



Institute for Judicial Nominating Commissioners

Facilitator's Guide



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Founded in 1913, the American Judicature Society is an independent, national, nonpartisan, nonprofit organization supported by a national membership of judges, lawyers and other members of the public. Through research, educational programs, and publications, AJS addresses concerns related to ethics in the courts, judicial selection, the jury, court administration, judicial independence, and public understanding of the justice system.

Contents

| | |
|--|-----------|
| Introduction to the Institute | 1 |
| Choosing Institute Topics | 2 |
| Developing a Program Agenda | 4 |
| Preparing Commissioners for the Institute | 5 |
| Leading an Effective Discussion | 6 |
| Conducting Institute Sessions | 8 |
| 1. Commission Ethics | 8 |
| Small-group exercises | 8 |
| Large-group discussion | 9 |
| 2. Confidentiality and Privacy | 10 |
| Guest speaker on the topic | 10 |
| Applicant perspectives | 11 |
| Small-group exercises | 11 |
| 3. The Organizational Meeting | 12 |
| Small-group exercises | 13 |
| Large-group discussion | 14 |
| 4. Recruiting Applicants | 14 |
| Small-group exercises | 15 |
| Large-group discussion | 15 |
| 5. Evaluative Criteria | 16 |
| Mock applications review exercise | 16 |
| Small-group exercise | 17 |
| 6. Screening and Investigation | 18 |
| Small-group exercises | 19 |
| Large-group activity | 20 |

| | |
|---|-----------|
| 7. Interviewing the Candidates | 20 |
| Mock interview | 21 |
| Small-group exercises | 21 |
| Large-group discussion | 23 |
| 8. Voting and Submitting Names of Nominees | 23 |
| Mock deliberation and voting session | 24 |
| Small-group exercises | 24 |
| Appendix A Sample Agenda | 26 |

Introduction to the Institute

The American Judicature Society developed this educational program to bring together busy commissioners to assess the procedures they use to select judicial nominees. In doing so commissioners will discuss best practices, and think about how they might change their procedures to improve the experience for themselves as well as applicants, thereby increasing public trust and confidence in the commission's work.

The Institute for Judicial Nominating Commissioners is a one-day program covering key steps in the commission process, which can range from an initial organizational meeting to submitting names to the appointing authority. Each topic, which can be selected from among the eight addressed in the *Handbook for Judicial Nominating Commissioners*, is discussed in general terms and is adaptable to the differing situations and concerns of various commissions. If AJS staff present the Institute, they also can share the experiences of other commissions around the country.

This *Facilitator's Guide* is an aid to both planning and conducting your Institute. Prior to planning a training program, please read the guide in conjunction with the *Handbook for Judicial Nominating Commissioners* to help identify key issues, select suitable topics, and prepare additional discussion questions or edit those suggested in this guide. AJS's experience indicates that discussion of questions and issues is the most valuable aspect of the program. This structured approach allows commissioners to share their questions and concerns and benefit from group problem solving. A well-conducted program will elaborate on the material in the *Handbook*, and relate that material to the actual experiences and needs of commissioners through carefully selected learning activities.

The *Guide* will help those who educate judicial nominating commissioners design a program that meets the needs of the commissioners in their jurisdiction. Some commission rules require regular educational programs, and the American Judicature Society has provided technical assistance and training materials, particularly the *Institute for Judicial Nominating Commissioners*, for commissions in most states with nominating commissions. If you would like AJS to conduct your Institute, call 515/271-2281.

Choosing Institute Topics

The 2004 second edition of the *Handbook for Judicial Nominating Commissioners* is the substantive source for Institute segments, and has eight chapters. The first two deal with issues that are embedded in all aspects of the commission's work—ethics and confidentiality and privacy issues. The next six chapters take readers step-by-step through the nominating commission process. The eight chapters are:

1. Commission Ethics
2. Confidentiality and Privacy
3. The Organizational Meeting
4. Notice of Vacancy and Recruitment
5. Evaluative Criteria
6. Screening and Investigation
7. Interviewing the Candidates
8. Voting and Submitting Names of Nominees

The Handbook can be ordered online at <http://www.ajs.org/cart/storefront.asp>, or the individual chapters can be downloaded at <http://www.ajs.org/js/materials.htm>.

Ask commissioners what they want or need to learn.

Once a jurisdiction has decided to convene a training program for its nominating commissioners, and set a date, place and time, it can be most helpful to the facilitator to immediately conduct a needs assessment in order to determine the most relevant segments for the Institute. For example, one jurisdiction mailed a form asking each commissioner to identify three significant questions or challenges he or she faced in fulfilling commission responsibilities. Results were tallied and topics for the training program were identified.

Another technique is to mail commissioners a list of possible topics for the training session (e.g., the *Handbook* chapter titles) and ask them to check those that would be most helpful. Again, a tally of responses should indicate the most relevant subjects for an educational program.

Be sure to report back to the commissioners the results of your pre-training survey, either in writing in their workshop materials or orally in the opening remarks on the training day.¹

Consider programming enhancements.

