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Panel clears First DCA JNC

By Gary Blankenship

Senior Editor

A First District Court of Appeal Judicial Nominating Commission member who asked tough questions of a judicial applicant has been cleared of charges she went too far by a special investigating panel.

The panel, in a report released February 8, also recommended that all JNCs follow the practice of bringing any negative information they have to the attention of an applicant during interviews. If the applicant isn't given a chance to respond, then the information shouldn't be used in commission deliberations, the panel advised.

Bar President Herman Russomanno appointed the special Panel of Inquiry after Ted Hires, Sr., of The Justice Coalition, based in Jacksonville, filed a complaint. He alleged that Commissioner Elizabeth White had a conflict of interest and that her question of applicant Scott Makar brought discredit on herself and the JNC process.

Russomanno, in accepting the panel's report, endorsed its recommendation that JNCs adopt a uniform policy for dealing with negative information. He also called for a hotline so JNC members can call and seek advice from experienced commissioners.

"A uniform rule will more clearly define how to deal with the two issues in this report: how to deal with negative information regarding a judicial applicant; and what constitutes a conflict of interest and how a commission should handle it," Russomanno said. "In addition, I will ask every JNC commissioner to attend and participate in all JNC training seminars in order to enhance their service as a public officer."

Russomanno cannot order the JNCs to change their rules or procedures. Rather, JNC members make their own rules at an annual convention. There is one set of procedural rules for trial court JNCs and a separate set for appellate court JNCs. In addition, each JNC can adopt its own rules, policies and procedures for matters not covered in the uniform rules.

In a letter to all JNCs, Russomanno urged each one to immediately adopt a rule on how to handle negative information.

The panel of inquiry was chaired by retired 11th U.S. Circuit Court of Appeals Judge Joseph Hatchett. Its other two members were former Bar President John Frost II and former Florida Association for Women Lawyers President Ava Doppelt.

After dispensing with the charges leveled against White, the panel recommended "that all judicial nominating commissions follow the lead of the First District Court of Appeal Judicial Nominating Commission in one respect: If a commissioner learns of negative information through his or her investigation of an applicant and wishes to consider this information when assessing the candidacy of the applicant, the commission must bring this negative information to the applicant's attention during the interview and allow the applicant to respond. If the commission does not bring this information to the applicant's attention during the interview, then the commission should not consider it when assessing the applicant's candidacy for judgeship."

The panel noted the charge that White brought discredit to herself and the JNC process revolved around questions she asked Makar during his interview that related to his divorce. White told the panel she was concerned that financial information in Makar's JNC application did not match that in the divorce court file and about allegations he gave his former wife a sexually transmitted disease.

Makar did not testify to the panel, but sent documentary evidence. He claimed there was no discrepancy on the financial information and that other parts of the court file not disclosed to the JNC by White exonerated him of the sexually transmitted disease charge. White contended that part of the file only said there was a disagreement among the parties on that issue and did not exonerate Makar.

Bar Board of Governors member Hank Coxe, who recruited White to serve on the JNC, and three other members of the JNC testified that although hard, White's questions were appropriate for a judicial candidate.

The Panel of Inquiry agreed, saying Sections IV and V of the Uniform Rules of Procedure for District Court of Appeal Judicial Nominating Commissions require a thorough investigation from all available resources. Those sections also specifically allow questions about a candidate's health, personal integrity, moral conduct and related issues.

"In order for a judicial nominating commission to perform its duty of screening qualified applicants competently, it must ask questions that are probing of the criteria listed in Sections IV and V. It is through its screening process that the most qualified applicants are recommended to the governor for selection to the appropriate court," the panel wrote. "The panel feels that the judicial nominating commissions' screening and forwarding of qualified applicants to the governor has resulted in a strong judiciary that has been most beneficial to the state of Florida. White's questioning of Makar, although admittedly 'tough,' was appropriate in light of the duty of the Judicial Nominating Commission and certainly does nothing to undermine the panel's confidence in the current judicial selection process."

The conflict of interest charge was based on an endorsement letter White's husband, attorney William J. Sheppard, had written in 1998, before she was appointed to the JNC, for Charles Pillans when he was nominated for an earlier First DCA vacancy. Pillans had applied again along with Makar and more than two dozen other candidates for two vacancies last year on the First DCA.

White testified that while she probably knew of the earlier letter, she didn't recall it until after the interviews. She said she had tried a case against Pillans in 1984, and had known him professionally since then. Sheppard told the panel he routinely wrote many endorsements, but stopped doing it when White was appointed to the JNC. Other witnesses testified they did not see a conflict of interest, and the panel agreed.

"The panel finds that no conflict of interest existed between White and Pillans," the panel concluded. "Sheppard did not advocate Pillans' candidacy during the nominating process that White was involved with. Neither Sheppard nor White had a close relationship with Pillans. White never saw the letter that Sheppard had written on Pillans' behalf for a previous judicial vacancy. In sum, none of these allegations rise to the level of a conflict of interest."

White said that while she was pleased with the panel's report, she was happier that the investigation showed how well the judicial nominating process works.

"Presently, there seems to be an attack on the commission system, but I think if most people understood how the commission operated they would be very proud of the system, because I think it operates very well," she said. "The continued use of the commission system gives us the very best, and that's really what we want."

Russomanno praised and thanked Hatchett, Frost and Doppelt for their investigation and said the report "will move the JNC process forward. . . .

"We must continue to strive to maintain the highest quality of JNC commissioners who are devoted to performing their sworn duties of selecting the most qualified judicial applicants to forward to the governor to the best of their abilities. Any time questions of propriety are raised about something as important as nominating judicial candidates, we should look at that process very carefully to recommend additional procedures that would improve and strengthen this process."

He said the Bar will continue to support the annual JNC Institute, which provides basic training for JNC members, and the new JNC Commissioner College, which provides diversity training for commissioners.

In a letter to each of the 26 JNC chairs, Russomanno urged them to take five steps, including adopting policies about bringing damaging information to the attention of judicial applicants during their interviews. Those are:

- Each JNC should immediately adopt a local rule regarding how to deal/or not deal with negative information concerning a judicial applicant.
- Each JNC during the next Rules Convention should formally adopt a uniform rule regarding how to deal/or not deal with negative information concerning a judicial applicant.
- Each JNC during the next Rules Convention should formally adopt a uniform rule that more clearly defines what constitutes a conflict of interest and more specifically how a commission should handle it.
- Each JNC should utilize a self-help procedure being put in place by the Bar's Judicial Nominating Procedures Committee establishing a 'hotline' for committee chairs to call and seek advice from experienced commissioners.
- Each JNC should stress the importance of attending and participating in each and every training seminar offered to them to better enhance the performance of their duties.

"The Bar is committed to this constitutionally based independent process of judicial selection and recognizes the process must be free of any perception of impropriety, real or implied, in order to maintain public confidence," Russomanno wrote. "We must do everything we can to maintain its purity and ensure the integrity of the JNC proceedings."



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