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Is Washington Ready for Merit Selection of Judges

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Is Washington Ready for Merit Selection of Judges?

by William S. Bailey and
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In 1980, Seattle established a judicial merit selection process for the Seattle Municipal Court, based on an approach used in many other jurisdictions and by the federal government under President Carter. The Seattle plan represents the first time a merit selection commission of lawyers and lay people has been used for non-federal appointments in Washington. The two individuals subsequently appointed to the Seattle Municipal Court have gone through one of this state's most rigorous judicial selection processes.

In this article, we will review how judges are presently selected in this state, the various methods of choosing judges in other jurisdictions and then discuss Seattle's experience with "merit selection." Then we will suggest the extent to which merit selection might be applied to other judgeships in Washington.

I. Methods of Judicial Selection

Election

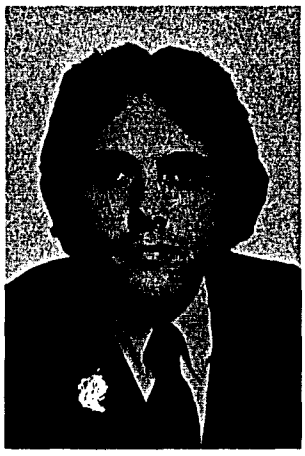
Election of judges evolved in the middle of the nineteenth century during the heated public sentiment against the spoils system. It is now the most commonly used method of selecting judges in this country. At least 30 states choose most or all of their judges by either partisan or non-partisan elections.

The Washington State Constitution provides for the election of judges at all court levels (Article IV, §§ 3, 5, 10), and the statutes further require this to be done on a non-partisan basis (RCW 29.21.070).

Over the years, certain problems have been identified in connection with judicial elections. Name recognition and personality can often replace legal ability as the necessary qualifications for election.

Few incumbents are ever opposed, but when they are, the contest usually fails to generate any real issues. All candidates uniformly stress the virtues of respect for the law and improved judicial efficiency.

Further, an aversion to the political process is thought to discourage many well-qualified individuals. The sacrifice of a successful law practice for the uncertainties of politics is not a decision lightly made.



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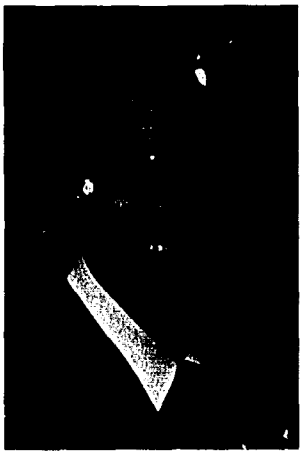
Hugh D. Spitzer is Legal Counsel to Mayor Charles Royer and teaches at the University of Washington's Graduate School of Public Affairs.



Campaigning for re-election significantly interrupts the performance of judicial business, requiring that the judges temporarily cut back on their duties.

Appointment

Only a few states rely exclusively on straight appointments made by the executive without any voter approval. This method is generally considered to be a holdover from the discredited spoils system. However, judicial appointment plays a big role, even in the majority of states which require elections of some kind. Most judges do not originally attain office through the election process. In Washington, and most other states, the executive branch initially appoints a judge to fill a mid-term vacancy. Judicial vacancies in the Supreme Court, the Court of Appeals, and the Superior Court are all filled by gubernatorial appointment (Article IV, §§3 and 5, and RCW 2.060.080). Vacancies of the district court level are filled by the appropriate county commissioners (RCW 3.34.100). In Municipal Court, the mayor appoints a judge to serve until the next election (RCW 35.20.150).

In fact, appointment is the predominant method of initial selection in Washington State. In 1973, 75% of the Washington Superior Court judges, 92% of the Court of Appeals judges, and 66% of the Supreme Court judges first attained office by appointment. *See*, Utter, Robert, "Selection and Retention—a Judge's Perspective", 48 *Wash. L.Rev.* 839 (1973).

Appointments to fill vacancies in Washington do not require confirmation by the Legislature, so a governor has few restrictions in exercising this function. In filling a vacancy, the judge does not generally serve a regular full term, but has the considerable advantage of incumbency when the next election is held.

