

**WHITEFORD, TAYLOR & PRESTON L.L.P.**  
**MEMORANDUM**

**Confidential:**  
**Subject to Attorney-Client Privilege**

**TO:** Board of Directors  
National Association of Judiciary Interpreters & Translators

**FROM:** Whiteford, Taylor & Preston  
Jefferson Glassie & Dorothy Deng

**DATE:** May 14, 2020

**RE:** NAJIT 2020 Board Election

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**I. Introduction**

You have requested legal advice in connection with the election process of the 2020 NAJIT Board of Directors election. Specifically, questions concerning the Elections Committee have been raised, including the appointment, timeframe, composition, and overall duties of the Committee.

As further discussed below, it is our view that the election process is consistent with the New York Not-for-Profit Corporation Law (NPC) and NAJIT Bylaws, and it is in the best interest of NAJIT to continue the current election process.

**II. Background**

NAJIT launched its 2020 Board of Directors election in April, 2020. All Board candidates have been introduced on NAJIT's website. Each candidate is featured with a professional headshot, bio, and candidate statement on the designated 2020 Annual Elections webpage. Members may also email their questions for the candidates, and responses from the candidates are shared on the "Ask the Candidates" section.

In addition to candidate information, the designated 2020 Annual Elections webpage includes instructions regarding the voting process by mail or electronically. The voting process is scheduled to conclude by June 5, 2020. Since the 2020 Board election launched in April, it is our understanding that 156 out of 876 eligible voting members have already participated in the electronic voting process.

While the election process is ongoing, questions concerning the Elections Committee have been raised because the Elections Committee was apparently not fully established when the election launched, and the members invited to serve on the 2020 Elections Committee were the same individuals who served in 2019. The purpose of this memorandum is to address each question presented to us by the NAJIT Board regarding the 2020 Board election process, and to address concerns arising from the Elections Committee according to NAJIT's Bylaws.

### **III. Analysis**

#### **A. What are the (minimum) requirements as per the bylaws for what the Elections Committee's duties are?**

NAJIT's Bylaws explain the Elections Committee's responsibilities in the following two provisions:

(1) Article Four, Section III (B): Election.

The Elections Committee shall count all votes prior to the Annual Business Meeting and report the results during the Annual Business Meeting. All envelopes and ballots shall be kept by the Chair of the Elections Committee for a twelve-month period.

(2) Article Five, Section I: Types of Committees.

The Elections Committee shall be an ad hoc committee consisting of no less than three active members and selected annually by the Board of Directors to carry out the elections (including counting ballots) during the election cycle.

Based on these two Bylaw provisions, the Elections Committee's duties are to carry out the Board election and keep the ballots as part of NAJIT's records, as well as report the election results during the Annual Business Meeting.

NAJIT utilizes a third-party election platform/software to securely administer the election process. Although members may vote by using paper proxy ballots upon request, the vast majority of NAJIT members have been voting electronically in recent election cycles. As a result, Elections Committee members have been carrying out their duties by becoming familiar with the election platform, as well as reporting the election results to NAJIT members.

#### **B. When do the Bylaws require the Elections Committee be approved by the Board and what would the deadline be for appointing a Chair of that Committee?**

Because the Bylaws do not include any mandated timeframe or deadline concerning appointment of the Elections Committee, the Board has flexibility to

fill the committee seats, provided that the Elections Committee is established within a reasonable time after the election is launched.

**C. Whether or not there is any issue having the Elections Committee staffed by the same individuals for more than one year according to the bylaws.**

Requirements concerning the composition of NAJIT committees are set forth under Article Five, Section I of the Bylaws. According to this provision, the Elections Committee must consist of no less than three active members and be selected annually by the Board of Directors.

Unlike specific Board term restrictions set forth under Article Four, Section I of the Bylaws (e.g., no director shall serve more than 3 terms or 6 years on the Board), there are no term restrictions applicable to any NAJIT committee members in the Bylaws. As such, the same individuals may continue to serve on the same committee, provided that the Board selects the committee members annually. As we understand that the Election Committee members who served in 2019 were invited to serve again in 2020 based on the Board's decision, it is our view that the selection process for the Committee is consistent with Bylaw requirements.

