



A GUIDE TO THE MASSACHUSETTS JUDICIAL SELECTION PROCESS

THE MAKING OF A JUDGE

3RD EDITION

BY

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MASSACHUSETTS BAR ASSOCIATION

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“Perfection, if the judge seeks it, requires the knowledge of the law and faithful application of the law; diligence and efficiency; unfailing courtesy without sacrifice of firmness and decisiveness; evenhandedness, while retaining a jealous regard for the individuality of every person; restraint, eternal restraint, particularly as to both the quality and quantity of speech; courage and strength in the face of criticism. Above all, integrity in all of its nuances.”

SUPREME JUDICIAL COURT CHIEF JUSTICE EDWARD F. HENNESSEY

INTRODUCTION

There are currently 411 statutorily created judicial positions in Massachusetts. The Supreme Judicial Court¹ consists of seven justices and the Massachusetts Appeals Court has 25 justices with some limited additional provisional appointments of retired justices serving as recall justices. The Massachusetts Trial Court system has an additional 379 justices throughout its seven departments² with the majority of those positions serving in the District Court Department. Similar to the Appeals Court, the Trial Court also has a limited number of recall justices serving on a provisional basis. Recall justices are selected by the chief justice of the Supreme Judicial Court for the Supreme Judicial Court, the chief justice of the Appeals Court for the Appeals Court and the chief justice for Administration and Management of the Trial Courts. Recall justices are appointed for 90-day periods for a single assignment.³

In Massachusetts, judges enjoy “lifetime” appointments as members of the judiciary. In 1972, voters passed a constitutional amendment, Article XCVIII, requiring judges to retire at age 70. Although there is not a constitutional requirement that a judge be an attorney, there has not been a non-attorney appointment in modern history. Further, as you will see below, various gubernatorial administrations have promulgated executive orders indicating that only attorneys would be appointed.

In addition to judges, Massachusetts also has 85 statutorily created clerk-magistrate positions. Clerk-magistrates serve throughout the District Court, Housing Court, Juvenile Court and Boston Municipal Court. Included in this number is the position of recorder of the Land Court. All of these positions are gubernatorial appointments, and they enjoy true lifetime appointments, not having a set mandatory retirement age. Clerk-magistrates are judicial officers

primarily responsible for the management and administration of the court's business. Clerk-magistrates also serve as judicial hearing officers on procedural criminal matters such as show cause hearings and in civil small claims sessions.⁴ There are many non-attorneys who serve as clerk-magistrates. Although recently, given the increased judicial responsibilities of clerk-magistrates, there has been a gubernatorial trend of appointing primarily attorneys, or non-attorneys with significant courthouse experience, to these positions.

THE EXECUTIVE BRANCH

The Massachusetts Constitution, Part the Second, Chapter II, Section I, Article IX, expressly reserves power to the governor to nominate and appoint all judicial officers, including clerk-magistrates, "by and with the advice and consent" of the Executive Council (more commonly referred to as the Governor's Council). The Governor's Council is an elected body composed of eight members, elected every two years, representing eight regions, each drawn up of five contiguous state senate districts.

Although there is neither a constitutional nor a statutory mandate that a governor do so, every governor in recent history has appointed a body to assist them in selecting suitable individuals for appointment to the bench. In 1975, Governor Michael S. Dukakis was the first to formalize a merit-based selection process with the ideal of removing partisan and political influence over the process. Hence, Dukakis promulgated an executive order establishing a Judicial Nominating Council (JNC).⁵ Each governor since 1975 has placed their own mark on the composition and function of similar formal screening committees through a series of subsequent executive orders. Presently, Exec. Order No. 558 governs the process that an individual judicial aspirant must follow to become a judge.⁶ It should be noted, however, that a governor is not bound by an executive order and may ignore it at will.

THE JUDICIAL NOMINATING COMMISSION APPLICATION AND SELECTION PROCESS

Arguably, Exec. Order No. 470 (06-1) was the most comprehensive order issued to date, having been heralded by former Governor Mitt Romney as the first-in-the-nation "blind" judicial merit selection process. Under the ambitious goal of removing politics from the judicial selection process, Exec. Order No. 470 (06-1) and its successors, Exec. Order No. 477 (07-1), Exec. Order No. 500 (08-1), and Exec. Order No. 558 (15-5) established a Judicial Nominating Commission, coupled with a code of conduct for both commission members and nominees to judicial office.⁷

The 21-member commission is designed to “identify and invite application by persons qualified for judicial office and to advise the governor” with respect to appointments of judges and clerk-magistrates to every trial and appellate court except the Supreme Judicial Court. The Recorder of the Land Court is also reviewed by the JNC. There are a host of prohibitions found in the executive order that are designed to insulate commission members from political influence. Specifically, commissioners are excluded from being registered lobbyists or legislators, or from having any immediate family members serving as legislators.⁸ Further, commissioners are prohibited from participating in political fundraising and agree not to accept a position on the bench for at least a one-year period following completion of their service.