Depending on the interests and concerns that surface in the pre-workshop survey, program planners can supplement a program based on topics from the *Handbook for Judicial Nominating Commissioners* in a number of ways. Some possible enhancements are described below. See also the discussion of the individual program segments beginning on page 8 for additional suggestions for presenting the Institute.

Panel of judges. One highly rated segment of a training program, used in several jurisdictions, is a luncheon panel discussion of sitting judges with different assignments, such as a supreme court justice, a trial court judge from an urban area, a trial court judge from a rural area, a trial judge who hears primarily domestic relations or child abuse and neglect cases, etc. Each judge usually speaks for about ten minutes, describing a typical workday and the demands of the position, and enumerating the skills and personal qualities required by a judge in this assignment. Leave plenty of time for commissioners to ask questions of the speakers. It often works well to have the judges begin speaking once dessert is served (about 25-30 minutes into the lunch break), and then plan 60-75 minutes for the speakers' presentations and questions from the commissioners.

Guest speakers. Another successful activity is to have the governor or a representative of the governor's office describe the steps that office undertakes once the commission sends up the nominees' names. If you choose this option, again leave time for questions from the commissioners. In terms of sequencing workshop topics, this works best at the end of the day.

Other commissions have had a guest expert speak on interviewing, or a representative of the state court administrator's office or other state investigator describe how, for example, criminal background checks are conducted. Program planners also might want to consider including a panel consisting of a journalist, a former judge and knowledgeable layperson (e.g., representative of the League of Women Voters or a former lay commissioner) to discuss their perceptions of the nominating commission process, and engage in a dialogue with the commissioners.

Mock interview. See page 21 for a detailed description of this option.

¹ A few states have only one commission, and discussion and selection of program topics possibly could be conducted at a commission meeting prior to any scheduled educational session.

Developing a Program Agenda

Most of the trainings conducted by AJS staff have been limited to one day, with two topics covered in the morning and two in the afternoon. The program planner can use the pre-training survey as a guide to the subjects of greatest interest to commissioners, and, if relevant, choose a supplemental activity.

Most often the Chief Justice is invited to welcome the commissioners, stress the importance of the public trust they fulfill, and express appreciation for the time they contribute. Then the substantive topics are addressed. Depending on time constraints and the number of topics chosen, usually three or four topics can be adequately presented.

An agenda template.

Appendix A of this guide suggests a typical one-day program schedule. We understand that the timing for different sessions will change depending on the number of topics covered, whether commissioners must leave in mid-afternoon to drive home, or other local considerations.

Inviting local speakers.

Once organizers have set the date, time and place of the Institute, speakers such as the Chief Justice and Governor should be invited and confirmed as soon as possible. If local planners decide that a lunchtime panel of judges or other guest speakers would be worthwhile, those individuals also should be invited early in the planning process.

Preparing Commissioners for the Institute

It will help commissioners participate in and learn at the workshop if they receive some materials in advance—ideally about ten days ahead of time, but with at least one weekend between the time commissioners receive the materials and the Institute date. The advance materials could include:

- ◆ A summary of responses to the pre-workshop survey of challenges and questions;
- ◆ The Institute agenda, including the names of all confirmed speakers;
- ◆ A copy of *Handbook for Judicial Nominating Commissioners, 2nd Ed.*, with a cover note referring commissioners to the chapters that address the topics to be presented (*Handbooks* are free and the only cost is for shipping to one address);
- ◆ Any necessary paperwork, such as a description of the expense reimbursement policy and a travel expense form (with instructions for submitting it); and, possibly,
- ◆ A copy of the foundation documents for the commission, including constitutional or statutory provisions, governor’s executive order, or supreme court rule, and also any internal procedural rules.

Leading an Effective Discussion

The facilitator has several tasks: conveying key concepts clearly, raising controversial issues, and maintaining a cohesive discussion. The key concepts are included in the chapters in the *Handbook for Judicial Nominating Commissioners*. Therefore, as noted in the section on preparing commissioners for the Institute, it will help the learning process if the commissioners can read the relevant chapters before they attend. Discussion questions relating to the content of each chapter will stimulate lively interchanges among commissioners and help advance the analytic and learning processes.

While the questions will trigger discussion, the facilitator must keep it flowing and on track, and be prepared to field follow-up questions. Facilitators can best prepare by reading through the handbook chapters and writing down questions that occur to them. Facilitators also must be familiar with any executive orders, constitutional or statutory provisions or rules relating to the work of the commission. The facilitator can then help commissioners frame the general concepts within the boundaries of the commission's authority and operating rules.

The facilitator should actively involve each commissioner. Since a significant number of commissioners are laypersons, certain questions should be designed to elicit their perspective. This also applies to questions for judge commissioners in order to tap their particular expertise. If the commission also includes sitting legislators, their insight into the legislative process may be helpful when discussing any changes that might require legislative action. If the Institute is statewide and representatives of a number of commissions are participating, the facilitator may wish to assign commissioners to small groups to work on one or a set of questions, and then share their conclusions with the large group.

All suggested discussion questions are merely that—suggestions. The program planner should feel free to add, delete, or revise questions based on local needs and practices.

