



The State Bar of California

OPEN SESSION AGENDA ITEM 704 NOVEMBER 2023

DATE: November 16, 2023

TO: Members, Board of Trustees

FROM: Justin A. Palmer, Chair, Commission on Judicial Nominees Evaluation

SUBJECT: Judicial Nominees Evaluation Commission Task Force Proposed Revisions to Rules and Request to Circulate for Public Comment

EXECUTIVE SUMMARY

At the Board of Trustees' July 2023 meeting, State Bar staff and the Commission on Judicial Nominees Evaluation (JNE) leadership recommended the formation of a task force to conduct a comprehensive review of the State Bar Rules governing JNE and propose potential amendments to the Board at its November 2023 meeting to release for public comment. The recommendation to establish a task force followed a series of rule proposals from staff pertaining to in person interviews and meetings, public comment from current and former JNE commissioners opposing the changes at the Board's May meeting, and extensive discussions between staff and JNE leadership regarding potential rule changes.

Following the July meeting, JNE leadership selected six individuals to participate in the task force, chosen to leverage the collective wisdom of current and former JNE members and leadership, and Trustee Jose Cisneros was appointed to represent the Board of Trustees. Over the course of the past three months, the task force solicited feedback from current and former JNE commissioners, as well as JNE staff, about ways to improve the JNE Rules and make the process more efficient. The common threads and lessons shared by these multiple stakeholders informed the mission of the task force.

After several meetings and hours of thoughtful discussion the task force identified, discussed, and reached unanimous agreement regarding a number of recommendations for rule changes, and propose that the Board release two options for public comment on one rule change, as described in detail below. These recommendations demonstrate the widespread impact and importance of JNE and its role in ensuring candidates for appointment to California's judiciary receive a fair evaluation.

We thank the task force members for their service. We also thank the State Bar for its commitment to the advancement of diversity, equity, and inclusion in the legal profession. We appreciate your focus on the pipeline into the legal profession, retention and career advancement, and judicial diversity.

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 March meeting, at staff’s recommendation, the Board voted to circulate for a 45-day public comment period a proposal that would amend State Bar Rules 7.52 and 7.60 to remove the requirement that candidate interviews and commission meetings be conducted in person, effectively permitting these tasks to be performed remotely where appropriate. Staff proposed these amendments in the context of significant fiscal challenges facing the State Bar and JNE operational changes that had been recently implemented to streamline operations and potentially increase the number of candidates the commission evaluates each cycle.

After receiving numerous comments opposing the proposed amendments during the public comment period and at the May meeting, the Board postponed its vote to the July 2023 Board meeting and directed staff and JNE leadership to explore a compromise.

In July 2023, staff and JNE leadership updated the Board on their ongoing discussions regarding the proposed changes as well as funding implications for JNE meetings. Ultimately, rather than move forward with potential amendments to the specific rules addressing in person interviews and meetings, staff and JNE leadership agreed that the best course of action would be to form a seven-person task force, comprised of six members selected by JNE leadership and one appointed by the Board, to conduct a comprehensive review of all of the rules governing JNE, and recommend any proposed amendments to the Board at its November meeting. The Board concurred with this recommendation during its discussion at the July meeting, and the task force began its work following the meeting.

The roster included the following members:

1. Justin A. Palmer, JNE Chair
2. Chhaya Malik, JNE Vice Chair
3. José Cisneros, BOT Vice Chair and RJNE Member
4. David Fu, former JNE Commissioner and Chair
5. Hon. Brenda Harbin-Forte (ret.) – current JNE Commissioner

6. Jody Nuñez, former JNE Commissioner and Chair; former RJNE Member and Chair
7. Lorena Peñaloza, current JNE Commissioner and incoming JNE Vice-Chair

Before it began meeting, the task force sent a survey to current and former JNE commissioners seeking their suggestions for potential rule changes. The task force was then divided into two-member teams who were assigned specific sections of Title 7 of the Rules of the State Bar to review and propose amendments. The full task force, and members of the JNE staff, met five times over the past three months to consider and propose changes to the existing rules.

