

Chapter 2

Confidentiality and Privacy



Two duties of judicial nominating commissions recognized by those states practicing merit selection are (i) “to operate consistently, fairly, and in strict confidence to encourage candidates to apply;” and (ii) “to function in a manner that fosters respect and public trust in the process.”¹ Implementation of these goals requires a balancing of individual privacy and public access interests. This balance centers on the treatment of confidentiality and privacy throughout the nominating process, and judicial nominating procedures from state to state vary significantly with respect to these issues.

What are Confidentiality and Privacy?

Confidentiality and privacy are often treated as synonymous concepts. Though related, these concepts should not be used interchangeably. *Confidentiality* is “secrecy; the state of having the dissemination of certain information restricted.”² Generally, individuals seek confidentiality to avoid public disclosure of personal matters.³ Information that is deemed confidential can be in any form and regarding any subject matter, even that which is not deemed “private” in the ordinary sense of the word. Within the nominating process, confidentiality can be applied to many things, such as application materials, results of investigations, deliberations, and voting, and can be granted to many participants, such as the applicant, the members of the judicial nominating commission, and entities providing information about the applicant.

Privacy is a right that is recognized implicitly in the United States Constitution and explicitly in many state constitutions.⁴ Right to privacy is “the right to personal autonomy” and “the right of a person and the person’s property to be free from unwarranted public scrutiny or exposure.”⁵ A person’s privacy can be invaded where “public disclosure, of an objectionable nature, of private information” occurs.⁶ Legally, an invasion of privacy is measured by the “ordinary person” standard; “[t]hus, ordinary inconveniences and annoyances, which commonly face members of society” are not invasions of privacy that are actionable in a court of law.⁷

The right to privacy is not absolute, and in the employment context, requires a balance between employees’ and employers’ interests.⁸ “Unlike discrimination, for example, employers legitimately need to obtain information about employees—a fact that, in one way or another, interferes with the employees’ privacy right.”⁹ During the nomination process, judicial nominating commissions act as employers screening potential employees. As a necessary part of the nominating process, judicial nominating commissions must solicit and investigate private information pertaining to applicants. However, judicial nominating commissions can make this necessity less intrusive by:

- Providing notice in the form of waivers, consents, and/or authorizations to applicants for various background investigations;
- Treating certain information and various parts of the nominating process confidentially;
- Providing express notice to applicants as to what is confidential within the nominating process; and

- Narrowly-tailoring the form and subject matter of inquiry within the nominating process.

Waivers, Consents and Authorizations

Nearly every judicial nominating commission requires applicants to sign waivers, consents or authorizations permitting the investigation and release of private and confidential information. An express waiver is a voluntary and intentional abandonment of a legal right or advantage.¹⁰ A consent is an “agreement, approval, or permission as to some act or purpose, esp. given voluntarily by a competent person.”¹¹ An authorization is a formal approval or sanction, which provides legal authority to act.¹²

Most judicial nominating commissions in the United States use waivers.¹³ As Utah’s Deputy State Court Administrator noted:

The Commissions find the information they receive regarding professional discipline, credit check, criminal background, and other information extremely valuable and useful in making their decisions. Having the applicant consent [via waivers] to these checks not only advises the applicant of what is being looked at, but makes the gathering of this information easier.¹⁴

Some waivers are tailored to provide for the release of specific information, such as professional discipline¹⁵, credit checks¹⁶, criminal background¹⁷, or health information¹⁸. Some waivers are required at different times within the nominating process¹⁹. And others broadly require the full release of any and all information pertaining to the applicant.²⁰

Waivers, consents and authorizations can be problematic in two ways: (1) if overly broad, they can have a chilling effect on good candidates applying for vacancies, and (2) they may violate state and federal statutes, causing them to be void and, if challenged, not legally enforceable. Applicants have a right to privacy and rights with respect to confidentiality of certain records. “In almost every context in which the right to privacy is recognized, courts have accepted some form of consent or waiver.”²¹ However, just because courts may accept some form of waiver, applicants can avoid waivers, and thereby invasions of privacy, by not applying for vacancies. Though judicial nominating commissions may prefer the limitless inquiry options a broadly drafted waiver permits, a narrowly tailored waiver, which limits the scope of inquiry, will:

- Be more acceptable to applicants;
- Be likely to increase the pool of applicants; and
- Continue to provide commissions with valuable information about the applicant on which to base evaluations.

