STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

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August 11, 2006

BY HAND

Roseann B. MacKechnie
Clerk of Court
United States Court of Appeals for the Second Circuit
40 Foley Square
New York, NY 10007

Re: Lopez Torres v. New York State Board of Elections, No. 06-0635-cv

Dear Ms. MacKechnie,

Pursuant to Fed. R. App. P. 28(j), Defendants-Appellants New York State Board of Elections, et al. call to this Court's attention the recent decision of the New York State Bar Association's House of Delegates adopting the report of the Association's Special Committee on Court Structure and Judicial Selection as the official position of the Association with respect to improving New York's convention system for the selection of candidates for Supreme Court Justice. Copies of the Special Committee Report and a letter providing notice of the House of Delegates' decision are attached.

The Special Committee's Report largely adopts the recommendations set forth in the February 6, 2006, Final Report to the Chief Judge of the State of New York issued by the Commission to Promote Public Confidence in Judicial Elections. See Appellants Br. at 18. Among other things, that report concluded, as Appellants have argued, that New York's judicial nominating conventions should not be replaced by primary elections. See Special Committee Report at 10-11; Appellants Br. at 18, 86; Reply Br. at 38, 43-44.

Sincerely,

Caitlin J. Halligan
Solicitor General

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# New York State Bar Association

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July 26, 2006



Hon. Eliot L. Spitzer
Office of the NYS Attorney General
The Capitol
Albany, NY 12224-0341

RE: Convention System for Selecting Candidates for Supreme Court Justice

Dear Attorney General Spitzer:

At its recent meeting in June, the New York State Bar Association's House of Delegates, the policy-making body for the Association, adopted the enclosed report of the Special Committee on Court Structure and Judicial Selection as the official position of the Association with respect to improving the convention system for the selection of candidates for the position of Supreme Court Justice.

The Special Committee issued that report after a comprehensive study of the February 2006 Final Report of the Commission to Promote Public Confidence in Judicial Elections, generally known as the "Feerick Commission" in deference to that body's chair, former Fordham Law School Dean John C. Feerick.

Based on its study of the Feerick Commission report, as well as the convention process itself, and the relatively recent decision by the United States District Court for the Eastern District of New York in *Lopez Torres, et al. v. New York State Board of Elections*, the Special Committee by and large supported the recommendations set forth in the Feerick Commission's Final Report.

The Feerick Commission had concluded that conventions are preferable to primaries for nominating Supreme Court Justice candidates, as primaries pose a risk of attracting substantial increases in partisan spending on judicial campaigns, which, in turn, would only serve to further undermine public confidence in the judiciary. The Commission further concluded that conventions facilitate ballot access for non-majority candidates, and allow candidates to avoid the high costs of conducting primary campaigns. The Feerick Commission stated that absent public financing for judicial campaigns, the judicial nominating convention system should be retained rather than be replaced by primary elections.

Our Special Committee endorsed these views in its analysis, a position which now reflects the official view of the Association based on our House of Delegates action in June.

I should note that this Association has a long-standing, frequently reiterated position in favor of merit selection of judges. Implementation of merit selection remains and will continue to remain our objective, and we will press for it. However, until that goal is achieved, we recognize and support the need for improvements in the convention process to address the practical and constitutional infirmities which exist.

Consequently, we commend our Association's report to you for your consideration in addressing the need for improvements in the judicial convention process.

Please feel free to contact me if we can be of further assistance as you consider this complex and difficult issue.

Respectfully yours,

Mark H. Alcott

Mark H. Alcott


# REPORT by
# New York State Bar Association
# Special Committee on Court Structure and Judicial Selection
# on
# Recommendations Contained in the Report of
# The Commission to Promote Public Confidence in Judicial Elections

Report approved by the House of Delegates on June 24, 2006 as the official position of the New York State Bar Association

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**Special Committee on Court Structure and Judicial Selection**

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| Lawrence R. Bailey, Jr. | Executive Committee Liaison |

## Background: NYSBA Activity on Selection of Judges

The New York State Bar Association has long been on record in support of numerous proposals relating to selection of New York State judges that are designed to enhance public trust and confidence in the legal system. In 1973, the House of Delegates first approved a court reorganization plan which included "merit selection of all judges [other than those serving in town and village courts]." The House revisited the issue and reaffirmed its support for merit selection in 1979. More recently, in 1993 the Association adopted a "Model Plan for Implementing the New York State Bar Association's Principles for Selecting Judges," a plan for merit selection of judges.