This process of initial appointment has been subject to a number of criticisms. *See*, "Selection and Retention—A Judge's Perspective", *supra*. There is no direct public participation. Political considerations may significantly affect appointments made under this system. Further, by giving the executive unregulated appointive power, there is a potential for compromising the separation of powers and independence of the judiciary.

Qualifications for Judicial Office

Commentators on qualifications for judicial office have often concentrated on comprehensive subjective standards, recognizing that "... (a) judge's decisions are in large part the product of ... what manner of man and lawyer he is when he ascends the bench." Rosenberg, Maurice, "The Qualities of Justices—Are They Strainable", 44 *Texas Law Review* 1063 (June 1966). These authorities have placed considerable emphasis on legal ability, decisiveness, independence, judicial temperament, and diligence.

In contrast, drafters of constitutional provisions and statutes on judicial qualifications adhere to a narrow, "bare bones" approach. They avoid subjective or comprehensive criteria. State constitutions customarily rely on such objective criteria as citizenship, residence, age, and legal experience.

In Washington we have no systematic set of criteria on the qualities that best equip lawyers to be good judges. Qualifications for judicial office established by our Constitution and statutes require little more than admission to the bar, presently the only requirement for the Supreme Court or Superior Court. The statute for the Court of Appeals adds five years of legal practice and residency for one year as further criteria.

The only variation from this "bare bones" approach to judicial qualifications in Washington was in the statute providing for original appointments of judges to the Court of Appeals. This statute temporarily expanded the objective criteria for this level of judicial office and required the Governor to consider the following factors in making appointments: personal character, intellect, ability, diversity of affiliation with social and economic groups (RCW 2.06.070). However, this statute applied only to the original appointments, and now the Governor is not required to consider any of these criteria when filling a vacancy in that court.

Criticism has been leveled at judicial qualification statutes such as Washington's which do not go beyond

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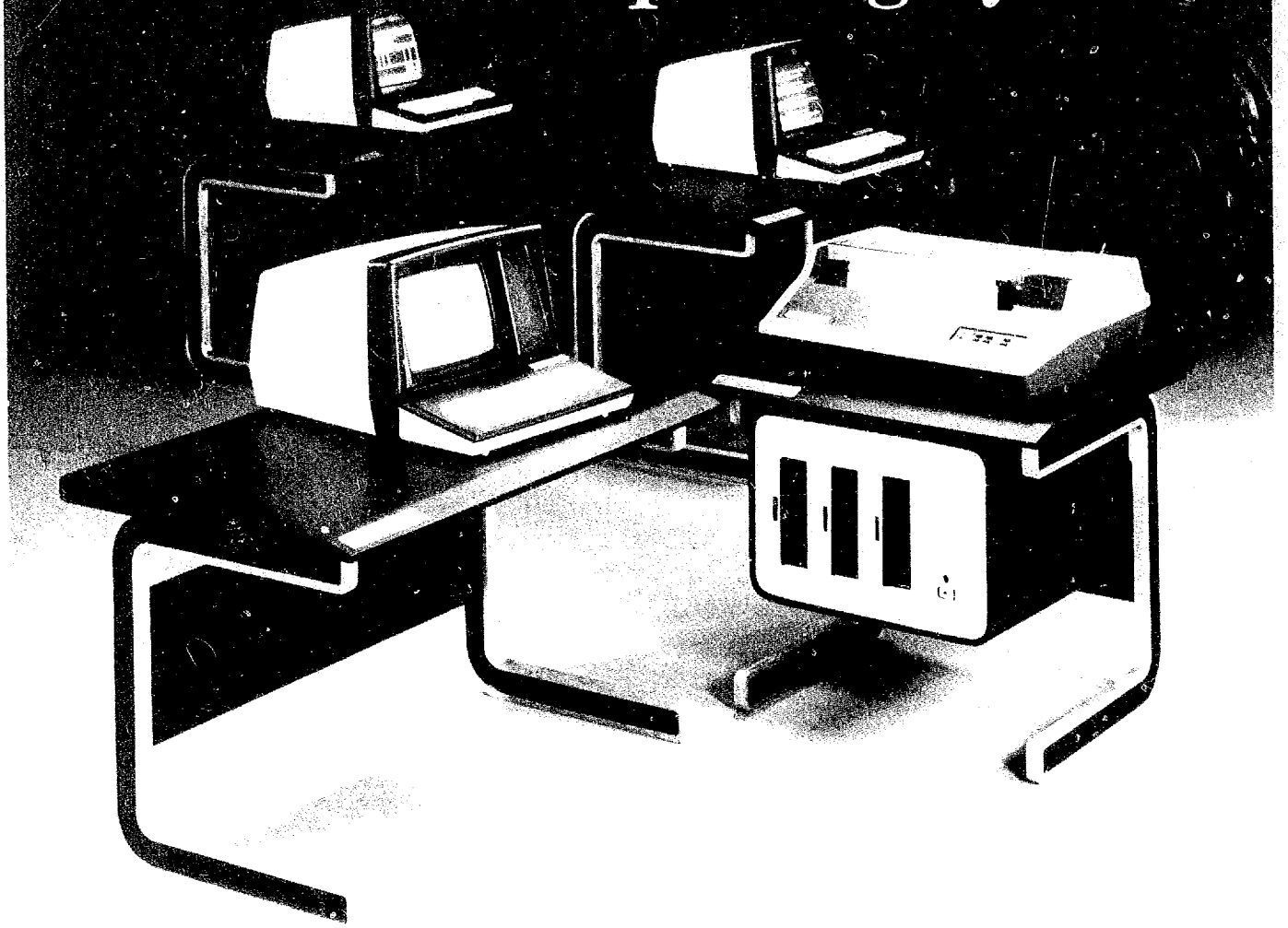

