



The State Bar of California

OPEN SESSION AGENDA ITEM 702 JULY 2022

DATE: July 21, 2022

TO: Members, Board of Trustees

FROM: Bridget Gramme, Deputy Chief of Programs

SUBJECT: Proposed Amendments to State Bar Rule 7.40 Regarding Assignment of Judicial Nominees Evaluation Commissioners: Return from Public Comment and Request for Approval

EXECUTIVE SUMMARY

This agenda item requests approval of amendments to State Bar Rule 7.40.

At its May 2022 meeting, the State Bar Board of Trustees authorized a 45-day public comment period for proposed amendments to Rule 7.40 of the State Bar Rules. The proposed amendments are intended to give the Commission on Judicial Nominees Evaluation (JNE) greater flexibility in forming the teams that investigate candidates for the Court of Appeal or Supreme Court and to clarify the required membership of the teams that investigate candidates for Superior Court.

As discussed in detail below, the State Bar received ten public comments on the proposed amendments two of which agree with the proposed amendments, one of which agrees if the amendments are modified, and seven of which disagree with the proposed amendments. Upon consideration of all the comments, staff recommends that the Board accept a minor suggested edit to the proposed language from one of the commenters, which would expressly clarify that the commission would continue to assign public members to each team investigating appellate court candidates whenever possible, and otherwise adopt the amendments as proposed. While those in opposition to the amendment raise important concerns about the role of public members on the commission, on balance, staff believes that the benefits of filling vacancies in the judicial branch as quickly and efficiently as possible outweighs the risk of harm from a potential investigating team that does not include a public member.

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. Each year, on average, between 150 and 200 candidates are investigated, evaluated, and rated by the JNE Commission. Under State Bar Rule 7.2, the JNE Commission must have at least twenty-seven and no more than thirty-eight members, at least eighty percent of whom must be “active licensees in good standing of the State Bar” with the balance to be public members. Under this rule, the JNE Commission can have no more than seven public members. Currently the JNE Commission has thirty-eight members, four of whom are public members.

Before the JNE Commission meets as a whole to evaluate and rate candidates, small teams of commissioners are assigned to investigate each candidate, reporting back the information they gather to the full commission. State Bar Rule 7.40 governs the required composition of these investigatory teams. Current Rule 7.40 requires that, when evaluating candidates for the Court of Appeal or Supreme Court, the JNE Commission assign a team of three commissioners to investigate candidates, with each team to include one public member. The JNE Commission typically evaluates two to three appellate court candidates per ninety-day appointment cycle.

Earlier this year, the Governor’s Judicial Appointments Secretary notified State Bar staff of the need to process a significantly higher number of judicial candidates, including appellate court candidates, in the upcoming appointment cycles due to record retirements caused by an aging judicial workforce and the impact of the COVID-19 pandemic. The current structure of appellate investigative teams will not accommodate a meaningful increase in the number of candidates reviewed per cycle.

Staff are actively engaged in efforts to recruit additional public members to serve on the JNE Commission. These efforts include outreach to current and former public members of the commission, asking them to share JNE Commission appointments information with their networks; public outreach on social media; and outreach to organizations for individuals interested in public service. However, even if recruitment efforts are successful and the commission eventually has the maximum number of public members allowed, the small number of public members will still limit the number of evaluations of appellate court candidates that can be completed each cycle. On a longer-term basis, the Board of Trustees, in consultant with the Governor’s Office, might consider modifying the overall composition of the JNE Commission to allow for, or require, more public members. A restructuring of the commission to reflect a different proportional make-up of public versus attorney members would provide for more opportunities for public members to be part of each investigation team.

In the meantime, to allow for more expeditious consideration of appellate court candidates when there are a large number of vacancies, as is currently the case, the proposed

amendments to Rule 7.40 provide that a team investigating an appellate candidate must include a public member “to the extent practicable.” In addition, the amendments clarify that the membership of a two-member team investigating a Superior Court candidate must include “at least one” State Bar licensee.