Judicial elections and their impact on the public's perception of the court system have in recent years been the focus of considerable attention by the media, state policymakers, and bar association leaders. Early in 2004, the Association established the Special Committee on Court Structure and Judicial Selection ("Committee"), initially chaired by Richard D. Simons, a former Associate Judge of the New York Court of Appeals, and now chaired by G. Robert Witmer, Jr., a Past President of the Association with extensive experience in the selection of judicial candidates.

The Committee's mission statement provides, in part, that "the Committee shall review issues relating to current and proposed methods of selecting members of the judiciary. It shall consider improvement of the ... methods of judicial selection, and make appropriate recommendations relating thereto." The Committee's roster is comprised of members who possess a broad range of experience in private practice, academia, state government, and the judiciary. Recent activity of the Committee has focused on judicial elections.[1]

In 2003, Chief Judge Judith S. Kaye announced the establishment of the Commission to Promote Public Confidence in Judicial Elections, chaired by former Dean John D. Feerick of the Fordham University School of Law ("Feerick Commission"). On June 29, 2004, the Feerick Commission issued the second of three reports, proposing a package of reforms, including state-sponsored independent screening commissions for judicial candidates.

In December 2004, the Committee published a report that focused primarily on that topic and on proposed amendments to add Part 150 to the Chief Administrator's Rules Governing Judicial Conduct, which would establish an Independent Judicial Election Qualification Commission (IJEQC) in each judicial district to review the

qualifications of candidates for Supreme Court, County Court, Surrogate's Court, Family Court, New York City Civil Court, District Court, and City Court.

The Committee's report recommended support of the proposed amendments to the Chief Administrator's Rules Governing Judicial Conduct. On December 16, 2004, the Association's Executive Committee approved the report. On March 8, 2006, a notice published in the *New York State Register* announced the amendment of the Chief Administrator's Rules Governing Judicial Conduct to include new Part 150, establishing the IJEQCs throughout the state.

**Federal Litigation: Lopez Torres, et. al. v. New York State Board of Elections**

In 2004, Judge Margarita Lopez Torres, along with other individual voters and judicial candidates, brought an action in the United States District Court (EDNY) against the New York State Board of Elections for declaratory and injunctive relief under 42 U.S.C. § 1983. The action challenged the constitutionality of New York State's convention system for the nomination of party candidates for State Supreme Court Justice and sought permanent injunctive relief to replace the convention system with a primary system.

The plaintiffs moved for a preliminary injunction seeking to enjoin the New York State Board of Elections' enforcement of three sections of the New York State

Election Law, N.Y. Elec. L. §§ 6-106, 6-124 and 6-158, on the grounds that these sections deny citizens and candidates equal protection under the law and violate the First and Fourteenth Amendments by imposing undue burdens on candidates seeking a political party's nomination for State Supreme Court Justice.

Section 6-106 provides that "[p]arty nominations for the office of justice of the supreme court shall be made by the judicial district convention."

Section 6-124 provides, in relevant part:

> A judicial district convention shall be constituted by the election at the preceding primary of delegates and alternate delegates, if any, from each assembly district or, if an assembly district shall contain all or part of two or more counties and if the rules of the party shall so provide, separately from the part of such assembly district contained within each such county. The number of delegates and alternates, if any, shall be determined by party rules, but the number of delegates shall be substantially in accordance with the ratio, which the number of votes cast for the party candidate for the office of governor, on the line or column of the party at the last preceding election for such office, in any unit of representation, bears to the total vote cast at such election for such candidate on such line or column in the entire state. The number of alternates from any district shall not exceed the number of delegates therefrom.... When a duly elected delegate does not attend the convention, his place shall be taken by one of the alternates, if any, and if no alternates shall have been elected or if no alternates appear at such convention, then the delegates present from the same district shall elect a person to fill the vacancy.

Section 6-158(5) provides that "A judicial district convention shall be held not earlier than the Tuesday following the third Monday in September preceding the

general election and not later than the fourth Monday in September preceding such election."

The district court held an evidentiary hearing on the motion for a preliminary injunction. The hearing began on September 13, 2004 and spanned 13 days. The court heard 14 witnesses and received more than 10,000 pages of documents into evidence. After the preliminary injunction hearing, the parties submitted four rounds of post-hearing findings of fact and conclusions of law.