mere admission to the bar, for:

> The qualities we seek ought not merely point to all the lawyers who are generally eligible for judicial office, but ought to help identify those who are best qualified.

Rosenberg, "The Qualities of Justices", supra, at 1071.

Bar Association Involvement

Many county bar associations in Washington have a standing judicial selection committee to determine the quality of possible candidates. In most counties, only lawyers serve on these committees. The judicial selection committees prepare and transmit a recommended list of lawyers for judicial appointment in the superior courts and also those of lesser jurisdiction. When a judicial vacancy occurs, the committee will confer with the appointment authority to offer suggestions and assistance in the selection of a lawyer.

The candidates recommended by this process are normally self-generating, and recruitment is not usually employed by the bar association. A background questionnaire is completed by the candidates, who are then interviewed by the committee. Those individuals who are determined to be qualified are submitted to the Governor for consideration when a judicial vacancy occurs.

In King County, the criteria for those lawyers found "Qualified" are legal ability, trial experience, good moral character, and a judicious temperament. Such candidates must "command the general respect of the bar."

While bar association endorsements can fill the gap created by terse constitutional and statutory provisions, it has several limitations. It is entirely voluntary in operation, and the Governor or other appointing authority may ignore the recommended candidates. Political considerations are not unknown in the appointment process, thereby raising the possibility that a well-connected insider may bypass the bar association process entirely.

This situation has also been criticized for limiting citizen input and placing too great a power in the bar. Such committees do not usually have the benefits of non-lawyers' practical, non-technical views in assessing judicial candidates. Although the general public's knowledge of the courts is limited, "their interest in a better justice system is high, and impressive support exists for reform and improvement." *See*, Utter, Robert F., "The State of the Judiciary—1979", 30 *Wash. State Bar News*, 12:13 (Dec. 1979). Under this method, direct citizen involvement comes only at election, long after a judicial appointment is an accomplished fact.

The lack of active recruitment by judicial selection committees or by the appointing authority may result in a judiciary that does not adequately reflect the composition of the relevant jurisdiction, in terms of race, sex, and background. Because the bar associations' selection committees have traditionally been composed of the white, male lawyers who do compose the bulk of the bar, their recommendations have been fairly or unfairly criticized as being biased against women, minorities, and younger lawyers.

Due to time constraints, the bar association committees are often not able to interview candidates as long as they would like. This fact, together with a lack of consistent criteria and a consistent interview process, does not always assure candidates of being properly and equally assessed. Sometimes a person's success with a bar judicial selection committee depends on whether the individual committee members have direct personal knowledge about the candidate. While this is not necessarily bad, it may constitute a built-in headwind against a well-qualified, but relatively "unknown" candidate.

Merit Selection

Merit selection of judges was first recommended as an alternative to the problems inherent in the traditional methods of judicial selection. The American Judicature Society first set out the present day process of merit selection back in 1914. This approach combines both election and appointment, focusing directly on the goal of selecting quality judges.

