



CITY OF PHILADELPHIA

BOARD OF ETHICS
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The Board's Regulation 8 (Political Activity), effective March 28, 2011, represents the Board's interpretation of Charter Subsections 10-107(3)&(4) as applied to appointed City officers and employees, and supersedes this advisory opinion to the extent that it is inconsistent with the regulation.

**Philadelphia Board of Ethics
Formal Opinion No. 2009-002**

May 13, 2009

Shelley R. Smith, City Solicitor
Law Department
1515 Arch Street, 17th Floor
Philadelphia, PA 19102

**Re: Political Activity Restrictions / Philadelphia Bar
Association's Commission on Judicial Selection and Retention**

Dear Ms. Smith:

You have requested advice as to whether your future participation on a peer review commission that evaluates and rates judicial candidates would violate Section 10-107 of the Philadelphia Home Rule Charter, which prohibits City employees from engaging in partisan political activities.

You advise that, as the City Solicitor, you are entitled by the by-laws of the Philadelphia Bar Association's Commission on Judicial Selection and Retention to an *ex-officio* seat on the Commission. As an aside, you note that you were an appointed member for several years and that you chaired the Commission in 2007. Further, you advise that you have been active with the Commission in your *ex-officio* role since your appointment as City Solicitor (City Council confirmed your appointment on February 4, 2008), though the current candidate evaluations began only in 2009.

You advise that your understanding has always been that the activity of the Commission is not political activity. You argue as follows:

The Judicial Commission's by-laws contain a prohibition similar to the Charter's, barring members of the Commission from engaging in political activity on behalf of judicial candidates, and the Commission's work does not lead to the endorsement of any candidate for judicial office. Rather, the Commission—whose members include the president judges of both courts in the First Judicial District and the Public Defender, among other ex-officio members—engages in a peer review process that, with the help of assigned investigative teams, reviews and evaluates the qualifications and fitness of applicants for judicial office they may seek.

You state that you understand that our opinion will apply only prospectively, and you advise that you seek guidance from this Board for your future activities with relation to the Commission.

You are advised that, as a Commission member following the Commission's Guidelines for Evaluation of Attorney and Judge Candidates ("Guidelines," attached as Appendix A), you would not, by participating in the process, be "tak[ing] any part in . . . any political campaign" in violation of Charter Section 10-107(4). Nor would it be prohibited campaign activity by you for the Commission to publicize its Recommended and Not Recommended ratings, even in formats that may incidentally include the names of all Commission members, including yours. However, you must avoid any activity referring to ratings of particular individual candidates, outside your functions as a Commission member, that could be considered to be campaign activity.

I. Caution on the Limitations of an Advisory Opinion

This opinion addresses your future conduct only. The City Code provides that Board of Ethics "[a]dvisory opinions shall be issued only with respect to proposed future conduct or action by a City officer or employee." City Code § 20-606(1)(d)(ii). The Board's Regulation No. 4 also limits advice to future conduct: "Except as provided in paragraph (e) below, the Board or its staff shall only issue advice . . . with respect to the proposed future conduct or action of the subject whose conduct is at issue." Board of Ethics Regulation No. 4 ¶ 4.1(d).

In addition, we can only address the ethics laws that are under our jurisdiction. *See* Charter § 4-1100.

An ethics advisory opinion is necessarily limited to the facts presented by the requestor. *See* City Code § 20-606(1)(d)(i). This Board's advice is predicated on the facts you have provided, and the Board has not conducted any independent inquiry into the facts. Although our previous opinions interpreting the law are guidance for how we will likely interpret the same provisions in the future, previous opinions do not govern application of the law to different facts. Ethics opinions are particularly fact-specific, and anyone wishing to be assured that his or her conduct falls within the permissible scope of the ethics laws is well-advised to seek an opinion prior to acting and to rely only on an opinion that addresses his or her individual situation. In that regard, to the extent this opinion states general principles and there are particular fact situations that concern you, you are encouraged to contact the Board for specific advice on the application of the ethics laws to those particular facts.

II. The Facts

In addition to the facts as stated above, you have provided information as to the following facts. You have provided us the Commission's Guidelines for Evaluation of Attorney and Judge Candidates ("Guidelines," attached as Appendix A). According to the Guidelines, the Commission evaluates candidates based on the following criteria, spelled out in detail in five pages:

- a. Legal ability sufficient to have earned the respect of lawyers and members of the bench.
- b. Trial or other experience which ensures knowledge of the rules of evidence and courtroom procedures.
- c. A record and reputation for excellent character and integrity.
- d. Financial Responsibility.
- e. Judicial temperament.
- f. Mental and physical capacity sufficient to discharge fully the duties of judicial office.
- g. Record of Community Involvement
- h. Administrative Ability
- i. Devotion to improvement of the quality of justice.
- j. Demonstrated sound judgment in one's professional life.

See Appendix A, pages 4-8. In addition, the Guidelines spell out in detail the process for the Commission's recommendation. Relevant elements of the Commission's evaluation process include:

A. Each candidate shall be evaluated by the entire Commission. For purposes of such evaluation 17 members of the Commission shall constitute a quorum.