On January 27, 2006, the district court granted plaintiffs' motion for a preliminary injunction, determining that plaintiffs were likely to succeed on the merits of their claim that New York State's judicial convention system violates the First Amendment. See Lopez Torres, et. al. v. New York State Board of Elections, 411 F. Supp. 2d 212 (EDNY 2006).

The district court concluded that the leaders of major political parties, not the delegates or voters, control who becomes a Supreme Court Justice. The court further determined that the petitioning requirements for delegates, the sheer number of delegates in a judicial district, as well as the fact that the delegates are elected annually just weeks before the judicial convention create insurmountable barriers that preclude a candidate without any party support from successfully mounting a meaningful campaign at the convention. According to Judge John

Gleeson, Judge López Torres "demonstrated ... that indisputable qualifications for the job and immense popularity among the candidate's fellow party members are neither necessary nor sufficient to get the party's nomination. Something different is required: the imprimatur of the party leadership." Further, the court found that Lopez Torres's effort to obtain her party's nomination for Supreme Court Justice was the selection process in microcosm. The court determined that, **"[t]he path to the office of Supreme Court Justice runs through the county leader of the major party that dominates in that part of New York State. Without his or her support, neither superior qualifications nor widespread support among the party's registered voters matters."** (emphasis added.)

As an interim remedy, the court eliminated the judicial nominating convention system, enjoined enforcement of N.Y. Elec. L. § 6-106 and use of the procedures set forth in N.Y. Elec. L. § 6-124, and ordered that nomination of Supreme Court Justices be replaced by primary election, as is currently the method of selecting judicial candidates for County Court, Surrogate's Court and City Court.

The defendants along with other interested parties appealed, and on March 3, 2006, the district court granted appellants' motion for a stay pending appeal, ordering that its decision would not take effect until after the 2006 general election. On March 14, 2006, the United States Court of Appeals for the Second Circuit entered an order expediting the appeal and scheduled oral argument for June 7, 2006.

The district court's decision, and the publication of the Feerick Commission report of February 6, 2006 ("Final Report"), greatly increased attention focused on this issue. As a result, President A. Vincent Buzard requested that our Committee review and report on the Feerick Commission's Final Report. The Frederick Commission's Final Report assumes the continuation of judicial conventions, as did this Committee during its deliberations. Consequently, we do not consider in this report processes for the selection of judges other than by judicial conventions.

**Overview and History of New York's Judicial Conventions**

The United States Constitution does not prescribe any particular method by which the states must choose their judges. Consequently, there exists a wide array of different judicial selection systems across the country, including pure appointments, partisan elections, non-partisan elections and hybrid systems. Like many other states, New York's judicial selection system contemplates a partisan political process whereby enrolled voters within the judicial districts elect Justices from among candidates nominated by local political parties. The State Constitution provides for the election of the general trial-level judges, Justices of the State Supreme Court. Any resident of New York State, who has been licensed to practice law in the State of New York for ten or more years, is eligible to run for Supreme Court Justice.

Unlike many other states, New York did not choose direct primaries as the vehicle by which parties select their standard bearers for this office. Instead, the Legislature chose to adopt a process whereby the nominating function is delegated to a locally elected body of delegates, who gather at a convention to select the Supreme Court nominees for their party. New York Election Law § 6-106 provides that all parties nominate their candidates for Supreme Court Justice at a judicial convention held in each district where there are one or more vacancies for Supreme Court, and requires that it convene in the third week of September. A judicial delegate serves a specific function within the political party structure — to nominate candidates for Supreme Court Justice to run on the party's ticket. The delegates are elected at a party primary in September from each Assembly District (AD) within each judicial district. Although the determination of the number of delegates for each AD is governed by each party's internal rules, New York Election Law requires that the allotted number be substantially proportional to the percentage of total votes cast statewide for the party's gubernatorial candidate in the last election.

To get on the primary ballot, a judicial delegate must gather 500 valid signatures from enrolled party members in the AD during the preceding petitioning window of time. After election of the delegates and their selection of the judicial

candidates at the judicial convention, the last step of the selection process for Supreme Court Justice is the general election in November.