Missouri was the first state to adopt merit selection, doing so in 1940. For this reason, merit selection is often called the Missouri Plan. Thirty-one (31) states and the

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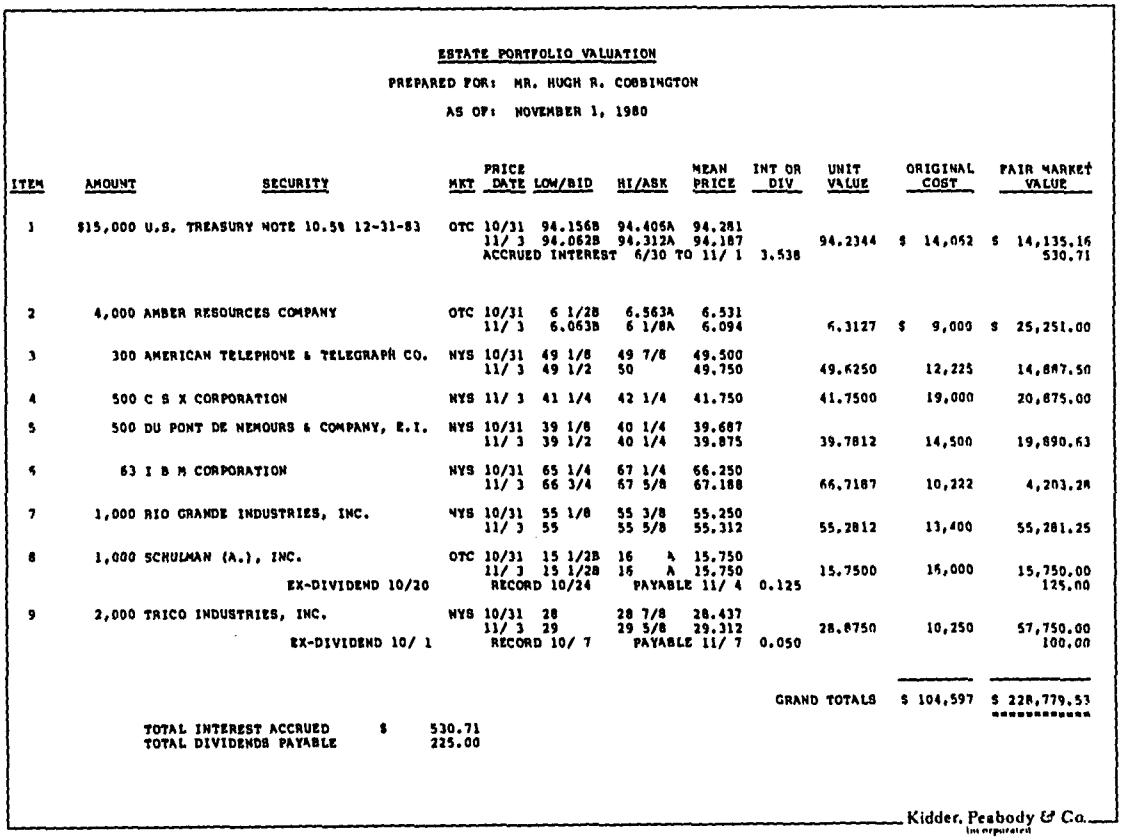