Though an applicant may be willing to sign waivers, consents or authorizations, judicial nominating commissions should check federal and state laws to insure that such waivers, consents or authorizations are permissible and legally enforceable. A waiver is only legally enforceable so long as an applicant enters into it knowingly and voluntarily.²² “An employer’s freedom to conduct ... background checks ... is regulated by a tangle of federal and state laws....”²³ Many state and federal laws limit background checks conducted by employers and provide liability for employer violations.²⁴ In particular, pre-employment inquiries may be significantly limited where privacy rights can be invaded.²⁵ Furthermore, though waivers may protect the investigating employer from liability, that same protection may not be extended to former employers or other entities releasing information pursuant to such waivers.²⁶ Thus, many entities contacted pursuant to a background check, such as former employers of an applicant, may be reluctant or may simply refuse to supply requested background information pertaining to an applicant for fear of legal repercussions. In an effort to protect employers who provide reference information to prospective employers, at least thirty-eight states have passed or are considering statutes shielding employers from lawsuits by former employees.²⁷

The Fair Credit Reporting Act and the Consumer Credit Reporting Act of 1996 limit background checks conducted by employers pertaining to credit history, criminal records and other background investigations; these laws limit the use of background information, and require written disclosure by the employer and written consent by the applicant.²⁸ Upon request, the applicant must receive a copy of such background reports, excluding medical information, and must be given an opportunity to contest the information contained within the reports.²⁹

With respect to criminal background checks, many states have additional restrictions. For example, in New Hampshire, employers may only inquire about an applicant’s criminal conviction record for the five year period prior to such inquiry and may require that an applicant have no arrest record only if “required by business necessity.”³⁰ In New York, an employer may or must, depending on the occupation, inquire into an applicant’s criminal conviction record; however, the applicant’s arrest record is not open to inquiry.³¹ Nevertheless, an employer may consider “independent evidence that led to an arrest,” and if an arrest record is legally obtained, may ask the applicant for “proof of disposition of the arrest.”³²

The *Americans with Disabilities Act* also creates inquiry restraints for judicial nominating commissions. Please see the discussion under “Health” and Appendix A in Chapter 5.

Even if an applicant signs a broadly drafted waiver, judicial nominating commis-

sions should not conduct excessively invasive pre-employment tests, such as polygraph tests and drug tests, because most of these invasive tests are prohibited or highly restricted by federal and state law.³³

Once judicial nominating commissions determine what types of background checks are legally permissible, they should consider what background checks are actually *needed* to evaluate applicants. The scope of any waiver, consent or authorization should be limited to those areas that are job related, legally permissible and necessary. By narrowing the scope and, once acquired, limiting access to such background information on a “need to know” basis³⁴, applicants’ privacy will be better protected. It must be remembered that “...the applicants are free to choose not to have their privacy invaded; they may walk away.”³⁵

Such an outcome is particularly unnecessary where waivers are crafted broadly, but used narrowly, by judicial nominating commissions. For example, several judicial nominating commissions use general waivers, but only investigate particular areas of inquiry, such as professional discipline and criminal background. Additionally, most judicial nominating commissions have very short timeframes to implement background investigations, thereby making a full, broad inquiry into an applicant’s background virtually impossible.

What Is Confidential and What Is Public?

Balancing the public’s right to be kept informed with the applicant’s right to privacy is difficult. Wherever possible, the applicant should be protected from (i) public scrutiny with respect to his or her private life and (ii) public embarrassment³⁶ that could result from the failure to receive a nomination. Most judicial nominating procedures require limited public disclosure, such as publicizing the names of the nominees submitted to the appointing authority. However, within judicial nominating procedures, what is treated as confidential and what is made public varies greatly by state.³⁷

Applications. The nominating process generally begins with a notice of vacancy and solicitation of applications. Most notices invite applicants to apply and, in some cases, the public to submit names of potential applicants. As most judicial nominating commissions know, well-qualified potential applicants often will not apply without encouragement. One of the potential deterrents to applying is the application itself, as applicants may be concerned with (i) the types of questions asked within an application, (ii) whether the applications are public documents, and (iii) even if the applications are confidential, whether private information contained in application responses will be disseminated in other ways. The more

invasive an application is and the broader the dissemination of application information, the less likely a potential applicant may be to apply.