## History of Judicial Conventions

Judicial conventions in New York State date back to the 19th century. In 1846, New York amended its Constitution to provide for the popular election of Supreme Court Justices from among candidates nominated by the political parties. N.Y. Const. of 1846, art. VI, § 12. A political party's judicial candidates were chosen by the same method as other candidates for State office, which, at the time, was by party convention. In 1911, the Legislature suspended the convention process for nominating judicial candidates in order to experiment with a primary system. Primaries, however, came under fire for creating the risk of party control and influence over judicial selection, as well as the opportunity for wealthy individuals to "buy the bench." After nearly a decade of debate and consideration of various proposals, in 1921 the Legislature restored the use of conventions for the nomination of candidates for Supreme Court Justice.

In February 2006, the Feerick Commission issued its Final Report, addressing the convention system. It concluded that conventions are preferable to primaries for nominating candidates for the office of Supreme Court Justice, and noted that "primaries pose a great risk of attracting substantial increases in partisan spending

on New York State judicial campaigns, which, as our research clearly shows, would serve to further undermine confidence in the judiciary."

Nominating conventions, on the other hand, "facilitate access to a place on the ballot for non-majority candidates . . ., allow members of geographic and other minority factions to build coalitions to win a spot on the ballot . . . and allow candidates to avoid the high cost of conducting primary campaigns in judicial districts." The report concluded that, "without public financing of judicial elections, the judicial nominating convention system should be retained rather than replaced by primary elections." In a similar vein regarding the cost of running primary campaigns for judicial office, Chief Judge Judith S. Kaye, in her 2006 *The State of the Judiciary* address noted that "[n]othing is more destructive of public confidence in the impartiality of judges than the need to raise large amounts of money."

**Final Report of the Feerick Commission (February 6, 2006)**

The Feerick Commission had originally contemplated that it would conclude its work with its June 2004 Report, but because the Commission was unable to conclude its work on the nomination process for Supreme Court Justices, Dean Feerick requested that Chief Judge Kaye continue the Commission. She did so, and on February 6, 2006 the Commission issued its Final Report, with specific

recommendations regarding judicial district nominating conventions. The report's introduction stated that

> In reviewing ways to improve the system, the Commission studied candidate selection by direct primary, which is the principal alternative to the nominating convention. We determined that primaries pose a great risk of attracting substantial increases in partisan spending on New York State judicial campaigns, which, as our research clearly shows, would serve to further undermine confidence in the judiciary. The Commission concluded that, without public financing of judicial elections, primaries are not preferable to judicial conventions. As a result, we shifted our focus toward making the judicial nominating convention system more open and effective, which we believe will enhance public confidence both in the system and its results. In this Final Report, we lay out specific steps to further that goal.

The specific recommendations of the Feerick Commission's Final Report are summarized as follows:

* Amend the election law to reduce the number of delegates to the judicial district convention;

* Provide that each assembly district send at least two delegates to the convention;

* Provide that delegates cast weighted votes;

* Reduce the number of signatures required for nomination as a delegate or alternate delegate candidate from an assembly district to 250; and,

* Amend the election law to promote the effectiveness and independence of delegates and alternates as follows:

- Delegates and alternates serve three-year terms;

- Delegate elections take place at the primary election the year preceding the judicial nominating convention at which the delegate will serve;

- Delegates be provided by the New York State Board of Elections with information about the judicial candidate nomination process;

- Delegates and the general public be provided by the Board of Elections with a list of announced judicial candidates at least ten business days prior to the date fixed for the convention; and,

- Candidates seeking nomination for the office of Justice of the Supreme Court have the right to address delegates at their conventions.

# RECOMMENDATIONS OF THE FEERICK COMMISSION

Set forth below is the substance of the Feerick Commission's Final Report and recommendations. Following the text of each recommendation is the position taken by the Association's Special Committee on Court Structure and Judicial Selection.

The recommendations of the Feerick Commission's Final Report are designed to serve three purposes. First, they are meant to attract as delegates people who are dedicated, experienced and willing to consider in depth the qualifications of judicial candidates with a view toward ensuring that their party nominates candidates for the Supreme Court who are well qualified and reflect the communities in which they will serve. Second, they are designed to afford conditions conducive to performing the delegates' duties in a professional manner. This includes providing adequate time and information to act independently and thoughtfully. Third, they are meant to ease barriers to qualified candidacies. Each of the recommendations offered below reflects these goals.

The Association's Special Committee strongly supports these principles.

