



The State Bar of California

OPEN SESSION AGENDA ITEM 704 JULY 2023

DATE: July 20, 2023

TO: Members, Board of Trustees

FROM: Bridget Gramme, Deputy Chief of Programs

SUBJECT: Update Regarding State Bar Rule Related to Commission on Judicial Nominees Evaluation In-Person Candidate Interviews (Rule 7.52), Update on Assignment of Judicial Nominees Evaluation Commissioners (Rule 7.40), and Recommendation for Additional 2023 Funding

EXECUTIVE SUMMARY

In the time following the May 2023 Board meeting, State Bar staff have engaged in extensive discussions with the Commission on Judicial Nominees Evaluation (JNE) leadership regarding the need to advance proposed amendments to State Bar Rule 7.52 requiring in person candidate interviews, as well as the implications of funding for one versus two nights of hotels in relation to JNE meetings. Following these discussions, staff and JNE leadership have reached an agreement regarding both issues.

Additionally, at its July 2022 meeting, the Board adopted an amendment to rule 7.40, which added the term “to the extent practicable” to the requirement that a public member of the JNE be assigned to each investigating team evaluating appellate court candidates. The Board voted to assess the effects of that amendment in May 2023. Staff inadvertently did not bring the corresponding analysis forward to the Board in May; this item corrects that omission.

This memo (1) addresses rule 7.52 regarding JNE candidate interviews; (2) requests that the Board amend JNE’s 2023 budget to restore funding for two nights of hotel; and (3) recommends that a task force be established to conduct a comprehensive review of the State Bar rules governing JNE operations, including the implications of the recent amendments 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 must be submitted “to a designated agency of the State Bar of California ... for evaluation of their judicial qualifications.” 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.

At its May meeting, the Board heard a number of public comments from current and former JNE commissioners, including the current chair and vice-chair of the commission, largely opposing staff’s proposed amendments to rules 7.52 and 7.60 which would remove the requirement that judicial candidate interviews and JNE meetings be held in person. As detailed in the May agenda item ([Item 703](#)), staff presented the proposed amendments in the context of significant fiscal challenges facing the State Bar and JNE operational changes that have been introduced over the course of the last year designed to streamline operations and potentially increase the number of candidates the commission evaluates each cycle. After discussion with JNE leadership and considering the public comments, staff withdrew its proposed amendments to rule 7.60 regarding remote meetings for the time being but maintained its recommendation to adopt the proposed amendments to rule 7.52, which would enable the current practice of conducting candidate interviews remotely to continue indefinitely.¹

After hearing the comments, and a lengthy discussion, the Board ultimately voted to table its discussion to the July meeting and encouraged staff to work with JNE leadership in the interim period on a potential compromise. Since that time, staff has held six meetings with JNE leadership in attempts to develop solutions that preserve the integrity and quality of the JNE evaluation process while accommodating the State Bar’s financial capacity to support this work and the policy objective of efficient use of staff and volunteer time. Staff also administered a survey to current JNE commissioners, as well as over 90 individuals who submitted applications to serve on the JNE commission, regarding various meeting scenarios given existing budget constraints, to inform recommendations for meetings moving forward.

Regarding rule 7.40, the Board adopted an amendment to this rule at its July 2022 meeting ([Item 702](#)) designed to increase JNE’s capacity to evaluate appellate court and supreme court candidates. Specifically, the amendment added the term “to the extent practicable” to the requirement that investigative teams evaluating such candidates must contain a public member and added clarifying language that “[w]henever possible, a public member will be assigned to each such team.” After several Board members expressed concern that the role of public members on JNE would be diminished, the Board voted to revisit rule 7.40 to assess the impact of the amendment at its May 2023 meeting. Due to staff oversight, the May agenda did not include a discussion of this rule.

¹ Prior to the pandemic, the State Bar funded commissioner travel related to candidate interviews. Other than one evaluation cycle in 2022, candidate interviews have remained remote, resulting in significant cost savings.

DISCUSSION

RULE 7.52

During the continued discussions between staff and JNE leadership regarding the proposed amendments to eliminate the in-person requirement for judicial candidate interviews, JNE chair Justin A. Palmer expressed his view that the existing rule 7.52 (a), allows a JNE chair to exercise discretion in favor of remote interviews, given the State Bar's existing budgetary and financial constraints.² He offered a commitment to do so throughout his tenure as chair, which expires in April 2024. JNE vice-chair Chhaya Malik has also expressed her commitment to maintain this practice if she is elected as JNE chair, which would extend to April 2025. JNE leadership maintains that a rule change is unnecessary.