As with background checks and waivers, applications (i) should contain inquiries that are job related, legally permissible and necessary for a full evaluation of the applicant, and (ii) should be narrowly drafted to avoid invasions of privacy. Though most application questions are clearly drafted to ensure that the applicant will be able to uphold the jurisdictional canons or codes of judicial conduct, invasive questions pertaining to the applicant's personal life should be limited. "Caution dictates that only necessary, job-related, and non-discriminatory questions be asked..."³⁸ For example, with regard to health questions, the focus should be on whether the applicant suffers from a condition, ailment or disease that could negatively affect his or her ability to perform judicial duties. Broadly drafted questions that delve into an applicant's entire medical history, for example, will not only provide a means to evaluate potential job performance, but may also (i) provide information that is irrelevant to such an evaluation, (ii) be unlawfully obtained pursuant to jurisdictional laws, and (iii) cause significant embarrassment to the applicant. Additionally, to reduce invasiveness wherever possible, questions should be time-limited³⁹ and focused primarily on the applicant.⁴⁰

Notice of whether applications are confidential should be made expressly on the face of the application.⁴¹ Some states require applications to be fully⁴² or partially⁴³ public. Others make clear that an application may become public under certain circumstances, such as after the judicial nominating commission decides to interview an applicant.⁴⁴ In some jurisdictions, confidential information requested in an application, such as social security numbers, may not only be withheld from the public, but may also be withheld from the judicial nominating commissioners evaluating the applicants.⁴⁵

Even if applications are confidential, the applicant may be concerned that private information from his or her application could be disseminated in other ways. For example, the greater the number of application copies required from the applicant, the greater the applicant's concerns may be about possible public dissemination.⁴⁶ Another concern may be that if interviews of the applicant are conducted publicly, private information contained within the application could become public.⁴⁷ Also, an applicant should be informed of the post-nomination process and whether the appointing authority will receive a copy of the application if the applicant is nominated.⁴⁸ Commissions should seriously consider sending applicants a copy of their procedural rules as a way to address applicants' concerns.

Communications: Applicant, commissioners, and the public. Judicial nominating commissions should create policies and procedures for communications throughout the nominating process. This will provide (i) commissioners with explicit guidance, (ii) applicants with a clear understanding of what is confidential, and (iii) the public with notice of the process.

One concern expressed with regard to the nominating process is the possibility of leaks, even where applications and other parts of the nominating process are formally confidential. One way to avoid such occurrences is for the chair or other designated person to be the sole commission spokesperson.⁴⁹ This helps to minimize leaks and provides consistency to disseminated information.

There are a number of communication controls used and enacted by judicial nominating commissions with regard to applicants, other commissioners, and the public. These controls can do a number of things, such as strengthen confidentiality or make the nominating process more open to the public. Such controls include, but are not limited to:

1. Permitting⁵⁰ or prohibiting⁵¹ the applicant to communicate with individual commissioners;
2. Requiring that all communications to commissioners in support of or opposition to an applicant be in writing⁵²;
3. Prohibiting communications to the commission regarding an applicant that are not based on the personal observations of one who has had significant dealings with such applicant⁵³;
4. Prohibiting commissioners from communicating outside commission meetings about particular applicants in the nominating process⁵⁴;
5. Requiring all information regarding an applicant obtained by a commissioner to be shared with the entire commission⁵⁵;
6. Soliciting⁵⁶ and limiting the methods of providing information regarding an applicant accepted by the commission from the public;
7. Permitting⁵⁷, discounting or prohibiting information regarding an applicant from an anonymous source or a source that insists on remaining confidential;
8. Permitting or prohibiting⁵⁸ applicant access to letters of recommendation or non-recommendation and other such information;
9. Withholding from the public (i) names of applicants⁵⁹; (ii) application materials⁶⁰; (iii) access to interviews⁶¹, deliberations⁶² and voting⁶³; and (iv) names of nominees⁶⁴;

10. Determining what information compiled by the judicial nominating commission will be shared with the appointing authority⁶⁵;
11. Requiring commissioners to disclose to the entire commission any pre-existing personal relationships with applicants⁶⁶; and
12. Providing the judicial nominating commission the right to inform law enforcement or disciplinary authorities about any criminal or unethical activity of the applicant uncovered through the nominating process.⁶⁷