Although a discussion will center around one topic, questions relating to other topics often will arise. For example, when discussing voting for nominees, a question may arise about whether commissioners who did not attend all the interviews should be eligible to vote. This ethical issue should be addressed—perhaps by asking how other commissions have handled it, and what commission rules apply to this situation. If a question pertains to a topic that will be fully discussed later in the Institute, the facilitator can give a brief answer and note that a more detailed exploration of the issue will take place later.

Finally, an effective discussion is progressive. The later discussion segments should build on those that come earlier and integrate the information and the issues. Even within a segment, the discussion should progress from general issues to specific suggestions for procedural change.

Conducting Institute Sessions

Segment One: Commission Ethics²

When AJS prepared the 2nd edition of *Handbook for Judges* in 2004, an advisory committee of judges, commissioners and staff guided the revision. A key recommendation was that, in order to emphasize its importance to the legitimacy and credibility of the commission process, the chapter on ethics be moved from the back of the *Handbook* to the front. We have done so.

The ethics chapter in the *Handbook* addresses the following issues:

- ◆ Formal Provisions
- ◆ Oaths of Office
- ◆ Conflicts of Interest
- ◆ Confidentiality
- ◆ Communication Policies
- ◆ Post-Nomination Communications

Ethical issues pervade every step of the nominating process. Well-organized commissions will have discussed in advance what the ethical challenges at each stage are, and developed formal ethics provisions.

Listed below are some suggestions for organizing the discussion of commission ethics.

Small-group exercises. Assign commissioners to small groups, keeping appellate commissioners and trial court commissioners with their peers if that makes sense. Each group should receive a worksheet with a list of its assigned questions and space for summarizing the group's responses. Choose from among the following activities:

- ◆ Give each group a copy of the commission's formal ethics rule, supreme court rule, oath of office or any other written ethical guide. Ask group members to complete a worksheet with the following questions:
 - To what extent are you familiar with these ethical provisions?
 - In which situations are they most helpful?

² See Chapter 1 of the *Handbook*, pages 3-15.

- In which situations are they not helpful?
- What change(s) would you recommend to the ethical provisions?

Allow about 20-25 minutes of small-group discussion, and at least 45 minutes for one representative of each group to report back and for a large-group discussion of recommended changes. Depending on the size of the group, more or less time can be allotted to either or both the discussion and report/discussion. The facilitator should log the recommended changes on a flip chart. If the jurisdiction has an oath of office, adapt the questions to fit that document's usefulness and elicit suggestions for change.

- ◆ If your jurisdiction does not have a formal ethics provision, reproduce the Rhode Island provision on page 5 of the *Handbook for Judicial Nominating Commissioners* (or another ethics rule you may be aware of) and ask the group to answer the following worksheet questions.
 - How helpful would it be to you to have a formal ethics provision?
 - To what extent would the Rhode Island provision work in your jurisdiction?
 - What would you change or add to the Rhode Island rule [or other sample provision] to make it applicable to your commission? For example, would you keep or change the Rhode Island rule's language on commissioner disqualification for a conflict of interest? How would you define "a substantial conflict of interest?"

Large group discussion. If time permits, the facilitator can lead a large-group discussion using the following questions:

- ◆ What is your greatest ethical challenge?
- ◆ What are some ethical breaches you are aware of and how did your commission handle them?
- ◆ Is there a procedure in place for dealing with a commissioner who violates an ethics or confidentiality or other commission rule? If not, should there be? How might such a policy be worded?
- ◆ Does the commission have a public reputation for being fair and impartial? What might be some additional public perception issues?
- ◆ Do applicants perceive the commission to be fair and impartial? If not, why not? How might those concerns be addressed?

Segment Two: Confidentiality and Privacy³

The *Handbook* advisory committee strongly advised that AJS devote a full chapter to these issues. Commission policies and procedures on privacy and confidentiality vary widely, and are discussed under the following headings:

- ◆ What Are Confidentiality and Privacy?
- ◆ Waivers, Consents and Authorizations
- ◆ What Is Confidential and What Is Public?
 - Applications
 - Communications with Applicants, Commissioners and the Public
 - Interviews
 - Deliberations
 - Voting
 - Records

If the program planner chooses to include this topic on the agenda, he or she should include in the pre-workshop mailing any written policy statement or procedural rule used by the nominating commission(s). The facilitator may open discussion by a brief (10-15 minutes) summary of the key points in the chapter, using an overhead projector or a PowerPoint presentation.

Learning activities can include the following:

Guest speaker on the topic. A representative of the state court administrator's office or other person familiar with designing and implementing commission confidentiality and privacy policies, especially those governing production, maintenance, storage and destruction of records, can give a brief overview of them and take questions from the attending commissioners. A 30-minute session should suffice, but local program planners should adjust the time depending on the number of commissions and the number of attending commissioners.

³ See Chapter 2 of the *Handbook*, pages 17-30.

