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JUL 05 2017
CLERK SUPREME COURT

Arizona Supreme Court

RULE 28 PETITION)
TO) No. R- 17 - 0045
AMEND RULES OF)
THE)
SUPREME COURT)
_____)

Comes Now, **Jack Levine** and, pursuant to Rule 28 of the Rules of the Supreme Court, hereby petitions the Court to: (1) Amend **Rule 7d. (2)(B)** of The Rules of Procedure for Appellate & Trial Ct. Appointments; (2) Amend **Rule 8** of the Rules of Procedure for Appellate and Trial Court Appointments; (3) Amend **Rule 6** of the Rules of Procedure for Judicial Performance Review; (4) Amend **Sec. 3** of the Code of Judicial Administration.

GROUND AND REASONS FOR REQUESTED RULE CHANGES

Most would agree that our Merit Selection System has brought an extraordinarily high caliber of hard working Judges and Justices to our trial and appellate court benches. However, despite this, there are, nevertheless, some significant flaws in the system that must be addressed if we are to have a judicial system that continues to engender the respect of the bar and the public.

The Judicial Selection Process Before Merit Selection

Before 1974, when there was a vacancy on either the Superior Court, or the Supreme Court, the Governor appointed all new Judges and Justices who held office until the next scheduled election. Merit Selection System was introduced in 1974 largely because the election of judges had two major failings. One such failing was that any lawyer that was 30 years old and admitted to practice for five years, met the minimum qualifications to run for judicial office. This sometimes led to the election of judges who were only marginally competent. Furthermore, many lawyers who were aware of a judicial candidate's lack of qualifications were often reluctant to speak out for fear that such candidate, if elected, might later preside over one of their cases.

Perhaps the most significant failing was that judicial candidates were heavily reliant on lawyers and law firms for campaign contributions and were often solicited by the candidates. If a candidate who received campaign contributions was elected, they would sometimes reciprocate with favorable rulings when the lawyer or law firm appeared before them in court cases. With the adoption of Merit Selection, the need for judicial candidates to raise money for their retention election was largely eliminated.

The Merit Selection System

In 1974, by a vote of the people, Article 6 of the Arizona Constitution was amended to provide for the appointment of Superior Court Judges in counties having more than 250,000 residents and for all State Appellate Court Judges. This appointment process came to be known as the "Merit Selection System." Under Merit Selection, Appellate and Trial Court Appointment Commissions were established consisting of the Chief Justice, five attorney members, nominated by the State Bar Board of Governors and 10 non-attorney public members. The Commissions were required to investigate the qualifications of applicants, hold public hearings, take public testimony and submit to the Governor the names of not less than three persons for any judicial appointment.

Returning Favors:

At the time that Merit Selection was adopted, almost everyone in the legal community applauded this fundamental change in the manner of selecting Judges and Justices. However, the Arizona Supreme Court, under rule-making authority granted to it by the Constitutional Amendment, provided for confidentiality for *“Information provided in writing or orally to the Commission by third parties regarding an applicant, and the third party’s identity, unless the third party specifically states in writing that the information may be made public.”* (Rule 7d. (2) B., Uniform Rules of Procedure for Commissions on Appellate and Trial Court. Appointments).

Furthermore, the Supreme Court in Rule 7b. of the Uniform Rules required that any such information provided by third parties be destroyed after six months.

At the time of their enactment, these Rules were obviously intended to encourage third parties to comment anonymously on the qualifications of applicants for judicial positions without fear of retaliation. However, the Rule makes no distinction between favorable and unfavorable comments. As a result, lawyers who have “influence” with members on the Appointments Commission could support a judicial candidate with favorable oral or written communications and later appear in Court before such candidate, if appointed. Under the present Rules, no one can be sure that in all cases judicial decisions in favor of such “influential lawyers” were based on the merits of the case before the Court rather than on a conscious or sub-conscious desire on the part of a grateful Judge to “return a favor”.

Selecting the Best Applicants Thru Merit Selection

One of the principal arguments favoring Merit Selection instead of electing Judges is that it is designed to improve the caliber of judicial decision-making. The Appointments Commissions in filling vacancies normally do an outstanding job in selecting applicants with good ethical and moral character, however, by comparison, they are not always well equipped to evaluate an applicant’s knowledge of the law, compared with that of other applicants. We can remedy this most effectively through a competitive written examination designed to test an applicant’s knowledge of important Arizona statutes and case law. Law school

graduates are not permitted to practice law without passing Arizona's bar examination, why should newly appointed Judges be permitted to make important decisions effecting people's lives without some assurance that they are the best possible candidates available?

The Rotation of Trial Court Judges

Under the present Rules of the Trial Court Appointments Commission, the judicial selection process under Merit Selection are designed to weed out incompetent judges, who sometimes attained the bench when judges were elected. However, this important goal has been severely undermined by policies adopted by the Presiding Superior Court Judges in Maricopa and Pima County, who for many years have operated under a policy of "judicial rotation" for their Superior Court Judges.

In a classic example of "unintended consequences," highly trained and specialized lawyers, when appointed to the bench, are frequently not appointed to a Division of the Court which coincides with their previous area of specialization. Even in those instances where newly appointed judges are assigned to a Division dealing with cases in the Judge's previous specialty as a lawyer, after several years, Judges are rotated and assigned to judicial duties unrelated to their previous area of expertise and are assigned cases they have little or no experience with.