Interviews. Some states require interviews to be conducted publicly, whereas others require interviews to be held in strict confidence. Regardless of the forum, like background checks and application questions, judicial nominating commissions must be careful to craft interview questions that are legally permissible, job-related, and necessary for a full evaluation of the applicant. Narrowly drafted questions that are uniformly asked of all applicants helps commissions to avoid invasions of applicants' privacy. When inappropriate questions are asked during an interview, the chair or other commissioners should intervene, and should caution applicants to use discretion when answering such questions. Since most interviews are twenty to forty-five minutes in length, job-related questions should be the focus in order to get the most relevant information from the applicant.

Particular care should also be given to interview subjects and questions in jurisdictions where application materials are confidential, but interviews are conducted publicly. For example, in some states where interviews are conducted publicly, judicial nominating commissions allow for a portion of the interview to be held in closed, executive session to protect the privacy of the applicant.⁶⁸ This provides the public with an open process while shielding the applicant from unwarranted and unnecessary public scrutiny of private information.

Deliberations. With few exceptions, nearly every jurisdiction conducts confidential deliberations. Even in jurisdictions that provide little or no confidentiality protections for applicants, commission deliberations are afforded extensive confidentiality. Confidentiality of deliberations is intended to encourage frank discussion of the applicants and their qualifications by the commissioners.⁶⁹ To aid in this endeavor, judicial nominating commissions may create different levels of confidentiality. For example, in New Mexico, the judicial nominating commission votes at the beginning of deliberations to determine whether the proceedings will be totally confidential (where no information regarding the proceedings may be released to anyone) or partially confidential (where applicants may be given feedback regarding the proceedings, but such feedback may not be attributed to specific persons and may not divulge voting information).

Voting. Like deliberations, most judicial nominating commissions have confidential voting procedures. In Tennessee, the importance of this confidentiality is reiterated in an oath taken by the commissioners:

...I shall not reveal, indicate or hint how any other member voted, felt or acted with regard to the consideration, selection or rejection of any potential nominee nor shall I reveal any part of what occurred in that process....

Most commissions vote by secret ballot in closed, executive session. Confidential voting provides commissioners the opportunity to freely express themselves without manipulation or intimidation from other commissioners. In a few jurisdictions, a non-binding vote is done in closed, executive session and then conducted again in public.⁷⁰

Records: Production, maintenance, and destruction. Judicial nominating commissions should also consider and provide notice to applicants regarding recordkeeping. Specific attention should be given to:

1. Who keeps and maintains commission records;
2. Who has access to commission records; and
3. How commission records are stored or destroyed.

Depending on the jurisdiction, recordkeeping is vitally important to maintaining confidentiality or providing an open process to the public. Most jurisdictions require a secretary to be named who will create and maintain commission meeting minutes.⁷¹ Minutes are distributed to the commissioners and usually sealed and maintained for a certain period of time, such as five years, after proceedings end.⁷²

Copies of applications are also provided, at minimum, to all commissioners during the nominating process. As the investigation of an applicant occurs, background reports, letters of recommendation and other information will be added to an applicant's file. Some judicial nominating commissions require oral information received by individual commissioners to be transcribed into written reports.⁷³ Written documents can create a more accurate record, but also can compromise the confidentiality of the information and its source if commissioners do not observe their commission's confidentiality rules.

A majority of judicial nominating committees require the applicant's application and file to remain confidential and outside the purview of the public. In some cases, even the applicants are not given the right to review their own files.⁷⁴ In other cases, if an applicant is not nominated, he or she may be able to get the original application back from the commission⁷⁵ or his or her application and file contents are automatically destroyed.⁷⁶ If an applicant is nominated and appointed by the appointing authority, the applicant's file is usually merged with his or her personnel file.⁷⁷

In jurisdictions where files are held confidentially, several judicial nominating commissions maintain proceeding files, including applications, for a certain period of years prior to file destruction.⁷⁸ In jurisdictions where applications are deemed public documents, such documents may be maintained by an administrative body, allowing public inspection upon request and destruction in accordance with jurisdictional statutory requirements.⁷⁹

In order to protect applicants' privacy, some commissions have a separate portion of the applicant questionnaire that is confidential. In Alaska, for example, information such as the names of an applicant's children and spouse's name and occupation, his or her home and business addresses, office and home telephone numbers, social security number, income, and private professional sanctions is in a section of the questionnaire that is clearly marked as confidential.