ESTATE PORTFOLIO VALUATION

PREPARED FOR: MR. HUGH R. COBBINGTON

AS OF: NOVEMBER 1, 1980

ITEM	AMOUNT	SECURITY	MKT	PRICE DATE	LOW/BID	HI/ASK	MEAN PRICE	INT OR DIV	UNIT VALUE	ORIGINAL COST	FAIR MARKET VALUE
1	$15,000	U.S. TREASURY NOTE 10.5% 12-31-83	OTC	10/31	94.156B	94.406A	94.281				
				11/ 3	94.062B	94.312A	94.187		94.2344	$ 14,052	$ 14,135.16
				ACCRUED INTEREST 6/30 TO 11/ 1				3.538			530.71
2	4,000	AMBER RESOURCES COMPANY	OTC	10/31	6 1/2B	6.563A	6.531				
				11/ 3	6.063B	6 1/8A	6.094		6.3127	$ 9,000	$ 25,251.00
3	300	AMERICAN TELEPHONE & TELEGRAPH CO.	NYS	10/31	49 1/8	49 7/8	49.500				
				11/ 3	49 1/2	50	49.750		49.6250	12,225	14,887.50
4	500	C S X CORPORATION	NYS	11/ 3	41 1/4	42 1/4	41.750		41.7500	19,000	20,875.00
5	500	DU PONT DE NEMOURS & COMPANY, E.I.	NYS	10/31	39 1/8	40 1/4	39.687				
				11/ 3	39 1/2	40 1/4	39.875		39.7812	14,500	19,890.63
6	63	I B M CORPORATION	NYS	10/31	65 1/4	67 1/4	66.250				
				11/ 3	66 3/4	67 5/8	67.188		66.7187	10,222	4,203.28
7	1,000	RIO GRANDE INDUSTRIES, INC.	NYS	10/31	55 1/8	55 3/8	55.250				
				11/ 3	55	55 5/8	55.312		55.2812	13,400	55,281.25
8	1,000	SCHULMAN (A.), INC.	OTC	10/31	15 1/2B	16 A	15.750				
				11/ 3	15 1/2B	16 A	15.750		15.7500	16,000	15,750.00
		EX-DIVIDEND 10/20		RECORD 10/24		PAYABLE 11/ 4		0.125			125.00
9	2,000	TRICO INDUSTRIES, INC.	NYS	10/31	28	28 7/8	28.437				
				11/ 3	29	29 5/8	29.312		28.8750	10,250	57,750.00
		EX-DIVIDEND 10/ 1		RECORD 10/ 7		PAYABLE 11/ 7		0.050			100.00
									GRAND TOTALS	$ 104,597	$ 228,779.53

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District of Columbia now use major elements of the plan for at least one of their court levels. Many of these jurisdictions have significantly extended their merit selection plans during the 1970s. Three distinct methods of adoption have emerged: statute, constitutional amendment or executive order issued by the governor.

President Carter expanded this concept to the federal courts in 1977, creating the U. S. Circuit Judge Nominating Commission to assist him in selecting federal circuit judges.

Merit selection is supported and recommended by the American Bar Association, the American Judicature Society, and the National Advisory Commission on Criminal Justice Standards and Goals.

As originally conceived, merit selection has three principal features:

1. The nomination of qualified judicial candidates by a non-partisan commission composed of members of the legal profession and lay persons.
2. Appointment of lawyers by the governor or other executive to fill vacancies from only those names submitted by the nominating commission.
3. Tenure by non-competitive popular election or by re-appointment.

Without question, the non-partisan nominating committee is the most important feature of the plan. The composition of the committee, as set out in the ABA Model Article, includes the Chief Justice as chairperson, three lawyers elected by the bar, and three lay people appointed by the governor. The committee actively seeks out potential candidates; it investigates, screens, reviews, and selects the nominees. Appointment is by the governor, but the candidates are limited to the choices presented by the nominating committee. Thus, even if the governor's choice is politically motivated, the committee system ensures that the individual is well qualified. Further, public input is preserved through the lawyer-lay person balance on the committee and the subsequent elections after appointment.

II. Young Lawyers' Proposal for Seattle Municipal Court

When the Seattle City Council approved a new Municipal Court judgeship in 1980, the Young Lawyers' Section of the Seattle-King County Bar formed a committee to determine whether a model merit selection process might be used to fill the new vacancy. Mayor Charles Royer indicated an interest in the Young Lawyers' Section idea of a merit selection experiment, and the Judicial Selection and Discipline Committee of the Young Lawyers' Section appointed a subcommittee to develop a model merit selection process for the new

Municipal Court position. Subcommittee members were William S. Bailey, Sharon Armstrong, Wayne Hansen, Wilda Heard, Fred Kaplan and Mary Anne Vance. After extensive research, interviews and several meetings, the subcommittee developed a proposal which was transmitted to the Mayor.

The Young Lawyers recommended a seven member committee, composed of three lay people, three lawyers, and a chair who could be a member of each group. The report also stressed the need to actively recruit in order to get a diverse body of candidates, and develop a rigorous uniform process for interviewing and investigating the background of candidates. The Young Lawyers committee also researched the peculiar needs of the Municipal Court, and developed special criteria for appointment to that bench, which were presented to the Mayor along with more general criteria.