**The judicial district nominating convention system should be made more open and effective.**

The Commission concluded that the judicial district convention system has benefits that merit its retention — in a sharply modified form. Conventions facilitate access to a place on the ballot for non-majority candidates. In contrast to primaries, which are able to grant victory only to majority vote getters, conventions allow members of geographic and other minority factions to build coalitions to win a spot on the ballot. Conventions also allow candidates to avoid the high cost of conducting primary campaigns in judicial districts, many of which include multi-county and multi-media market areas. However, in order to obtain the benefits of the convention process, New York State must ensure that the process is fair and open and that it promotes effective, democratic and deliberate representation.

Position of the Committee: Support.

**The election law should be amended to reduce the number of delegates to the judicial district convention.**

The Commission recommends setting a minimum of twenty-five and a maximum of fifty on the number of delegates that may attend the district convention. The Commission further recommends designating the number of delegates by statute. Under this recommendation most conventions would be smaller than they are today. A smaller convention promotes a deliberative and collegial atmosphere in which real discussion can take place. It lowers the bar for those who seek judicial nomination without the support of party leadership. Under the proposed system, qualified candidates will be able to succeed with fewer votes. Also, a smaller convention, where the real business of choosing judicial nominees can be conducted, is likely to be attractive to a larger pool of delegates focused on the business of nominating candidates who are well-qualified and reflective of the district in which they will serve if elected. Nevertheless, the number of delegates must not be reduced so far that conventions fail to function as representative bodies. In setting a minimum of twenty-five delegates, the Commission seeks to balance conditions for diversity, on the one hand, and conditions for genuine debate on the other.

Position of the Committee: Support. Because of the significant differences in the demographic and geographic make-up of judicial districts around the state, we agree with the Commission that it is necessary to provide a range as to the number of delegates, rather than to require a precise number of delegates for each judicial district.

**Each assembly district should send at least two delegates or alternates to the convention.**

The election of two delegates from each assembly district will yield delegations that match the Commission's recommendation that judicial district conventions be comprised of not more than fifty delegates and no fewer than twenty-five.

Position of the Committee: Support. Delegates are currently selected from assembly districts in each judicial district. At first blush, this may seem unusual since most judicial candidates and their supporters define themselves by the county in which they reside or work. Indeed, this self-definition by county has occurred within the current system of electing delegates from assembly districts, and therefore there is little reason to alter the current statutory process. Furthermore, this selection of delegates from smaller political units, such as assembly districts, leads to the selection of more diverse and representative delegates, especially in densely populated counties. For example, the First Judicial District has only one county, New York County, and 12 assembly districts. If the delegates needed to reside only in the County, they could conceivably come from one, or a few, assembly districts, which would make it much more difficult to achieve the goal of having a delegation that represents the wide diversity of the County. The same could also apply to the Eleventh Judicial District (Queens County) and the Twelfth Judicial District (Bronx County).

There was a minority view within the Committee that counties, rather than assembly districts, should be the subdivision from which delegates are selected. Justification for this view was that each county in New York is the designated venue for matters under the jurisdiction of the Supreme Court. Further, it was argued that selection of delegates by counties rather than by assembly districts would serve to open the delegate-selection process. (See Minority Opinion #1.)

**Delegates should cast weighted votes.**

In order to maintain the principle of "one person, one vote," under this proposed plan delegates will cast weighted votes. All assembly districts in a judicial district will send the same number of delegates. However, in situations where a judicial district contains a portion of an assembly district, delegates' votes will represent fewer voters. In order to assure that the party's members and other supporters are properly represented at the judicial district conventions, the Commission recommends retaining the principle expressed in section 6-124, which is that the number of assembly district votes should reflect the number of votes cast by registered voters in a given assembly district for the parties' nominees for governor in the last general election.

Instead of maintaining that ratio by changing the number of delegates from year to year as the statute does now, the Commission would change the weight of the votes cast by a fixed number of delegates.

Position of the Committee: Support. The concept of weighted voting is important to the representative nature of the office of delegate.

**The number of signatures required for a candidate to run as delegate or alternate delegate should be reduced to 250.**

The Commission recommends that the number of signatures required for nomination as a candidate for delegate to the judicial district convention be reduced from the current requirement of 500, to open the process to more party members. The current signature requirement makes it more difficult to obtain a position on the ballot than is necessary to ensure that potential delegates have a reasonable level of community support. This concern can be addressed by reducing the number of required signatures.

Position of the Committee: Support. This recommendation to reduce the required number of signatures would enhance the ability of candidates not supported by leaders of the local political parties to qualify delegates for the primary ballot.