Applicant perspectives. A former applicant (or several of them), whether eventually nominated or not, could speak about his or her reaction to the privacy and confidentiality practices of the commission, about confidentiality of records, about the information requested in the applicant questionnaire or on any of the issues raised in the small-group discussion questions suggested below.

Small group exercises. Depending on the number of participating commissioners, break the attendees into small groups, and give them a discussion packet consisting of the written policy statements or rules governing confidentiality and privacy and a worksheet.⁴ During their allotted discussion time (which will vary depending on the number and size of the commissions and the questions asked), commissioners should work through the questions on the worksheet. The program planner should choose the categories and questions that are most appropriate for the jurisdiction, editing them as necessary.

Regarding waivers, consents or authorizations:⁵

- ◆ To what extent are the waivers, consents or authorizations effective in eliciting information that helps you assess applicants?
- ◆ Is the information requested related to the essential functions of the judicial position?
- ◆ If the form needs to be changed, how would you rewrite the waiver, consent or authorization?

Regarding applications:

- ◆ How is private information (e.g., Social Security numbers, applicants' home addresses, names and addresses of spouses and children, etc.) safeguarded? What, if any, changes need to be made to keep this information secure?
- ◆ To what extent are applicants informed of various confidentiality provisions governing specific sections of the applicant questionnaire and commission proceedings (such as interviews and voting)? If the commission does not have a written statement on these issues, draft a notice to applicants specifying what is confidential and what is not.

4 For comparative purposes, you also may wish to hand out Table 4, "Rules of Confidentiality," from *Judicial Merit Selection: Current Status*, available from the American Judicature Society at www.ajs.org/js/materials.htm. The table is a national summary of commission confidentiality rules.

5 For sample certifications and waivers used by Alaska, Florida and Massachusetts Commissions, see Appendix C to Chapter 3, pages 53-56 of the *Handbook for Judicial Nominating Commissioners, 2nd Ed.*

Regarding communications between and among commissioners, the applicant, and the public:

- ◆ To what extent have commissioner “leaks” of privileged information occurred? How has this problem been addressed, or how should it be handled?
- ◆ What does the commission do with unsolicited information for or against an applicant? What happens when a commissioner receives such information from an anonymous source? What changes, if any, are necessary to current written or unwritten policy on these issues?

Regarding privacy, confidentiality and recordkeeping:

- ◆ Are you aware of any instance where an applicant’s questionnaire and investigative file were inappropriately made public? How was the situation handled, or how should it have been handled?
- ◆ In your judgment, does your rule or policy explicitly state which materials are confidential? Does the rule or policy adequately protect the confidentiality of commission records? If not, how would you word, or re-word, a confidentiality provision?

Privacy and confidentiality of interviews, deliberations, and voting also should be discussed in the context of any Institute segments on those topics.

Segment Three: The Organizational Meeting⁶

To prepare to discuss issues relating to the organizational meeting, the facilitator should be familiar with commission constitutional and statutory provisions, supreme court rules and commission procedural rules. Discussion questions can be tailored to address particular provisions or rules. If the commission does not operate under written procedural rules, the facilitator can open a discussion about whether they are needed.

The facilitator should begin the session by noting that the organizational meeting is a critical, but often overlooked, component of the commission’s efficient and effective operation. A key purpose of the organizational meeting is to review any formal evaluative criteria the commission uses and discuss their relevance to the vacant judicial position. If evaluative criteria have not been formalized, then this is the time to discuss and decide which are appropriate for the current vacancy.

⁶ See Chapter 3 of the *Handbook* and appendices, pages 31-56.

The organizational meeting has additional purposes—to orient new commissioners about their role and the commission’s charge, to learn more about the vacancy to be filled, to discuss ethical standards and guidelines, to review procedural rules and possibly establish new ones, to review the applicant questionnaire to either confirm that it solicits information related to the current vacancy or to revise it if necessary, and to resolve logistical issues related to filling the vacancy.

Under certain conditions, a face-to-face meeting may not be necessary; see footnote 1 on page 40 of the *Handbook* for an alternative.

Possible learning activities are suggested below; facilitators should supplement or revise the discussion questions to tailor them to the commission’s experiences.

Small-group exercises. Assign commissioners to small groups, keeping appellate commissioners and trial court commissioners with their peers if that makes sense. If one commission handles all vacancies in your state, you may wish to have the commissioners address each of the listed topics in turn. If there are multiple commissions, each commission may address one topic and report their conclusions in a large-group discussion. Time allocated for the session will vary depending on the discussion format you select.

The goals of the organizational meeting:

- ◆ Review the purposes of the meeting, pages 32-34 of the *Handbook for Judicial Nominating Commissioners*. Would your commission find an organizational meeting helpful to, for example, clarify or establish evaluative criteria? Why or why not? If not, how are this and other issues addressed (or how can or should they be addressed)? If yes, which issues should be discussed at such a meeting?
- ◆ Which, if any, of these concerns should be addressed by commission rule or by a rule change?

Open or closed organizational meetings:

- ◆ Should your organizational meeting be open to the public? See suggestions in the third paragraph on page 32 of the *Handbook* and the second and third paragraphs on page 35 under “The Role of the Chair.” What are the drawbacks and benefits of a public meeting? Who should or could be invited to attend an open meeting? What do you recommend for your commission? Which, if any, rule changes would you recommend?