The executive order sets forth a series of qualifications for those seeking appointment to the bench. All applicants must be members in good standing of the Massachusetts bar, having graduated from a law school accredited by the commonwealth or American Bar Association. Individuals seeking appointment to the bench must have legal experience and training of a minimum of 10 years for the Trial Court and 13 years for the Appeals Court. Clerk-magistrate applicants must have graduated from an accredited undergraduate college or have a minimum of 15 years experience working in the court system. Further, clerk-magistrate applicants who are attorneys must possess a minimum of three years experience and non-attorney applicants must have a minimum of five years of “relevant experience.”

In addition to commissioners, applicants are also bound by a code of conduct. Aspirants are expressly prohibited from conducting “campaigns” for judicial office. In particular, communications by, or on behalf of, particular candidates to commissioners are strictly prohibited. Judicial aspirants are prohibited from making political contributions to executive branch office holders at any time while their applications are pending with the commission. Further, candidates who have been nominated by the governor are prohibited from participating in any county, state or federal political fundraising. Nominees are forbidden to appear, while they await final appointment, as counsel in the court or its division to which they have been nominated.

JNC commissioners are initially charged with a blind review of an individual’s application. All applications are bifurcated by commission staff and the anonymous non-biographical part of the application (Part II) is forwarded by staff to commissioners to commence their blind review process. The commission is charged with deliberation to discuss the relative strengths and weaknesses of applicants and may consider the particular needs of courts ... in determining the relative strengths and weaknesses of applicants. Upon review of an applicant’s background, a commissioner may move, with the support of at least one-third of commissioners voting (a minimum quorum being present), to proceed with an interview of the candidate. It is subsequent to this stage that the identity of the applicant is revealed and the interview process occurs. After

completion of due diligence (ordered by a vote of 50 percent of commissioners voting) and interviews, the commission votes on whether to recommend the applicant to the governor for nomination. An affirmative vote of at least two-thirds of those commissioners voting (with a minimum quorum being present) is required for individuals to advance to the governor for his consideration.⁹

Individuals recommended for nomination are then transmitted to the governor's chief legal counsel for his discretionary review, interview or further due diligence including possible background investigations by the State Police Special Investigations Unit and state and federal tax collection agencies.

Any applicant recommended by the commission for nomination may be considered for nomination by the governor for any judicial office for a period of 18 months after the date of the recommendation.¹⁰

JOINT BAR COMMITTEE REVIEW

Throughout the past century, the organized bar has played both informal and formal roles in assisting the Executive Branch in the merit selection of judicial officers. The bar recognizes that a competent, principled judiciary is the cornerstone of the justice system. The function of the Joint Bar Committee (JBC) on Judicial Appointments is to independently review, evaluate and report on the qualifications of judicial and clerk-magistrate aspirants to all courts of the commonwealth. Although rarely exercised, the committee has on occasion evaluated the appointment of individuals to the federal courts having jurisdiction over Massachusetts. The 25-member committee is chaired by the Massachusetts and Boston Bar Associations and has a diverse body of practitioners from every county and a majority of specialty bar associations in the state. Members of the committee are non-partisan and generally serve for three years.

The JBC was formally established in 1961¹¹ and the committee has played a role with every administration in evaluating the qualifications of judicial applicants. The committee works with the governor's chief legal counsel, on a confidential basis, in serving as the final independent check and balance on those individuals selected by the governor for nomination. In other words, the committee operates after an individual is approved by the JNC, selected by the governor, and prior to their submission to the Governor's Council.

The JBC conducts due diligence and reviews the background of every nominee prior to their nomination. The committee receives confidential information provided by the governor's legal office, including an individual's JNC application and any other relevant materials as submitted by the candidates. The committee may, on its own, obtain additional information as desired, including the interview of judges, attorneys, court personnel and other individuals who may have pertinent information regarding the candidate. If desired, the committee may interview the candidate.

The JBC maintains a consistent evaluation process, which assesses the following: a candidate's integrity; character and reputation; knowledge of the law; professional experience; temperament; diligence; financial responsibility; and public service.