**The election law should be amended to promote the effectiveness and independence of delegates and alternates.**

The Commission believes that effective, democratic and deliberative representation can be enhanced at the judicial district conventions by expanding the delegates' terms of office and electing new delegates and alternates a full year before the first convention at which they will serve.

Position of the Committee: Support. This recommendation would provide a judicial candidate with the opportunity to learn the identities of delegates and campaign for the support of those delegates at the judicial convention and would allow delegates to learn about the candidates before the convention.

**Delegates and alternates should serve three-year terms.**

The Commission recommends extending the term of office for delegates and alternates to three years, replacing the current single-year term. As recognized in the comparatively long terms for judicial office in New York State, a longer term fosters independence. It also promotes effective representation as delegates and alternates apply the experience they gain throughout their three-year terms. The initial terms of delegates under the new law should be staggered between one and three years.

Position of the Committee: Support. The current term of office is too brief and too dependent upon the annual support of the county leader. It does not allow delegates to obtain an adequate level of experience and knowledge regarding the judicial-selection process. A three-year term would allow delegates to obtain and use experience that would benefit the operation of judicial conventions.

**Delegate elections should take place in the year preceding the first judicial district nominating convention at which the delegate will serve.**

Electing delegates and alternates the year before the first convention at which they serve promotes effective and informed representation. Under the proposed amendments, delegates and alternates will have a full year to develop an understanding of their position and to evaluate potential candidates for office.

Similarly, candidates would have an expanded opportunity to present themselves and their credentials to the delegates in hopes of gaining support. The term of office will start the first day of January immediately following a delegate's election and run three calendar years.

As it is the goal of the Commission to increase voter awareness of the process by which Supreme Court justices are elected, the Commission believes that holding elections for judicial district convention delegates on Election Day, when voter turnout is at its highest, is preferable to holding them on Primary Day. We do not make the recommendation to that effect now because of the limitations of current voting technology. We anticipate, however, that in the near future voting technology will allow voters to cast votes for both the general elections and political party elections on the same ballot. We therefore recommend for that future time that the election of delegates and alternates to the judicial district conventions take place on Election Day.

Position of the Committee: Support. Similar to the recommendation relating to a three-year term of office for delegates, the recommendation to provide for the election of delegates in the year preceding the first convention at which they will serve enhances the openness and transparency of the judicial-selection process. In particular, it would provide a critical period within which a potential judicial candidate could learn the identities of delegates and plan for specific outreach and campaigning with regard to those delegates.

**The New York State Board of Elections should provide delegates with information about judicial elections.**

To ensure that delegates and alternates to the convention understand their role and civic responsibility in the process of nominating candidates for the office of Justice of the Supreme Court, the Commission recommends that the New York State Board of Elections distribute to every delegate and alternate a statement regarding the role and responsibility of a delegate, information regarding the judicial system, the duties and responsibilities of Supreme Court justices, and the skills, professionalism and personal characteristics required of independent and impartial judges. These materials should be brief and easy to read, and should be available in hard copy and other media. The Board of Elections should provide these information packets to county political party leaders at least thirty days in advance of the date fixed for the judicial nominating convention. The party leaders will be responsible for forwarding this information to the delegates and alternates at least

twenty days prior to the convention. At least ten days prior to the date fixed for the judicial convention, the party leader would be required to file with the Board of Elections a certificate stating the date and method by which all delegates and alternates to the convention were provided with these materials.

Position of the Committee: Support. This recommendation also would assist delegates in carrying out their duties.

**The Board of Elections should provide delegates and the general public with a list of announced judicial candidates at least ten business days prior to the date fixed for the convention.**

Candidates for the office of Justice of the Supreme Court are not required to initiate their candidacy formally in advance of the judicial nominating convention. Nevertheless, many candidates do so. As the Commission deems it crucial that voters and convention delegates have as much information as possible about judicial elections, the Commission would require the New York State Board of Elections to publish, in hard copy or other media, a list of all of the candidates who have notified their political parties of an intent to seek the party's nomination. The list should be published and distributed to all delegates and alternates at least ten business days prior to the date fixed for the convention. The fact that candidates' names are published should not preclude additional nominations from the floor at the convention.