B. In making its evaluation, the Commission shall consider the results of any plebiscite with respect to a judicial retention candidate, the report of the reviewing team assigned to that candidate, an appearance by a candidate before the Commission, and any other relevant and reliable information concerning the Candidate.

...

F. Only the members of the Commission and no more than two members of the staff of the Bar Association designated for the purpose of assisting the Commission in ministerial functions may be present during the discussion or the voting with regard to a recommendation.

G. With respect to each candidate, the Commission shall vote as to whether such candidate is to be designated as Recommended or Not Recommended in accordance with Section II hereof. If a majority of Commission members present believe that the Commission does not have sufficient information with which to cast a vote, the Commission may direct that further review take place and that a vote on the candidate be rescheduled to a subsequent meeting.

H. The affirmative vote of a majority plus one of the members of the Commission present and voting shall be required to designate a candidate as Recommended. If a candidate fails to receive the affirmative vote required to be found Recommended, then such candidate shall receive a Not Recommended designation.

I. A Not Recommended designation following the first evaluation vote on a candidate shall be considered a "Preliminary Rating of Not Recommended," subject to the candidate's right to make a personal appearance pursuant to Section IIIM.

J. The vote as to each candidate shall be by secret ballot. The ballot shall list the standards for evaluation in Section II1. Members of the Commission who evaluate a candidate as Not Recommended shall indicate those standards which have not been met by the candidate.

...

L. No candidate shall be finally designated Not Recommended unless the candidate has been given an opportunity to appear before the Commission following a preliminary finding of Not Recommended. When a candidate makes an appearance following a Preliminary Rating of Not Recommended, the candidate shall have the right to make a statement and members of the Commission shall be permitted to question the candidate. The Commission shall then conduct a final evaluation vote as set forth herein.

....

Guidelines, Appendix A at 9-10.

This process is summarized in another document provided to us, a “Judicial Elections FAQ”:¹

10. What interest does the Bar Association have in the judicial election?

We are an independent, non-partisan organization of lawyers. We are non-political. We simply want to see the most qualified people elected to judicial office. Our independent 30-member Judicial Commission and its 120-member investigative division complete an exhaustive study and investigation of each of the judicial candidates. The Commission and its staff spend countless hours reviewing the candidates’ backgrounds and experience before reaching conclusions about which candidates for Common Pleas and Municipal Court are qualified to be judges.

11. How does the Commission conduct its investigation?

Each investigation into a candidate’s credentials consumes at least 10 hours of staff time. The 120-member investigative division represents the eyes and ears of the Judicial Commission. A five-member team that includes non-lawyers reviews each candidate. Investigative Division

¹ <http://www.philadelphiabar.org/page/JudicialElectionsFAQ>

members interview judicial candidates as well as lawyers, judges and others who are knowledgeable about the candidates. Additional time is also spent reviewing writing samples and other factors that bear on a candidate's qualifications. Every candidate is also given up to two hours of consideration by the full Commission. In the case of sitting judges seeking retention in their posts the Commission also relies on the results of a poll of the city's lawyers, which rates the judges on their performance.

You provided us historical information about the Judicial Commission, which includes in part the following:²

The Association's current Commission on Judicial Selection and Retention was organized in 1977 as the successor to the previous ad hoc Commission on Merit Retention and the Association's Judiciary Committee. The duties and the composition of the Commission remained unchanged for several years, with the exception of the establishment of a 45-person Investigative Division, which began its work in 1981 and which now has been expanded to 90 persons, one-third of whom must be non-lawyers. In 1984, the Commission's composition was expanded to include the chairs of the Association's Women's Rights and Municipal Court committees, as well as those of the Probate and Trust Law and Family Law sections. The presidents of the Barristers' Association of Philadelphia and of the Hispanic Bar Association of Pennsylvania were also added as ex officio voting members at that time. In 1991, the Commission was expanded to include the president of the Asian-American Bar Association of the Delaware Valley.

* * *

Since the administration of Governor Milton Shapp, the Commission has had agreements with each Governor of the Commonwealth that only candidates found Recommended by the Commission would be appointed to the Philadelphia Court of Common Pleas. As a result of these agreements, the Commission has worked closely with the Governors' Trial Court Nominating Commissions to convey the results

²<http://www.philadelphiabar.org/page/JudicialCommissionHistory>

of Commission investigations and evaluations of candidates seeking appointment to the bench. The Commission also has had agreements with the Philadelphia Democratic and Republican committees that the political parties will not slate candidates for judicial office who have not been found Recommended by the Commission.

The Commission makes its evaluations and recommendations known to the public through press releases and written advertisements. In addition, the Campaign For Qualified Judges, the Association's political action committee, raises funds on behalf of only those candidates who are found Recommended by the Commission.

It is notable that the Commission's Guidelines provide that: "Consideration of all candidates shall be in accordance with the Bylaws of the Philadelphia Bar Association." Appendix A at Paragraph I.B.(3)(a). Those By-laws, at Article VI on Judicial Selection,³ provide the following, in part:

Section 600. Policy Concerning Judicial Selection, Retention and Evaluation.