DISCUSSION

After considering stakeholder feedback and engaging in extensive discussions, the task force recommends that the Board release proposed amendments to the following rules for public comment, as described below and reflected in Attachment A.

GENERAL PROVISIONS

Temporary commissioners – Rule 7.3: The task force recommends amending this section to reflect current practice of referring to temporary commissioners as “pro tempore” commissioners. Additionally, the proposed amendment would expand the pool of temporary commissioners accessible to the JNE commission by permitting individuals who may have served less than a full term on the commission to serve as pro tempore commissioners.

Duties of commissioners – Rule 7.5

Subsection (D) of this rule currently prohibits former JNE commissioners from applying to become a judge when a majority of the commission consists of members with whom they have served. The task force recommends amending this subsection to clarify that it applies to the person’s prior service, “either as a regular or pro tempore member of the commission.”

PROCEDURES

In General

Assignment of commissioners - Rule 7.40(B)

At its July 2022 meeting ([Item 702](#)), the Board adopted an amendment to this rule at the request of the Governor’s Judicial Appointments Secretary, 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]henver possible, a public member will be assigned to each such team.” At the July 2023 meeting, staff and JNE leadership advised the Board that the task force would reevaluate the impact of this amendment and present recommendations.

In considering this rule, the task force reviewed the composition of the investigating teams in the time since the Board adopted amendments to rule 7.40 in July 2022. The JNE

commission completed eight evaluation cycles and evaluated 29 appellate court candidates and two supreme court candidates. Each investigating team for each of these candidates has included a public member. The task force also considered that a full slate of eight public members have now been appointed to serve on the commission beginning in 2024.

After review, the task force recommends amending this section to revert to the original requirement that the investigating team on an appellate or Supreme Court candidate must include a public member. This is consistent with JNE's long standing practice and codifies the value JNE places in public membership, particularly in the appointment of California's appellate and Supreme court candidates.

Duties of lead commissioner – Rule 7.41

The task force recommends amending this section to include additional duties for the lead commissioner such as scheduling the candidate interview and notifying the chair when the investigating team members determine that the candidate is not engaging in the investigation process in good faith. The proposed amendment is designed to clarify how JNE responds to instances where the candidate makes it difficult to schedule an interview within the commission's timeline or otherwise is uncooperative with the evaluation process.

Request for withdrawal – Rule 7.42 [New]

The task force recommends adding a new rule clarifying the circumstances in which the JNE Chair may request the Governor withdraw a candidate from consideration during an investigation cycle. The ambiguity in the existing rules, has resulted in a great deal of confusion, particularly as it relates to pending disciplinary complaints against a candidate. See discussion of Rule 7.61(D) discussed below. The task force drafted this proposed new rule taking into account input from a number of sources including commissioners who experienced this difficulty in the past, JNE staff, the Office of General Counsel, the Office of Chief Trial Counsel, and the Governor's Judicial Appointments Unit.

Confidential Comment Forms:

Candidate's contact list – Rule 7.45

The task force recommends amending this section to conform to current commission practice of asking candidates to submit the names of all attorneys and judicial officers mentioned in their application for judicial appointment in addition to the list of names they already provide to the commission.

Required distribution – Rule 7.47

The task force recommends amending this section to conform to current commission practices, e.g. updated electronic distribution in Los Angeles County, commission staff outreach to appellate courts, and nomenclature (i.e. "questionnaires" was changed to "Confidential Comment Forms (CCF)"). Of note, the proposed amendments also significantly elevate the target numbers for the size of the CCF random distribution and contacts with candidate raters, observing that existing rules pre-date current electronic distribution practices, and current ease of distribution justifies a more expansive inquiry into potential raters. The target numbers in this rule are reflective of current practices.

Candidate Interviews:

Prior disclosure of substantial and credible adverse allegations – Rule 7.50

The task force recommends amending this section to include the option for a candidate to waive the required four business days' notice of substantial and credible adverse allegations by the investigating team before the interview. It also expands the judicial qualities requiring prior notice of credible adverse allegations to include absence of bias and commitment to equal justice.

