John Caher: Welcome to “Amici,” News and Insight from the New York judiciary and Unified Court System. Today, we are pleased to bring you former Chief Judge Judith S. Kaye, who, among her many other activities, serves as chair of the Commission on Judicial Nomination, the entity tasked with evaluating potential nominees for the Court of Appeals, the highest court in the state.

Judge Kaye, who had been a commercial litigator when she was appointed to the Court of Appeals in 1983, was the first woman on the court, the first woman to serve as Chief Judge, and the longest serving Chief Judge in state history. She presided over the court for more than 15 years, and is now of counsel to Skadden, Arps, Slate, Meagher & Flom in Manhattan.

The Commission on Judicial Nomination was created in 1977 through an amendment in the New York State Constitution and charged with nominating candidates for the Court of Appeals based on merit. When a vacancy occurs, a 12-member commission, comprised of members appointed by all three branches of government, interviews applicants and submits to the Governor a list of nominees it deems suitable for the high court. The Governor must select from that list.

The commission has been unusually busy of late. In the past two years, four new judges have joined the court, and in the next couple years, three other judges will come to the end of their terms. The court is currently seeking candidates for the Chief Judge position, so this is a particularly opportune time to discuss what the commission is, how it works and what it does.

John Caher: Judge Kaye, let’s talk about the process. What triggers the commission into action?

Judge Kaye: What triggers the commission into action is a letter from the Clerk of the Court of Appeals. It’s dated April 15th, 2015. It’s a letter from Andrew Klein, the Clerk of the Court of Appeals of the State of New York, to the New York State Commission on Judicial Nomination, care of Henry Greenberg, our counsel: “Dear Mr. Greenberg, please be advised that the term of Court of Appeals Chief Judge Jonathan Lippman expires on December 31, 2015. This letter constitutes the required notice under the Judiciary Law.”

The Commission is now triggered into action on the office of the Chief Judge of the Court of Appeals of the State of New York.

John Caher: What happens next? You’ve got notification, and what do you do next? Do you advertise the vacancy, or do you wait for applications? Do you recruit candidates, or all of the above?
Judge Kaye: Let me start by saying that we have taken a very, very active posture — we meaning the Commission on Judicial Nomination — in that we want to be sure that we interest as many candidates as possible so that we can make the very best to choices when we hand the Governor the list.

The first thing we will do is gather and make up our schedule. We will plan between May and June, or so, to just do as much as we can to get word out to the public about this vacancy, so that everyone who is interested, everyone who has a friend who is interested and believes that he or she is qualified for the position, is sure to apply. We want to have the largest number of possible applicants. That is our first objective.

I'm going to start in a week or so by making an appearance at what is called the State-Federal Judicial Council, which is a state-federal gathering of judges and lawyers — just as the name suggests — where I'm going to talk about this opening. Hopefully, the many people there will spread the word so that we will begin to receive applications. When we gather, we will fix the dates for, first of all, our consciousness-raising sessions throughout the state, and second of all, the submission of applications.

John Caher: Now, are all the applicants interviewed? If not, how do you decide which candidates to interview?

Judge Kaye: As I mentioned to you a moment ago, our purpose is to get the largest possible number of applicants, and we have been quite successful these past rounds that we've had. We've had these consciousness-raising sessions and we've had applicants in the dozens.

Assuming that we are successful again to get applicants in the dozens, we will not interview all of the applicants. We will study very hard. We have the most wonderful group of assistants who help us in investigating each of the written applications, and then we will determine how many of the applicants we will bring in for interviews. But we hope we have a very large number of applicants, and we hope we will have a good sized number of people we interview as well.

In the past, for each vacancy, the law — and by this I mean both the Judiciary Law and the Constitution of the State of New York — provides for a list of three to seven candidates to hand to the Governor. This time, for Chief Judge, we have to hand the Governor a list of seven. I'm hoping that we'll be working very, very hard. Certainly, every member of the commission expects to be working very, very hard, and so does our group of investigators. We hope we'll see a large number of applicants. We'll spend time reviewing them, investigating them, and then interviewing them.
John Caher: Once the interviews start, how long does an interview typically go, and what sort of things are discussed?

Judge Kaye: I would say we leave roughly half an hour for an interview. We don't draw very strict lines. We don't kick people out. We try to make the interviews very meaningful. We now have, basically, our fifth round together, so we're pretty experienced in being both effective and efficient.

This time around we're interviewing people for Chief Judge, so our questions are going to be very much directed to what you believe, you, the candidate. Based on your application and what you've told us in writing, what do you believe, especially suits you, especially qualifies you for a position of this enormous importance? What in your background singles you out from all the others? We like to get good, full answers reflecting a familiarity with the justice system, the state court justice system, the Court of Appeals. This time we'll be looking for administrative qualifications as well, because the office actually includes two roles: Chief Judge of the Court of Appeals and Chief Judge of the State of New York.