The Association shall

- A. recommend and actively support for judicial office individuals who, by their character, temperament and professional distinction, have demonstrated their qualifications for judicial office;
- B. oppose the selection for or retention in judicial office of individuals who have not demonstrated such qualifications;
- C. recruit and induce individuals most qualified for judicial office to accept appointment or stand for election to such office;
- D. exclude political considerations from the evaluation of individuals for retention and selection of individuals for judicial office;
- E. actively support constitutional reform for merit selection of judges;
and

³ <http://www.philadelphiabar.org/page/ByLawsArticle6>

F. conduct periodic interim evaluations with regard to the performance of members of the judiciary.

You explain that the “active support” for qualified judges referred to in Section 600 is done by the Association’s PAC, the Campaign For Qualified Judges, and if the phrase “active support” referred to the Commission, it would conflict with the political activity prohibition of the Guidelines at ¶ I.B.(7)(a). *See* Appendix A at page 3. It is our understanding that you propose to have no involvement in the Campaign for Qualified Judges PAC. Section 602 of the By-laws provides for the composition of the 30-member Commission, including 20 *ex-officio* members, of whom the City Solicitor is one.

Section 604 of the Bar Association By-laws provides the following confidentiality restrictions on members of the Commission:⁴

Section 604. Duty of Fidelity; Breach; Removal; Disqualification.

A. No member of the Commission shall in any way make known the members’ intention to vote for or against any person to be considered by the Commission prior to the time of the meeting at which the vote on that candidate shall be cast.

B. Except as provided in this Article, any action taken by the Commission and any discussions or statements made at a Commission meeting pertaining to the qualifications of any person whose name has been submitted to or has been considered by the Commission shall be confidential and shall not be disclosed.

C. Any member making any commitment or disclosure in violation of this Section 604 may be removed by the other members of the Commission. Any member so removed shall have a right of appeal to the Board by filing an appeal with the Secretary within 30 days following such removal, but the appeal shall be restricted to the factual question whether the member made the commitment or disclosure. If the Board finds that the member did make the commitment or disclosure, the Board shall not reverse the action of the Commission. The action of the Commission in making such removal shall not be stayed by reason of the pendency of an appeal. The decision of the Commission shall be

⁴ <http://www.philadelphiabar.org/page/ByLawsArticle6>

final unless appealed to the Board, and the decision of the Board shall be final and binding on all parties, with no further right of appeal.

III. Discussion

Policy Considerations

The general purpose of political activity restrictions on government employees is to reduce political pressure on those employees and promote efficient, impartial administration of government. The Philadelphia Home Rule Charter's political activity restrictions were intended to ensure merit-based City employment and to avoid the use of City employment to serve political interests:

Purposes: 1. Merit principles of governmental employment require the divorcement of politics from such employment. They presuppose employment upon merit and not because of political connections, powers and pressures. They also presuppose that governmental employment will not serve as a means for political tribute to maintain political parties and regimes. The prohibitions of this section are intended to sustain these basic principles and precepts subject to certain qualifications which political necessities require to be made at certain levels of employment and office-holding. Absolutism in this area is neither necessary nor practicable for the fact is that political parties are essential parts of the democratic form of government in the United States. This section attempts to balance the public interests involved.

Charter § 10-107 Annotation 1. The governmental interest in such a provision has been described as being that "in insuring efficient and impartial administration of public service and avoiding . . . possible abuses." *Com. ex rel Specter v. Moak*, 452 Pa. 482, 492 (1973). As the Board has stated before, "[T]he public interest lies in maintaining a system of public office holding based on merit and not on political connections or willingness to serve political purposes." Board of Ethics Formal Opinion No. 2007-004 at 6.

Applicable Law

The Philadelphia Home Rule Charter Section 10-107 applies to restrict your political activities because you are an appointed City officer and a City employee. The

question you have posed requires an analysis under Charter Section 10-107(4), which provides:

No appointed officer or employee of the City shall be a member of any national, state or local committee of a political party, or an officer or member of a committee of a partisan political club, or take any part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote.

Charter § 10-107(4). Violation of this provision is a misdemeanor punishable by immediate dismissal, ineligibility for any City position for one year, a fine of not more than \$300, and imprisonment of not more than ninety days. Charter §§ 10-107(6), 10-109.

Questions Presented

You seek advice about whether your future participation on the Philadelphia Bar Association's Commission on Judicial Selection and Retention would violate Charter Section 10-107.⁵ Your question requires us to determine whether your participation on the Commission would cause you to violate Charter Section 10-107(4) by either: (1) being a member of a committee of a partisan political club, or (2) taking part in the affairs of a political party or a political campaign.

Analysis

First, as to whether you are a member of a "partisan political club," we must consider the meaning of the term "partisan." Legislative provisions restricting political activities by public employees are generally construed by the courts to refer to partisan, as opposed to nonpartisan, political activity. *See generally*, Annot., "Validity, Construction, and Effect of State Statutes Restricting Political Activities of Public Officers or Employees," 51 ALR4th 702 (1987). Such court opinions do not generally go on to define "partisan." Indeed, one federal court has concluded that the line between partisan and nonpartisan political activities is difficult to draw. *See Magill v. Lynch*, 560 F.2d 22, 29 (1st Cir. 1977).