Position of the Committee: Support with modification. We join the Feerick Commission in its goal of open and transparent judicial conventions. That goal would be enhanced if information about judicial candidates were required to be made public in time for the candidates to be evaluated prior to the judicial convention. Earlier identification of candidates would allow delegates to investigate the qualifications of judicial candidates, to receive reports from the relevant Independent Judicial Election Qualification Commission ("IJEQC") and from citizen and organized bar groups, and to make meaningful evaluations of those candidates in advance of the convention. A rule requiring earlier identification of all judicial candidates would provide protection against last-minute nomination on the floor of the convention of candidates concerning whom the delegates have little or insufficient information. The public-spirited citizens whom we hope will be elected as delegates will be best served and prepared if they know in advance the identity of the candidates and the evaluations of them by other public-spirited organizations.

The minority believes that the Feerick recommendation for the election of delegates for three-year terms and the I.J.Q.C. (Rules of Chief Administrative Judge, Part 150) provide adequate safeguards against the possibility of the convention's nominating an unqualified candidate. Moreover, the minority believes that disqualifying any aspirant who had not filed a "Notice of Intention" at least 60 days before the primary election is unnecessarily restrictive. It could prevent the convention from considering well qualified candidates and could create problems for minority parties in recruiting strong candidates. (See Minority Opinion #2.)

In order to facilitate early identification of all candidates for Supreme Court, the Committee recommends a procedure whereby candidates would be required to declare their intention to run for office at least 60 days before the primary election. Prior to that deadline, the candidate would be required to file with the Board of Elections a document called, "Notice of Intended Candidacy--Justice of Supreme Court" ("Notice"). Failure to file by the specified time would be fatal--the candidate's name could not be considered at the judicial convention. However, filing the Notice would not preclude the filer from withdrawing his or her candidacy. The procedure would, however, preclude a last-minute, unknown candidate from being presented to the convention.

Anyone who filed the Notice would be entitled to be considered by the IJEQC and by other appropriate judicial screening bodies. This would give those bodies approximately 70 days to complete their evaluation and for any appeals to be heard and considered. A candidate who filed the required Notice could decline to appear before such screening bodies. However, such failure would expose the candidate to criticism at the judicial convention, where the delegates would know of the candidate's failure or refusal to appear.

**Candidates seeking nomination for the office of Justice of the Supreme Court should have the right to address the delegates.**

Because candidates do not necessarily announce their candidacies prior to the convention, and candidates not previously considered may be nominated from the floor, delegates may be unaware prior to the convention of the names of candidates that are put forward. The Commission recommends that to further enable delegates to exercise their civic responsibility in nominating the best possible candidates for Justice of the Supreme Court, candidates who have been moved and seconded at the convention should have an opportunity to address the delegates briefly

regarding their qualifications for the judiciary. To further this, anyone who has formally announced a desire to be nominated at the convention shall be notified in advance by the party leader of the time and location of the convention.

Position of the Committee: Support. Whether or not a candidacy must be declared before the convention, this recommendation would help shift the focus of the judicial convention from the name of the judicial candidate or slate supported by the leaders of the political party to the candidates themselves.

It would also foster a more open and democratic operation of the judicial convention, with open debate, as opposed to the current process that is controlled by the leaders of major political parties and has drawn much criticism.

## Conclusion of the Feerick Commission

New York's Supreme Court justices serve on one of the most important trial courts in the nation. It is essential that the candidate selection process protect the reputation and respect for that bench. Although the current judicial district convention system is far from perfect, we are convinced that if reformed it can serve to promote public confidence in the Supreme Court bench. In the recommendations above, we offer what we believe is a blueprint to achieve a convention system that increases voter awareness, promotes the independence of convention delegates, encourages qualified candidacies and establishes conventions that allow for genuine deliberation and debate.

Position of the Committee: Support.

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[1] This report is the second of two reports by the Association's Special Committee on Court Structure and Judicial Selection ("Committee") relating to recommendations by the Commission to Promote Public Confidence in Judicial Elections, Chaired by John D. Feerick (the "Feerick Commission"). The Committee's first report, relating to recommendations in the Feerick Commission report issued in June 2004, was approved by the Association's Executive Committee on December 16, 2004.

The instant report relates to recommendations in the Feerick Commission report dated February 6, 2006, regarding changes in the operation of judicial nominating conventions. The Feerick Commission report, along with other materials from which the substance of the Committee's work was drawn, are listed below and may be found at the web site addresses also listed below.