Conduct of Candidate Interviews – Rule 7.52

The task force devoted substantial time to discussion of Rule 7.52 regarding candidate interviews in person versus by remote means. Some members emphasized the high quality of in-person interviews compared to virtual meetings, citing issues with virtual interviews such as potential audio and visual integrity problems due to poor reception. Others emphasized the general social acceptance and ubiquity of remote proceedings, believing that virtual interviews offered similar experiences to an in-person interview, enhanced the overall JNE process, and offered cost savings for the State Bar's budget. The task force was not provided with detailed financial information; and therefore did not engage in an extensive discussion about how virtual interviews would impact State Bar's budget. Staff did, however, provide an estimated annual cost of resuming in person interviews of approximately \$135,000.

Ultimately, the task force voted to present two alternative proposals to the Board and recommend releasing both options for public comment:

Option 1:

Keep the existing rule, which would uphold the commission's longstanding tradition of conducting candidate interviews in person which has been essential to the commission's overall mission, given the importance of judicial selection, the impact on public protection, and the relatively few opportunities to evaluate a judicial candidate in person.

OR

Option 2:

Propose to proceed with remote proceedings as acceptable for trial court candidates but that interviews of all candidates for a Court of Appeal or the Supreme Court should be in person.

Evaluations

Summary evaluation of candidate previously evaluated for superior court or Court of Appeal – Rule 7.56

The task force recommends amending this section to clarify the circumstances under which a shortened evaluation process is appropriate where a given candidate has already been evaluated by the commission. Of note, the proposed amendments would limit the summary evaluation process to candidates who have been evaluated within the past twelve months

and clarify that if the summary evaluation does not reveal additional negative matters, the commission shall adopt the prior evaluation submitted to the governor's office.

Reports

Reports to commission – Rule 7.60

The task force recommends amending this section to conform the procedures for the submission of a candidate report by the investigation team to current practice and clarify that the reports must be submitted in advance of the JNE meeting. The rule also clarifies that commission meetings to consider the candidate reports must be held in person and provides that the chair of the commission will consult with State Bar staff regarding the location and schedule of meetings.

Reports to Governor – Rule 7.61

The task force recommends amending this section to repeal subsection (D), which addresses protocol for evaluating candidates who have a pending State Bar complaint against them. This subsection would be moot if new rule 7.42, discussed above, is adopted, which the task force developed to resolve many of the ambiguities in existing subsection (D).

Reconsideration – Rules 7.65–7.68

The task force reviewed the current rules in this article and after discussion determined they were clear and needed no revision. The basis for review is clearly spelled out in rules 7.65–7.66.

The task force considered amending the rules to include notice of the findings of the Review Committee of the Commission on Judicial Nominees Evaluation (RJNE) in writing to the JNE leadership and whether the rules should be amended to include notice to the candidate of the reason for a rescission of a not qualified (NQ) rating. The task force was concerned that any modification of the rules permitting disclosure of the basis for a rescission might violate JNE Rule 7.20 pertaining to confidentiality. Some expressed concern that the lack of detail provided to candidates regarding the basis of the rescission might lead candidates to believe that the substantive bases for their appeal, such as bias, were validated when most rescissions are in fact based on technical rule violations. Ultimately, however, the task force felt it was too risky to provide the candidates with any information regarding the basis for an RJNE NQ rescission.

RJNE currently advises the JNE leadership via staff about the basis for a rescission. After consideration the task force concluded that this practice does not require a rule change as there is nothing in the rules precluding the disclosure of this information informally, and it is educational for the sitting JNE members to understand why an NQ was rescinded so similar problems can be avoided in future investigations. The task force felt the current practice works and is not controversial.

TECHNICAL AMENDMENTS

Proposed amendments to the following rules are technical amendments to replace outdated terminology referring to the President of the Board of Trustees and replacing it with "Chair:"

- Removal of commissioners – Rule 7.4
- Commission records – Rule 7.8
- Breach of confidentiality – Rule 7.22

FISCAL/PERSONNEL IMPACT

Staff estimates the cost of resuming in person candidate interviews to be approximately \$135,000 annually. If the Board ultimately adopts “Option 1” presented in Rule 7.52, and maintains the existing requirement that the candidate interviews be conducted in person, this amount would need to be added to JNE’s budget in 2024.