We'll be trying to get, in addition to this rather full written application, trying to get a good sense of the human being. That's the purpose of the of the interview. What especially suits you to be Chief Judge?

John Caher: How does internal selection process work? Is there a discussion prior to voting, a series of votes? How does it work? How does somebody make the final cut?

Judge Kaye: I think we have a quite wonderful process, where each branch of government appoints four candidates. That's four appointed the Judiciary, by the Chief Judge, four appointed by the Governor, four appointed by the Legislature. The Constitution prescribes that they have to be of different political parties, that some have to be lawyers, some have to be non-lawyers.

And this all goes to answering your question. Imagine this group sitting around a table given the diversity of appointors, the diversity of background, some lawyers, some non-lawyers, the diversity of political party. We will have essentially the same group. I know we have one new appointee; we've just been informed that Michael Hutter has been appointed.

Most of us have been together through these last appointments and we work collaboratively exceedingly well, because we know what we're looking for and we work very hard in studying the writings. To call this a collegial process is, I think, exactly right word. There's a very, very healthy discussion about who we're going to interview.
The interviews, I might tell you, are excellent. Then, we have open discussion and open voting. We do very in-depth discussion prior to voting. We hear from the people who have done the investigations prior to voting. Then we start the voting.

Will I swear that every single candidate that's been on the list [previously] has an automatic ride? No, because sometimes there's a little back and forth. This is a human process and there are 12 appointees. But, I think if you talk to any member of the Commission, he or she will tell you that it's really a remarkable process, a remarkably collegial process, where we have, in the end, unanimously each time, agreed on a list of seven candidates that we have handed to Governor Cuomo, and I look forward this time to doing the same thing.

John Caher: How does the voting work though? Let's say you interview 15 people, and then you say, candidate one, yes or no? Candidate two, yes or no? How does the process work? I imagine it's multiple rounds.

Judge Kaye: Yes, I would say multiple rounds, but we're not rigid. We may have to go from a list of 25 down to 20, down to 15. There are definitely rounds of voting. There are some people everybody would say at the beginning there's no doubt that that person goes on our list.

I'm hoping that we have to cut the list a lot, because I'm hoping that our outreach sessions informing people about this great office will yield a number of really superb candidates. There will be rounds as we cut our list down and down, but essentially the process I've described to you is a very full, in-depth, open, informed discussion. That's been true of every time that I've been a member of the Commission.

John Caher: With your mandate to find the candidates that are best qualified for the Court of Appeals, how do you factor in diversity issues? Gender, ethnic, racial, geographic diversity?

Judge Kaye: We have that in mind all the time, because the truth is it is important. We all recognize that those are important factors. We always are careful in our list to be sure that we have reached every part of the state, that we have crossed gender and ethnic lines, because that's part of our mandate and part of what we would want to see in the choice for the Court of Appeals.

I don't know beyond that how to answer that question, except if you take a look at our lists. Again, I'm speaking of the lists where I've been chair. The past four lists, I think have been true to the mandate that our courts should reflect the gender, ethnic, and geographic diversity of our state. We do it, and we work hard to do it.
John Caher: Having seen it from both sides of the table, are there any reforms to the process that you would advocate or that you think are necessary?

Judge Kaye: I’ve thought hard about that, and I think we know each long enough to know that if thought there were any reforms to the process that I thought were necessary, I would have set about doing them or seeking to get them done. I think this process works really well. I cannot, as I think very hard, I cannot think of anything but praise that I would give to the process.

I've got the Constitution open in front of me, and I urge anyone hearing this podcast or this exchange that we’re having to take a look at Article Six, Section Two, and see how carefully thought through this entire system is. I just don't know of a better system. They really thought so hard about how to assure that we'd get the best of the best and it's really quite a remarkable provision of the Constitution of the State of New York. I truly urge anyone hearing this to take a look at it and think about your question: Are there reforms that are necessary? Read the provision.

Anybody who thinks he or she would be a credit to really do a good job as Chief Judge should apply. Open the Constitution. Take a look and see how well- constructed, impartial, fair this Commission is, how fair the process is, and know, as a human matter, that your application will be very, very seriously considered. If you think this is something you want, if you think this is something you have a shot at, don't fail to apply. That's the thing that vexes me the most, that too many people turn themselves off, unnecessarily.

John Caher: If someone does apply and is fortunate enough to get an interview, what would be your advice to them then? What can they do to position themselves best to make the list?

Judge Kaye: Just imagine if you were going to make an argument before the Court of Appeals. You'd just want to know everything about the issues. So, you’d want to know everything about what are the job requirements, what makes an outstanding Chief Judge of the State of New York. You know that it has two aspects, one being the judicial aspect; you're the chief judicial officer. Another, you're the chief executive officer.

