

## *Chapter 4*

### ***Notice of Vacancy and Recruitment***



An important goal of the commission method of judicial selection is to increase the number of qualified applicants for a judicial vacancy. Commissions can increase the pool of qualified applicants by encouraging applications from individuals who might not otherwise apply. Often, however, commissioners have been criticized for not aggressively seeking out applicants. By examining methods for both notification and active recruitment, the commission will be equipped to systematically recruit the best applicants.

## Notice of Vacancy

The selection process begins at the time the nominating commission becomes aware that a judicial vacancy exists. In most states, the clerk of court is required to notify the commission chair, who in turn notifies the commission members, usually by calling a commission meeting. Notice requirements range from a minimum of five days to a maximum of 90 days before the commission must meet. After the commission has been notified that a vacancy exists, an announcement should be sent by the commission chair to the media (see Appendix B).

**Content of the Notice.** The chair may want to publish two separate notices, one prior to the commission's organizational meeting and one immediately following the meeting. An initial publication of a vacancy might merely inform the public that a vacancy exists and that an organizational meeting of the nominating commission will be held at a given place and time. We recommend that this notice of vacancy be published immediately after the commission is activated. Although there may be some delay in advertising the notice because of periodical publication schedules, speedy dissemination of the notice can be achieved through emails and listserves, and the delay should not exceed one week. Delays reduce valuable time available to applicants and commissions.

Publication of a more detailed notice of vacancy will be crucial after the organizational meeting. This more detailed notice may include: (1) a brief description of the nature of the vacancy, the needs of the court and a description of the judicial position; and (2) an overview of application procedures, including materials to be submitted by applicants, means of obtaining commission rules, procedures and application forms and a deadline for submitting applications. Each of these items is discussed in detail below.

**Nature of the vacancy and job description.** The notice should include both a description of the nature of the vacancy and the minimum legal qualifications for the position. The nature of the vacancy refers to the name of the court, both the geographic and subject matter jurisdiction of that court, and the case mix the court typically handles. Minimal or preferred legal qualifications often include residency requirements, a certain length of membership in the state bar, and minimum age. Most nominating commissions include this information in a cover sheet attached to the applicant questionnaire.<sup>1</sup> It also will be most helpful to both commissioners and applicants to provide a job description that details the essential functions of the position.

An accurate description of the vacancy can act to encourage only qualified individuals to apply. By taking the time to adequately define the vacant position at

the notification stage, a commission can save countless hours weeding out clearly unqualified applicants. Those same applicants can save the time required to complete an application for a position clearly not suited to their experience or ability. The commission will be able to devote the time saved to serious applicants.

Since commissions sometimes lack resources such as clerical staff and duplicating equipment<sup>2</sup>, or simply to make the most effective use of the staff they do have, it appears that all or most commissions require applicants to submit multiple copies of the questionnaire and attachments. This saves commission time and ensures that all members of the commission will have access to the questionnaire.

**Application procedures.** Information concerning the means of obtaining commission rules, procedures and application forms as well as the deadline for submitting applications is essential. Without basic information outlining the application procedure, the most willing and able candidate will be frustrated in his or her attempt to seek a judicial nomination. Also, if electronic submission of applications is acceptable, the commission or its staff person needs to inform applicants of the URL from which an application packet may be downloaded or where to get a CD version, how to submit the application (electronically or in hard copies), and the commission's policy for dealing with a delayed submission caused by a last-minute computer crash.

Commissions may also offer guidance as to both the nature of supplemental materials an applicant may provide and limits as to their volume. The following are examples of materials that might be submitted:

- judicial opinions,
- legal articles or briefs, and/or
- citations to chapters of books and full length books.

In practice, almost all states now include an instructional cover sheet with their applications that includes the legal requirements for the position, instructions on the number of copies of the questionnaire to be submitted and the submission deadline, details about the nature and length of appended materials such as writing samples, an outline of the commission's procedures and a timeline, and, quite often, a copy of the state's Code of Judicial Conduct.

Many states lack specific rules requiring them to spell out these basic prerequisites to judicial candidacy. Although several states do require widespread notification utilizing various media, the content of the notice is left to the discretion of

the individual commissions. By adopting the above suggestions for effective publication of vacancies, commissions will be more likely to adequately inform interested qualified applicants as to how and where they should apply.

**Dissemination of the Notice.** State statutes and court rules establishing commission plans for judicial selection provide that vacancies should be broadly publicized. A recent review of commission rules indicates that notices are placed in outlets ranging from publication in an official county newspaper to use of all the broadest possible media. The most-mentioned placements of notices, usually via press releases, include the following:

- state, county and local bar associations, including women, minority and specialty bars for, e.g., prosecutors, criminal defense and government attorneys, trial lawyers, insurance defense lawyers, and their publications;
- local and state general circulation newspapers;
- local legal newspapers;
- general circulation minority publications; and
- local television stations.

