

■ COURT OF APPEALS ■

Quest for Diversity Triggers Debate Over Role Of Race, Gender In Judicial Selection Process

BY JOHN CAHER

ALBANY

THE DIVERSE LIST of contenders for the Court of Appeals released last week, and the general assumption that the open position is a “black seat,” has caused some members of the bar to question whether race is a legitimate, or even constitutional, consideration in reviewing candidates for the state’s court of last resort.

Governor Andrew Cuomo on March 7 received a list from the Commission on Judicial Nomination that included three black candidates—Appellate Division, First Department, Justices Sheila Abdus-Salaam and Dianne Renwick, and Rowan Wilson, a litigation partner at Cravath, Swaine & Moore. It is widely assumed the governor will pick a black candidate to replace Judge Theodore Jones Jr., who was the only black judge on the court when he died in November.

But the perception that there is or should be a “black seat” on the court has caused concern among some, especially coming on the heels of last month’s appointment of Jenny Rivera to fill what many viewed as the “Hispanic seat.” Rivera, of Puerto Rican descent, replaced the first Hispanic to serve on the court, Carmen Beauchamp Ciparick, who retired on Dec. 31.

Assemblyman William Nojay, a freshman Republican lawmaker from suburban Rochester, who is of counsel with Hiscock & Barclay, said he is deeply concerned that racial politics has infected judicial selection.

“The very notion of there being a black seat or a woman’s seat or a Hispanic seat or a white seat is offensive,” Nojay said. “There is no way to justify judging someone by the color of their skin, no matter which side of the bench you are on. Our justice system should be color blind, both as to the merits of the party to litigation and the merits of the judge sitting on the bench.”

Nojay’s comments largely echo those last month of two senior mem-

bering” of the high court and argues that diversity should not be a consideration. Bonacic said that if at any given time the seven best candidates are all Hispanic women, so be it.

“I reject the notion that any seat on the Court of Appeals should be classified by ethnic position,” he said in an email last week.

Bonacic noted that legislation sponsored in 2009 by then Judiciary Committee Chairman John Sampson, D-Brooklyn, would have empowered the commission to “consider appropriate institutional factors of racial, gender, ethnic, geographic, experiential and other diversity.”

Sampson introduced the measure after concerns were raised that the list for the position filled by Chief Judge Jonathan Lippman lacked diversity. But Sampson’s bill was never voted on by his committee, let alone enacted.

Nevertheless, the commission adopted a new rule declaring its commitment to diversity and has made a concerted effort to broaden the pool of applicants. Sampson applauds that effort.

“To me, you are looking for an experienced bench and also candidates who are reflective of what New York state looks like,” Sampson said in an interview. “You need the best qualified people on the bench and diversity is something you need to take into consideration, just like you take into consideration litigation background and educational background. Diversity is just another component that should be taken into consideration.”

37

Applicants Were Interviewed for Jones’ Seat

41%

Were Women

41%

Were Ethnic Minorities

bers of the state Senate who openly challenged the assumption that ethnicity, gender or any quality other than merit should factor into the equation.

Senator John DeFrancisco, a Syracuse Republican and former Judiciary Committee chairman, acknowledged the political necessity of diversity, but suggested skin color and gender should not trump merit.

The current chairman, John Bonacic, R-Mount Hope, vocally opposes what he characterized as the “social engi-

The list released March 7 includes three blacks and three women, all registered Democrats, and includes candidates from different parts of the state.

In contrast to the list for the Ciparick position, there do not appear to be any Hispanic candidates on the list for the Jones vacancy.

First Department Justice Rolando Acosta, one of three Hispanics on the prior list and the only candidate in the last round who received the highest rating from all of the bar groups that evaluated nominees, withdrew from consideration for the Jones position, partially on the assumption that he is racially disqualified, according to sources familiar with his sentiments.

A press release issued by the commission revealed that 71 individuals applied for Jones' seat and 37 were interviewed. Thirty-eight percent of the applicants, and 41 percent of the interviewees, were women; 31 percent of the applicants, and 41 percent of the interviewees, were ethnic minorities. The commission is chaired by former Chief Judge Judith Kaye, now of counsel to Skadden, Arps, Slate, Meagher & Flom.

