



# The State Bar of California

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## **OPEN SESSION AGENDA ITEM 701 MARCH 2023**

**DATE:** March 16, 2023

**TO:** Members, Board of Trustees

**FROM:** Bridget Gramme, Deputy Chief of Programs

**SUBJECT:** Proposed Amendments to State Bar Rules 7.52 and 7.60 Regarding Commission on Judicial Nominees Evaluation In Person Interview and Meeting Requirements to Conform to 2023 Budget: Request to Circulate for Public Comment

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### **EXECUTIVE SUMMARY**

State Bar Rules 7.52 and 7.60 require interviews and presentations conducted in the course of evaluations by the Commission on Judicial Nominees Evaluation (JNE) to occur in person absent unusual circumstances. As written, this requirement is a barrier to implementing recent efforts to streamline the JNE evaluation process, and the Board's adoption of the State Bar's 2023 budget which limits the available expenditures for subentity in-person meetings. Notably, candidate interviews have been taking place remotely throughout the COVID-19 pandemic and there have been many benefits to this new model, including ease of scheduling and cost savings to the State Bar and the candidates. This agenda item therefore recommends Board approval to circulate for a 45-day public comment period a proposal that would remove the requirement to conduct these tasks in person and permit the use of remote interviews and meetings where appropriate.

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### **BACKGROUND**

Government Code section 12011.5(a) requires that when the governor prepares to fill judicial vacancies, the names of candidates for the judgeships must 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. Title 7 of the State Bar Rules specifies the procedures under which the JNE Commission operates.

To accommodate a request by the governor's judicial appointments secretary that the commission increase the number of candidates it evaluates each 90-day cycle, JNE staff have been working closely with the commission to streamline processes and procedures and maximize efficiency in the evaluation process. As a result, over the past year, the commission has successfully moved its operations onto a SharePoint site so that commissioners may access candidate reports in advance of each meeting, schedule candidate interviews via a shared calendar, securely share notes and documents between investigative teams, conduct electronic voting at commission meetings, and more. The commission also adopted a streamlined format for its candidate reports and received high praise from the governor's appointments office on their quality.

This exercise, combined with the Board's adoption of the 2023 budget which limits available expenditures for subentity in-person meetings, has revealed an urgent need to amend certain State Bar Rules so that more efficient, and less costly, procedures can be permanently implemented. Staff will present a more comprehensive package of proposed amendments to the State Bar Rules to reflect additional changes to JNE operations at the Board's May meeting, but those recommended here are necessary to implement the budget and are therefore being proposed now outside of the typical rule amendment cycle.

Specifically, rule 7.52 currently requires that the investigating team must interview a judicial candidate in person, unless the chair authorizes the use of remote means in unusual circumstances. Prior to the COVID-19 pandemic, in compliance with this rule, interviews took place at the State Bar's Los Angeles or San Francisco office, at the investigating team's discretion. The State Bar covered the commissioners' costs to attend the interview; the candidates covered their own costs of travel. These interviews have been taking place on Zoom since March of 2020 due to the pandemic.

Rule 7.60 sets forth the requirements for reports at the conclusion of an investigation and evaluation of a judicial candidate. Specifically, it requires the investigating team to provide the commission with a written report on the candidate and provides that, "absent unusual circumstances, the lead commissioner must present the report in person." In practice, these presentations take place in person at JNE commission meetings, which have traditionally been scheduled as two-day meetings on a Friday and Saturday, every other month, and alternating between the State Bar's San Francisco and Los Angeles offices. During the pandemic, these meetings took place via Zoom, but the commission resumed its in-person meeting schedule in April of 2022. Currently, at the chair's discretion, investigators who are unable to attend a meeting in person present their report to the commission via Zoom or telephone for their candidates only but do not participate in the entire meeting from a remote location as the commission highly values its in-person discussions.

Prior to the development of the secure SharePoint site described above, each investigating commissioner would present their report at commission meetings by reading the entire report

out loud. Due to concerns that these highly confidential reports might be inadvertently left on an office printer or downloaded on a computer, commissioners did not receive reports in advance or during the meetings. As staff began looking for ways to streamline the JNE evaluation process, it became clear that the verbatim reading of reports took a significant amount of time during the meetings and was a primary reason that two full days were needed to conduct JNE business each cycle. The SharePoint site is secure, and the commission has adjusted its procedures so that candidate reports are now edited and made available to commissioners at least a week in advance of the scheduled commission meeting, providing ample time for commissioners to review them before the meeting and note any areas for discussion. Importantly, they cannot be downloaded or printed to preserve the confidentiality of the report. This alleviates the need for the commissioners to read the full reports out loud, leaving more time for focused discussion of the candidate while substantially reducing the time it takes to conduct each meeting overall.

Typically, the State Bar covers the cost of travel for each of the 38 commissioners, and staff as needed, including two nights of hotel, and meals. The State Bar has also incurred additional costs for hosting meetings on Saturdays including staff overtime, security, janitorial costs, HVAC, etc. With the Board's adoption of the [2023 budget](#) on February 27, 2023, the State Bar will now only cover one night of hotel accommodations instead of two, and the budget does not include funding to cover the additional costs associated with hosting Saturday meetings. The budget would still fund two days of meetings on the weekdays.