The role of the commission chair:

- ◆ What are the duties of your commission chair? (See discussion on the role of the chair beginning on page 34 of the AJS Handbook.) Are there additional responsibilities the chair could assume, and if so, which ones? Which rule changes or additional rules might help the chair fulfill his or her responsibilities?
- ◆ If your commission does not have a chair, would you find it useful to have one? What responsibilities should he or she assume?

Scheduling commission activities:

- ◆ Commissions often operate under constitutional, statutory or other time constraints. To what extent do commission logistics enhance or hamper the commission's ability to meet the deadlines? How does your commission establish its timetable, and how is it disseminated to members? To applicants?
- ◆ Which applicant materials are available to the entire commission? Are they distributed in time for commissioners to fully review them? If additional information would be helpful prior to interviews, what materials are required, how can they be gathered, and when should they be disseminated?
- ◆ Describe any rule change or enactment that would address any logistical log-jams.

Large-group discussion. Based on the reports from the small groups, commissioners may want to address the following summary question:

- ◆ Which rule enactments or changes would facilitate organizing the commission's work to fill a vacancy?

Segment Four: Recruiting Applicants⁷

The facilitator should know the commission's past notification procedures and any legal requirements for giving notice and recruiting applicants.

Commissioners should read Chapter 4 before the discussion, and supplemental handouts could include copies of recent notices of vacancy and a list of outlets to which they were sent, and any rules governing commissioners personally recruiting potential applicants.

⁷ See Chapter 4, "Notice of Vacancy and Recruitment," and appendices, pages 57-67 of the AJS Handbook.

Learning activities are suggested below:

Small-group exercises. Depending on the size of the group, the facilitator should assign participants and topics as appropriate.

The notice of vacancy:

Refer discussants to pages 58-61 of the *AJS Handbook*, "Notice of Vacancy." Hand out two recent notices of vacancy used by the commissioners in the group.

Discuss the following:

- ◆ How well crafted were the notices? Were they effective in drawing a diverse pool of highly qualified applicants? How could or should the dissemination list be modified? (See distribution suggestions on *Handbook* page 64.)
- ◆ What questions did potential candidates raise about the application procedure, or what parts of the application process appeared to confuse the applicants? Edit or rewrite the notices to address observed problems.

Personal recruitment of applicants:

- ◆ Refer discussants to pages 61-63 of the *AJS Handbook*. Hand out any commission rule(s) governing active recruiting of applicants. Discuss the following:
 - To what extent do you recruit colleagues and personal friends? What problems, if any, have you encountered when actively recruiting? How have you addressed those problems?
 - How effective has personal recruitment been in securing applications from qualified applicants?
 - Are any rule enactments or changes necessary to guide commissioners when actively recruiting?

Large-group discussion. After small-group representatives have reported their groups' conclusions to all participants, the following questions could be posed to the large group:

- ◆ Based on the report(s) from the small group(s), how would you modify the notices of vacancy?
- ◆ Considering the results of the small-group discussion(s), what rule enactments or changes do you recommend concerning the policies and procedures governing commissioner recruitment of applicants?

Segment Five: Evaluative Criteria⁸

Articulating criteria applicable to the judicial position and applying those criteria in an equitable and consistent manner not only are essential components of the commission's charge to nominate the best-qualified candidates, but also help assure applicants and the public that the process is fair. These criteria play an important role in screening, investigating and interviewing candidates and choosing the nominees. The facilitator should be familiar with the job description, applicant questionnaire, legal qualifications and criteria used by the commission.

Suggested learning activities follow.

Mock applications review exercise. The facilitator could ask four or five lawyers (possibly including former judges) from diverse practice backgrounds to complete the application form for a trial court vacancy, either completing the forms accurately, or using a combination of real and fictitious answers and an assumed name. If enough volunteers could be found, another group of mock applicants could submit forms for an appellate court vacancy; perhaps some attorneys, law professors and retired judges would be willing to participate.

To draw on the different perspectives of attorney, lay and judge commissioners, the facilitator may wish to divide the participants into peer groups. Each group receives the applicant questionnaires, along with a worksheet listing the relevant applicants' names. After discussing the mock applications in conjunction with the judicial position description and evaluative criteria used by the commission, each group selects its top three applicants.

A representative of each group reports their top three candidates. The facilitator, who has the names of the applicants on an overhead transparency or a flip chart, puts a check mark or otherwise indicates the top-rated names.

Questions for large-group discussion:

- ◆ How helpful was the job description in matching applicants and evaluative criteria? If no job description was available, what needs to be done to develop one (i.e., who in the justice system has ultimate responsibility for preparing job descriptions, who else needs to be involved in describing the essential functions of the position, etc.)?

⁸ See *Handbook* Chapter 5 and appendices, pages 69-103.

