

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

Date: March 24, 1998 Revised: _____

Subject: Judicial Nominating Commissions

| | <u>Analyst</u> | <u>Staff Director</u> | <u>Reference</u> | <u>Action</u> |
|----|----------------|-----------------------|------------------|---------------------|
| 1. | <u>Harkins</u> | <u>Moody</u> | <u>JU</u> | <u>Favorable/CS</u> |
| 2. | <u>_____</u> | <u>_____</u> | <u>_____</u> | <u>_____</u> |
| 3. | <u>_____</u> | <u>_____</u> | <u>_____</u> | <u>_____</u> |
| 4. | <u>_____</u> | <u>_____</u> | <u>_____</u> | <u>_____</u> |
| 5. | <u>_____</u> | <u>_____</u> | <u>_____</u> | <u>_____</u> |

I. Summary:

The bill would require each judicial nominating commission (JNC) to include at least one resident from each county within the judicial circuit.

Constitutionally suspect language has been deleted and advisory language has been added which expresses the State of Florida’s concern that judicial nominating commissions reflect the racial, ethnic, and gender diversity of populations affected by those commissions.

II. Present Situation:

A. Operation of a Judicial Nominating Commission (JNC)

Under s. 43.29, F.S., the statute which this bill would amend, each JNC consists of nine members. The Board of Governors of The Florida Bar appoints three members who must be Florida lawyers practicing in the territorial affected jurisdiction. The Governor appoints three members who must reside in the affected jurisdiction or in the judicial circuit. Id. These six members appoint three additional members who must not be members of The Florida Bar and who must reside in the affected jurisdiction. Id.

Currently, members of a JNC may not be justices nor judges. s. 43.29, F.S. Members of a JNC may hold public office other than judicial office. Id. A member of a JNC may not be appointed to state judicial office in the territory or jurisdiction in which that member makes nominations, either during the member’s 4-year term or any time less than 2 years after the expiration of the member’s 4-year term. Id. Members may not serve consecutive 4-year terms and may be suspended by the Governor and removed by the Senate in a manner consistent with s. 7, Art. IV, Fla. Const. Id.

Presently, each county within a given judicial circuit may or may not be represented on a particular judicial nominating commission, i.e., representation is possible, but not required. *This bill would require representation for each county.* The following is a list of the 20 judicial circuit courts and the counties which comprise each:

- The first judicial circuit is composed of Escambia, Okaloosa, Santa Rosa, and Walton Counties.
- The second judicial circuit is composed of Leon, Gadsden, Jefferson, Wakulla, Liberty, and Franklin Counties.
- The third judicial circuit is composed of Columbia, Dixie, Hamilton, Lafayette, Madison, Suwannee, and Taylor Counties.
- The fourth judicial circuit is composed of Clay, Duval, and Nassau Counties.
- The fifth judicial circuit is composed of Citrus, Hernando, Lake, Marion, and Sumter Counties. Two of the circuit judges authorized for the fifth judicial circuit shall reside in either Citrus, Hernando, or Sumter County, and neither of such two judges shall reside in the same county.
- The sixth judicial circuit is composed of Pasco and Pinellas Counties.
- The seventh judicial circuit is composed of Flagler, Putnam, St. Johns, and Volusia Counties. One judge shall reside in Flagler County; two judges shall reside in Putnam County; two judges shall reside in St. Johns County; and three judges shall reside in Volusia County. There shall be no residency requirement for any other judges in the judicial circuit.
- The eighth judicial circuit is composed of Alachua, Baker, Bradford, Gilchrist, Levy, and Union Counties.
- The ninth judicial circuit is composed of Orange and Osceola Counties.
- The tenth judicial circuit is composed of Hardee, Highlands, and Polk Counties.
- The eleventh judicial circuit is composed of Dade County.
- The twelfth judicial circuit is composed of Manatee, Sarasota, and DeSoto Counties.
- The thirteenth judicial circuit is composed of Hillsborough County.
- The fourteenth judicial circuit is composed of Bay, Calhoun, Gulf, Holmes, Jackson, and Washington Counties.
- The fifteenth judicial circuit is composed of Palm Beach County.
- The sixteenth judicial circuit is composed of Monroe County. One judge in the judicial circuit shall reside in the middle or upper Keys. There shall be no residency requirement for any other judge in the judicial circuit.
- The seventeenth judicial circuit is composed of Broward County.
- The eighteenth judicial circuit is composed of Brevard and Seminole Counties.
- The nineteenth judicial circuit is composed of Indian River, Martin, Okeechobee, and St. Lucie Counties.
- The twentieth judicial circuit is composed of Charlotte, Collier, Glades, Hendry, and Lee Counties.

