



The State Bar of California

OPEN SESSION AGENDA ITEM 704 SEPTEMBER 2021

DATE: September 23, 2021

TO: Members, Board of Trustees

FROM: Dag MacLeod, Chief of Mission Advancement & Accountability Division

SUBJECT: Proposed Amendments to State Bar Rule 7.61 Regarding Voting Procedures of the Commission on Judicial Nominees Evaluation: Request to Circulate for Public Comment

EXECUTIVE SUMMARY

This agenda item requests approval to circulate for public comment a proposed change in the rules governing the voting procedures of the Commission on Judicial Nominees Evaluation (JNE). The proposed change would remove abstentions from the count of vote totals of the JNE Commission and, by so doing, eliminate the possibility of a judicial candidate having no valid rating that could be applied by the commission. The proposed changes also eliminate some redundancies in the rules and clarify the assignment of ratings that involve tie votes.

BACKGROUND

Government Code section 12011.5(a) requires that when the governor prepares to fill judicial vacancies, the names of candidates for the judgeships be submitted "to a designated agency of the State Bar of California ... for evaluation of their judicial qualifications." The Board of Trustees created the Commission on Judicial Nominees Evaluation (JNE) to fulfill this function pursuant to the Government Code. Each year, on average, between one hundred and fifty and two hundred candidates are investigated, evaluated, and rated by the JNE Commission.

State Bar Rules, Title Seven, Division One, specify the procedures under which the JNE Commission operates. Rule 7.26 of Chapter 2 requires that the JNE Commission assign one of four ratings to each candidate that it evaluates: Not Qualified, Qualified, Well Qualified, or

Exceptionally Well Qualified. Rule 7.61 of Chapter 3, Article 5 specifies the requirements for vote counting and the selection of a rating based on the votes.

Throughout rule 7.61 the calculation of ratings is defined to include abstentions in the vote totals. For example, rule 7.61(B) establishes requirements for reporting Not Qualified ratings to the governor and notes that the requirements vary depending on whether a majority “of the commissioners *voting or abstaining*” was 75 percent or greater. Rule 7.61(E) states that “A candidate is reported as not qualified only if more than half the commissioners *voting or abstaining* rate the candidate not qualified” (emphasis added).

DISCUSSION

During the review of a recent report to the governor, staff to the JNE Commission identified an error in the assignment of a not qualified rating to a candidate. Although the candidate had received a plurality of not qualified votes, a majority of the votes of JNE commissioners were qualified or better.

Although staff discovered the error in time to correct the record, this prompted staff to review prior not qualified ratings to ensure that this type of error hadn’t occurred before. In the process of reviewing prior not qualified ratings, staff identified three instances in which candidates were incorrectly assigned not qualified ratings. However, in each of these cases, staff also found that while the candidate was erroneously assigned a not qualified rating, the candidate could not have been rated as qualified either. Because the rules require the inclusion of abstentions in the vote totals, it is possible for a candidate to fail to meet any of the criteria for assigning a rating.

For example, if a candidate received 15 votes of Not Qualified, 10 votes of Qualified, and 5 abstentions, the candidate could not be rated as not qualified under the rules because the candidate did not receive a Not Qualified vote from more than half of the total of “commissioners voting or abstaining.” However, under the rules it would not be possible to assign this candidate a Qualified rating either because the number of qualified votes was less than half of the total of votes and abstentions.

The proposed revisions to rule 7.61 in Attachment A (redline) and Attachment B (clean copy) would resolve this contradiction by eliminating abstentions from vote totals. Additional changes proposed in the amendments to rule 7.61 involve the elimination of some redundancies in the rules, and the consolidation and clarification of language in the rules regarding tie votes.

Moving beyond the amendment to the rules proposed in this agenda item, staff have taken action to correct the three prior instances in which the rules do not allow for the assignment of a rating to a candidate. Staff determined that the rules including abstentions in the vote totals were enacted in 2009 and so reviewed prior not qualified ratings from that date forward. In the three prior instances discovered during the review, the candidates were erroneously assigned a not qualified rating when in fact there was no rating that applied.

At the time that the candidates were rated as not qualified, two of the three requested reconsideration of the not qualified rating by the Review Committee of the JNE Commission (RJNE).¹ In both cases RJNE, unaware of the issue caused by the counting of abstentions in the totals, upheld the not qualified rating. In August staff brought these issues to RJNE and recommended that RJNE rescind the not qualified ratings. RJNE agreed with the staff recommendation and rescinded the not qualified ratings for these two candidates.

For the third candidate erroneously rated as not qualified but who did not request reconsideration, staff conferred with the current JNE chair about the need for corrective action to be taken on behalf of the JNE commission. Staff recommended setting aside the not qualified rating, similar in effect to the rescission of the not qualified ratings for the other two candidates taken by RJNE. The JNE chair agreed with this course of action. All three of the candidates who received an erroneous not qualified rating have been informed of the respective corrective actions taken.