Conclusion

While balancing public interests and applicants' privacy interests throughout the nominating process, commissioners should not lose sight of their practical needs. For example, depending on jurisdictional requirements, most judicial nominating commissions must, within thirty to sixty days of a judicial vacancy:

- Find potential applicants;
- Receive and evaluate applications;
- Conduct applicant background checks and interviews;
- Deliberate and vote on the applicants; and
- Provide the appointing authority with a list of nominees.

From a practical standpoint, the process does not provide most judicial nominating commissions with enough time to possibly delve into every private facet of each applicant's life. Even if a commission had the time to do so, it is not generally necessary for purposes of a full and complete applicant evaluation.

Therefore, overly broad and lengthy applications, waivers, and interview questions only act to unnecessarily deter well-qualified potential applicants from seeking judgeships. Where jurisdictions have a very open, public nominating process, judicial nominating committees should make significant attempts to avoid public inquiries into applicants' private lives in ways that verge on an invasion of privacy. Conversely, where commissions (i) have extraordinarily lengthy timeframes, such as several months, for applicant evaluation, and (ii) seek greater amounts of private information from applicants, greater confidentiality protections should be afforded to applicants in exchange for their increased loss of privacy.⁸⁰ Attention to confidentiality and privacy will increase the pool of applicants while still maintaining the public trust.

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- 1 Maryland's "An Overview of the Nominating Commission Process," p.3.
 - 2 Black's Law Dictionary (7th ed. 1999).
 - 3 See *Cantu v. Rocha*, 77 F.3d 795 (Tex. 1996).
 - 4 E.g., Alaska and Arizona.
 - 5 Black's Law Dictionary (7th ed. 1999).
 - 6 *Id.*
 - 7 Frank C. Morris, Jr. "Workplace Privacy Issues: Avoiding Liability" SD52 ALI-ABA 697, 702 (June 3-5 1999).
 - 8 Jonathan V. Holtzman "Applicant Testing for Drug Use: A Policy and Legal Inquiry" 33 Wm. & Mary L. Rev. 47, 65-66 (Fall, 1991).
 - 9 *Id.* at 66.
 10. Black's Law Dictionary (7th ed. 1999).
 - 11 *Id.*
 - 12 *Id.*
 - 13 E.g., Missouri, Nevada, Minnesota, Connecticut, Massachusetts.
 - 14 Comment response to the American Judicature Society Survey Concerning Judicial Nominating Commission Practices.
 - 15 As used in Massachusetts, South Dakota, Delaware, and Iowa, for example.
 - 16 As used in Massachusetts, South Dakota, and Arkansas, for example.
 - 17 As used in Massachusetts, South Dakota, Delaware, and Iowa, for example.
 - 18 As used in Massachusetts and South Dakota, for example. *But see* Appendix A to Chapter 5 discussing the *Americans with Disabilities Act* and its limits on the health information that may be requested.
 - 19 For example, the judicial nominating commission requires only a professional disciplinary waiver from the applicant and the Governor requires waivers for credit history and criminal background from any nominees.
 - 20 As used in Indiana, Kansas and New York, for example.
 - 21 Jonathan V. Holtzman "Applicant Testing for Drug Use: A Policy and Legal Inquiry" 33 Wm. & Mary L. Rev. at 85.