B. Constitutionality of Racial, Ethnic, and Gender Requirements

The existing statute, s. 43.29, F.S., provides that the Board of Governors of The Florida Bar, the Governor, and the six members appointed by the Board of Governors of The Florida Bar and the

Governor, each must appoint at least one individual who belongs to a racial or ethnic minority group or a woman. *Id.* Therefore, each JNC must consist of no less than three members who are either of an ethnic or racial minority or female. However, on July 7, 1995, in *Mallory v. Harkness*, 895 Fla.Supp. 1556 (S.D. Fla. 1995), the court held that s. 43.29(1)(a), F.S., as a race/gender based quota, violated the Fourteenth Amendment of the U.S. Constitution and permanently enjoined its enforcement against the *Mallory* plaintiff. Presumably, any individual adversely affected by s. 43.29(1)(a), F.S., who has standing, could obtain an injunction for the reasons set forth in *Mallory*. The same race/gender quotas contained in s. 43.29(1)(a), F.S., are contained in s. 43.29(1)(b) and (c), F.S. Therefore, these portions of the present statute are likewise subject to challenge under the Fourteenth Amendment of the U.S. Constitution as construed by the court in *Mallory*.

In its final report, the Article V Task Force recommended the elimination of language relating to the racial or gender composition of nominating commissions. However, the Article V Task Force also recommend that this language be replaced with language suggestive of the aspirations reflected in the current statutes with respect to race and gender diversity. The Florida Bar currently approves such a change.

III. Effect of Proposed Changes:

The bill deletes portions of s. 43.29, F.S., which were determined to be unconstitutional race/gender quotas in the case of *Mallory v. Harkness*, 895 Fla.Supp. 1556 (S.D. Fla. 1995). The bill replaces these quotas with a requirement that appointing authorities consider whether existing commissions reflect the racial, ethnic, and gender diversity as well as the geographic distribution of the population of the territorial jurisdiction affected by a judicial nominating commission.

Additionally, the bill provides that each judicial nominating commission (JNC) for each of the twenty judicial circuits have at least one member from each county within the judicial circuit affected by each commission. The new requirements of this bill apply to members or electors appointed on or after July 1, 1998.

The requirement that every county in a particular judicial circuit be represented on that circuit's judicial nominating committee (JNC) could be problematic in some circumstances. For example, the third judicial circuit is composed of seven counties: Columbia, Dixie, Hamilton, Lafayette, Madison, Suwannee, and Taylor. Under this bill, The Florida Bar would still pick three members, each of whom must practice law in the affected jurisdiction. Therefore, The Florida Bar must choose three practicing attorneys who desire the position, preferably from three different counties (recall that in order to satisfy the requirements of this bill, seven of the nine ultimate members of this commission must be from separate counties). Hypothetically, if the only lawyers interested in the position were from Columbia County, the bar would be obligated to pick those three. There being only six additional positions, the governor's and the three appointees' choices would be limited to one person from each of the remaining counties. It might be difficult to find a person willing or able to serve from every small county.

The bill takes effect July 1, 1998.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

D. Other Constitutional Issues:

This bill may address the constitutional issues brought to light in the case of *Mallory v. Harkness*, 895 Fla.Supp. 1556 (S.D. Fla. 1995). Constitutionally suspect language has been deleted and advisory language has been added which expresses the State of Florida's concern that judicial nominating commissions reflect the racial, ethnic, and gender diversity of populations affected by those commissions.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

This bill does not provide instruction as to how the Governor, the Board of Governors of The Florida Bar, and their appointees are to coordinate their appointments so as to assure that each county within a given judicial circuit has at least one member on that circuit's judicial nominating commission. Hypothetically, the Board of Governors of The Florida Bar could appoint three members, all of whom are residents of the same county within a given judicial circuit. The burden would then fall upon the Governor to choose members from other counties within the judicial circuit in order to assure compliance with this bill. If the Governor elected three members, all from the same county, assuming the hypothetical judicial circuit contains two counties, then the six members elected by The Florida Bar and the Governor would find their choice of potential appointees limited to residents of the remaining county. The problem would be more pronounced in the eight judicial circuits comprised of more than three counties. In such judicial circuits, neither the Governor, nor The Florida Bar, nor their six appointees could solely assure compliance with this. Appointing authorities will need to take measures to coordinate their appointments in order to achieve the requirements set forth in this bill.

VIII. Amendments:

None.