AMENDMENTS TO RULES OF THE STATE BAR OF CALIFORNIA

Title 7 (Miscellaneous Provisions), Division 1 (Commission on Judicial Nominees Evaluation),

Amend Rules 7.3, 7.4, 7.5, 7.8, 7.22, 7.40, 7.41, 7.45, 7.47, 7.50, 7.52, 7.56, 7.60, 7.61

Add Rule 7.42

AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL

None

STRATEGIC PLAN GOALS & IMPLEMENTATION STEPS

None: operational

RECOMMENDATIONS

RESOLVED, that the Board of Trustees release for a 60-day public comment period the proposed amendments to Title 7 of the Rules of the State Bar as proposed in Attachment A.

ATTACHMENT LIST

- A. Proposed amendments to JNE Rules

Commission on Judicial Nominees Evaluation Compendium of Governing Authority

SECTION 1. Rules of the State Bar of California

Title 7 (Miscellaneous Provisions), Division 1 (Commission on Judicial Nominees Evaluation)

Chapter 1. General provisions

Rule 7.1 Commission on Judicial Nominees Evaluation.....	1
Rule 7.2 Membership and terms	1
Rule 7.3 Temporary <u>Pro tempore</u> commissioners	1
Rule 7.4 Removal of commissioners	2
Rule 7.5 Duties of commissioners	2
Rule 7.6 Time limit changes	2
Rule 7.7 Information on candidates	3
Rule 7.8 Commission records.....	3

Chapter 2. Standards

Rule 7.20 Confidentiality required	3
Rule 7.21 Confidentiality exclusions	4
Rule 7.22 Breach of confidentiality	5
Rule 7.23 Disclosure of conflicts of interest	5
Rule 7.24 Disqualification from participation.....	5
Rule 7.25 Qualities evaluated.....	6
Rule 7.26 Ratings assigned	6
Rule 7.27 Rating imputed	7

Chapter 3. Procedures

Article 1. In general

Rule 7.40 Assignment of commissioners	7
Rule 7.41 Duties of lead commissioner	8
<u>Rule 7.42 Request for Withdrawal.....</u>	<u>8</u>

Article 2. Confidential Comment Forms

Rule 7.45 Candidate's contact list	8
Rule 7.46 Commission's contact list	9
Rule 7.47 Required distribution	9

Article 3. Candidate interviews

Rule 7.50 Prior disclosure of substantial and credible adverse allegations...	10
Rule 7.51 Purpose and timing of candidate interviews.....	10

Rule 7.52 Conduct of candidate interviews.....	11
--	----

Article 4. Evaluations

Rule 7.55 Separate evaluation for superior court and appellate court	11
Rule 7.56 Summary evaluation of candidate	11
Rule 7.57 Evaluation of Supreme Court candidate for Court of Appeal	12

Article 5. Reports

Rule 7.60 Reports to commission	12
Rule 7.61 Reports to Governor	12

Article 6. Reconsideration

Rule 7.65 Reconsideration of not qualified rating.....	14
Rule 7.66 Review committee.....	14
Rule 7.67 Candidate's request for new evaluation	15
Rule 7.68 Governor's request for new evaluation	15

SECTION 2. California Statutes

Government Code Section 12011.5	17
Government Code Section 11140	19
Government Code Section 11141	20
Business & Professions Code Section 6013.5.....	21

SECTION 3. State Bar Board of Trustees Policy Manual

Policy Manual Section 4 (Subentities of the State Bar)

Subsection 4.1 - 4.11 – Policies Governing Subentities	23
Appendix E – Subentity Duties, Composition, and Appointing Authorities....	26

TITLE 7. MISCELLANEOUS PROVISIONS

Adopted July 2007

DIVISION 1. COMMISSION ON JUDICIAL NOMINEES EVALUATION

Chapter 1. General provisions

Rule 7.1 Commission on Judicial Nominees Evaluation

The Board of Trustees of the State Bar of California has established a Commission on Judicial Nominees Evaluation (“commission”) pursuant to statute¹ to confidentially investigate and evaluate the judicial qualifications of those identified by the Governor for appointment or nomination to a judicial office.