The proposed amendments do not affect the participation of the public members of the JNE Commission in the evaluation and rating of candidates as they only affect the makeup of the investigatory teams. The public members will continue to participate in the commission’s discussion of each candidate and vote on the rating for each.

The specific amendments proposed were discussed at the May 2022 meeting and are provided, with added clarifying language as suggested by one of the public comments, in Attachments B (redline) and C (clean copy).

DISCUSSION

During the 45-day comment period, the State Bar received ten comments. The full text of these comments is set forth in Attachment D. Two individuals submitted comments agreeing with the proposed amendments. One individual submitted a comment agreeing if the amendments are modified. Seven individuals submitted comments disagreeing with the proposed amendments. Of the seven that disagree with the amendment, four comments argue generally that it is important for public members to be included in the process for evaluating judicial candidates but do not address the specific changes proposed, two comments argue that the proposed changes do not go far enough to strengthen the role of attorneys in evaluating candidates for appellate court appointments, and one comment does not address the substance of the change in any way.

The comment agreeing with the amendments if modified suggests that language should be included in the rule expressly stating that “public members would continue to be assigned to each team whenever possible.” Staff believes that this is a valid point as it would codify the intention that public members should continue to serve on these investigating teams. According to the Office of General Counsel, because the proposed amendment only restates the meaning of the originally circulated proposed change, the modified proposal need not be recirculated for further public comment. (Rules of the State Bar of Cal., rule 1.10(B)(2).)

Of the comments disagreeing with the proposed changes, four comments argue that it is important for the public to have a role in evaluating judicial candidates generally. For example, one commenter states, “Allowing lawyers only to choose judges does not feel objective nor fair.” These comments, however, do not appear to take into consideration that the proposed changes would only affect the composition of the investigatory teams, not the composition of the JNE Commission as a whole. Public members of the commission would still participate in the discussion and vote on the recommended rating for each candidate. In addition, it is important to remember that the commission does not choose judges; it evaluates the candidates and provides recommended ratings to the governor, who has the ultimate appointing authority.

Three of the comments disagreeing with the proposed amendments suggest that there should be improved recruitment of public members. One commenter states, “Nowhere in this information do you discuss where you recruit public members, the challenges faced, or proposals to more easily include public members. There could be other solutions to this scenario that does not require opting out public member participation.” As discussed above, staff are actively engaged in efforts to recruit more public members to serve on the JNE Commission. However, even if the commission is able in the future to have a full complement of seven public members, the requirement for a public member to be part of every team investigating an appellate court candidate will continue to make it difficult to process evaluations of these candidates in a timely manner when there are many vacancies to be filled.

Two of the comments disagreeing with the changes argue, by contrast to the comments noted above, that nonattorneys should have no role in the evaluation of judicial candidates. These comments are in direct contradiction to section 12011.5 of the Government Code, which expressly requires that public members be included in the composition of the JNE Commission.

None of the comments disagreeing with the amendments, whether in favor of public member participation or against it, addresses what is specifically proposed to be changed: the required composition of the investigatory teams for appellate court candidates. The proposed amendments leave unchanged the role of public members of the JNE Commission in evaluating and rating judicial candidates. The amendments are intended solely to provide flexibility when there are many appellate court candidates to be evaluated and too few public members to allow investigations to be carried out in a timely manner under the current rule. Moreover, with the additional clarifying language now added, the proposed amended rule will clearly state that a public member should be included on each investigatory team whenever possible.

Staff believes that the proposed amended rule strikes an appropriate balance between the need for public member input in the evaluation of judicial candidates and the need for judicial vacancies to be filled without undue delay.

In conclusion, staff recommends that the Board adopt the proposed amendments with the added clarifying language discussed above, as set forth in Attachments B and C.

FISCAL/PERSONNEL IMPACT

The Bar may experience minor cost savings with the proposed amendments in reduced travel and expense costs for pro tem commissioners.