The committee recommended that the members of a municipal court selection group be balanced in terms of ethnic background, sex and age; include people with previous contact with the Seattle Municipal Court, and individuals with a mental health, social service and criminal justice background.

After receiving the Young Lawyers' Section recommendations, and circulating them among a number of bar groups for comment and criticism, the Mayor accepted the proposed process with very little modification.

III. Seattle Implements Merit Selection

Mayor Royer wrote bar and community organizations asking for suggestions of people to serve on the selection committee; received about 40 names. After considering all the people suggested, the Mayor appointed a committee composed of individuals from all walks of life.

Criteria for Appointment

The Young Lawyers' Committee had submitted two sets of criteria to the Mayor for municipal bench. The first group of criteria were the general selection criteria for judicial office, developed by the American Judicature Society. These emphasize an applicant's reputation, ability to inspire confidence, independence, dignity, industriousness, fairness and analytical skills. The committee took these general criteria and merged them with suggestions made by judges, prosecutors and defense attorneys presently working in Municipal Court. This effort resulted in the following working criteria for the Municipal Court vacancy:

Capacity for hard work
Ability to handle stress
Strong personality
Diplomacy
Precise verbal skills

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Independence
Sensitivity to diverse social and economic backgrounds

Recruitment and Interviews

In order to get a diverse set of applicants, advertisements for the Municipal Court vacancies both in the spring and in the fall, were placed in newspapers of general circulation and publications specifically directed toward women and minorities. In addition, the Mayor's Office staff and members of the selection committee contacted a wide range of attorneys and attorney groups and asked them to encourage people to apply for the open positions. Of the 18 people who applied for the new position in spring, there were 12 male and 6 female applicants. Of the 18, 6 were minorities. Of the 19 additional lawyers who applied for the vacancy in the fall of 1980, 12 were male and 7 were female. Three were minority group members. All applicants were asked to fill out the same application form designed to elicit basic information as to the essential qualifications necessary for a judicial appointment. The application also included an explanation of the process, including the criteria and a schedule of the process. Both the committee and the Mayor's Office wanted to make the procedure as open as possible, and keep the applicants informed of their progress every step of the way.

For the February vacancy, the committee read the applications submitted and decided to interview all the applicants. The committee was interested in determining the effectiveness of the application form and therefore, wanted to talk to each of the candidates to find out if their skills and background, as reflected in the form, were similar to the qualities they exhibited in an oral interview.

For the fall vacancy, the committee felt confident enough in the application forms to interview only some of the applicants, and the six strongest candidates were selected for an interview.

The committee developed a set of standard interview questions to be asked of each candidate, specifically geared to test the criteria. Candidates were also asked why they were interested in being a Municipal Court judge, and committee members were allowed to pose follow-up questions to the people interviewed. Each committee member rated the applicants on a scale of 1 to 10 for the ten qualities deemed necessary for appropriate judicial performance. A standard rating sheet was provided for each applicant and the composite ratings for each one was totaled prior to final decisions by the committee. Interviews lasted 25 to 30 minutes per candidate. For the first vacancy, the committee found that 10 of the 19 applicants were qualified to serve as a Municipal Court judge, but recommended only the highest of seven because of the Mayor's practical problems in interviewing a large number of candidates. In the fall, four out of the group of seven originally nominated by the selection committee were still interested in a judicial appointment, and Mayor Royer considered these persons again, together with four more individuals recommended by the committee.

Mayoral Appointment

Both in the spring and in the fall, the Mayor interviewed the finalists for about 25 minutes, discussing a wide range of subjects including judicial philosophy, familiarity with Municipal Court, judicial administration and personal interests. The Mayor felt that the toughest part of the job of appointment—that of determining whether people were qualified to serve—had been effectively done by the selection committee. Hence he used his personal interviews with the candidates to try to get a feel for them personally, to learn about their individual philosophies and goals, and to try to pinpoint those whose social and legal philosophies were generally in accord with his own.

As it turned out, there were several qualified candidates, both in the spring and the fall, whom the Mayor would have liked to have appointed. Although it is difficult to read the mind of an executive, it appeared that Mayor Royer was influenced by the following aspects of the candidates: Trial experience, criminal law background, age and life experience, personal bearing during the interview, judicial philosophy, attitude toward municipal court administration, affirmative action, and ability to successfully stand for election.

