

## Vermont's Judicial Application Process

Any attorney seeking a Vermont Supreme or superior court judgeship (or a position as a family court magistrate or on the Public Service Board) must apply to, and appear before, the Judicial Nominating Board. It is the JNB's responsibility to decide whether to send a judicial applicant's name to the governor for possible appointment.

I have had the privilege of serving on the JNB since 2001 (with one two-year break in the middle). I am frequently struck by how little is publicly known about this board. In part, this may owe to the fact that, by law, the JNB's proceedings are confidential. Still, there is much about the process that need not be so mysterious.

When the Vermont Legislature created the JNB,<sup>1</sup> it tasked it with the authority to screen judicial applicants. The JNB has eleven members. At least six are sitting members of the legislature (three designated by the Senate and three by the House). By statute, these designees must include different political parties, and no more than two of the six can be attorneys. As for the five remaining JNB members, the governor appoints two (who by law cannot be attorneys), and the Vermont bar elects three attorneys. Accordingly, non-lawyers always outnumber lawyers, sometimes overwhelmingly. Each member serves a two-year term, and most are limited to three consecutive terms.

Whenever a judicial seat opens, the governor mobilizes the JNB. Once mobilized, the JNB chair (elected by the other board members) electronically announces the judicial vacancy to all Vermont attorneys, and invites them (and, in the case of a Supreme Court vacancy, trial court judges) to apply. The application deadline is usually four weeks from the notice of vacancy.

There are few restrictions on who may apply for a judgeship. The only statutory requirement is that the applicant have practiced law (or served as a judge) in the state of Vermont for at least five of the ten years preceding their appointment. Judicial applicants must fill out an extremely comprehensive (some might say onerous) form that includes information about their past experience, their views on the state of the judiciary, and a full financial disclosure. The application also asks applicants to list references.

After the deadline has passed, the JNB chair distributes a copy of every single application to all JNB members, assigning each primary responsibility to reference-check a certain number of the applicants.

This includes calling the listed references, but can also involve speaking about the applicant with others (although the process, including the names of all applicants, is confidential, the board's rules specifically permit such inquiry). In addition to reviewing the application forms and checking references, the board also runs criminal record and professional disciplinary action checks on all applicants.

The next step for an applicant is a personal interview. By rule, all candidates have a right to be interviewed, so with rare exception, if you apply for a judgeship you receive an interview. During my time on the board, there was one instance when the sheer volume of candidates made the prospect of interviewing every applicant so daunting that a board subcommittee prescreened the applications. After doing so, the JNB notified several applicants that a personal interview was unlikely to result in their name being sent to the governor, and suggested to them that they waive their right to an interview or withdraw their application. Nevertheless, even then, any applicant who requested an interview was granted one.

The interview protocol itself has remained fairly consistent over the years. First, any JNB member who has a personal or business connection to any applicant, such as might influence or appear to influence their vote, must report that to the board's chair, and may then recuse himself (or be recused) from further consideration of the candidate. After any such recusals are addressed, each candidate is brought in for a personal interview with the full board. The interview typically lasts twenty to thirty minutes. Each JNB member has the opportunity (but is not required) to ask one question of each applicant. The range of questions is so broad that it is impossible even to generally characterize them.

The applicant's performance in the interview can be critical. Few judicial applicants have recent experience interviewing for a job. As a consequence, and with so much at stake, many accomplished attorneys and judges, understandably nervous during the interview, may not perform as well as they had probably hoped. The three JNB members who are elected by the bar (and those legislative members who are attorneys) often personally know many of the candidates, or at least have some familiarity with their work or general reputation. But many of the other board members may not know anything about most of the candidates. As such, and for better or worse,

the impression made by the candidate during this twenty to thirty minute interaction can significantly affect the outcome.

After every candidate is interviewed, the board discusses each one in order to fulfill its statutory charge of determining which are "qualified" for the judicial position sought. In performing this task, the JNB has scant guidance. 4 V.S.A. § 601(d) tells us that in determining whether a candidate is "qualified," we should consider their "integrity, legal knowledge and ability, judicial temperament, impartiality, health, experience, diligence, administrative and communicative skills, social consciousness, and public service." And we are further told when we are screening for trial court positions that we must give "particular consideration ... to the nature and extent of [the applicant's] trial practice."<sup>2</sup> By board rule, we must not consider any candidate's race, religion, gender or political affiliation. Beyond these guidelines and strictures, the JNB is left to its own interpretation and discretion as to what makes a candidate qualified for a particular judicial post.