⁵ You also asked to be advised with respect to Civil Service Regulation 29. We do not have jurisdiction to advise on the application of Civil Service Regulations, although we note that they would not appear to apply to you directly, since, as a department head, the City Solicitor is exempt from civil service. Charter §7-301(b).

Some definitions of “partisan” can be found, however. The Pennsylvania Civil Service Act, which includes prohibitions similar to those in Section 10-107 and Civil Service Regulation 29, states that: “‘Partisan’ when used as an adjective refers to a political party.” 71 P.S. § 741.905b(g)(6). Black’s Law Dictionary defines “partisan” as “An adherent to a particular party or cause as opposed to the public interest.” Webster’s Third New International Dictionary defines “partisan” as “composed of, based upon, or controlled by a single political party or group,” as contrasted with “bipartisan” which refers to accord or cooperation between two major political parties. The Pennsylvania Supreme Court has given as examples of partisan political activity: “being committee-persons, working at the polls or running for public office.” *Commonwealth ex rel. MacElree v. Legree*, 530 Pa. 381, 609 A.2d 155, 157 (Pa. 1992). *See also In re Dobson*, 517 Pa. 19, 534 A.2d 460, 462 (1987). More recently, the federal District Court has held that “the plain meaning of ‘political activities’ includes any action which involves the advocacy [sic] of partisan decision-making.” *Coover v. Saucon Valley Sch. Dist.*, 955 F.Supp. 392, 401 (E.D. Pa. 1997). The *Coover* Court cited a U.S. Supreme Court decision that interpreted “partisan” to refer to activities directed “toward party success.” *United States Civil Service Comm’n v. National Ass’n of Letter Carriers*, 413 U.S. 548, 556, 37 L.Ed.2d 796, 804 (1973).

According to the facts you have supplied, the Philadelphia Bar Association is an independent non-partisan, non-political professional organization of lawyers, and its Commission on Judicial Selection engages in a merit-based evaluation of judicial candidates, designating them “Recommended” or “Not Recommended.” The criteria that determine the Commission’s designation of “Recommended,” such as legal ability, experience, temperament, administrative ability, do not take into account party affiliation. The Commission is not affiliated with a single political party or the candidacy of individual candidates. The Commission appears to evaluate all candidates of all parties and designates as “Recommended” multiple candidates within the same party. As stated in the governing by-laws, the Commission’s process “exclude[s] political considerations from the evaluation of individuals for retention and selection of individuals for judicial office.” We note also that the Commission’s Guidelines require that Commission members abide by a “Policy on Participation in Judicial Campaigns,” which restricts their political activity regarding judicial campaigns and provides that:

Commission members and reviewers are absolutely prohibited from playing a role of any kind in the campaigns of candidates for Pennsylvania judicial offices. This policy expressly prohibits a Commission member or reviewer from giving financial support to

judicial candidates. This prohibition is absolute during an individual's tenure on the Commission or as a reviewer and is recommended for the one-year period immediately following the end of a Commission member or reviewer's tenure. The sole exception to this prohibition is the Philadelphia District Attorney, an elected official, who may support only candidates found "Recommended" by the Commission.

Guidelines at page 3. We conclude that the Philadelphia Bar Association and its Commission on Judicial Selection and Retention are akin to a non-partisan civic organizations.⁶ *See* Civ. Serv. Reg. 29 ¶ 29.034 (listing as an example of a permissible political activity being "a member or officer or participat[ing] in the activities of non-partisan civic organizations"). Based on the facts you have provided, we conclude that the Philadelphia Bar Association's Commission on Judicial Selection and Retention is not a committee of a partisan political club, and we advise that membership on the Commission would not violate Charter Section 10-107(4).

As to the second issue, your personal conduct, the facts detailed above about the non-partisan nature of the Commission and its candidate evaluation process also support our advice that your individual participation as a member of the Commission would not constitute taking part in the affairs of a political party or a political campaign. The campaign activity prohibition of Charter Section 10-107(4) has long been interpreted as prohibiting public, partisan expressions of support for political candidates and political parties while permitting private and non-partisan political expression. *See* Advice of Counsel GC-2008-519 at 3, 6; Law Department Political Activity Guide, published at Opinion No. 95-20, *1994-1996 City Solicitor's Opinions* at 150-154; City Solicitor's Formal Opinion No. 283 (concluding Charter § 10-107 prohibits only partisan political activity, not non-partisan political activity) *1964 City Solicitor's Opinions* at 6; *compare* Civ. Serv. Reg. 29 ¶ 29.03 (Permissible Activities) *with* ¶ 29.04 (Prohibited Activities). Accordingly, we conclude that your participation in the Commission process under its rules, without more, would not violate Charter Section 10-107(4).

