcm1055-94666.pdf (last visited March 1, 2016).
- 17 Supreme Court Judicial Nominating Commission Rules of Procedure, [http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/048CA9B594B7DDA1852572AD0047F46E/\\$FILE/JNC%20Uniform%20Rules%20of%20Procedure%20_Supreme%20Court_.pdf?OpenElement](http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/048CA9B594B7DDA1852572AD0047F46E/$FILE/JNC%20Uniform%20Rules%20of%20Procedure%20_Supreme%20Court_.pdf?OpenElement) (last visited March 1, 2016).
- 18 Supreme Court Rules, §1.602(C), <https://supremecourt.nebraska.gov/supreme-court-rules/1691/%C2%A7-1-602-disqualification-process> (last visited March 1, 2016).
- 19 Utah Administrative Code, Rule R356-101-9, <http://www.rules.utah.gov/publicat/code/r356/r356-101.htm#T11> (last visited March 1, 2016).
- 20 CVR 90-800-001, Rule 5(b), <http://legislature.vermont.gov/assets/Documents/2014/WorkGroups/House%20Judiciary/Bills/H.866/Witness%20Testimony/H.866~Code%20of%20Vermont%20Rules~Judicial%20Nominating%20Board%20Rules~2-27-2014.pdf> (last visited March 1, 2016).
- 21 Supreme Court Rules, §1.602(C), <https://supremecourt.nebraska.gov/supreme-court-rules/1691/%C2%A7-1-602-disqualification-process> (last visited March 1, 2016).

Rule 2.2

Commission members are not eligible to apply for a judicial vacancy for which the commission screens and nominates applicants during their term on the commission and, except in special circumstances, for at least one year thereafter.

Commentary

As many states have recognized, the application of a current or former commission member for a judgeship presents a potential conflict of interest. To remedy this, commission members should be ineligible to apply for a judgeship while serving on the commission and, in most instances, for at least one year after concluding their service. This rule may pose difficulties in smaller jurisdictions where the pool of potential applicants is limited or where other special circumstances apply. This model code of conduct strives to capture best practices, and in adopting it, either in whole or in part, jurisdictions should adapt individual rules such as Rule 2.2 to best serve their respective legal and judicial environments.

Some states impose a lengthier ineligibility period of two, three, or even five years (e.g., Connecticut,²² Colorado,²³ Oklahoma²⁴). Where commission members serve staggered terms, one consideration in determining the length of the ineligibility period is the length of the term that commission members serve. Ideally, there will be at least some turnover in the makeup of the commission before a former member may seek a judicial nomination.

22 Conn. Code chapt. 872 § 51-44l, http://www.ct.gov/jsc/lib/jsc/pdfs/sec51_44a.pdf (last visited March 1, 2016).

23 Colo. Const. art VI, § 20(4), https://www.courts.state.co.us/userfiles/File/Court_Probation/Supreme_Court/Committees/Judicial_nominating_Commission/Const_A_VI_S20_S24.pdf (last visited March 1, 2016).

24 Okla. Const. art VII(B), § 3(f), <http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=84973> (last visited March 1, 2016).

Rule 2.3

Except for judge members, no commission member shall hold any elected public office for which s/he receives compensation during his or her period of service. No commission member shall hold an official position in a political party or political campaign. No commission member shall make a campaign contribution on behalf of a judicial candidate.

Commentary

Since the core purpose of a commission-based appointment process is to limit the role of politics in selecting judges, it is critically important that nominating commission members appear to be, and are, apolitical during their terms of office. To that end, some states impose even more stringent restrictions on political activity on the part of nominating commission members. For example, many states that bar non-judge commissioners from holding an elected public office also bar them from holding another appointive public office (e.g., Connecticut,²⁵ Kansas,²⁶ Oklahoma²⁷). Massachusetts²⁸ extends the prohibition on holding other elective or appointive public office to family of commission members as well. In addition, at least one state prohibits commission members from making political contributions on behalf of any candidate for local, state, or federal office (Massachusetts²⁹).

25 Conn. Code chapt. 872 § 51-44a, http://www.ct.gov/jsc/lib/jsc/pdfs/sec51_44a.pdf (last visited March 1, 2016).

26 Kan. Const. art. III, § 5(g), <https://kslib.info/829/Article-Three-Judicial> (last visited March 1, 2016).

27 Okla. Const. art VII(B), § 3(f), <http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=84973> (last visited March 1, 2016).