The "Peter Principle" Lives Here

Recently rotated Judges in Maricopa and Pima County do undergo several weeks of training for their new assignments. However, this is thought by many to be insufficient to equip Judges to make "life-changing", or in some cases, "life or death" decisions, effecting litigants in those areas of the law in which they are largely unfamiliar. The result is a perfect example of the "*Peter Principle*," where, the Commission on Trial Court Appointments rewards the achievements of highly

skilled lawyer-specialists by nominating them to a position where, at least initially, they are almost certain to meet with failure, unless by chance, the judicial assignment happens to coincide with their previous practice specialty.

Specialization among the judiciary is thought by many to be long overdue. Most lawyers feel that it is virtually impossible to be entirely competent in mastering more than one or two areas of law. Yet, this reality has been largely ignored by those who establish judicial policy. Instead of selecting and assigning Judges as we presently do, Judges should be initially recommended by the Merit Selection Commissions to fill a vacancy in either the Civil, Criminal, Family Law, Juvenile, or Probate Divisions of the Court, based on the applicants' experience as a lawyer in their legal specialty or, area of concentration. Once appointed, Judges should be required to serve in that assignment on a permanent basis unless they wish to vie with new applicants at the Commission on Trial Court Appointments, based on competitive examinations, for an opening in one of the specialty divisions of the Court.

Judicial Retention Elections

As part of the Constitutional Amendment adopting Merit Selection, provisions for judicial retention or rejection by the voters was included in Art. 6, Sec. 38. To carry out the mandate of the Constitution, the Supreme Court established the Commission on Judicial Performance Review whose function is to hold hearings and receive comments on Judges or Justices standing for retention. Based on public comments, together with survey forms distributed to persons who have been in direct contact with each judge or justice surveyed, the Commission, at a public hearing, votes on whether a Judge or Justice "meets" or "does not meet" judicial performance standards. The report of the Commission is then disseminated in voter informational pamphlets in the weeks immediately before the election.

Judges or Justices standing for retention are retained if they receive a simple majority of the votes cast. However, there are many voters who suspect that the Commission may be "rubber-stamping" the retention of Judges and that the "bar"

is set too low. Those holding such views believe that any judge or justice who does not receive a “substantial” majority of votes should be rejected. To support their position, they point to past elections in which more than one Superior Court Judge, despite being involved in unsavory conduct were narrowly retained in the judicial retention election which followed such conduct. As a result, some voters, as a protest, frequently cast their ballots against retention for all Judges on the ballot.

Conclusion

(1) We should remove the confidentiality provisions in the present Rules for favorable recommendations concerning judicial applicants to the Commission on Trial Court Appointments and preserve such recommendations for future review. (2) We should require competitive examinations for all judicial applicants. (3) We should enact a rule to end the rotation of trial court Judges by requiring the permanent assignment of Judges to their respective areas of expertise. (4) We should “raise the bar” for recommending the retention of Judges and Justices, by requiring a two-thirds favorable vote from the members of the Commission on Judicial Performance Review, instead of a mere majority as the present rule requires.

Adopting these measures would go a long way towards greatly improving our Merit Selection System and instilling an increased measure of confidence in our judicial system. Such efforts ought to be enthusiastically supported by all for the significant benefits it would bring.

Jack Levine, has served as an Advisor to the Arizona Supreme Court’s Committee on the Uniform Rules of Procedure for Commissions on Appellate and Trial Court Appointments. He is a former member of the State Bar Board of Governors and is a Past President of the Arizona Trial Lawyers Association.

PROPOSED AMENDMENTS

Rule 7d (2) (B) - Rules of Procedure for Appellate and Trial Ct. Appointments

Rule 7d. (2) (B) should be amended by deleting its present language and, in its place the following should be substituted:

“Information provided in writing or orally to the Commission by third parties regarding an applicant that reflects unfavorably upon the applicant and, the third party’s identity, unless the third party specifically states in writing that the information may be made public;”

Rule 8 - Rules of Procedure for Appellate and Trial Ct. Appointments

Rule 8 should be amended to replace the paragraph heading and language of the present paragraph “c. Screening Meeting” with the following:

“c. Testing”

“Upon completion of their investigation of applicants, the Commission shall administer a suitable written examination to the applicants, designed to test such applicant’s knowledge of Arizona law. The examination selected May consist of the most recent Arizona Uniform Bar Examination, an equivalent examination.”

Rule 8 should be further amended by re-designating the present paragraph “c. **Testing**” as paragraph “d. **Screening Meeting**”

Rule 6(f)(4) - Rules of Procedure for Judicial Performance Review

*Petitioner further petitions the Court to Amend **Rule 6 (F) (4) Report Of The Commission Of The Rules Of Procedure For Judicial Performance Review** to require a finding by a **two thirds majority** of the Commission as to whether the judge or justice “meets” or “does not meet” judicial performance standards.*

Section 3-406 -

Petitioner further petitions the Court to amend The Code Of Judicial Administration by adding a new **Section 3 – 406** as follows:

Section 3 – 406: Permanent Assignment of Judges

“Newly appointed Judges in Maricopa and Pima Counties shall be selected and assigned to a Division of the court that most closely matches their previous area of practice and expertise as lawyers and, shall remain in such assignment during their entire term of office, unless they elect to compete with new judicial applicants under consideration by the Trial Court Appointments Commission for a different assignment.”

Respectfully submitted this 5th day of July, 2017.

By: Jack Levine

Jack Levine