- ◆ Which criteria did [the judges] [the attorneys] [the lay commissioners] use to assess qualifications based on the application form? **For the facilitator:** Note any criteria that were relied on more heavily by one group; follow up by asking why that group found those criteria more important. Ask for the other groups' reactions to the weighting of certain criteria. On the other hand, look for common-denominator criteria used by all peer groups, as well as criteria ignored by all groups, and discuss why those criteria were chosen or ignored.
- ◆ If your commission has not formally articulated criteria (or if they are not specified in your governing provisions), what needs to happen to develop them? Who needs to be involved?
- ◆ What difficulties did you encounter in evaluating the applicants' qualifications on paper (if any)?
- ◆ In what specific ways did the information in the application form and the job description help or hinder your assessment? If necessary, what changes to the questionnaire would you recommend? (For a composite questionnaire, see "Sample Applicant Questionnaire" beginning on page 42 of the *AJS Handbook*.)

Small-group exercise. Sort the attending commissioners into appropriate small groups (preferably peer groups in order to bring out differing perspectives) and hand out the job description for a trial or appellate judgeship, or a recent notice of vacancy that describes the judgeship, any evaluative criteria specified in governing provisions or procedural rules, a blank applicant questionnaire, and a worksheet with any or all the following questions, (or assign specific questions to different groups):

- ◆ What criteria would you use to assess applicants for this position? What measures would you use to determine whether the applicant meets each criterion, at least on paper? (For suggested measures, see pages 89-103 of the *AJS Handbook*).
- ◆ In the context of the position described, which criteria do you think are most important? Less important? Irrelevant? Why?
- ◆ How useful is the questionnaire in eliciting information about the extent to which an applicant meets important criteria? If necessary, what changes to the questionnaire would you recommend? (For a composite questionnaire, see "Sample Applicant Questionnaire" beginning on page 42 of the *AJS Handbook*.)

- ◆ Should commissioners discuss among themselves the criteria they individually use for each applicant? Why or why not?
- ◆ Should the commission as a group establish evaluative criteria in advance, and include the criteria in the application packet? Why or why not? (See discussion of evaluative criteria on page 37 of the *AJS Handbook*, and all of Chapter 5.)
- ◆ What is the commission’s policy on health-related issues? What problems has the commission encountered and how were they addressed? (See *Handbook Appendix A to Chapter 5, “Judicial Nominating Commissions and the ADA,”* beginning on page 82.)
- ◆ How does the commission stay abreast of current regulations and case law on ADA issues?

In a large-group setting, ask a representative of each group to report the group’s responses to their assigned question(s). If recommendations for revising the applicant questionnaire or for articulating formal evaluative criteria emerge, follow up with questions about what needs to be done to accomplish the changes, who needs to be involved, and what the immediate next step will be and who will be responsible for taking it. Summarize responses on a flip chart.

Segment Six: Screening and Investigation⁹

Careful screening and investigation will give commissioners the information they need to decide which applicants they will interview. See *Handbook* pages 106-107 for a discussion of a preliminary screening procedure to reduce a large pool of applicants to a manageable group for further investigation. AJS recommends that commissions use structured forms for interviewing references and others so they gather comparable information on the applicants. See, for example, Appendix A beginning on page 114 for suggested questions for information sources, and Appendix B beginning on page 119 for the standardized reference inquiry forms used in Nebraska. Idaho and Alaska also survey all attorneys to further supplement the pool of information gathered; see Appendix C beginning on page 126 for the questionnaires they use. The facilitator should know of any screening techniques and investigative procedures the commissioners use.

⁹ See *Handbook* Chapter 6 and appendices, pages 105-129.

Suggested learning activities follow.

Small-group exercises. Sort the commissioners into appropriate groups. All groups may work on the questions below, or separate questions can be assigned to different groups. Distribute a worksheet with each group's assigned questions and space for writing the group's responses.

Preliminary screening:

- ◆ Taking into consideration your commission's resources and time constraints, is it feasible for you to adopt the procedures for screening and investigation suggested in Chapter 6 of the *Handbook*? Which do you already use? Which might you consider adopting? Which cannot be implemented and why?
- ◆ To what extent do you employ preliminary screening as described in Chapter 6? If you don't screen applications, would it be helpful to do so? Why or why not? If helpful, who would do the screening? What criteria could be used to screen applications?

Investigating applicants:

- ◆ How does your commission conduct background investigations of applicants? For example, who contacts sources? Are the same questions asked of all persons contacted? To what extent does the commission go beyond the references the applicant provides? How helpful are the suggested questions in *Handbook* Chapter 6, Appendix A (page 114) and the Nebraska inquiry forms in Appendix B (page 119)? What would it take to adapt and use them in your own investigation process? Is your state bar of a size that would make an attorney survey, such as those used in Alaska and Idaho, feasible and timely (see Appendix C, pages 127-29)? How are the results of the investigation shared among commissioners?

Ethical considerations:

- ◆ What are commissioners' obligations to reveal the *content* of positive and negative information about applicants? How does the commission weigh written versus oral communications from sources? What are commissioners' obligations to reveal the *sources* of positive and negative information?
- ◆ Should applicants be confronted with negative information? If yes, when should the information be revealed and who should reveal it?

