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Nominations to Alaska Commission on Judicial Conduct

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1. INTRODUCTION

You have asked whether the Board of Governors of the Alaska Bar Association must submit more than one name to the governor when submitting a nomination for an attorney seat on the Alaska Commission on Judicial Conduct. You have also asked whether the governor may request additional nominations after receiving a nomination. We conclude that, although the governor may request additional nominations after receiving a name in nomination, neither the Alaska Constitution nor the Alaska Statutes require the Board to submit more than one name in nomination for an attorney seat on the Commission on Judicial Conduct unless the governor first rejects the initial nomination.

2. THE CONSTITUTION

The Alaska Commission on Judicial Conduct is created by the Alaska Constitution. Alaska Const. art. IV, • 10. It consists of nine members, including "three members who have practiced law in this state for ten years, appointed by the governor from nominations made by the governing body of the organized bar and subject to confirmation by a majority of the members of the legislature in joint session." *Id.* *See also* AS 22.30.010. Although section 10 contemplates the Governor making appointments from *nominations* made by the Board of Governors, it does so in the context of appointing three attorneys to the Commission. Section 10 does not address the question of whether the Board must submit more than one name in nomination when only one attorney member is being appointed.

Section 10 was added to the Constitution by amendment in 1968. Originally, section 10 created the "Commission on Judicial Qualifications," which consisted of nine members, including one justice of the supreme court, three judges of the superior court, one judge of the district court, "two members who

have practiced law in this state for ten years, appointed by the governing body of the organized bar," and two lay members. In 1982 section 10 was amended, renaming the commission the "Commission on Judicial Conduct," and reconstituting nine members on the Commission to include "three persons who are justices or judges of state courts," three attorneys nominated by the board of governors of the bar association and appointed by the Governor, and three lay members.

3. DISCUSSION

The constitution must be "upheld as the people ratified it." *Citizens Coalition for Tort Reform v. McAlpine*, 810 P.2d 162, 168 (Alaska 1991). "[C]onstitutional provisions should be given a reasonable and practical interpretation in accordance with common sense." *O'Callaghan v. State*, 826 P.2d 1132, 1136 (Alaska 1992). The word "nominate" is defined as "Designate, name; to appoint or propose for appointment." Webster's New Collegiate Dictionary 779 (1976). The generally accepted definition of "nominate" does not require that the nominator propose a slate of candidates; placing one name in nomination comports with the general understanding of the term.[1]

Indeed, when the framers of the Constitution wanted to ensure that the Governor had more than one candidate to consider for appointment, they so specified in the Constitution. Article IV, section 5, governing the appointment of judges and justices, specifically requires the nomination of more than one candidate for judicial office: "The governor shall fill any vacancy in an office of supreme court justice or superior court judge by appointing one of *two or more* persons nominated by the judicial council." (Emphasis added.) Had the framers of the amendment to section 10 intended that the governor be able to select from more than one nominee when making appointments to the judicial council, they could have adopted the language employed in article IV, section 5.

Application of the canons of statutory construction leads to the same conclusion. "One settled principle of interpretation provides that when words used in a prior statute or constitutional provision are omitted in a subsequent statute or provision, we presume that a change of meaning was intended." *Citizens Coalition*, 810 P.2d at 169-70. Here, the prior constitutional provision, article IV, section 5, requires that

[1] Nothing in the Constitution or AS 22.30.010 would prohibit the Board from submitting more than one name in nomination for the Commission on Judicial Conduct.

two or more names be submitted in nomination. The subsequent provision, contained within the same article, article IV, section 10, contains no such requirement. It follows that the framers of the 1982 amendment to section 10 did not intend to require the Board of Governors to submit more than one name in nomination when nominating an attorney member for the Commission on Judicial Conduct.

The legislative history of section 10 does not provide any evidence of the framers' intent regarding the number of names that must be placed in nomination for attorney members on the Commission. Discussions of the proposed amendment in the House Judiciary Committee indicate that the intent of the amendment was to provide more of a balance between the lay members and the attorneys on the Commission. Tape of House Judiciary Committee #18, side 1 (April 9-10, 1981) (discussing House Joint Resolution 32). Prior to the 1982 amendment, a majority of the members of the Commission were judges; the House Judiciary Committee supported the amendment because public perception would be enhanced by having members who were not judges deliberate over questions of judicial conduct. *Id. See also* Tape of Senate Judiciary Committee, side 1 (June 10, 1981) (discussing House Joint Resolution 32, and confirming that intent was to provide more balance to the commission and to change the name to avoid a misleading perception that the Commission dealt with qualifications rather than conduct); 1982 Voter Pamphlet at 79 (statement in favor of Ballot Measure No. 3 proposing amendments to article IV, section 10; arguing in favor of name change and increased lay membership of the Commission because "[u]nder the present system, the Commission is dominated by judges and lawyers"; no discussion of nominating procedure for attorney members).[2]

Prior to the 1982 amendment, the Board of governors of the Bar Association directly appointed the attorney members to the Commission. The requirement that the governor appoint the attorney members from nominations by the Board of Governors is consistent with the legislative intent to alleviate any public perception that the Commission was dominated by attorneys. Requiring the Board of governors to submit more than one name in nomination would also be consistent with that intent. However, the purpose of eliminating the public perception of attorney dominance is served by giving the governor the power to reject nominations made by the Board of Governors; it is not necessary to require the Board of Governors to provide the governor with a

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[2] The Voter Pamphlet did not contain a statement opposing Ballot Measure No. 3.

slate of candidates. In light of the lack of legislative history to the contrary, we conclude that the plain language of section 10 allows the Board of Governors of the Alaska Bar Association to place only one name in nomination for the attorney member of the Commission on Judicial Conduct.

In our view, this result does not impermissibly infringe on the governor's discretion. The governor has the discretion to reject the name submitted in nomination by the Board of Governors.[3] It is common that a nominating or appointing entity will submit only one name to the entity that has appointment or confirmation authority.

You have also asked whether the Governor may request additional names from the Board of Governors when the Board of Governors has placed only one name in nomination. Nothing prevents the Governor from making such a request. However, after the Board of Governors has nominated one attorney, it is not required to submit additional nominations until after the Governor has rejected the initial nomination.

If you have additional questions on this matter please contact us.

SCS:pch

cc: Pat Ryan, Chief of Staff, Office of the Governor
Bruce Botelho, Deputy Attorney General

[3] The language in Section 10, which allows the governor to appoint "*from* nominations" (emphasis added), provides the governor with a right of refusal. This confirms our conclusion that the Board of Governors need only submit one name in nomination; by giving the governor the right of refusal, the framers of Section 10 ensured that governor's discretion was preserved, but exempted the Board of Governors and the attorney candidates from the burden of having more than one name go up to the governor when only one seat was vacant.