In a recent Law Journal opinion article (NYLJ, Feb. 28), Richard Schager Jr., a partner at Stamell & Schager, maintained that new rules adopted by the Commission on Judicial Nomination "have led to the now commonly expressed view that ethnic and social groups are entitled to representation in the judiciary."

Schager argues in the essay that "there is no basis in the Constitution, the Judiciary Law, or the mandate to the commission for designating a Hispanic seat on the Court of Appeals, any more than there is a basis for designating an African-American, Irish, Jewish or Catholic seat."

Nojay agrees.

"I think it is unconstitutional and contrary to both the letter and spirit of the laws," he said. "More important, it is contrary to what we have been trying to do in American society for decades. We need diversity of perspective and background, but that is not to be confused with racial discrimination in the name of racial diversity."

Under the criteria spelled out in Article VI of the state Constitution, and repeated in Article 3-A of the Judiciary Law, the commission is charged with evaluating candidates based on their "character, temperament, professional aptitude and experience." It says nothing about race, gender or geography, critics point out.

Stephen Younger, counsel to the commission, declined to comment. In the past, however, the commission has contended that its authority to review candidates includes consideration of diversity.

Former Chief Judge Sol Wachtler, who was elected to the court in 1972 and later became a leader in establishing the appointive system, said in an email last week that the "first concern in appointing a judge should be that judge's legal and listening skills and overriding concern for doing justice." But he also said diversity is an important and valid consideration.

"No matter how qualified the members of an appellate bench are, by way of learning or judicial skills, an appellate bench without diversity is severely handicapped and unworthy of New York state," Wachtler said.

He said the experiences unique to minorities cannot always be fully understood or appreciated by a judge who has not had those experiences, no matter how well-meaning.

"Many of us have experienced the pain of discrimination and bigotry, but not all of us fully understand it or its sequella," Wachtler said. "We have all read about the inner city, but not all of us understand the sense and societal norms of those neighborhoods. We all cherish our civil liberties, but not all of us appreciate how subtle and not so subtle forces can diminish those liberties without warning or understanding. We all believe in law enforcement, but not all of us understand how members of certain communities can feel themselves singled out for unlawful police activity."

William Pollard III of Kornstein Veisz Wexler & Pollard said diversity on the high court remains important. Roughly 35 of the state population is black or Hispanic, according to the 2012 census.

"It is good for our public institutions to reflect the diversity of our state and

that is a legitimate consideration when choosing nominees to serve on the Court of Appeals," Pollard said. "Merit and experience always come first but Judge Kaye and her colleagues are entitled to consider a broad array of qualifications and needs for the court in determining which of the candidates should be recommended to the governor."

New York stopped electing judges to the Court of Appeals after a 1977 amendment to the state Constitution implemented an appointive system designed to depoliticize the selection process.

Under the new process, Governor Mario Cuomo named the first woman to the court (Kaye), the first Hispanic (Ciparick) and the first black (Fritz Alexander) to serve in a permanent position. Harold Stevens was the first black on the court, but served only briefly on an interim basis and was defeated in the 1974 election.

Andrew Cuomo has echoed his father's concerns and has said that diversity on the Court of Appeals is essential for the tribunal to have credibility across the societal spectrum.

As attorney general in 2007, Cuomo praised then Governor Eliot Spitzer for appointing Jones to the court, ending a brief period in which there were no black judges on the panel. At the time, Cuomo said in a statement that he was "pleased that the court will again begin to reflect some of the diversity that is representative of our state."

The governor must wait 15 days after receiving the list to nominate the next high court judge. He must make a decision within 30 days and must choose from the candidates forwarded by the Commission on Judicial Nomination. That means the new judge will be nominated sometime between March 22 and April 6.

In addition to Abdus-Salaam, Renwick and Wilson, the committee endorsed Justices Eugene Fahey of the Fourth Department and John Leventhal of the Second; Maria Vullo, a partner at Paul, Weiss, Rifkind, Wharton & Garrison; and David Schulz, a partner at Levine Sullivan Koch & Schulz.

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