You really want to be very well prepared in terms of chief judicial officer. You want to know what it's like, what the court is like, what is service like on the highest court of the State of New York. You want to know, on the leadership qualities, what kinds of things has the Chief Judge of the State of New York [does]. My goodness, look back over the past few decades and you'll see what a challenge it is to make this a better justice system.
I would say the first thing is intensive preparation about the job. The second is, how do you best describe why you are the right candidate for the job, using all of your qualifications that you've built up over the years? What would you do to keep this court system an utterly outstanding court system? Why are you the person best qualified for the job?

I look upon it almost as preparing for an oral argument in the sense that you want to think of the most challenging questions if you put yourself on the other side of the table. You know why you're there, so show me why you deserve to be Chief Judge.

I can tell you, having been through the process three times on the other side of the table, I've never bitten my nails more. It's the same point — that you want to know that you are maximally and utterly prepared.

Everyone should know that it's a kind and respectful and dedicated and wonderful group of 12 who will be doing the interviews. I have never seen anything less than maximal respect paid to the candidates. It's hardly one of these processes where you're interviewed into the ground. The burden is on you, the interviewee, to show that you have prepared yourself well for what the requirements of the position are, and why you meet those requirements, how you meet those requirements.

John Caher: It's interesting, I was thinking earlier, you can always debate or argue over who ought to make the list. You can certainly argue over which of the usually seven nominees is the one who ought to be appointed, but I can't think of a single time, ever, when afterward, after the person was appointed, the legal community, judges, anyone, was saying that person doesn't belong in the Court of Appeals, that person shouldn't be there. I've never heard that.

Judge Kaye: I as well. I think that is our standard that they should be ... just the absolute best person I can think of for the job.

I'm so pleased to report, certainly for the 11 commissioners who work with me, I've just never seen a more dedicated group. We have, since we've got this letter from Andy Klein April 15, our sleeves are rolled up and we are getting ready to go.

I've told you about the May 18 first consciousness-raising, but we will get letters out, a wide number of letters out to bar associations, to every place we can think of because we regard as our first huge challenge ... We want to be flooded with applicants so that we can study them all very carefully and know that we have reached the very best possible people, and especially the very best possible person to be Chief Judge of the State of New York.
John Caher: Of course for most of New York's history the Court of Appeals was an elected position. Is this a better process?

Judge Kaye: I think I said earlier, and I'm so glad you've given me the opportunity to say this again because, anticipating our call today, I have pulled out the Constitution and I have it sitting in front of me. I just don't know of a better system.

There's the elective system. Many of our judges, most of our judges in the State of New York are elected; our trial judges are elected.

One thing that we have seen is where judges are elected to the top court in other states. Millions, tens of millions of dollars go into elections for state high court judges. We've seen so many examples of that. I would have to say that I am thankful that we do not have this in the State of New York. That's the elective system.

Then there's the retention system that's another alternative, where you have elections for a short time and then you have retention. There again you have all of the problems and difficulties of huge amounts of money being poured in for political reasons, not necessarily for quality reasons.

There's a third possibility where solely the chief executive officer of the state makes the appointment.

Of the various ways of reaching the choice of judge, associate judge, or Chief Judge of the Court of Appeals, honest, I can't think of a better system than the one that's been devised, which does this massive amount of work.

Of course, once we give the list to the Governor, the Governor also does a massive amount of work, but at least the Governor only has seven candidates. We might have 50. We have to go through all of these people. I think we do a huge, huge service to the Governor, to the appointing authority, in the sense that we do consciousness raising, first of all, and then we do all this enormous amount of vetting.

Third of all, the Commission itself is so diverse. We are of different political parties, some are lawyers, some are non-lawyers. Every now and then, somebody does make me sit up straight when I hear him or her ask a candidate being interviewed what book a person is reading. You just never know what kind of question you're going to get. But what a great system. What a great system was devised by those people back in the late 70's. Really, the best system I can think of.
John Caher: The proof seems to be in the pudding. I don't think anyone would seriously dispute that the New York State Court of Appeals is, if not the most esteemed state court in the country, certainly one of them.

Judge Kaye: Well, I sure hope so. With every fiber of my being, I intend to do everything as chair of this Commission to ensure that that remains true.

John Caher: Judge Kaye, thank you for your time.

Judge Kaye: Thank you. Thank you for what you're doing, because you're helping us get the word out, and the posture we are in now is to get the word out to everybody. If you think you would like to be the Chief Judge and are qualified to be the Chief Judge, if you know somebody who you think is qualified to be the Chief Judge, please, please, please do not hesitate to make application for the position.

John Caher: Thank you for listening to this edition of Amici. If you have a suggestion for a topic on “Amici,” call John Caher, 518-453-8669 or send him a note at jcaher@nycourts.gov. In the meantime, stay tuned.