Upon completion of its due diligence, the JBC votes the candidate as either "well-qualified," "qualified," "not qualified" or "insufficient information to evaluate." A quorum of at least 13 members is necessary for a vote to be considered valid. Candidates who are found to be "not qualified" are afforded an opportunity to meet with the committee. The committee may then, at its discretion, vote to reconsider its prior "not qualified" vote. The committee communicates all of its votes confidentially to the governor's chief legal counsel. If the governor chooses to ignore the findings of the committee when a candidate is deemed "not qualified" and proceeds to nominate such individual, the committee will publicly disclose the "not qualified" finding. However, in any event, the findings of the committee are never made public prior to an individual's nomination.

THE GOVERNOR'S COUNCIL

The council is referred to as the Executive Council, but is more commonly known as the Governor's Council. The council was created by the Constitution of Massachusetts as adopted in 1780. Part the Second, Chapter II, Section I, Article IX of the Massachusetts Constitution specifically calls for the council to give its advice and consent to the executive upon his nomination of a candidate to judicial office. The council consists of eight members, elected every two years from electoral districts, each of which are made up of five contiguous state senate districts.

The council has its own questionnaire that nominees must complete. These questionnaires, although not as exhaustive as a JNC application, elicit important information that is available to the public upon request after the conclusion of the council's vote. Upon nomination by the governor, a nominee's public hearing before the council is generally scheduled within a few weeks. At this time in Massachusetts history, council assemblies are presided over by the governor or lieutenant governor. However, there is currently a non-binding procedure that allows a councillor (who usually represents the district in which the nominee resides) to preside over the nominee's hearing. Hearings occur in the council chambers, located within the governor's office, and are attended by anyone who wishes to be heard regarding a candidate's nomination. Adverse witnesses may appear and will be heard by the council. Although these assemblies are not subject to the open meeting law, they have been, as a matter of practice, open to the public. The constitution requires that each "... nomination shall be made by the governor ... at least seven days prior to such appointment."¹²

A majority vote of the council is necessary for a nominee to be confirmed. According to the constitution, five councillors shall constitute a quorum.¹³ Therefore, a nominee can be confirmed upon the vote of three councillors. The Governor, presiding as chair of the council, will frequently call upon the Lieutenant Governor to break a tie vote. Traditionally, at the Governor's Council meeting when a confirmation vote is taken, councillors will voice their intention to vote for or against a nominee. However, according to the constitution, "The resolutions and advice of the council shall be *recorded* in a register, and signed by the members present"¹⁴

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1. The Supreme Judicial Court is one of the few (the constitution also recognizes the Probate Court and Justices of the Peace) constitutionally created courts in the commonwealth (*see Massachusetts Constitution*, Part the First, Article XXIX). However, the Supreme Judicial Court's members are set by statute [*see* M.G.L. ch. 211, § 1 (2012 Ed.)]
 2. The seven departments of the Trial Court are: Superior, District, Boston Municipal, Probate and Family, Juvenile, Housing and Land.
 3. *See* M.G.L. ch. 211, § 24, ch. 211A, § 16 and ch. 211B, § 14 (2012 Ed.).
 4. Historically, there have been a number of statutory amendments that have increased the breadth of clerk-magistrate powers, e.g., chapter 379 of the Acts of 1992, the Court Reform Act, greatly expanded the powers of clerk-magistrates [*see also* M.G.L. ch. 221, § 62 (c) (2004 Ed.)]. Additionally, recent amendments have been made to the *Massachusetts Rules of Criminal Procedure*, which have broadened the role of clerk-magistrates and assistant clerk-magistrates in determining probable cause to issue complaints in criminal cases.
 5. *See* Exec. Order No. 114 issued Jan. 3, 1975.
 6. *See* Exec. Order No. 558 (15-5) issued Feb. 5, 2015.
 7. *See* former Governor Mitt Romney's first executive order establishing the blind review process, Exec. Order No. 445 (03-3). Governor Charles D. Baker's recent Exec. Order No. 558 (15-5) closely mirrors the Patrick and Romney gubernatorial administrations' blind review process.
 8. This prohibition does not preclude a lobbyist or legislator from being appointed as a judge or clerk-magistrate.
 9. *See* Exec. Order No. 558, § 1.1 wherein a quorum shall consist of two-thirds of then-appointed commissioners.
 10. This provision has been waived on occasion by a governor.
 11. The Joint Bar Committee rules were most recently amended on May 14, 2002.
 12. *Massachusetts Constitution*, Part the Second, Chapter II, Section I, Article IX.
 13. *Massachusetts Constitution*, Part the Second, Chapter II, Section III, Article I.
 14. *Massachusetts Constitution*, Part the Second, Chapter II, Section III, Article V.