AMENDMENTS TO RULES OF THE STATE BAR OF CALIFORNIA

Title 7, Division 1, Chapter 3, Article 1, Rule 7.40

AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL

None

STRATEGIC PLAN GOALS & OBJECTIVES

Updates are being made to this section of the agenda item template to reflect the 2022–2027 Strategic Plan.

RECOMMENDATIONS

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

RESOLVED, that the Board of Trustees hereby approves and adopts proposed amended rule 7.40 of the State Bar Rules attached hereto as Attachment B, effective July 21, 2022.

ATTACHMENTS LIST

- A.** May 2022 Board of Trustees Meeting Agenda Item 707 (without attachment)
- B.** Proposed amended State Bar Rule 7.40 (redline)
- C.** Proposed amended State Bar Rule 7.40 (clean)
- D.** Public Comments Received



The State Bar of California

ATTACHMENT A

OPEN SESSION AGENDA ITEM 707 MAY 2022

DATE: May 19, 2022

TO: Members, Board of Trustees

FROM: Bridget Gramme, Deputy Chief of Programs

SUBJECT: Proposed Amendment to Rule 7.40 (Assignment of Judicial Nominees Evaluation Commissioners) of the Rules of the State Bar: Request to Circulate for Public Comment

EXECUTIVE SUMMARY

State Bar Rule 7.40 requires that, when evaluating candidates for the Court of Appeal or Supreme Court, the Commission on Judicial Nominees Evaluation (JNE) assign a team of three commissioners that must include one public member. There are currently a large number of pending and expected vacancies for judges serving on the California Courts of Appeal, and a relatively small number of public commissioners serving on the JNE Commission. This agenda item therefore recommends Board approval to circulate for a 45-day public comment period a proposal that would clarify that assignment of a public member should be made “to the extent practicable,” and make other clarifying changes to rule 7.40.

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 JNE Commission to fulfill this function. Each year, on average, between 150 and 200 candidates are investigated, evaluated, and rated by the JNE Commission.

Title 7 of the State Bar Rules specifies the procedures under which the JNE Commission operates. Rule 7.40 requires that the chair of JNE, or staff in the chair’s absence, appoint a team of commissioners, one of whom is designated as lead, to investigate candidates and report to the commission. For candidates for the superior court, the rule requires the appointment of a

two-person team. Subsection (B) specifies that for candidates for the Court of Appeal or Supreme Court, a team of three or more commissioners must be appointed, one of whom is a public member.

Currently, there are 38 JNE commissioners, four of whom are public members. According to the most recent Judicial Vacancy Report, as of May 1, 2022, there are 11 pending judicial vacancies in the appellate courts, and the governor's office reports that they expect several more in the coming year with impending retirements.

DISCUSSION

The governor's office provides the JNE Commission with a list of candidates for evaluation every 90 days. Given the size of the commission, and the in-depth nature of the investigations, the commission typically has the capacity to evaluate 25 to 30 judicial candidates per cycle. The commission is relatively limited in its ability to evaluate appellate court vacancies in accordance with rule 7.40 given the small number of public members on its roster. In a typical cycle, the commission brings on pro tem members (former commissioners who volunteer on a particular investigation) to meet the public member requirements. Even with these volunteers, the commission typically only evaluates two to three candidates for the Courts of Appeal per cycle.

At this rate, it would take approximately one year to evaluate 11 candidates for the Court of Appeal to fill the existing vacancies and longer, as additional vacancies emerge due to expected retirements in the coming year.

In light of this, in consultation with the governor's office which has expressed an interest in the commission increasing its capacity to evaluate appellate candidates, staff recommends amending rule 7.40 to add the term "to the extent practicable" to the requirement that investigative teams evaluating appellate candidates must contain a public member. This would reiterate the importance of public voices as the preferred composition of investigative teams while giving the commission flexibility to evaluate more appellate candidates per cycle if necessary.

Staff also recommends that subsection (A) be amended to clarify that "at least" one of the members of the investigating team for superior court candidates be a licensee of the State Bar.