There can be no disputing that "qualified" is a subjective term. It is fair to say that during my tenure on the JNB (and I have served on six different iterations of the board, since the membership has changed every two years), there has been something of a sea change in the way the board has interpreted that term and has executed its screening role. The first board I sat on (and apparently many of its predecessors) took what some might regard as a relatively hands-off approach, setting a lower bar for applicants to meet. Over the last decade or so, the board has more aggressively narrowed the pool.

Reasonable minds can differ about whether, as a matter of policy, philosophy, or statutory interpretation, this shift in approach has been justified or wise. Some may feel that it is not the board's prerogative to winnow the applicant pool, and that the governor should have free range to select from all candidates who have generally comported themselves well. Others feel differently. For example, superior court judge Matthew Katz, in a letter sent to the board some years ago, urged the JNB to be more effective in carrying out its screening. He wrote that "it is neither a dark secret nor an opinion confined to me that sometimes the long lists [of applicants deemed by the JNB to be qualified] have resulted in unfortunate appointments." In his view, "it is vital to the long term quality and effectiveness of Vermont justice that the Board

... exercise [its] authority to pass on only ... the most qualified." He urged the board to "truly limit the number of candidates to those most qualified to take on the very high responsibility of being a judge."

The practical consequence of the board's change in approach has been that, whereas several years ago many (probably most) judicial applicants received letters telling them they had been found "qualified" and that their name would be forwarded to the governor, in the last decade most judicial applicants have received disappointing letters notifying them that their name was not sent up.

Another recurring phenomena, which at first blush may be perplexing, is the experience some applicants have of being found "qualified" during one cycle but not during a later one. That is, an applicant might get a letter from one board telling them their name was sent up to the governor, and then receive the opposite result when applying for a subsequent vacancy. This can happen because every two years, the board's make-up changes, and a candidate who is viewed as qualified by one board may not be so viewed by another. It can also occur because, whether fair or appropriate or not, every JNB vote almost necessarily involves a relative comparison of all of

the candidates in the applicant pool. Since each pool is different, an individual's outcome may vary from vacancy to vacancy depending on who else has applied. There may also be other circumstances that affect what qualities or experience a particular board believes a candidate must have in order to be "qualified" for the particular vacancy before it.

Despite what might seem like an obvious potential for politically-motivated decisions on individual applicants, I can honestly say that in all the time I have served on the board, I have rarely seen partisan politics play any role in the decision-making process. Neither has it mattered to most board members, no matter their individual leanings, affiliations, or desires, whether an applicant works in the public sector or in private practice, for a big firm or a small one, for plaintiffs or instead defendants, or in civil or criminal law. I have been wholly impressed by how seriously the board members have taken their responsibilities, and how much time, thought, and dedication they have devoted to the process.

After the interviews and discussions, the board votes by secret ballot on each candidate. In order to be deemed "qualified," the candidate must receive a major-

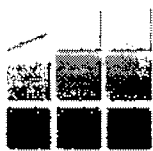
ity of the votes; anything less (including a tie) means that the applicant's name is not forwarded to the governor. After the vote, a list of those candidates found qualified is transmitted to the governor. No statute or rule governs how long the list should be, and the number varies from vacancy to vacancy. In recent years, the lists have been short. The number and identities of applicants on the list is confidential. By law, the governor must select from the board's list. There have been occasions when governors have attempted to reject the JNB's list, or have asked it to re-open the process. Such gubernatorial actions have led to significant internal debate about how the board should respond.

There are rumblings that, in the not too distant future, the legislature may revisit the current statutory judicial selection process. If that occurs, I would urge all attorneys, with or without judicial aspirations, to become engaged in the dialogue.

*John L. Kellner, Esq., practices in Burlington with O'Neill Kellner & Green.*

<sup>1</sup> 4 V.S.A. §§ 601-603.

<sup>2</sup> 4 V.S.A. § 602 (c).



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