- 22 See Alan M. Koral "Avoiding Workplace Litigation: When You Write, You May be Wrong" 562 PLI/Lit 319, 373 (April, 1997).
- 23 Frank C. Morris, Jr. "Workplace Privacy Issues: Avoiding Liability" SD52 ALI-ABA at 764.
- 24 *Id.*
- 25 See *id* at 782.
- 26 See J. Hoult Verkerke "Legal Regulation of Employment Reference Practices" 65 U. Chi. L. Rev. 115 (Winter 1998).
- 27 Philip M. Berkowitz "Challenges of Workplace Safety and Security" 681 PLI/Lit 219, 282 (September, 2002).
- 28 See Philip M. Berkowitz "Challenges of Workplace Safety and Security" 681 PLI/Lit at 254-255.
- 29 See Hoult Verkerke "Legal Regulation of Employment Reference Practices" 65 U. Chi. L. Rev. 115.
- 30 See Philip M. Berkowitz "Challenges of Workplace Safety and Security" 681 PLI/Lit at 253.
- 31 See Alan M. Koral "Avoiding Workplace Litigation: When You Write, You May be Wrong" 562 PLI/Lit at 365.
- 32 See *id.*
- 33 For example, polygraph tests are basically prohibited by the Employee Polygraph Protection Act of 1988, as well as statutes in New York, Connecticut and New Jersey, for example. See Alan M. Koral "Avoiding Workplace Litigation: When You Write, You May be Wrong" 562 PLI/Lit at 369-370. Pre-employment drug testing was rejected in *Willner v. Thornburgh* by the D.C. District Court as an unreasonable search for a Department of Justice applicant, even if consented to, because other aspects of the thorough background check would likely divulge such information. However, this was overturned on appeal, over strong dissent, in part because (i) it was deemed a significant governmental need, (ii) the applicant consented to and had notice of the testing, and (iii) the applicant did not have to apply with DOJ. See Jonathan V. Holtzman "Applicant Testing for Drug Use: A Policy and Legal Inquiry" 33 Wm. & Mary L. Rev. at 69-72.
- 34 See Rochelle B. Ecker "To Catch a Thief: The Private Employer's Guide to Getting and Keeping an Honest Employee" 63 UMKC L. Rev. at 258.
- 35 See Jonathan V. Holtzman "Applicant Testing for Drug Use: A Policy and Legal Inquiry" 33 Wm. & Mary L. Rev. at 52.
- 36 Massachusetts's Judicial Nominating Commission Executive Director notes that "...all records of the Judicial Nominating Commission are free from public disclosure thereby preventing loss of business and potential embarrassment for the applicant."
- 37 For a summary of the confidentiality rules of all commissions, see *Judicial Merit Selection: Current Status*, Table 4, Rules of Confidentiality" (Chicago: American Judicature Society, 2003).
- 38 Philip M. Berkowitz "Challenges of Workplace Safety and Security" 681 PLI/Lit at 283.
- 39 For example, many applications such as that used for district court judges in Minnesota asks the applicant to list the applicant's residences for the last ten years.
- 40 For example, the Personal Data Questionnaire for Candidates in Rhode Island includes the following question: List the names of any employer from which you, your spouse/significant other or domestic partner, or dependent child received \$1,000 or more gross income [within the last year]." Some applicants may not be willing to divulge such information for significant others, domestic partners or children.
- 41 For example, on the first page of the application for an Associate Judge of the Court of Appeals in New York, it states "Judiciary Law, Article 3-A, § 66 provides that all communications to the Commission, including applications, among other things, shall be confidential and privileged and not available to any person, except as otherwise provided in Article 3-A, and except for the purposes of Article 210 of the Penal Law, which relates to perjury."
- 42 For example, a memorandum dated February 2003 to all prospective judicial applicants in New Mexico states "After the application deadline, a press release will be issued releasing the names of the candidates. The applicants' Questionnaires at this time will be considered public documents and available for anyone to see."
- 43 For example, the application instructions provided by the Alaska Judicial Council states "This application constitutes a public record within the meaning of AS 0.25.110 and AS 39.25.080. All information, except that specifically denoted as confidential herein (Section II), is available for public inspection.
- 44 For example, the Waiver and Statement of Consent provided with the Application for the Indiana Supreme Court states "... that this application and information will be publicly disclosed if the applicant is included in the first group of candidates after evaluation, as described in IC 33-2.1-4-7(d)."
- 45 For example, the Magistrate Application used in Idaho includes an Additional Personal Data form requesting the social

security number, birth date and all names used by the applicant. This form states “This information is gathered for the sole purpose of obtaining a criminal history background check, and for identification purposes in conducting complete background checks of the applicant. The information on this page will not be disclosed to the Magistrate Commission.” Additionally, in Massachusetts, the initial application review is blind (without reference to the applicant’s name), providing the commission with the applicant’s qualifications only.