States with smaller bars, like Alaska, Idaho and South Dakota, notify all members of the state bar.

Commissions also might want to consider placing notices of vacancies as follows:

- on court websites;
- on governors' websites, as in Massachusetts and Minnesota, where commissions operate under executive orders;
- Through court and bar listserves;
- with local-access cable stations;
- with state or local chapters of national organizations, such as American Board of Trial Advocates, American College of Trial Lawyers, Association of Trial Lawyers of America, National District Attorneys Association, Inns of Court, National Legal Aid and Defenders Association, Defense Research Institute, etc.

In short, adequate notification of vacancy necessarily entails both a detailed description of the vacancy and application procedures as well as a wide dissemination of that notice (see Appendix A). By giving the public timely detailed notice

of a judicial vacancy, a commission takes its first step toward finding the most qualified applicants. The second step requires initiative on the part of commission members in their active recruitment of qualified applicants who might otherwise not seek consideration.

## **Active Recruitment**

Vigorous recruiting is considered by many to be the key to a commission's success in building a pool of highly qualified applicants. Commissioners should recognize that qualified applicants must often be sought out and persuaded to apply. Many state nominating commission rules require some form of active recruitment by commissioners,<sup>3</sup> because often highly qualified individuals will not actively seek judicial appointment. A number of the rules or comment in handbooks for nominating commissioners note that some of the most successful applicants have been recruited.

Clearly, the two most significant forms of recruitment are broad dissemination of the notice of vacancy as described above and personal recruitment by a commission member.

Commissioners may have received suggestions of potential applicants at the organizational meeting. Additionally, commissioners may make public speeches to community and legal groups, and personally contact individuals specifically recommended to the commission. Outstanding applicants for previous vacancies may also deserve commission attention.

Personal recruiting should increase the likelihood of obtaining a highly qualified group of candidates for judicial office. However, this may place the recruiting commissioner in an awkward position by suggesting to the applicant that appointment is assured. It is imperative that commissioners indicate to recruited applicants that the mere solicitation of their application is not a promise of the commissioner's endorsement throughout the nominating process. Commissioners should solicit applicants on behalf of the commission as a whole, and with the clear understanding that the recruited applicant will be subject to the same evaluative scrutiny as other applicants.

The same cautions apply when some potential applicants who may have been aware that a judicial vacancy would be opening up, either due to retirement or pending funding for the position, contact a commissioner about applying. In this situation, these interested parties should be treated exactly the same as those with whom the commissioners initiate contact: They should be given procedural information, encouraged to apply, and cautioned that this encouragement in no way constitutes an endorsement by the commissioner.

## Ethical Considerations

Most commissioners will encounter their first ethical dilemma after notice of the vacancy has been published. The problem will most likely arise when the commissioner attempts to fulfill his or her recruiting responsibilities by actively seeking out qualified applicants for the vacancy. Active recruitment should be encouraged as it results in the best pool of applicants; however, related ethical issues include:

- the appearance of commissioner support for a recruited applicant, and
- disqualification of a particular recruiting commissioner under appropriate circumstances.

When actively seeking qualified applicants, commissioners should inform the prospective applicant that being approached by a commissioner does not guarantee a nomination. Each applicant, whether actively recruited or independently seeking a nomination, will be subject to the same investigative and interview procedures. It is important for recruited applicants to realize that they will not be given special consideration simply because the commission is inviting their application.

Often recommendations of qualified potential applicants will come from individual commissioners. Several questions of propriety may then arise. For example, if the potential applicant is a personal friend, relative or law partner of the recruiting commissioner, will it be appropriate for that commissioner to recruit the applicant? To preserve the appearance of propriety in this instance, a disinterested fellow commissioner may be better suited to ask the individual to submit an application. However, in a small community where commissioners are likely to know the applicants, the same public perception of favoritism may not exist. Each commission will have to determine whether, under the circumstances, a personal friend is the best person to recruit an applicant. No matter what the commission determines to be appropriate, it is essential that the entire process, beginning with recruitment of candidates, be, and be perceived to be, fair and impartial.

Still other potential problems will arise as commissioners receive phone calls and letters in support of various applicants. These communications should be handled with the same care employed when actively recruiting candidates. Promises should not be made to candidates' supporters, but rather, a clear statement of the commission's impartial procedures might be reiterated. Once again, each commissioner should be sensitive to public perceptions of commission activities and the corresponding need to avoid any appearance of impropriety.