28 Gov. Charles D. Baker, Exec. Order No. 558 (February 5, 2015), <http://www.mass.gov/governor/docs/jnc/eo-558.pdf> (last visited March 1, 2016).

29 Gov. Charles D. Baker, Exec. Order No. 558 (February 5, 2015), <http://www.mass.gov/governor/docs/jnc/eo-558.pdf> (last visited March 1, 2016).

Rule 2.4

Commission members shall consider each applicant in an impartial and objective manner. In considering each applicant, a commission member shall not discriminate on any basis prohibited by law.

CONFIDENTIALITY

Rule 3.1

Neither commission members nor commission staff shall discuss or disclose, except among themselves, any matters or materials classified as confidential under these Rules. This mandate of confidentiality survives commissioners' terms of office and must be observed in perpetuity.

COMMISSIONER COMMUNICATIONS

Rule 4.1

Where commission members are charged with actively seeking out and encouraging qualified individuals to apply for judgeships, a commission member shall not commit in advance to vote for any applicant and shall make clear that no commitment or support for nomination is implied. A commission member shall disclose to the commission that s/he has encouraged an applicant to apply when that applicant is first considered by the commission.

Commentary

Many nominating commissions recognize that allowing commission members to actively recruit well-qualified applicants, particularly persons who might not otherwise apply, is a critical tool for enhancing diversity among the pool of applicants and, ultimately, on the bench. The commission itself may enlist the aid of community groups and organizations in this effort. It is important, however, for recruited applicants, as well as the public, to understand that recruitment does not suggest that special consideration will be given or that commitments have been made.

Rule 4.2

Commission staff, the chair, or the chair's designee shall conduct all communications with an applicant about the application or the process. Except as required to conduct due diligence, individual commission members shall avoid substantive communications with applicants from the time the application is submitted until completion of the final vote on the nomination.

Commentary

Ex parte conversations of this nature are almost certain to undermine the appearance of impartiality in the commission's work. Commission members must not give, and must not seem to be giving, preferential assistance to any applicant.

Rule 4.3

Each commission member shall disclose information regarding the qualifications of any applicant so long as the commission member believes it is reliable and relevant to the consideration of the applicant. Such information conveyed in written communications with the commission member shall be forwarded to all other commission members; oral communications regarding such matters shall be shared orally with other members.

Commentary

In order for commission members to conduct a full and fair review of all applicants, all members must have access to the same information. Full sharing of information from external sources about applicants' qualifications is typically done as a matter of course where commission members perform due diligence on applicants, but it may be less routine where commission members do not have this responsibility.

Rule 4.4

After certification of a list of nominees to the governor, no commission member shall contact the governor or any member of the governor's office or staff for the purpose of further influencing the governor's decision. However, if contacted by the governor or a member of the governor's office or staff, commission members may discuss their own views about the qualifications of applicants as well as publicly available information.

Commentary

In some states, a governor's council or one or both houses of the legislature must confirm the governor's appointee. These jurisdictions may wish to revise Rule 4.4 to address communications with members of these entities as appropriate.

Rule 4.5

Commission members are permitted, and encouraged, to communicate with the public regarding the commission's role in the judicial selection process, in accordance with these Rules.

Commentary

Educating the public about how a commission identifies highly qualified candidates and what factors are considered will enhance the public's trust in both the judicial selection process and the courts as a whole. Commission members are well positioned to provide this education. However, in discussing with members of the public a particular application process and/or particular applicants, commissioners should be mindful of the importance of preserving the integrity of the commission's work, as well as the confidentiality interests addressed in Rule 3.1. Commissions may wish to include this topic in the training program or orientation session referenced in Rule 1.3.

Rule 4.6

The commission chair may designate one or more commission and/or staff members to communicate the commission's decision as to the list of nominees to unsuccessful applicants. In any communication with an unsuccessful applicant, whether initiated by the applicant or the commission member, a commission member shall not make any representation regarding an applicant's future chances of selection, an individual commissioner's intentions regarding a future application, or any other topics held confidential by these Rules.

Commentary

In light of the possibility that unsuccessful applicants may apply for a future vacancy, commission members should refrain from sharing any information about the screening and nominating process that might jeopardize the impartiality and integrity of future processes.



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