Rule 7.1 adopted effective July 17, 2009; amended effective January 1, 2012.

Rule 7.2 Membership and terms

The commission, its chair, and its vice-chair are appointed by the Board of Trustees and serve at the pleasure of the Board. To the extent feasible,

- (A) the commission is to consist of 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 and the balance public members;
- (B) one of the State Bar licensees is to be a former judge, preferably of an appellate court; and
- (C) the membership is to consist of a variety of persons of different backgrounds, abilities, interests, and opinions who are broadly representative of the ethnic, sexual, and racial diversity of the population of California.²

Rule 7.2 adopted effective July 17, 2009; amended effective January 1, 2012; amended effective January 25, 2019.

Rule 7.3 ~~Temporary~~ Pro tempore commissioners

- (A) The chair may appoint a former member of the commission as a ~~temporary pro tempore~~ pro tempore commissioner to assist the commission with its workload. An appointee must recently have been commission chair or served at least one three-year term on the commission or its review committee. A ~~temporary pro tempore~~ pro tempore commissioner may lead an investigation.

¹Government Code § 12011.5.

²See Government Code §§ 11140, 11141, and 12011.5.

- (B) A ~~temporary~~ pro tempore commissioner may participate only in the consideration of and vote on the candidate the chair has assigned the commissioner to investigate.

Rule 7.3 adopted effective July 17, 2009; amended effective March 19, 2021.

Rule 7.4 Removal of commissioners

The Board may remove from office any commissioner whom the commission chair has identified in a report to the ~~President~~ Chair of the Board as failing to perform assigned duties or regularly attend scheduled meetings.

Rule 7.4 adopted effective July 17, 2009.

Rule 7.5 Duties of commissioners

Each commissioner must

- (A) not endorse or participate in a judicial candidate's campaign for office;
- (B) not vote on a candidate if absent for any time from the meeting at which the commission votes on the candidate;
- (C) not participate in any other judicial evaluation process;
- (D) not apply for or accept a State of California judicial appointment or permit his or her name to be submitted for evaluation as a candidate for such an appointment while a majority of the commission consists of members with whom ~~he or she has~~ they have served, either as a regular or pro tempore member of the commission;
- (E) report to the chair or vice-chair of the commission for appropriate action any concern that a fellow commissioner has breached these rules or law applicable to the commission; and
- (F) comply with these rules after signing a declaration that he or she has read, understood, and agrees to comply with the rules, the declaration being made under oath upon taking office.

Rule 7.5 adopted effective July 17, 2009; amended effective March 19, 2021.

Rule 7.6 Time limit changes

For good cause and with the consent of a candidate for judicial office, unless otherwise provided by law, a time limit prescribed by these rules may be changed.

Rule 7.6 adopted effective July 17, 2009.

Rule 7.7 Information on candidates

- (A) To evaluate the judicial qualifications of a candidate for a judicial office, each commissioner must consider the following information:
 - (1) a current Application for Appointment provided by or to the Governor's office;
 - (2) any past application materials and commission evaluations that have not been deemed unreliable by a Review Committee; and
 - (3) past State Bar complaints against and discipline imposed on a candidate, except for complaints based on allegations that the commission deems unfounded.
- (B) The commission may also consider information regarding candidates solicited from local or statewide bar associations that may have knowledge of the candidate through their own judicial evaluation procedures.

Rule 7.7 adopted effective July 17, 2009.

Rule 7.8 Commission records

- (A) Upon completion of his or her service or term, a commissioner must forward to the State Bar for retention for two years any completed Confidential Comment Forms and other records related to a commission investigation or activity. Copies of records stored electronically must be transferred to the State Bar and deleted from any electronic device not issued by the State Bar. After two years, all the forms and other documents related to an investigation or activity must be destroyed, unless the Board of Trustees, its ~~President~~ chair, or the chair of the commission instructs otherwise.
- (B) Records related to a Review Committee decision must be destroyed three years after the decision.

Rule 7.8 adopted effective July 17, 2009; amended effective September 2, 2010; amended effective January 1, 2012.