It would not be prohibited campaign activity or a public, partisan expression of support for a candidate for you to participate as one of approximately thirty members

⁶ It is noted that the Philadelphia Bar Association has a political committee (PAC). Having a PAC does not make the Association or its other committees partisan political organizations. Even if the PAC itself is a partisan political organization, you advise that you are not associated with the PAC, and you have advised that the PAC is not associated with the Commission on Judicial Selection and Retention.

of the Commission, evaluating candidates based on non-partisan, merit criteria in which you would vote on whether they are “Recommended” or “Not Recommended” by secret ballot with only Commission members and no more than two staff members present, as required by the Guidelines. *See* Paragraphs F and J of the Guidelines, Appendix A. A vote by secret ballot is not a public expression of support. In addition, the governing by-laws require that Commission members not make known their voting intentions prior to voting and not disclose any statements made at the Commission meeting related to the qualifications of any person. The fact that the Commission publicizes its recommendations, which your vote would count toward as one of many members, does not make your vote itself a public expression of support. Moreover, the Commission’s process does not result in support of candidates only from one party, or of any one candidate, which are the behaviors of a political party, a partisan political club, or a political campaign. The Board finds persuasive the fact that the individuals rated “Recommended” by the Commission are frequently opposing candidates within a single political party. We also find that the policy concerns that underlie political activity restrictions and Charter Section 10-107, of merit-based City employment and reducing the influence of partisan politics in City government, are not implicated under the facts you have presented.

For these reasons, the Board advises that, assuming you follow the Commission’s Guidelines, your participation on the Commission would not constitute prohibited activity under Charter Section 10-107(4). We advise, however, that you should take care not to engage in any activity outside the Commission’s governing by-laws and Guidelines that could constitute prohibited political activity.

IV. Conclusion

The Board of Ethics concludes, and you are advised that, as a member of Philadelphia Bar Association’s Commission on Judicial Selection and Retention following the Commission’s Guidelines for Evaluation of Attorney and Judge Candidates, you would not, by participating in the process, be “tak[ing] any part in . . . any political campaign” in violation of Charter Section 10-107(4). Nor would it be prohibited campaign activity by you for the Commission to publicize its Recommended and Not Recommended ratings, even in formats that may incidentally include the names of all Commission members, including yours. However, you must avoid any activity referring to ratings of particular individual candidates, outside your functions as a Commission member, that could be considered to be campaign activity.

If you have any additional facts to provide, we will be happy to consider if they change any of the conclusions in this opinion. Since you have requested public advice from the Board of Ethics, we will make this letter public as required by Code Section 20-606(1)(d)(iii).

By the Board:

Richard Glazer, Esq., Chair
Richard Negrin, Esq., Vice-Chair
Phoebe A. Haddon, Esq., Member
Kenya S. Mann, Esq., Member

[As of the consideration of this Opinion, there was a vacancy on the Board.]



PHILADELPHIA BAR ASSOCIATION

COMMISSION ON JUDICIAL SELECTION AND RETENTION GUIDELINES FOR EVALUATION OF ATTORNEY AND JUDGE CANDIDATES

I. ORGANIZATION

A. The Commission on Judicial Selection and Retention shall be organized in accordance with the Bylaws of the Philadelphia Bar Association.

B. Rules and Procedures

1. Investigative Division Composition

- a. The division shall be composed of not more than one hundred and twenty members, one-third of whom shall be lay persons.
- b. Each member shall serve a three-year term; no member shall serve more than two consecutive terms.
- c. Members of the division shall cover a broad spectrum of the profession and the public, and be appointed by the Chancellor with the advice and consent of the Board of Governors.

2. Standards

- a. Criteria for evaluation and review procedure shall be established by the Commission.
- b. There shall be a comprehensive review of each candidate for judicial office including interviews with the candidate and persons who have had professional dealings with a candidate and an examination of the candidate's academic and professional background.
- c. The division shall seek wide participation by the legal profession, the judiciary and the public in the review of candidates. Where appropriate, public interest groups shall be requested to provide information regarding the qualifications of the individuals being reviewed.

3. Assignment of Candidates

- a. Consideration of all candidates shall be in accordance with the Bylaws of the Philadelphia Bar Association.
- b. All candidates must submit a complete answer to the Commission's personal data questionnaire. All lawyer candidates shall give written authorization to the Commission and its Investigative Division to obtain information from the Disciplinary and Continuing Legal Education boards of the Supreme Court of Pennsylvania, the Pennsylvania Lawyers Fund for Client Security and from the Municipal Court and the Court of Common Pleas of Philadelphia. All sitting judge candidates shall give written authorization to the Commission and its Investigative Division to obtain information from the above agencies, the Pennsylvania Judicial Conduct Board and Court of Judicial Discipline, and from the court administrator of the court on which they sit and such appellate courts as may be appropriate.
- c. The Commission shall return to a candidate any questionnaire which is not complete.
- d. Upon receipt of a candidate's completed questionnaire and applicable written authorization, the Vice Chair of the Commission shall assign members of the Investigative Division, one of whom shall be a lay person, as a team to review that candidate. One member of the team shall be designated by the Vice Chair as the team leader. The Vice Chair shall also assign a member of the Commission to serve as liaison to the reviewing team. The liaison is expected to attend the interview of the candidate and to participate in the review conducted by the reviewing team.
- e. All members of the Commission shall receive notice of the assignment of the reviewing teams.
- f. Members of the Commission shall notify the reviewing team or the Chair or Vice Chair of any relevant questions or facts which should be explored or any witnesses who should be contacted during the review of the candidate.