- 46 Most commissions do require enough copies of the applicant questionnaire for all commissioners. In most instances, this is to reduce the workload of the commission support person, who may be the chair’s employee.
- 47 In Arizona, for example, application materials are confidential, however, interviews of the applicant are public.
- 48 For example, as noted in Footnote 43 above, a portion of the judicial application in Alaska is confidential. However the application instructions inform the applicant that upon nomination, the Governor shall receive a complete copy of the nominee’s application, both public and confidential portions. For a description of materials sent to the appointing authority, see *Judicial Merit Selection: Current Status*, “Table 3: Rules governing submission of list of nominees” (Chicago: American Judicature Society, 2003).
- 49 E.g., New York.
- 50 E.g., Iowa (see Section 3(6) of Iowa’s Internal Rules of Procedure of State Judicial Nominating Commissions) and Maryland (see Section C(6) of An Overview of the Nominating Commission Process).
- 51 E.g., Minnesota (see Section VII of the Application Procedures for District Court Judges), Utah (see Section III(c) of Utah’s Application for Judicial Office), Oklahoma (discourages contact – see #9 of the Oklahoma Judicial Nominating Commission Instructions/Information for Submission of Judgeship Application), and Arizona (until after final vote – see Rule 4(d) of the Uniform Rules for Nominating Commissions).
- 52 E.g., Minnesota (see Section III(B) of the Application Procedures for District Court Judges).
- 53 E.g., Idaho (see p. 13 of the *District Magistrates Commission Orientation Manual*).
- 54 E.g., Massachusetts (see Section 1.5.5 of Executive Order 445).
- 55 E.g., Rhode Island (see Section I of the Uniform Rules of Procedure for the Judicial Nominating Commission) and Missouri (see Rule 10.32).
- 56 E.g., Iowa (see Section 3(3) of Iowa’s Internal Rules of Procedure of State Judicial Nominating Commissions), New Mexico (see Memorandum to Prospective Applicants from Suellyn Scarnecchia dated February 2003), and Maryland (see Sections A(1-2) and B(3) of An Overview of the Nominating Commission Process).
- 57 E.g., Massachusetts (see Section 2.3.1 of Executive Order 445) and Arizona (see Rule 8(b) of the Uniform Rules for Nominating Commissions).
- 58 E.g., Alaska (see Section B(2) of the Alaska Judicial Council – Judicial Selection Procedures), Colorado (eg. Rule #2 of the Fourth Judicial District Nominating Commission’s Rules of Procedure) and Nevada (see the Commission on Judicial Selection Informational Request letter).
- 59 E.g., Iowa (see Section 3(3) of Iowa’s Internal Rules of Procedure of State Judicial Nominating Commissions), New Mexico (see Memorandum to Prospective Applicants from Suellyn Scarnecchia dated February 2003), Massachusetts (see Section 1.5.4 of Executive Order 445), Missouri (see Rule 10.28), Tennessee (see p.16 of the Tennessee Judicial Selection Commission Application for Nomination of Judicial Office and Section XIV of the Tennessee Judicial Selection Commission Bylaws and Rules of Procedure), and Utah (see Section III(f) of Utah’s Application for Judicial Office).
- 60 E.g., Iowa (see Section 3(3) of Iowa’s Internal Rules of Procedure of State Judicial Nominating Commissions), New Mexico (see Memorandum to Prospective Applicants from Suellyn Scarnecchia dated February 2003), Massachusetts (see Section 1.5.4 of Executive Order 445), New York (see p. 1 of the Questionnaire for Candidates for Associate Judge of the Court of Appeals), Utah (see Section III(f) of Utah’s Application for Judicial Office), Maryland (see Section C(7) of An Overview of the Nominating Commission Process), Arizona (see Rule 7(d) of the Uniform Rules for Nominating Commissions), and Nevada (see page v of the Commission on Judicial Selection Application Instructions and Rule #7(c) of the Nevada Commission on Judicial Selection Rules).
- 61 E.g., Massachusetts (see Section 1.5.4 of Executive Order 445), Utah (see Section III(f) of Utah’s Application for Judicial Office), and Maryland (see Section C(6) of An Overview of the Nominating Commission Process).
- 62 E.g., Iowa (see Section 4(6) of Iowa’s Internal Rules of Procedure of State Judicial Nominating Commissions), Massachusetts (see Sections 1.5.4 and 5.4 of Executive Order 445), Nevada (see Rule #4 of the Nevada Commission on Judicial Selection Rules), Utah (see Section III(f) of Utah’s Application for Judicial Office), Maryland (see Section C(7) of An Overview of the Nominating Commission Process), Rhode Island (see Memorandum to Prospective Candidates for Judicial Office from Girard R. Visconti revised September 2002), Idaho (see Rule 32(d) of the Idaho Court Administrative Rules), Tennessee (see Section XIII of the Tennessee Judicial Selection Commission Bylaws and Rules of Procedure), and Connecticut (see Section 51-44(j) of the Connecticut General Statutes).