FISCAL/PERSONNEL IMPACT

The State Bar may experience minor cost savings with the proposed amendments in reduced travel and expense costs for pro tem commissioners.

AMENDMENTS TO RULES OF THE STATE BAR OF CALIFORNIA

Title 7, Division 1, Chapter 3, Article 1, Rule 7.40

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 7.40 of the State Bar Rules attached hereto as Attachment A.

ATTACHMENT LIST

- A.** Proposed amendments to State Bar Rule 7.40

Rule 7.40 Assignment of commissioners

The chair or staff in the chair's absence must appoint a team of commissioners ("team"), one of whom is designated as lead, to investigate candidates and report to the commission as follows:

- (A) for a candidate for superior court, a team of two or more commissioners, at least one of whom is a State Bar licensee; and
- (B) for a candidate for the Court of Appeal or Supreme Court, a team of three or more commissioners, one of whom, to the extent practicable, is a public member. Whenever possible, a public member will be assigned to each such team.

Rule 7.40 Assignment of commissioners

The chair or staff in the chair's absence must appoint a team of commissioners ("team"), one of whom is designated as lead, to investigate candidates and report to the commission as follows:

- (A) for a candidate for superior court, a team of two or more commissioners, at least one of whom is a State Bar licensee; and
- (B) for a candidate for the Court of Appeal or Supreme Court, a team of three or more commissioners, one of whom, to the extent practicable, is a public member. Whenever possible, a public member will be assigned to each such team.

**Comments Received on Proposed
Amendments to Rule 7.40**

Date Received	Name	Comment
5/26/2022	Carmen	AGREE: (No further comment received)
5/27/2022	Megan Zavieh	AGREE: The proposed rule is practical and allows for the important process of judicial nominee evaluation to move forward without being hindered by a limiting rule. It should be implemented as proposed.
6/11/2022	Paul Eric Gold	DISAGREE: Don't allow non attorneys to vote at all. Since they never appear before any judge, their votes, and comments, are not relevant. If you are going to let non attorneys participate in everything that an attorney is allowed to participate in, you might as well stop making attorney pass the Bar, and the MCLE, and character examinations. Once non attorneys can participate in all of those activities and functions, then there is no point in the existence of the State Bar, or their dues, or their discipline, or their rules, or anything whatsoever.
6/13/2022	Anonymous	DISAGREE: There are plenty of attorneys that could serve in this role. Promoting this to members of the bar needs to be done before we include non-attorneys that are likely partisan and seek to sway the bench for political purposes.
6/14/2022	Ken Murray	DISAGREE: Far more important than efficiency, is trust over the process. Allowing lawyers only to chose judges does not feel objective nor fair. In the argument, it states that the Bar continues to solicit public members. However, in a quick review of the Bar website, I can find no evidence of such solicitation. It may be there, but so buried as to be meaningless. This finding makes me think the Bar is not particularly interested in fulfilling it's obligation, only avoiding the obligation, and phrasing it as "efficiency" No.
6/15/2022	Marybeth Carter	DISAGREE: Nowhere in this information do you discuss where you recruit public members, the challenges faced, or proposals to more easily include public members. There could be other solutions to this scenario that does not require opting out public member participation.
6/20/2022	Jane Solomon	DISAGREE: I can't think of a reason why the State Bar should have sole control over evaluations; it's an organization with its own peculiar goals and values that may or may not include public benefit. If public members aren't required the Bar will have sole control. It sounds like more public members need to be recruited.

6/23/2022	Tejae	DISAGREE: If Newsom proposed it then it can't be a good thing for law abiding citizens
6/25/2022	Anthony P Jakubisin	DISAGREE: The public's role must remain intact. One can imagine a very different California in the future and I do not want the public's role / public voice to be rationalized away at the whim of politicians in power.
6/28/2022	Anonymous	AGREE ONLY IF MODIFIED: While the informational materials state that "Public members would continue to be assigned to each team whenever possible," this is not explicitly stated in the rule. This language should be added to the rule itself.