4. Disqualification

- a. An assigned member of a reviewing team shall be disqualified if he or she has a personal relationship or a continuing or longstanding professional relationship with a candidate or is counsel for a party in a material matter assigned to a candidate.
- b. A member of a reviewing team shall disqualify himself or herself if he or she cannot objectively and fairly fulfill his or her responsibility.

5. Confidentiality

- a. Confidentiality is essential to the work of the Commission. A member of the Investigative Division shall not disclose any information obtained during the course of a review or evaluation by a reviewing team of a candidate to any person, including the candidate, other than to other members of the reviewing team and members of the Commission.
- b. A violation of the confidentiality rule shall be sufficient cause for termination as a member of the Investigative Division.

6. Participation by Reviewing Team During Evaluation Procedure

- a. A reviewing team shall participate in the evaluation procedure with respect to their assigned candidate as provided herein.

7. Policy on Participation in Judicial Campaigns

- a. Commission members and reviewers are absolutely prohibited from playing a role of any kind in the campaigns of candidates for Pennsylvania judicial offices. This policy expressly prohibits a Commission member or reviewer from giving financial support to judicial candidates. This prohibition is absolute during an individual's tenure on the Commission or as a reviewer and is recommended for the one-year period immediately following the end of a Commission member or reviewer's tenure. The sole exception to this prohibition is the Philadelphia District Attorney, an elected official, who may support only candidates found "Recommended" by the Commission.

II. STANDARDS FOR EVALUATION FOR JUDGE AND ATTORNEY CANDIDATES

A. Candidates may be questioned, both by the reviewing team and by Commission members, on a wide range of subjects, but a candidate should not be required to indicate how the candidate would decide issues of substantive law that may arise in future litigated cases. There should be no issue-oriented litmus test used in the evaluation of a candidate. No candidate will be excluded from consideration because of race, religion, creed, national origin, sex, sexual orientation, age or handicap, so long as the candidate satisfies the constitutional standards for judicial service. A candidate's ideas concerning the role of the judicial system and judges are relevant subjects of inquiry.

B. 1. Recommended: This Evaluation shall be made for those individuals who are being considered for election, retention or appointment to a designated court and who clearly demonstrate substantial compliance with the following criteria:

a. Legal ability sufficient to have earned the respect of lawyers and members of the bench.

A candidate should possess a high degree of knowledge of established legal principles and procedures and have a high degree of ability to interpret and apply them to specific factual situations. A sitting judge seeking retention should have demonstrated, over time, his or her knowledge of established legal principles and procedures as well as a high degree of ability to interpret and apply them to specific factual situations.

Legal knowledge may be defined as familiarity with established legal principles and evidentiary and procedural rules. Legal ability is the intellectual capacity to interpret and apply established legal principles to specific factual situations and to communicate, both orally and in writing, the reasoning leading to the legal conclusion. Legal ability connotes also certain kinds of behavior by the judge such as the ability to reach concise decisions promptly once the candidate is apprised of sufficient facts, the ability to respond to issues in a reasonably unequivocal manner and quickly to grasp the essence of questions presented.

Legal knowledge and ability are not static qualities, but are acquired and enhanced by experience and by the continual learning process involved in keeping abreast of changing concepts through education and study. A candidate should possess a high level of legal knowledge and a ready knowledge of rules of evidence; however, a candidate should not normally be expected to possess expertise in any particular substantive field. More important is the demonstration of an attitude reflective of willingness to learn the new skills and knowledge which will from time to time become essential to a judge's performance and of a willingness to improve judicial procedure and administration.

A review of a candidate's overall professional record, including legal briefs and other written materials authored by the candidate, a willingness and commitment to professional development, and reputation among judges and professional colleagues who have had first-hand dealings with the candidate will be helpful in evaluating legal knowledge and ability.

b. Trial or other experience which ensures knowledge of the rules of evidence and courtroom procedures.

A candidate should be an experienced lawyer, licensed in the jurisdiction in which the candidate seeks to be a judge. In certain compelling situations, an otherwise outstanding lawyer should not be deemed unqualified solely because of lack of trial experience.

A candidate should be admitted to practice law in the jurisdiction in which the candidate seeks to be a judge. The length of time that a lawyer has practiced is a valid criterion in screening applicants for judgeship. Such professional experience should be long enough to provide a basis for the evaluation of the candidate's demonstrative performance and long enough to ensure that the candidate has had substantial exposure to legal problems and to the judicial process.

It is desirable for a candidate to have had substantial trial experience and a knowledge of the litigation process. Trial experience includes the preparation and presentation of matters of proof and legal argument in an adversary setting. The extent and variety of the candidate's experience in actual trials should also be considered and weighed heavily. However, other types of legal experience should also be carefully considered, such as negotiation and mediation skills. A private practitioner, a law teacher or corporate, government or public interest attorney may have experience which will contribute to successful judicial performance. Outstanding persons with such experience should not be deemed unqualified solely because of lack of trial experience. The depth and breadth of that professional experience and the competence with which it has been performed, rather than the candidate's particular type of professional experience should be considered.

c. A record and reputation for excellent character and integrity.

A candidate's personal and professional actions should demonstrate consistent adherence to high ethical standards. A candidate should be of undisputed integrity.