Chapter 2. Standards

Rule 7.20 Confidentiality required

- (A) Except as permitted by law³ or these rules, commission investigations, opinions expressed to the commission by raters or others with regard to a candidate's qualifications, interviews with candidates or others, meetings, the vote or comments of any individual commissioner or the vote of the commission as a whole, and all other commission activities and records are absolutely confidential. Disclosure is prohibited

³ Government Code § 12011.5.

even of the name of a candidate or the fact that the commission is considering a candidate.

- (B) To ensure the integrity and confidentiality of the commission's activities and records, the Board of Trustees and its members are not permitted to receive copies of commission records or inspect its records except as authorized by law or these rules.
- (C) This rule applies to the Board of Trustees, commissioners, and employees and agents of the State Bar but not to candidates.

Rule 7.20 adopted effective July 17, 2009; amended effective January 1, 2012.

Rule 7.21 Confidentiality exclusions

None of the following constitutes a breach of confidentiality under these rules:

- (A) confidential inquiries made in the course of investigations;
- (B) information commissioners share or discuss to discharge their responsibilities under these rules, such as information about interviews with raters, Confidential Comment Forms, comments of individual commissioners, and votes;
- (C) information required by the review committee appointed to review commission ratings of not qualified;⁴
- (D) information required to investigate and determine a claim of breach of confidentiality;⁵
- (E) attendance at commission meetings or inspection of commission records at the offices of the State Bar by members of the Board of Trustees;
- (F) information that the chair authorizes individual commissioners to provide to members of the Board of Trustees;
- (G) presentations or recommendations, supported with reasons, made by the chair or the chair's designee to the Commission on Judicial Appointments;⁶
- (H) public disclosure as permitted by law of a not qualified rating of a candidate the Governor has appointed to a trial court;⁷
- (I) disclosure by the chair or staff to a candidate of a not qualified rating; and

⁴ Rule 7.66.

⁵ Rule 7.22.

⁶ Government Code § 12011.5(h).

⁷ Government Code § 12011.5(g).

- (J) any discussion regarding law, rules, or procedures applicable to the commission.

Rule 7.21 adopted effective July 17, 2009; amended effective January 1, 2012.

Rule 7.22 Breach of confidentiality

A special committee of the Board of Trustees must investigate a claim of breach of confidentiality.⁸ The ~~President~~ Chair of the State Bar Board of Trustees, subject to the approval of the Board, must appoint the special investigative committee within 7 days of the report of a breach of confidentiality.

Rule 7.22 adopted effective July 17, 2009; amended effective November 19, 2010; amended effective January 1, 2012.

Rule 7.23 Disclosure of conflicts of interest

In order to avoid conflicts of interest that may interfere or appear to interfere with the commission's ability to impartially assess the qualifications of a candidate for judicial office, a commissioner or board member attending a commission meeting or inspecting commission records must immediately disclose to the chair the nature of any significant present or past familial, professional, business, social, political, or other relationship with a candidate, whether direct or indirect.

Rule 7.23 adopted effective July 17, 2009.

Rule 7.24 Disqualification from participation

- (A) If a commissioner or the chair determines that a relationship would unduly influence or appear to influence the commissioner's consideration of a candidate's qualifications, the commissioner must not investigate or evaluate the candidate and must refrain from attempting to influence the evaluation of any other commissioner. Factors to be considered in making the determination include the date of the relationship, its duration, and whether it is more than casual or incidental. If the commissioner determines that the relationship does not require disqualification and the chair disagrees, the determination of the chair prevails.
- (B) A disqualified commissioner may complete a Confidential Comment Form on a candidate but may not be present when the commission considers or votes on the candidate or be identified as a rater at a commission meeting.
- (C) A board member whose relationship with a candidate may interfere or appear to interfere with the commission's ability to impartially assess the qualifications of the

⁸ See Business & Professions Code §§ 6044, 6049, 6050, 6051, 6051.1, and 6052.

candidate may not be present when the commission meets to consider the candidate, may not review commission records regarding the candidate, and must refrain from attempting to influence the evaluation of any commissioner regarding the candidate.

Rule 7.24 adopted effective July 17, 2009.