Additional procedural and ethical issues:

- ◆ How do or would you handle the last-minute receipt of detrimental information? Would or should the investigation period be extended?
- ◆ How should commissioners handle campaign efforts by an applicant's supporters? By the applicant? By other commissioners on behalf of the applicant?

Large group activity. Have one member of each group report the responses to the group's assigned question(s). Write key phrases on a flip chart. If several groups addressed the same set of questions, ask subsequent reporters for any additional or different responses. If time permits, ask the following questions of the large group.

- ◆ What one recommendation do you have for changing the way you conduct screening and investigation? Record responses on flip chart; at end of discussion look for clusters of similar recommendations. Note to facilitator: You could use the classic brainstorming model, where everyone can throw out their recommendations, good or bad, for up to ten minutes. Record ideas on flipchart. Then open it up for a vote—each participant can vote for two of the ideas that have been raised during the brainstorming period. The two ideas with the most votes win.
- ◆ What has to be done now to implement your highest priority recommendations? Who will/should take the lead?

Segment Seven: Interviewing the Candidates¹⁰

The interview is the commission's opportunity to meet and assess the person behind the paper. To ensure fair and comparable interviews, commissioners should adopt systematic interviewing procedures. (See, for example, the *Handbook* discussion on structuring the interview beginning on page 137.) This requires that the commission prepare in advance, and pre-select interview questions that are related to the requirements of the judicial position and are unbiased. For purposes of comparability, commissioners will want to use a set of general job-related questions that are asked of all interviewees, and prepare tailored questions for individual interviewees that address information that surfaced in responses on the applicant questionnaire or in the investigation process. See pages 133-37 of the *Handbook* for a discussion of developing general and tailored questions and for avoiding improper questions. See also the suggested interview questions in Appendix B (page 145) and the Idaho interview guidelines in Appendix C (page 150).

¹⁰ See *Handbook* Chapter 7 and appendices, pages 131-152.

Suggested learning activities follow.

Mock interview. If the facilitator invited various attorneys to submit mock application forms (see page 16), perhaps this same group of lawyers and/or former judges would be willing to role play interviewees. All participants should have copies of the relevant mock application forms.

If the state has a single commission, those commissioners can try their interview techniques. If the training session includes representatives of a number of commissions across the state, the program planner can invite a number of them to interview the mock applicants. The makeup of any panel of commissioners should reflect the attorney/lawperson/judge composition of a typical commission.

The commissioners who conduct the mock interview should meet by conference call or email each other before the program to organize their session. For example, the group may wish to designate specific commissioners (or ask for volunteers) to play certain roles, such as the “dominator,” who asks too many long-winded questions or precedes each question with a speech; the “boundary breaker,” who asks inappropriate questions about religious affiliation, marital status, child-care arrangements, or anything unrelated to the requirements of the position; or the “silent member” who has little or no interaction with the interviewee. Based on their experiences, the interviewers probably will have additional roles to assign. For details, see page 131 for the *Handbook* chapter on interviewing.

After the mock interview, the facilitator leads the large group in a discussion of which questions were helpful, not helpful, inappropriate, etc., and why. The mock interviewers and applicants should also be encouraged to comment on the interview process. Possible questions for discussion with the large group follow:

- ◆ What were the most helpful questions that were asked? The least helpful?
- ◆ What question(s) should have been asked, but were not?
- ◆ What suggestions do you have to improve the interviewing process? For example, did all commissioners participate equally in the questioning, or did one or two dominate? Were appropriate follow-up questions used?

Small-group exercises. As with other segments, the facilitator may choose to have all groups work on the same questions, or may choose to assign different questions to different groups. Each group should have a worksheet listing its assigned questions with space for a summary of the group’s responses.

The logistics of interviewing:

- ◆ Given your past experience, what is a reasonable number of interviews to be scheduled in one day?
- ◆ What is a reasonable and effective time allocation for each interview? Chapter 7 in the *Handbook* recommends 45 minutes. Is this too much time? If yes, under what circumstances?
- ◆ Are all interviewees accorded approximately equal time before the commission? If not, why not?
- ◆ In a busy day of interviewing, commissioners can suffer information overload and facts about individual candidates can blur. Does your commission take a few minutes after each interview to briefly discuss key impressions to help fix each interviewee in the commissioners' minds? Why or why not?
- ◆ What can or should be done to improve this part of the interviewing process?

The commissioners' role in interviewing:

- ◆ How do you apportion responsibility among the commissioners for asking questions?
- ◆ How can or do you balance the roles of lawyer and lay members of the commission? What are the contributions of each?
- ◆ How do you handle a commissioner who dominates the questioning?
- ◆ What can or should be done to improve commissioner participation in the interviews?

The interview questions:

- ◆ How does your commission decide which questions to ask of all interviewees? What is the process for developing questions tailored to individual interviewees?
- ◆ What question(s) have you consistently found to be most effective in eliciting useful information from candidates? What makes them effective? Which have you found to be least effective? What makes them ineffective?
- ◆ What can or should be done to improve the process of developing interview questions?