The candidate's record and reputation for consistent adherence to high ethical standards is of the highest importance. The reputation of the candidate for truthfulness and fair dealing in both legal and extra-legal contexts is also of great importance.

The integrity of a judge is the keystone of the judicial system, for it is integrity which enables a judge to disregard personal prejudices, personalities and partisan political influences so that decisions are based solely on the facts and the law applicable to those

facts. It is therefore imperative that a judicial candidate's integrity and character with regard to honesty and truthfulness be above reproach.

d. Financial Responsibility.

A candidate should be financially responsible.

The demonstrated financial responsibility of a candidate is one of the factors to be considered in assessing the candidate's ability to fulfill the responsibilities of judicial office. Whether there have been judgments or liens or bankruptcy proceedings instituted by or against a candidate and whether the candidate has promptly and properly filed all required tax returns may be relevant to financial responsibility. Financial responsibility demonstrates self-discipline and the ability to withstand pressures which might compromise independence and impartiality.

e. Judicial temperament.

A candidate should possess judicial temperament, which includes patience, courtesy, impartiality, even temper, a well-defined sense of justice, compassion, fair play, humility, tact, common sense and understanding.

Among the qualities which comprise judicial temperament are patience, open-mindedness, courtesy, tact, firmness, understanding, compassion and humility. Because the judicial function is essentially one of facilitating conflict resolution, judicial temperament requires an ability to deal with parties, counsel, jurors, and witnesses calmly and courteously, and the willingness to hear and consider the views of all sides. It requires the ability to be even-tempered, yet firm; open-minded, yet willing and able to reach a decision; confident, yet not egocentric. Because of the broad range of topics and issues with which a judge is typically required to deal, judicial temperament requires a willingness and ability to assimilate data outside the judge's own experience. Moreover, it requires an even disposition coupled with a keen sense of justice and a recognition that the administration of justice and the rights of the parties transcend the judge's personal feelings and desires. Judicial temperament implies, among other things, an absence of arrogance, impatience, and arbitrariness.

f. Mental and physical capacity sufficient to discharge fully the duties of judicial office.

A candidate should possess the requisite mental and physical capacity needed to discharge fully the demanding duties of judicial office.

A candidate should be in good mental and physical health. Good health embraces a condition of being sound in body and mind with relative freedom from physical disease or pain. A history of a past disabling condition or suggestion of a current disabling condition should require further inquiry as to the degree of impairment. A serious health condition should be considered carefully to determine what possible effect it may have on the candidate's ability to perform the duties of a judge. Medical documentation of current health status may be necessary. However, diseases or impairments which do not prevent a candidate from fully performing judicial duties should not be a cause for rejection of a candidate.

Good health also includes an absence of erratic or bizarre behavior which would significantly affect the candidate's functioning as a fair and impartial judge. A candidate should be free from current abuse of alcohol or drugs and should be able to handle stress constructively in an emotionally charged environment.

g. Record of Community Involvement

A candidate should have a record of involvement in public service, community affairs, pro bono activities or other volunteer efforts in an effort to improve the quality of life of others in the community. A candidate should be aware of and sensitive to the diversity of the general community.

The rich diversity of backgrounds among members of the judiciary is an important strength of our judicial system and, therefore, a candidate's non-legal experience should be considered together with the candidate's legal experience. Participation in public service and pro bono activities adds another dimension to the qualifications of the candidate.

Experience which provides an awareness of and sensitivity to people and their problems may be just as helpful in the decision-making process as a knowledge of the law. Active involvement in community and civic affairs, pro bono activities and other kinds of public service are important aspects of a candidate's qualifications. It is desirable that a candidate have broad life experiences.

h. Administrative Ability

A candidate should possess past administrative experience or strong administrative skills needed to administer justice effectively, fairly and efficiently.

Increasingly, judges are called upon to possess strong administrative skills in order to balance effectively the demands of long court lists and complex litigation. Effective administrative skills are necessary for judges to dispose of cases within reasonable time limits without sacrificing the legitimate needs of individual litigants or their counsel.

i. Devotion to improvement of the quality of justice.

A candidate should demonstrate, as part of the candidate's professional life, efforts directed at improving the quality of justice for all citizens.

It is the responsibility of every attorney to work toward maintaining the integrity and improving the competence of the bar to meet the highest standards of legal practice.

Attorneys, by reason of education and experience, are well-qualified to recognize strengths and deficiencies in the legal system. Therefore, they should participate in proposing and supporting initiatives to improve or preserve the system. Such efforts might include, among others, active participation in the work of local, state and national professional associations and organizations.

j. Demonstrated sound judgment in one's professional life.

A candidate should demonstrate sound judgment in his or her professional life.

A candidate should demonstrate reliability, diligence, perseverance, common sense and attentiveness. A candidate should possess good work habits and the ability to set priorities in relation to the importance of the tasks to be accomplished.

A candidate should meet procedural deadlines, keep appointments and commitments, and respect the time of litigants, lawyers, judges and court personnel.