Rule 7.25 Qualities evaluated

In evaluating the qualifications of judicial candidates, the commission must consider the extent to which candidates possess the following qualities, the absence of any one of which is not intended to be disqualifying: impartiality, freedom from bias, industry, integrity, honesty, legal experience broadly,⁹ professional skills, intellectual capacity, judgment, community respect, commitment to equal justice, judicial temperament, communication skills, and job-related health. In addition

- (A) Superior court candidates are expected to have the qualities of decisiveness, oral communication skills, and patience;
- (B) Court of Appeal candidates are expected to have the qualities of collegiality, writing ability, and scholarship; and
- (C) Supreme Court candidates are expected to have the qualities of collegiality, writing ability, scholarship, distinction in the profession, and breadth and depth of experience.

Rule 7.25 adopted effective July 17, 2009.

Rule 7.26 Ratings assigned

- (A) The commission must assign one of the following ratings to candidates for superior court:
 - (1) exceptionally well qualified to candidates possessing qualities and attributes of remarkable or extraordinary superiority that enable them to perform the judicial function with distinction;
 - (2) well qualified to candidates possessing qualities and attributes indicative of a superior fitness to perform the judicial function with a high degree of skill and effectiveness;
 - (3) qualified to candidates possessing qualities and attributes sufficient to perform the judicial function adequately and satisfactorily; or

⁹ Government Code § 12011.5(d).

- (4) not qualified to candidates possessing less than the minimum qualities and attributes required by these rules.
- (B) The commission must assign one of the following ratings to candidates for the Court of Appeal or the Supreme Court:
 - (1) exceptionally well qualified to candidates possessing qualities and attributes of remarkable or extraordinary superiority that enable them to perform the appellate judicial function with distinction;
 - (2) well qualified to candidates possessing qualities and attributes indicative of a superior fitness to perform the appellate judicial function with a high degree of skill, effectiveness, and distinction;
 - (3) qualified to candidates possessing qualities and attributes sufficient to perform the appellate judicial function with a high degree of skill and effectiveness; or
 - (4) not qualified to candidates possessing less than the minimum qualities and attributes required by these rules.

Rule 7.26 adopted effective July 17, 2009.

Rule 7.27 Rating imputed

Notwithstanding any other provision of these rules, a candidate is deemed qualified if elected to superior court and then appointed by the Governor to fill the vacant and unexpired term for that office immediately preceding the term to which he or she has been elected.

Rule 7.27 adopted effective July 17, 2009.

Chapter 3. Procedures

Article 1. In general

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, 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 adopted effective July 17, 2009; amended effective July 21, 2022.

Rule 7.41 Duties of lead commissioner

The lead commissioner must

- (A) contact the other team members to establish procedures to facilitate the investigation, reduce duplication of effort, and assure compliance with these rules; and
- (B) before beginning the investigation, notify the candidate that the investigation is pending; and-
- (C) schedule the candidate interview; and
- (D) notify the Chair in the event they determine the candidate is not in good faith participating in the investigation process. In the event the Chair determines that the candidate has not participated in the investigation process in good faith, the Chair may request that the Governor withdraw the candidate.

Rule 7.41 adopted effective July 17, 2009.

Rule 7.42. Request for withdrawal

- (A) The chair may ask the Governor to withdraw a candidate if:
 - (1) a complaint, investigation, or other disciplinary matter against a candidate is pending before the State Bar or Commission on Judicial Performance when the Governor refers the candidate to the commission for evaluation, or
 - (2) a complaint, investigation, or other disciplinary matter against a candidate is pending before the State Bar or Commission on Judicial Performance is pending when the commission votes-on the candidate.
- (B) If the Governor declines to withdraw a candidate pursuant to subsection (A) the commission may consider the open complaint, investigation or other disciplinary matter against the candidate pending before the State Bar or Commission on Judicial Performance in assigning a rating pursuant to Rule 7.26.

Article 2. Confidential Comment Forms

Rule 7.45 Candidate's contact list

Upon receiving the name of a candidate, the team must ask the candidate to provide the names of and contact information for:

- (A) All attorneys and judicial officers mentioned in the candidate's Application for Appointment; and
- (B) Fifty to seventy-five people to whom Confidential Comment Forms may be sent because they are reasonably likely to have knowledge of the candidate's qualifications.

