



The State Bar of California

OPEN SESSION AGENDA ITEM 50-6 NOVEMBER 2021

DATE: November 18, 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: Return from Public Comment and Request for Approval

EXECUTIVE SUMMARY

On September 23, the Board of Trustees authorized a 30-day public comment period for proposed amendments to State Bar rule 7.61 governing voting procedures of the Commission on Judicial Nominees Evaluation (JNE). The State Bar received one comment in support of the proposed amendments. Staff is now returning this proposal to the Board to seek approval to implement the changes to State Bar rule 7.61 effective immediately.

BACKGROUND

At its September meeting, the Board of Trustees authorized a 30-day public comment period for proposed amendments to State Bar rule 7.61 governing voting procedures of the Commission on JNE. The changes are needed to correct a contradiction in the rules for rating candidates for judicial office.

State Bar 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.

The calculation of ratings in rule 7.61, however, requires the inclusion of abstentions in the vote totals making it possible for a candidate to fall short of the votes needed to be rated as qualified or better, while still lacking the votes needed to be rated as not qualified.

DISCUSSION

The State Bar received one public comment in support of the proposed rule change. The proposed revisions to rule 7.61, shown in Attachment A (redline) and Attachment B (clean copy), would resolve the contradiction in the rules 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.

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

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 approves the proposed amendments to State Bar rule 7.61 effective immediately.

ATTACHMENTS LIST

- A.** Proposed amendments to State Bar rule 7.61 (redline)
- B.** Proposed amendments to State Bar rule 7.61 (clean copy)
- C.** Public comments regarding proposed amendments to State Bar rule 7.61

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.

Public comments regarding proposed amendments to State Bar rule 7.61.

Professional Affiliation	Commenting on behalf of an organization	Name	City	State	Agree / Disagree	Comments
None	No	Hon. David W. Long, Retired	Ventura	CA	AGREE	It would seem inappropriate to count an "abstention" against any candidate if it affects the outcome of the vote where a majority (or any other quantity) is required in reaching the rating. The abstaining voter, presumably, is abstaining due to lack of substantive knowledge of the candidate. Whether or not that "presumption" is accurate in any individual case, it is patently unfair to have such a vote counted where it either positively or negatively is used in the calculation of a majority vote.