FISCAL/PERSONNEL IMPACT

None

AMENDMENTS TO RULES OF THE STATE BAR OF CALIFORNIA

Title 7, Division 1, Chapter 3, Article 5, Rule 7.61

AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL

None

STRATEGIC PLAN GOALS & OBJECTIVES

Goal: None

RECOMMENDATIONS

Should the Board of Trustees concur in the proposed action, passage of the following resolution is recommended:

RESOLVED, that the Board of Trustees authorizes staff to make available for a 45-day public comment period the proposed amended rule 7.61 of the State Bar Rules attached hereto as Attachment A (redline) and Attachment B (clean copy).

¹ Under State Bar Rules, a candidate who is rated not qualified “is entitled to request reconsideration of the rating” (Rule 7.65).

ATTACHMENT(S) LIST

- A. Proposed amendments to State Bar Rule 7.61 (redline)
- B. Proposed amendments to State Bar Rule 7.61 (clean copy)

Rule 7.61 Reports to Governor

- (A) (1) A commission report to the Governor regarding the qualifications of a candidate must include the names of the team members; the number of Confidential Comment Forms mailed and the number returned; and the number of commission votes for each rating, except ~~when the commission has found the candidate not qualified on the basis of substantial and credible information as provided in subdivision (B)(2)(a).~~ When a report includes the number of commission votes, it must also provide the number of any commissioners who were present for the discussion of a candidate but then abstained from voting for any reason.

(2) A candidate is reported as not qualified only if a majority of commissioners voting rate the candidate not qualified. An abstention does not count as a vote.

(3) If half the commissioners voting rates a candidate not qualified and half rates the candidate qualified or better, the candidate is reported as qualified. For a candidate who is rated by a majority of commissioners voting as qualified or better, in the event of a tie vote among qualified, well qualified or exceptionally well qualified ratings, the candidate will be reported as having received the highest of the ratings that received the tie vote.

- (B) (1) The commission must find a candidate not qualified only on the basis of substantial and credible information.

(2) The report for ~~if the commission has found~~ a candidate found to be not qualified, ~~the report~~ must also

- a. state that “at least 75% percent of the commissioners voting ~~or abstaining~~ find the candidate not qualified” and not provide the number of votes; or
- b. state that “a majority that is less than 75% percent of the commissioners voting ~~or abstaining~~ finds the candidate not qualified” ~~with the number of votes~~ and provide the number of votes.

- (C) If unusual circumstances prevent a team from creating mailing lists, distributing Confidential Comment Forms, obtaining responses, or otherwise meeting the requirements of these rules, the team must identify those circumstances in its report to the Governor.

- (D) If a State Bar complaint against a candidate is pending when the commission votes on the candidate, the commission must ask the Governor to withdraw the name unless the candidate is a sitting judge and the complaint concerns activity that occurred before the candidate assumed judicial office. If the commission votes such a candidate not qualified, it must notify the Governor's office that the basis for the not qualified rating is the open complaint.

~~(E) If half the commissioners voting or abstaining rates a candidate not qualified and half rates the candidate qualified or better, the candidate is reported as qualified. A candidate is reported as not qualified only if more than half the commissioners voting or abstaining rate the candidate not qualified.~~

(~~E~~F) In general, the commission makes reports to the Governor in the order in which the Governor has submitted the names of candidates. The commission may consider a candidate out of order if the chair determines that there are reasons to do so.

Rule 7.61 adopted effective July 17, 2009.

Rule 7.61 Reports to Governor

(A)

- (1) A commission report to the Governor regarding the qualifications of a candidate must include the names of the team members; the number of Confidential Comment Forms mailed and the number returned; and the number of commission votes for each rating, except as provided in subdivision (B)(2)(a). When a report includes the number of commission votes, it must also provide the number of any commissioners who were present for the discussion of a candidate but then abstained from voting for any reason.
- (2) A candidate is reported as not qualified only if a majority of commissioners voting rate the candidate not qualified. An abstention does not count as a vote.
- (3) If half the commissioners voting rates a candidate not qualified and half rates the candidate qualified or better, the candidate is reported as qualified. For a candidate who is rated by a majority of commissioners voting as qualified or better, in the event of a tie vote among qualified, well qualified or exceptionally well qualified ratings, the candidate will be reported as having received the highest of the ratings that received the tie vote.

(B) (1) The commission must find a candidate not qualified only on the basis of substantial and credible information.

(2) The report for a candidate found to be not qualified-must also

- a. state that “at least 75 percent of the commissioners voting find the candidate not qualified” and not provide the number of votes; or
- b. state that “a majority that is less than 75 percent of the commissioners voting finds the candidate not qualified” and provide the number of votes.

(C) If unusual circumstances prevent a team from creating mailing lists, distributing Confidential Comment Forms, obtaining responses, or otherwise meeting the requirements of these rules, the team must identify those circumstances in its report to the Governor.

(D) If a State Bar complaint against a candidate is pending when the commission votes on the candidate, the commission must ask the Governor to withdraw the name unless the candidate is a sitting judge and the complaint concerns activity that occurred before the candidate assumed judicial office. If the commission votes such a candidate not qualified, it must notify the Governor's office that the basis for the not qualified rating is the open complaint.

- (E) In general, the commission makes reports to the Governor in the order in which the Governor has submitted the names of candidates. The commission may consider a candidate out of order if the chair determines that there are reasons to do so.