Mayor Royer received a large number of letters from members of the bar and the community at-large; although these letters demonstrated each candidate's standing in the community and ability to get support in an election campaign, the large number of communications for each candidate offset each other, and therefore were not a significant factor in the ultimate appointments.

IV. Improving the Merit Selection Process

Throughout the implementation of the merit selection process in Seattle, candidates and committee members were asked to critique the procedure and suggest improvements. Candidates and panelists were uniformly pleased with the process, and felt it was efficient, fair and did effectively what it was supposed to do.

We make the following suggestions for the use of those who develop similar processes in the future:

1. Selection Committee

We found that a seven member committee worked quite well, and believe a number over nine persons is too large, both because it could intimidate people being interviewed, and because if a committee is too large, the individual members do not feel the same responsibility

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or have the same personal effect on the process. Our committee members attended meetings and interviews regularly. We felt that having three lawyers and three lay members, with a lawyer chair, worked well. It is important to have a strong chair (which we had), and we recommend that the executive who appoints a judicial selection committee personally select the chair to insure strong leadership,and to insure good communication between the executive and the committee.

The committee should be well balanced in terms of sex and ethnic background. We did not have enough women on the panel, and although this did not influence the final outcome of its recommendations, the female committee members and candidates may have felt at a disadvantage.

We also suggest that executives who choose to use the merit selection process, appoint committee members for terms of two or three years on an overlapping basis. The committee members' experience with the spring selection process made them much more efficient in the fall, so an ongoing group is quite advantageous. However, in order to insure enthusiasm and a fresh outlook among selection committee members, a limitation of no more than two terms should be imposed.

2. Recruiting

Recruiting is more important for getting a high quality group of candidates, and for affirmative action, than any other factor. Hence it is important for the appointing authority to actively seek out quality candidates from various lawyers' associations. Advertising openings is also important, and interested attorneys should be able to apply and be added to an ongoing list of qualified candidates at least twice a year. We suggest that recruiting be done by someone other than the interview committee, perhaps by the appointing executive's staff. This helps avoid embarrassing conflicts of role.

3. Criteria

We were pleased with the tailoring of criteria specifically to the Municipal Court and strongly recommend that there be a separate set of criteria for each level of the judiciary. Appellate judgeships, for example, should emphasize an individual's analytical skills and writing ability. Perhaps writing samples should be required. In the courts of limited jurisdiction, however, writing is not nearly so important as an ability to speak clearly and concisely, and an ability to come across as fair to the members of the public before the Court.

Applicants for positions should know what criteria will be used at each step of the process, including the initial cut of people based on their applications.

4. Application Form

Our application form was effective, but could have asked for more detailed information on each job which the applicant had held since leaving law school. It is also useful to ask each applicant for a simple resume so

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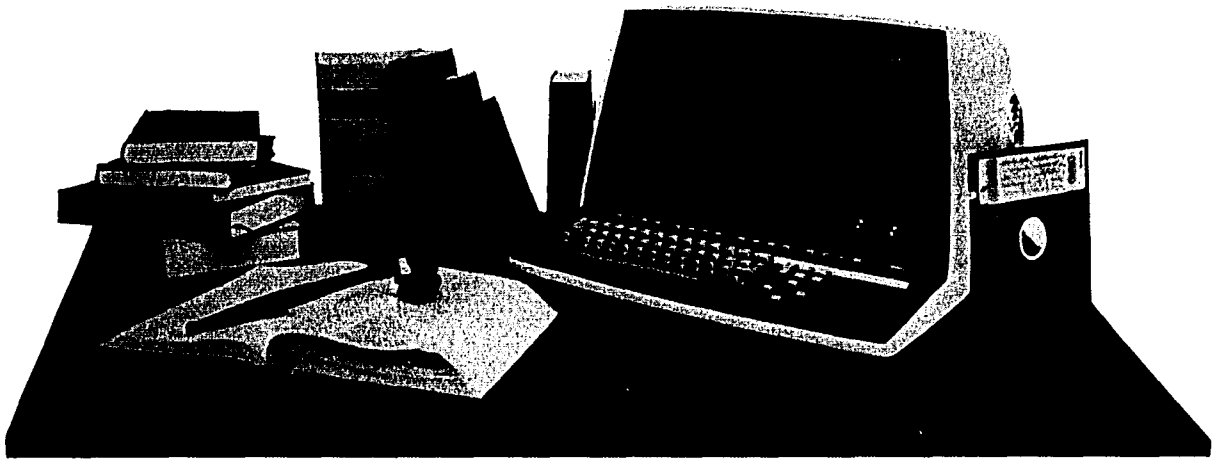

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committee members can see that resume. Alternatively, the application can be designed so that it is itself a structured resume.