Staff sought the opinion of the Office of General Counsel (OGC) regarding this interpretation, inquiring about the meaning of the term "unusual circumstances," and whether such circumstances exist now that the state of emergency imposed during the pandemic has been lifted. The existing rules do not define "unusual circumstances" and OGC has advised that it would be beneficial to define this term to avoid ambiguity and provide clarity as to when these circumstances exist. OGC has further advised that budgetary and financial constraints are factors that reasonably support "unusual circumstances" within the meaning of the rule to justify the chair's continued authorization of remote candidate interviews in the short term. However, budgetary constraints are generally temporal and could not be relied on permanently. Accordingly, a rule change is still advisable to define the term "unusual circumstances," assuming that the term remains in any future versions of the rule.

Staff also believes that good governance principles weigh in favor of a rule amendment removing the sole authority to make decisions that significantly impact the State Bar's budget from subentity members.³

JNE leadership believes staff could accomplish a healthy balance of governance by continuing to work under the existing rule structure. The JNE rules confer substantial discretion to the chair in discharging the statutory responsibilities of the commission. Good governance is not disrupted by having JNE leadership interpret the rules in conjunction with ongoing coordination with State Bar staff.

Based on conversations with JNE leadership, the sentiment expressed in many of the public comments received, and the analysis provided by OGC, staff recommends that no action be taken to amend rule 7.52 at this time.

Instead, both staff and JNE leadership propose to convene a seven-person task force, with six of the members selected by JNE leadership and one Board of Trustee member to be selected by

² Rule 7.52 (a) provides in pertinent part that "The team must interview a candidate in person, unless the chair authorizes the use of remote means in unusual circumstances."

³ Staff estimates that resuming in-person candidate interviews would cost approximately \$105,000 annually. In addition to JNE rules, there are other subentity rules that vest power in chairs to make decisions implicating the State Bar budget; all such provisions should be addressed by the Board.

the Board. Staff and JNE leadership agree that the task force will consider and draft any amendments necessary to update and clarify the rules. The task force will be charged with clearly articulating the basis for any proposed change, in view of its impact on the investigative process as a whole, and will endeavor to jointly present a package to the Board at its November meeting, to the extent practicable.

Pursuant to OGC's analysis, based on Mr. Palmer's authorization under the existing rule, candidate interviews will proceed via Zoom for the time being; the issue can be revisited as part of the overall rules review exercise.

UPDATE ON RULE 7.40

In the time since the Board adopted amendments to rule 7.40 in July 2022, the JNE commission has completed six evaluation cycles and evaluated 24 appellate court candidates and two supreme court candidates. Each investigating team for each of these candidates has included a public member. Consistent with their commitment to the Board last year, staff, in consultation with JNE leadership, has been successful in recruiting public members, and anticipates a full slate of eight public members to serve on the commission beginning in 2024.

This increase in public members, and the invaluable willingness of former JNE public members to serve as pro tem members on these investigations, has enabled the commission to maintain its practice of including public members on all appellate and supreme court investigating teams.

Staff recommends that the proposed task force described above evaluate the impact of the amendments to rule 7.40 as it considers the complete set of JNE rules over the next several months and bring back a recommendation to the Board in November as to whether or not the 2022 amendment adding "to the extent practicable" as a modifier to public member participation in appellate candidate reviews is still necessary in light of robust public member participation on the commission overall.

TWO NIGHTS OF HOTEL PER MEETING

The State Bar's 2023 budget includes one night of hotel for each of JNE's six in-person meetings this year. This is a change from prior practices when two nights of hotel were afforded per meeting. JNE leadership believes that the reduction to one night of hotel per meeting is negatively impacting the commission's ability to do its work and has significantly reduced morale on the commission. Mr. Palmer has relayed to State Bar staff that at least three JNE members have expressed a desire to quit this volunteer commitment. Based on the sentiment expressed in many of the public comments received, staff understands the concerns and now recommends the Board fund two nights of hotel per meeting. This would equate up to \$25,000 to cover the remaining three meetings of this year. JNE leadership would like a commitment to the full-year equivalent of this funding for budget years 2024 and 2025; staff does not believe such a future commitment is appropriate at this time.

Staff anticipates that this budget adjustment will help alleviate the disruption to current JNE meetings and help with the morale issue that the commission is facing. State Bar staff remains

committed, however, to continue working with JNE leadership, the commission, and the governor's office to develop future operational changes that address the State Bar's financial capacity to support the commission while maintaining the quality and integrity of this very important work. These efforts may include any tangible recommendations made by the task force.

FISCAL/PERSONNEL IMPACT

Should the Board agree with staff's recommendation, a General Fund augmentation in an amount not to exceed \$25,000 would be required. This amount would be added to the budget amendment being presented to the Board as part of the July agenda item package.

AMENDMENTS TO RULES

None

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 directs staff to add \$25,000 to the 2023 Judicial Nominees Evaluation Commission budget to support two nights of hotel per meeting for the remainder of the year.

ATTACHMENT LIST

None