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Applicants for Court of Appeals Falling, Nominating Panel Head Says



JOHN F. O'MARA, right, chairman of the Commission on Judicial Nomination, chats with Senate Judiciary Committee Chairman **John F. Sampson** after yesterday's hearing on the selection process.

BY **JOEL STASHENKO**
ALBANY

THE CHAIRMAN of the Commission on Judicial Nomination told legislators yesterday he is at a loss to explain the dwindling pool of applicants for openings on the Court of Appeals.

Elmira attorney John F. O'Mara told members of the Senate Judiciary Committee that only 17 people, three of them women, submitted applications for the most prestigious judicial post in the state, chief judge. That was down dramatically from the 46 applications the commission received for a 2003 opening on the Court of Appeals.

"I am concerned," Mr. O'Mara said. "The commission is concerned."

Mr. O'Mara testified at the second of three or four planned hear-

ings prompted by unease about the diversity of candidates on the commission's nominee lists.

Mr. O'Mara said in an interview after the hearing that the shallower applicant pool has reduced the numbers of minorities and women applying for the Court.

"As the pool of applicants goes down, the diversity goes down," Mr. O'Mara said. "The number of women has gone down."

At the hearing, Senator John L. Sampson, D-Brooklyn, the panel's chairman, said he continues to find it "troubling" that the list of seven candidates from which Governor David A. Paterson nominated Judith S. Kaye's replacement contained only the names of men, six of whom are white (NYLJ, Dec. 2).

Mr. Sampson said that true or not, the all-male list created a perception that the commission sought to exclude

» Page 7

NYLJ.COM | New York Law Journal

WEDNESDAY, FEBRUARY 4, 2009 | 7

Off the Front / Expert Analysis

Applicants

« Continued from page 1

women and is not committed to diversity. Every list for openings on the Court in the last four years has included at least one woman, Mr. Sampson noted.

"It may not be reality, but sometimes perception is reality," Mr. Sampson said. "There is a perception that something else was going on."

Mr. O'Mara cautioned, "I would not read anything into that" and pointed out that, as the commission was screening and interviewing candidates last year, four of the seven members of the Court were women. All were nominated to the Court by the commission.

With Judge Kaye's retirement on Dec. 31, the six remaining Court members include three women, one of them Hispanic, and one black male.

In prepared testimony submitted to the commission, Mr. O'Mara called the Court's diversity "a model for the nation."

Mr. O'Mara said there is no consensus among the 12 commission members or its staff about why "there is diminished interest in being on the bench."

He suggested that one factor could be judicial pay, reflected both in the "disparity" between what judges and top private legal practitioners earn and the fact that state judges have gone 10 years without a raise.

Mr. O'Mara hastened to add,

however, "It's not a good time to be talking about salary increases" given the poor state of New York's budget.

Mr. O'Mara said federal judgeships, with higher pay than state judges (\$165,200 for district judges), regular cost-of-living increases until recently and lifetime appointments, could also be diminishing the applicant pool for the state's highest court.

Mr. Sampson dismissed Mr. O'Mara's suggestion that the judicial pay scale in New York is narrowing applications. He noted that an associate judge on the Court, with a salary of \$151,200, still makes considerably more than the \$144,000 of an Appellate Division justice or the \$136,700 of a Supreme Court justice.

Instead, he asked whether a core group has come to submit applications for opening after opening on the Court and others do not apply "because they think they have no opportunity to get through the commission to even be nominated?"

Mr. O'Mara conceded that "a lot of the applicants are the same" from opening to opening.

Senator Andrew J. Lanza, R-Statens Island, asked Mr. O'Mara whether the commission takes the ethnicity, race or gender of candidates into account when screening nominees.

Mr. O'Mara said commission members are statutorily obligated to consider candidates' temperament, character, professional aptitude and experience when weigh-

ing nominees, but that diversity is also a factor.

Mr. Lanza asked Mr. O'Mara that if two candidates' qualifications are equal, should race, gender or ethnicity "tip the scales" in favor of a minority or female?

"Speaking for myself, yes," Mr. O'Mara replied.

By law, Mr. O'Mara and other members of the commission are barred from discussing individual candidates considered for openings.

Proposals for Change

As Corporation Counsel Michael A. Cardozo of New York City did last week when addressing Mr. Sampson's committee, Mr. O'Mara urged lawmakers to move cautiously when considering changes in commission procedures.

Mr. Sampson said some proposals under consideration are to expand the size of the lists handed up to governors to nine or more candidates from the current three to seven.

Mr. Sampson said it also has been suggested to expand the commission to 15 members from 12. He said that would make it harder for a bloc on the commission to "hijack" the process by refusing to vote for a candidate, denying him or her the two-thirds vote necessary to make it onto nominating lists that go to governors.

Currently, four of the commission members are picked by the governor, four by the chief judge and one each by the majority and



JOHN O'MARA testifies yesterday before the Senate Judiciary Committee in Albany.

minority leaders of the Senate and Assembly.

In general, Mr. O'Mara said, since its creation in 1977 the commission has expanded the diversity of the Court of Appeals by its nomination of four women—including one Hispanic—and three blacks.

"I think the system has worked very well," Mr. O'Mara said.

Mr. O'Mara, a partner with Davidson & O'Mara, will complete his third, four-year term on March 31. An appointee of former Gover-

nor George E. Pataki, Mr. O'Mara said it is time for him to step down from the unpaid post. Mr. Paterson will choose his replacement.

"Twelve years is enough," said Mr. O'Mara, who suggested that limiting the members' terms might inject new blood on the panel.

Mr. Sampson said yesterday he is not yet sure when he will schedule a confirmation hearing for Appellate Division, First Department Presiding Justice Jonathan Lippman, who was ultimately nominated by

Mr. Paterson to fill the chief judge's seat.

Mr. Sampson continued to say he has no problem with Justice Lippman's nomination.

"Our concern is not with the selection of Jonathan Lippman, it's about the process," he said.

The Senate is required to accept or reject the governor's nominee by Feb. 13, but there is no penalty if it misses the deadline.

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