Ethical issues:

- ◆ To what extent is a commissioner permitted to participate in or excluded from interviewing when he or she has a relationship with an interviewee? Does the commission have a written policy or rule about this? If not, should it have such a rule?
- ◆ To what extent do you confront an interviewee with detrimental information? Is the interview the most appropriate time and place to do so? If not, when?
- ◆ Should commissioners who have not participated in all of the interviews be allowed to vote for the final list of nominees to be submitted to the appointing authority? Why or why not?
- ◆ How do or would you handle a situation where a commissioner asks an inappropriate question?
- ◆ What can or should be done to address these or other ethical issues?

Large-group discussion. Each group representative reports back his or her group's responses to the discussion questions. Key phrases, including any recommendations for change, should be summarized on a flip chart or any other mechanism that makes the information visible to the group.

The facilitator then should follow up on the recommendations for change, perhaps by asking the following questions:

- ◆ What has to happen next to implement the recommendation about...? (interviewing logistics, role of commissioners, designing interview questions, ethical concerns—whatever is relevant to the discussion.)
- ◆ (If appropriate) Who will take the lead in following up on the recommended changes?

Segment Eight: Voting and Submitting Names of Nominees¹¹

All the commission's previous activities have led to this crucial point: deliberating, voting, and submitting the names of the best qualified candidates to the appointing authority. This is where the commission's operating procedures, and information gathered in the applicant questionnaire and through investigating and interviewing candidates all come together to help inform the commissioners' final selection of nominees.

¹¹ See Chapter 8 in *AJS Handbook* and sample voting rules, pages 153-166.

In most jurisdictions, deliberations are conducted in closed session to encourage frank and open discussion of the candidates by the commissioners and to safeguard the candidates' privacy. This is the time for commissioners to voice their favorable opinions and reservations when comparing and evaluating the candidates.

Then the commissioners are ready to vote. The *AJS Handbook* describes some of the less effective voting methods, which often are subject to manipulation and may not yield the best-qualified nominees (pages 154-56). AJS recommends a successive-majority voting method (described on pages 156-57), which is reflected in the Iowa, Nevada and Rhode Island voting rules in Appendix A beginning on page 161.

Finally, a short list of nominees is selected and sent to the appointing authority, usually in alphabetical order. At this point, the names of the nominees are made public. See page 157 of the *Handbook*.

The facilitator may choose among the following learning activities:

Mock deliberation and voting session. If the training program has included a mock interview (see Segment Seven above), those who role-played the interviewing commissioners could conduct a mock deliberation about those interviewees, and then role-play the successive majority voting system, ultimately selecting the final nominees. The large group could comment on the deliberations and voting.

Small-group exercises. The facilitator may wish to assign the following sets of questions to separate small groups, or raise them with the entire large group.

Final deliberations:

- ◆ Are deliberations closed in your jurisdiction? If so, do you get the kind of candid discussion you think is most helpful? If not, what inhibits the discussion?
- ◆ If deliberations are public in your jurisdiction, what is the positive or negative impact of that openness on the discussion? How do you deal with the drawbacks of a public process?
- ◆ Do you allow a commissioner who has not participated in all the interviews to deliberate? Why or why not? Has your commission developed a rule or policy to cover this situation?

Voting procedures:

- ◆ What voting method do you use? Is it spelled out in a rule? Do all commissioners understand the method?
- ◆ What works and does not work with your voting method? How might any problems be avoided? What, if any, change to the voting procedure is necessary?

Submitting names to the appointing authority:

- ◆ Have you ever had difficulty finding the required minimum of the best-qualified nominees? What caused this, and how might it be addressed?
- ◆ Has the governor (or other appointing authority) ever rejected your list and asked for another one? If yes, how did you respond? (The facilitator needs to know whether and how the governing provisions address this possibility.)
- ◆ In addition to the final list of names, what additional information do you send the governor? Has the governor ever asked for additional information?
- ◆ Who decides whether and how to respond to such a request (e.g., the chair, the entire commission)? Is there a formal rule or policy for this situation? If not, should there be?

APPENDIX A

SAMPLE AGENDA

INSTITUTE FOR [STATE] JUDICIAL NOMINATING COMMISSIONERS

Date and Time

Location

| | |
|---------------------|--|
| 7:30-8:00 a.m. | Registration and Continental Breakfast |
| 8:15-8:45 a.m. | Welcoming Remarks by the Chief Justice Overview of the Institute (can be given by the state judicial educator or other designated person) |
| 8:45-10:00 a.m. | Topic 1 |
| 10:00-10:15 a.m. | Break |
| 10:15-11:30 a.m. | Topic 2 |
| 11:45 a.m.-1:15p.m. | Lunch (11:45-12:15) Panel Discussion with Judges (12:15-1:15) |
| 1:30-2:45 p.m. | Topic 3 |
| 2:45-3:00 p.m. | Break |
| 3:00-4:00 p.m. | Topic 4 (or presentation by Governor or his or her representative) |
| 4-4:15 p.m. | Closing Remarks (thanks, logistical information about submitting reimbursement forms, etc.) |