- 2. Not Recommended: This evaluation shall be made for those individuals who have not met the criteria set forth in Section IIB1 or who fail to submit a questionnaire or who fail to participate in the Commission's evaluation process.**

III. EVALUATION PROCEDURES

- A. Each candidate shall be evaluated by the entire Commission. For purposes of such evaluation 17 members of the Commission shall constitute a quorum.**
- B. In making its evaluation, the Commission shall consider the results of any plebiscite with respect to a judicial retention candidate, the report of the reviewing team assigned to that candidate, an appearance by a candidate before the Commission, and any other relevant and reliable information concerning the Candidate.**
- C. The reviewing team assigned to a candidate being evaluated shall present its report which shall have been submitted previously in writing to the Commission and shall answer questions directed to it by members of the Commission.**
- D. Except for candidates for judicial retention, all candidates shall appear in person before the Commission to state their reasons for seeking judicial office. Unless extended by the Chair, all such initial appearances shall be limited to approximately five minutes in duration. No member of the Commission other than the Chair shall be permitted to question the candidate during an initial appearance of the candidate.**
- E. Members of a reviewing team are encouraged to attend both the candidate's initial appearance pursuant to Section IIID and final appearance before the Commission pursuant to Section IIIM, but shall not be entitled to be present for the Commission's discussion or vote or to confront and examine the candidate during such appearances.**
- F. Only the members of the Commission and no more than two members of the staff of the Bar Association designated for the purpose of assisting the Commission in ministerial functions may be present during the discussion or the voting with regard to a recommendation.**
- G. With respect to each candidate, the Commission shall vote as to whether such candidate is to be designated as Recommended or Not Recommended in accordance with Section II hereof. If a majority of Commission members present believe that the Commission does not have sufficient information with which to cast a vote, the Commission may direct that further review take place and that a vote on the candidate be rescheduled to a subsequent meeting.**
- H. The affirmative vote of a majority plus one of the members of the Commission present and voting shall be required to designate a candidate as Recommended. If a candidate fails to receive the affirmative vote required to be found Recommended, then such candidate shall receive a Not Recommended designation.**

- I. A Not Recommended designation following the first evaluation vote on a candidate shall be considered a "Preliminary Rating of Not Recommended," subject to the candidate's right to make a personal appearance pursuant to Section IIII.**
- J. The vote as to each candidate shall be by secret ballot. The ballot shall list the standards for evaluation in Section III. Members of the Commission who evaluate a candidate as Not Recommended shall indicate those standards which have not been met by the candidate.**
- K. A Not Recommended designation by the Commission, whether preliminary or final, must be accompanied by a written statement to the candidate of reasons for such finding.**
- L. No candidate shall be finally designated Not Recommended unless the candidate has been given an opportunity to appear before the Commission following a preliminary finding of Not Recommended. When a candidate makes an appearance following a Preliminary Rating of Not Recommended, the candidate shall have the right to make a statement and members of the Commission shall be permitted to question the candidate. The Commission shall then conduct a final evaluation vote as set forth herein.**
- M.
 - 1. A finding of Recommended or Not Recommended shall remain in effect for three years.**
 - 2. If a finding of Recommended is valid for a primary election occurring within the three year period above-mentioned, it shall remain in effect for the general election next occurring after the expiration of said three year period.**
 - 3. When a candidate is found Recommended, he or she shall be advised in writing that it is the candidate's obligation to notify the Commission promptly of any material facts which would require changes in answers given in the candidate's questionnaire.**
 - 4. The Commission may require the candidate to provide written updates of the Commission Questionnaire during the effective period of a Recommended evaluation.**
 - 5. A candidate previously rated Not Recommended may submit, in writing, any new information which may impact on a reconsideration of that candidate's evaluation.**
 - 6. By a majority vote of those members present and voting, the Commission may require a new review and evaluation for any judicial candidate notwithstanding the fact that a previous finding of either Recommended or Not Recommended is still in effect.****

a) The vote on such reconsideration shall be by written ballot only.

N. 1. Where a candidate withdraws after a Preliminary Rating of Not Recommended any request made by such candidate for a new evaluation within one year of the Not Recommended finding shall be deemed to be a request for a personal appearance pursuant to Section IIIM. Any request made by such candidate for a new evaluation after the year period shall be treated as such.

2. Where a candidate withdraws after a Preliminary Rating of Not Recommended and subsequently becomes a candidate for judicial office within the one year period without submitting to further review by the Commission, he or she shall be found Not Recommended.

O. Notice of the Commission's evaluation shall be given in writing to each candidate. When the Commission's evaluation is Not Recommended, such written notice shall include a statement of reasons for such evaluation. In the event that a candidate evaluated by the Commission is a candidate in a judicial election, the Commission's evaluation shall be released to the Commission or agency authorized by the Governor to evaluate and recommend candidates for judicial appointment.

IV. EVALUATION OF APPELLATE AND FEDERAL COURT CANDIDATES

In determining whether to evaluate a candidate for any statewide for federal court position, the Commission should consider, *inter alia*, the following factors:

- a) whether the Commission has been requested to provide an evaluation by the Pennsylvania Bar Association or the American Bar Association;
- b) whether the candidate has already served on a statewide or federal bench for sufficient period of time to permit an evaluation of his or her performance in such office;
- c) whether the candidate is a member of Philadelphia Bar;
- d) whether such evaluation would be in the public interest.

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