5. Interview Questions

No matter how carefully a selection committee develops criteria for selection, it is very difficult to design questions that adequately elicit information about a candidate on every criterion. We found the most effective questions were those that asked each candidate to describe stressful situations in their personal lives and queries that contained hypotheticals based on the real life problems commonly faced by judges. The practical problem of using hypotheticals is that one can never give as many facts in a hypothetical question to an interviewee as there are in a real life situation. Therefore, hypotheticals should be designed so as to be factually simple, yet challenging to answer.

If a question does not work well, the committee should not be afraid to drop it. We recommend that the committee develop several more questions than they need, and perhaps "test run" the questions on a couple of lawyers who are not currently interested in serving in the judiciary. Perhaps testing questions on some judges would be useful.

As recommended above, interviews should be at least 20 minutes in length.

6. Reference Checks

No matter how carefully the interview questions are designed, it is nearly impossible to find out from an interview whether an individual works hard, or can handle analytical and stressful situations of different kinds. Hence it is very important that committee members call references, perhaps with a standard set of questions. In that all candidates put their best foot forward by listing only favorable references, committee members should be prepared to make inquiries of people not listed by the candidate with sufficient knowledge of their qualifications.

When the appointing authority has narrowed down the field to a few candidates, someone should do an extensive background check on the candidates, including interviews with clients and lawyers who have been on the opposing side in litigation. If the committee can design adequate assurances of confidentiality, the lawyers on the committee should be permitted to solicit the views of other attorneys on the quality and character of the applicant's legal work, and to submit those comments to the committee for consideration.

7. Feedback

Applicants who are chosen for an interview, and those who are not, should be given prompt feedback by a staff person or committee member as to the committee's reaction. After the committee has recommended candidates to the appointing authority, all candidates should be given an assessment of how they performed. This is very important to help people improve their chances during a later selection, and also to assure applicants and qualified candidates that the process is fair.

We gave prompt "feedback" to all our applicants and candidates, and they uniformly expressed appreciation for that procedure.

8. Timeline

At the beginning of each selection process, or when an outdated standing list of qualified candidates is being retired and replaced by a new list, the committee should agree upon a practicable timeline. The timeline may need to be negotiated with the relevant executive.

The advantage of a timeline is, of course, that it keeps the process on track, and lets everyone concerned know what to expect at each point in time. Our Fall process took three months from job announcement to confirmation. A process where the committee must newly develop selection criteria can take up to three or four months.

V. Conclusions

The success of the Seattle experiment with a merit selection nominating commission is in keeping with the nationwide experience. Wherever any variation of this system has been utilized, it has received high praise. No state which has opted for the plan has ever returned to its previous method.

In the authoritative work, *The Politics of the Bench and Bar,* Watson and Downing report a clear perception by the Missouri Bar that merit selection has elevated the caliber of the judiciary in that state. In Colorado, research demonstrates that the great majority of attorneys and judges believe that the plan improved the quality of judges selected.

Skeptics continue to argue that the adoption of a commission is no guarantee against politics as usual. While there is some truth in this, the argument does not negate the plan's ability to establish a minimum threshold for judicial qualifications. The governor may continue to choose members of his own party for the judiciary, but the plan assures that those individuals will have the necessary ability, experience and temperament. The mere visibility of the process limits the opportunity for manipulation of the "smoke filled room" variety.

Criticisms that such commission will not be representative of the community have also proved to be unfounded by subsequent studies. The demands of the political process alone dictate that the governor does disenfranchise significant groups in the electorate.

While the merit selection plan is not seen as a panacea, it has been convincingly shown to resolve many of the difficulties involved in identifying well-qualified candidates for judicial office. The time has come for considering its implementation in judicial appointments statewide in Washington. □