Feerick Commission, Final Report to the Chief Judge of the State of New York
http://www.nycourts.gov/reports/FeerickJudicial Election.pdf

Lopez Torres v. New York State Board of Elections

-Memorandum and Order of the U. S. District Court (EDNY)

-Briefs for the Appellants and the Appellees, and others, on appeal from the U. S. District Court to the U. S. Court of Appeals for the Second Circuit

http://www.nysba.org/LopezTorresLitigation

# MINORITY OPINION #1
By Thomas E. Myers

## MINORITY OPINION ON COMMITTEE'S POSITION THAT EACH ASSEMBLY DISTRICT SHOULD SEND AT LEAST TWO DELEGATES OR ALTERNATES TO THE CONVENTION (Page 15)

A minority position articulated in committee is that judicial districts which encompass more than one county, e.g., Upstate judicial districts, should have delegates elected from each county in the judicial district, rather than from each assembly district. The rationale for the minority position is four-fold. First, venue in Supreme Court actions is based on each county in the judicial district, and candidates for Supreme Court Justice in these Upstate judicial districts are often county-based candidates. Second, many political parties in these multi-county judicial districts are organized geographically by county, not by assembly district. Third, assembly districts have no geographical correlation with judicial districts, some assembly districts are divided across judicial districts, and weighted voting percentages for delegates selected on a county basis could be more readily determined. Fourth, the 1918 historical rationale of attempting to replicate the state Legislature by using assembly districts is no longer as significant as the primary objective of opening and simplifying the judicial nominating convention process.

Thomas E. Myers
Hon. Richard J. Bartlett

# THE LAWYER'S CODE OF PROFESSIONAL RESPONSIBILITY

EC 8-6 Judges and administrative officials having adjudicatory powers ought to be persons of integrity, competence, and suitable temperament. Generally, lawyers are qualified, by personal observation or investigation, to evaluate the qualifications of persons seeking or being considered for such public offices, and for this reason they have a special responsibility to aid in the selection of only those who are qualified. It is the duty of lawyers to endeavor to prevent political considerations from outweighing judicial fitness in the selection of judges. Lawyers should protest earnestly against the appointment or election of those who are unsuited for the bench and should strive to have elected or appointed thereto only those who are willing to forego pursuits, whether of a business, political, or other nature, that may interfere with the free and fair consideration of questions presented for adjudication. Adjudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against unjust criticism. While a lawyer as a citizen has a right to criticize such officials publicly, the lawyer should be certain of the merit of the complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified.

# MINORITY OPINION #2
By Hon. Stewart F. Hancock, Jr.

## MINORITY POSITION ON COMMITTEE'S RECOMMENDATION THAT THE NOMINATING CONVENTION MAY ONLY CONSIDER CANDIDATES WHO HAVE FILED A NOTICE OF INTENDED CANDIDACY AT LEAST 60 DAYS BEFORE THE PRIMARY ELECTION. (Page 19)

The minority would not depart from the Feerick Report on this issue. The Committee's recommendation could prevent the Convention from considering well qualified persons who for one of several reasons might not have been in a position to become a candidate until shortly before the Nominating Convention. There is no reason to believe that a late entry as a candidate will necessarily be someone who is unqualified. Moreover, the filing requirement deadline could pose a problem in some districts where minority parties have often experienced difficulties in persuading qualified lawyers to seek judicial office as their parties' candidates.

The recommended filing requirement deadline is not necessary to further a basic aim of the Feerick Commission – assuring that only the most qualified persons are selected as the party's candidates by the nominating conventions. The minority believes that two Feerick Commission recommendations provide that assurance.

First, the delegates who must be willing to serve for three-year terms under the Feerick Commission recommendation are likely to be public-spirited citizens who will take seriously their responsibility of choosing the candidates who are best qualified and rejecting those who are not; there is no reason to believe that these delegates will not act in the public interest.

Second, the Feerick Commission recommendation for Independent Judicial Qualification Commissions (adopted in Rules of the Chief Administrative Judge, Part 150) provides additional assurance that the unqualified persons will not be selected as party candidates. While approval of a Qualification Commission is not a prerequisite to nomination as a candidate, a Commission is required to publish the list of candidates found qualified for election to judicial office as well as the names of those who failed to participate in the evaluation process. The minority believes there is little or no possibility that a candidate who has not received the approval of a Qualification Commission will seek the nomination of a party, much less be chosen as the nominee by the delegates to that party's nominating convention.