Importantly, the transition away from Saturday JNE meetings will align this subentity with the express policy adopted by the Board in November 2018 that weekend meetings, except where absolutely necessary, will not be scheduled. This policy was implemented based on the recommendations of the Governance in the Public Interest Task Force to streamline subentity policies and procedures, and was specifically adopted in light of the cost of overtime for staff, facility costs to keep the building open on the weekends, and the difficulty for staff to maintain a reasonable work-life balance.<sup>1</sup>

Staff are currently working with JNE leadership to accommodate the operational changes required to comply with the new budget. While they have been open to and recognized the need for many of the changes staff have recommended in the past year, JNE leadership—and many commissioners—have been generally opposed to eliminating the Saturday meetings. They have asked staff to look at alternatives, including private meeting space, and staff are in the process of gathering that information.

Like the Board of Trustees' meeting calendar, JNE commission meetings are often scheduled out years in advance. At this writing, the commission's schedule is set, including Friday/Saturday meetings every other month, through April 2024. Staff will continue to work with JNE leadership but propose maintaining the existing schedule, with a Thursday overnight hotel accommodation, 8:30 a.m. start time on Friday, and transitioning the previously scheduled Saturday meetings to remote through April 2024. Staff propose to schedule the

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<sup>1</sup> See November 16, 2018 [Agenda Item 704](#) at p. 6; and [minutes](#).

meetings after that time to a Thursday/Friday schedule with one hotel overnight, and would advise new applicants of the proposed schedule going forward. The proposed amendment to rule 7.60 would permit the remote meeting option where necessary.

## **DISCUSSION**

### **PROPOSED AMENDMENTS TO RULE 7.52**

As the commission enters its third year utilizing remote candidate interviews, it has become evident that there are clear benefits to maintaining this practice going forward. In addition to the obvious cost savings to the State Bar and to the candidates themselves—particularly those who live in the more remote counties—this new mode has vastly improved the scheduling process, made it much easier to conduct follow up interviews where needed, and created a clear record for the Review Commission on Judicial Nominees Evaluation (RJNE) to rely upon when reviewing the commission’s “Not Qualified” ratings of certain candidates. While some commissioners have expressed concern that remote interviews do not provide the same opportunity to get to know the candidates as well as they could during in-person interviews, on balance staff believe that the pros of remote interviews outweigh the cons.

Accordingly, staff recommend that the Board release for a 45-day public comment period a proposed amendment to rule 7.52 subsection A that would remove the requirement that the investigating team must interview candidates in person.

### **PROPOSED AMENDMENTS TO RULE 7.60**

While the commission has made significant strides in streamlining its procedures and reducing the time it takes to conduct each meeting, it is still possible that the volume of candidates in a given cycle may require more than a one-day meeting for the commission to fully evaluate all candidates. To accommodate the 2023 budget, and maintain the existing calendar for meetings scheduled through April of 2024, it would be beneficial for the commission to have the option to finish up its remaining business remotely on Saturdays. The current rule, however, requires that the lead investigators present their reports in person, thus prohibiting the commission from completing its business via Zoom. Additionally, the current rule only permits investigating commissioners who cannot attend the meeting in person to present their report to the commission via Zoom in “unusual circumstances.”

Accordingly, staff recommend that the Board circulate for a 45-day public comment period a proposed amendment to rule 7.60 that would remove the requirement that investigating commissioners present their report “in person,” thus authorizing commission meetings to be conducted remotely, and allow lead investigators to present their reports remotely if necessary.

## **FISCAL/PERSONNEL IMPACT**

The proposed amendments would enable JNE to conform with the budget adopted by the Board on February 27, 2023.

## **AMENDMENTS TO RULES OF THE STATE BAR OF CALIFORNIA**

Title 7, Division 1, Chapter 3, Rules 7.52 and 7.60

## **AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL**

None

## **STRATEGIC PLAN GOALS & IMPLEMENTATION STEPS**

None: operational

## **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 7.52 of the State Bar Rules attached hereto as Attachment A; and it is

**FURTHER RESOLVED**, that the Board of Trustees authorizes staff to make available for a 45-day public comment period the proposed amended rule 7.60 of the State Bar Rules attached hereto as Attachment B.

## **ATTACHMENTS LIST**

- A.** Proposed amendments to State Bar Rule 7.52
- B.** Proposed amendments to State Bar Rule 7.60

**Rule 7.52 Conduct of candidate interviews**

- A. The team must interview a candidate. A candidate may not be interviewed by or appear before the entire commission in connection with his or her nomination.
- B. In conducting the interview, the team must do nothing to enable the candidate to ascertain the source of information it has received under the assurance of confidentiality.
- C. Unless the candidate objects, the interview must be recorded and the recording retained in accordance with these rules. A candidate who objects to recording is not entitled to review of a rating of not qualified.

**Rule 7.60 Reports to commission**

At the conclusion of an investigation and evaluation, the team must provide the commission with a written report on the candidate and, absent unusual circumstances, the lead commissioner must present the report to the commission at its meeting. The report must specify the number of Confidential Comment Forms mailed and the number received; categorize the responses; summarize substantial and credible information submitted; recommend a rating; and otherwise comply with commission instructions.