**D. Whether or not the Board may take actions to uphold the Bylaws when a specific officer designated to take said actions does not appear to be carrying out the officer's designated duties.**

All NAJIT Board of Directors and Officers owe fiduciary duties to NAJIT and must exercise their duty of care, which is further illustrated §717(a) of the New York NPC—"Directors and officers shall discharge the duties of their respective positions in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances."

NAJIT officers are designated with certain responsibilities in the Bylaws (see Article Four, Section V) and may be given other tasks by the Board. In the event an officer does not carry out his/her designated duties, such as failing to respond or participate in Board communication exchanges, it would be reasonable and prudent for the Board to act in good faith for the best interest of NAJIT to direct fulfillment of the officer's designated duties to ensure compliance with the Bylaws and, here, the elections process.

**E. Pursuant to NAJIT's Bylaws and the regulations of the State of New York, does the Elections Committee have to be fully in place, with an appointed chair, on the date that the electronic balloting commences?**

In regards to compliance with the New York law, §712(e) of the NPC states that committees of the corporation shall be elected or appointed in the manner set forth in the Bylaws. As such, as long as NAJIT follows its Bylaws concerning the

establishment of committees, NAJIT is compliant with the New York law requirements.

As explained above, because NAJIT's Bylaws do not include any mandated timeframe concerning appointment of the Elections Committee, the Board has flexibility to fill committee seats, provided that the Elections Committee is established within a reasonable time after the election is launched and can fulfill its duties.

**F. Based on the record of emails and votes, whether or not NAJIT has appropriately launched the election process in accordance with the Bylaws.**

The NAJIT Board election process is provided in Article Four, Section III of the Bylaws. Although this provision includes a number of timeframes relating to nominations and election, it is our view that the Board acted in good faith collectively to move the election process forward in a manner generally consistent with the Bylaws. In addition, despite the slight procedural discrepancies, NAJIT members are currently participating in the election process and there is no requirement or need under the law to halt or otherwise suspend the process.

Unlike many jurisdictions that authorize election by ballot without a membership meeting, New York is one of the few states that requires the election of directors take place at the annual meeting of the members (see NPC §603(b)). However, many organizations and their members desire to vote electronically without having to attend the membership meeting in person. In order to do so, New York organizations (including NAJIT) have relied on proxy ballots to achieve electronic voting while also complying with the statutory requirement of having a meeting (i.e., members attend by proxy, see NPC §609).

Because NAJIT's election is deemed to take place at a meeting, the election process is subject to the meeting notice requirements (NPC §605), waivers of notice (NPC §606), and the meeting quorum provided in Article Eight, Section I of NAJIT's Bylaws. The quorum is "10 percent of, or 100 of, the voting members present in person or by proxy, whichever is the lesser number."

Pursuant to NPC §606, the attendance of any member at a meeting, in person or by proxy, shall constitute a waiver of notice by him or her (unless the member protested prior to attending). Given that over 10% and 100 eligible NAJIT voting members have already submitted their proxy ballots to the election platform, a meeting quorum appears to have been met pursuant to NAJIT's Bylaws.

**G. According to NAJIT's Bylaws and the regulations of the State of New York, should the Elections Committee disband or be otherwise unable to continue its work after the balloting has commenced, can the process**

**continue or must the association close the balloting and start the process all over again?**

It is our understanding that the members of the Elections Committee resigned. Our recommendation to the Board is to fill the Elections Committee positions as soon as practical, bring the new Committee members up to speed about the election platform, and have them ready to announce the election results to NAJIT membership.

NAJIT has provided comprehensive information about all candidates on its website, and it appears that members have been engaging with the candidates via the robust “Ask the Candidates” section. Furthermore, less than half way through the election cycle, NAJIT has already met its meeting quorum (demonstrated by lodged proxy ballots) and is therefore on solid ground to support the election result. Based on all the information above, it is our opinion that continuing the election process is the best course of action for NAJIT.

**IV. Conclusion & Recommendations**

As explained above, we believe the NAJIT Board acted in good faith and consistent with NAJIT’s Bylaws and New York law to launch and conduct the election process. Therefore, we believe it is in the best interests of NAJIT to move the process forward as planned and we see no legal reason to halt or suspend the process. It would be very disruptive to cancel the process at this point. The NAJIT Board has the ultimate responsibility for management of the corporation under New York law and must take actions to ensure compliance. Minor or nonmaterial deviations simply should be corrected as soon as possible and it seems the Board has taken appropriate legal actions to that end.

Please let us know if you have any questions, comments, or suggestions.