Campaigning by applicants' professional associates cannot be avoided but potential problems can be diminished. Problems may include giving the public a perception that the process is political and subject to outside influence. Commissioners may also be unable to deal with campaign-like communications. By adopting a uniform method for handling letters and phone calls<sup>4</sup>, the public will gain confidence in the fairness of the process and commissioners will have guidance when confronted with campaign activities.

## Conclusion

The procedures outlined above should help a commission to create a pool of qualified applicants. By encouraging broad dissemination of a detailed notice and active recruitment on the part of each commissioner, commissions can achieve a fundamental goal of merit selection: a greater number of qualified applicants for every judicial vacancy.

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1 E.g., Massachusetts, Nebraska.

2 In a survey conducted in November 2002, the AJS Hunter Center for Judicial Selection learned from respondents that the most common staffing pattern is support from the state court administrative office, the clerk's office, or, in the case of the District of Columbia, a DC government employee. Colorado, Missouri and Rhode Island utilize the chairperson's support staff. Massachusetts and Minnesota, whose commissions are established by governor's executive order, use governor's office staff persons. Other staffing models are Judicial Council staff in Alaska and Idaho, and a staff person at The Florida Bar. In New Mexico, the Dean of the University of New Mexico is the ex officio chair, and his or her staff person coordinates nominating commission activities. The chair of the South Dakota Judicial Qualifications Commissions reports that there is no staff support.

3 E.g., Alaska, Colorado, Connecticut, Florida, Iowa, Minnesota, Missouri, Nevada, New York, Rhode Island, South Dakota and Utah.

4 *The Alaska Judicial Applicant Guidelines* (a joint publication of the Alaska Commission on Judicial Conduct, the Alaska Judicial Council and the Alaska Bar Association, October 2000) notes that the conduct of applicants is governed by both the Alaska Bar Rules and the Alaska Code of Judicial Conduct, and misconduct is subject to discipline by the appropriate body. In discussing informal consequences for noncompliance with the guidelines, the applicants are cautioned that, "[a]part from formal disciplinary action, those who engage in marginal application activity risk alienating those they seek most to impress. Blanket letter-writing campaigns, arranging for lobbyists or other individuals to make strategic phone calls, and asking judge friends to campaign for the applicant, adversely reflect on the applicant's reputation for integrity and judicious conduct" (page 7).



## APPENDIX TO CHAPTER 4

A. Notification Checklist

B. Notice

## A. Notification Checklist

**Notice of vacancy.** Widespread notification is likely to result in a greater number of highly qualified applicants from which the commission can choose. Thus, a commission should consider placing a notice in the following locations:

- Court, state, local or county bar, and specialty bar (e.g., women, minorities, trial lawyers, defense lawyers, prosecutors, government attorneys, etc.) websites;
- Professional journals and newsletters serving the various segments of the bar;
- Listserves whose members include judges and state, local, county and specialty bar members;
- Appropriate radio, television and local-access cable stations;
- General-circulation and legal newspapers serving the relevant geographical area;
- Courthouse bulletin or notice boards.

**Active recruitment.** Commissioners may also wish to contact other sources to increase the size of the pool of applicants such as:

- Law firms, corporations, and public organizations;
- Professional organizations serving various specialty practitioners, women and minorities in the legal community, although these contacts probably will have been made in order to place notices in publications, on websites, and through listserves;
- Legal educators at in-state and regional law schools;
- Local civic and charitable organizations;
- Previous outstanding applicants.

If members of the legal and judicial community participated in an open organizational meeting, they may have suggested individuals to contact. Commissioners may also wish to personally recruit applicants by:

- Contacting fellow members of groups such as bar organizations, women's, minority, environmental, religious, sports-related, civic, charitable and other groups;
- Making speeches to community groups; and
- Contacting people specifically recommended to the commission.

## B. Notice

The Nominating Commission is now soliciting names of persons to fill a vacancy on the \_\_\_\_\_ Court of \_\_\_\_\_. The vacancy was created by the resignation of the Honorable \_\_\_\_\_, effective \_\_\_\_\_. You are invited to submit your own name or the names of others to be considered for this office. The public is invited to make nominations to the Commission for this vacancy.

Any such names to be submitted should be sent, as soon as possible and in any event by \_\_\_\_\_, to [name and address of commission contact person].

Persons suggested will be sent a questionnaire which must be returned by \_\_\_\_\_. After reviewing the questionnaires, the commission will invite a number of candidates for personal interviews.

Your attention is invited to the following standards employed by the commission: [list]

Listed below are the current members of the commission with addresses:

Interested persons may also see and print information about this vacancy, the nominating commission's rules of procedure, criteria for evaluating applicants, the roster of commission members, the [State] Code of Judicial Conduct, the applicant questionnaire, and the timeline for commission meetings and filling the vacancy by going to the [court's] [commission's] website at [www. \\_\\_\\_\\_\\_](http://www._____).