- 63 E.g., Iowa (see Section 3(7) of Iowa's Internal Rules of Procedure of State Judicial Nominating Commissions), South Dakota (see Section 2(4) of the Rules of Procedure of the Judicial Qualifications Commission), Massachusetts (see Section 1.5.4 of Executive Order 445), Utah (see Section III(f) of Utah's Application for Judicial Office), Tennessee (see Section I of the Tennessee Judicial Selection Commission Bylaws and Rules of Procedure), Idaho (see Rule 32(d) of the Idaho Court Administrative Rules), and Maryland (see Section D(3) of An Overview of the Nominating Commission Process).
- 64 E.g., Iowa (see Section 3(8) of Iowa's Internal Rules of Procedure of State Judicial Nominating Commissions), and Tennessee (see p.16 of the Tennessee Judicial Selection Commission Application for Nomination of Judicial Office, and Sections XIII and XIV of the Tennessee Judicial Selection Commission Bylaws and Rules of Procedure).
- 65 For example, in Iowa, the Governor receives the applications of nominees and a commissioner may personally discuss the merits of a nominee, but he or she may not disclose to the Governor the discussions or voting that occurred in executive sessions of the Commission. In Colorado's first district, the judicial nominating commission may, upon the Governor's request and a majority vote of commission members, consult with the Governor about a nominee and may provide the Governor with the application and other information gathered by the commission.
- 66 E.g., South Dakota (see Section 3 of the Rules of Procedure of the Judicial Qualifications Commission), Utah (see Section III(h) of Utah's Application for Judicial Office), Tennessee (see Section XII of the Tennessee Judicial Selection Commission Bylaws and Rules of Procedure), New Mexico (see Section 3 of Rules Governing Judicial Nominating Commissions), and Maryland (see Section D(1) of An Overview of the Nominating Commission Process).
- 67 E.g., Utah (see Section III(f) of Utah's Application for Judicial Office).
- 68 E.g., Arizona (upon two-thirds vote of the commission members), New Mexico (upon a good cause showing) and Rhode Island.
- 69 See Arizona's Uniform Rules for Nominating Commissions at <http://www.supreme.state.az.us/hr/rulespage.htm>.
- 70 E.g., New Mexico (see Section 8 of Rules Governing Judicial Nominating Commissions).
- 71 E.g., Missouri (see Rule 10.25), South Dakota (see Section 2 of the Rules of Procedure of the Judicial Qualifications Commission), Colorado (eg. Section II of the First Judicial District Nominating Commission's Rules of Procedure), and Nevada (see Rule #2 of the Nevada Commission on Judicial Selection Rules).
- 72 E.g., Iowa (see Section 4 of Iowa's Internal Rules of Procedure of State Judicial Nominating Commissions) and Arizona (see #11 of the Summary of the Nomination Process).
- 73 E.g., Missouri (see Rule 10.32).
- 74 For example, Utah requires applicant to sign a waiver of the right to review the records of the commission.
- 75 For example, in Arizona, all documents pertaining to an applicant are kept by the commission for six months and the applicant may, during that period, request the return of his or her original application.
- 76 E.g., District Magistrate Commission in Idaho and in Arizona (unless the Commission decides to hold an applicant's file for an upcoming vacancy).
- 77 E.g., District Magistrate Commission in Idaho.
- 78 In Iowa, for example, files are destroyed after five years. In Minnesota, applications and letters of recommendation are destroyed after two years. In Arizona, letters of recommendation are destroyed after six months.
- 79 For example, commissions in Tennessee forward applications to the Administrative Director of the Courts.
- 80 E.g., Massachusetts.