Rule 7.45 adopted effective July 17, 2009.

Rule 7.46 Commission's contact list

- (A) Upon receiving the name of a candidate, the team must prepare a list of people to whom Confidential Comment Forms may be sent because they are reasonably likely to have knowledge of the candidate's qualifications. To the extent feasible, the list must reflect a broad cross-section of attorneys who practice the same types of law as the candidate and where the candidate practices.
- (B) Whenever possible the team will not place continuing and exclusive reliance on the same sources of information in evaluating candidates from a given area.

Rule 7.46 adopted effective July 17, 2009.

Rule 7.47 Required distribution

- (A) The objective of the team must be to obtain a return of at least ~~fifty~~ seventy-five Confidential Comment Forms that provide information that is sufficient and credible for a fair evaluation.
- (B) Absent ~~unusual~~ special circumstances, the team must send Confidential Comment Forms ~~confidential questionnaires~~ to
 - (1) all those listed in a candidate's Application for Appointment and all others whose names are submitted by the candidate;
 - (2) ~~seventy-five~~ fifteen hundred individuals selected at random from the commission's contact mailing list;
 - (3) all judicial officers in each county where a candidate practices and all judicial officers where a candidate seeks appointment, ~~except for the County of Los Angeles; and~~
 - ~~(4) at least fifty percent of all judicial officers, including those reasonably likely to have knowledge of a candidate's qualifications if the candidate practices in the County of Los Angeles, and all judicial officers in any other county where the candidate seeks appointment;~~
 - ~~(5) all justices of any appellate district where a candidate practices and all justices of the California Supreme Court; and~~
 - ~~(6)~~ (4) in the case of a candidate who practices criminal law, ~~or at least fifty randomly selected prosecutors and criminal defenders;~~ district attorneys and public defenders ~~whichever number is less,~~ selected at random in any county where a candidate practices criminal law and in any other county included in the jurisdiction of the court where the candidate seeks appointment.

(C) Commission staff must send electronic Confidential Comment Forms to all justices of the California Supreme Court, all justices of any appellate district where a candidate practices or seeks appointment, all judges of the Ninth U.S. Circuit Court of Appeals, and all judges of the federal district courts where the candidate practices or in districts that overlap with jurisdiction of the court where the candidate seeks appointment.

~~(C)~~ (D) A team member who receives negative or adverse comments on a Confidential Comment Form must make a reasonable effort to contact the person who completed the form and be prepared to report the results of the contact to the commission.

Rule 7.47 adopted effective July 17, 2009.

Article 3. Candidate interviews

Rule 7.50 Prior disclosure of substantial and credible adverse allegations

At least four business days before interviewing a candidate, or unless such notice is waived by the candidate, the team must disclose to the candidate as specifically as possible without breaching the confidentiality required by these rules any substantial and credible adverse allegations related to temperament, bias, commitment to equal justice, industry, integrity, ability, experience, health, physical or mental condition, or moral turpitude that would be determinative of unsuitability for judicial office unless rebutted. The team may disclose only allegations it has corroborated.

Rule 7.50 adopted effective July 17, 2009.

Rule 7.51 Purpose and timing of candidate interviews

(A) When the lead commissioner determines that a reasonable time has elapsed for return of Confidential Comment Forms and a sufficient number of forms has been returned to enable the team to evaluate the candidate's qualifications, the entire team must interview the candidate to

- (1) discuss as specifically as possible all factors positive and negative, relevant to qualifications regarding which the team requires further information, without breaching the confidentiality required by these rules; and
- (2) afford the candidate the opportunity to respond to the adverse information provided to the candidate¹⁰ and present additional information regarding qualifications that support his or her candidacy.

(B) Before voting on the candidate, the commission must afford the candidate a reasonable opportunity to provide the commission with additional information in response to adverse allegations raised in the interview.

Rule 7.51 adopted effective July 17, 2009.

Rule 7.52 Conduct of candidate interviews

- (A) **OPTION 1 [EXISITNG]:** The team must interview a candidate in person, unless the chair authorizes the use of remote means in unusual circumstances. A candidate may not be interviewed by or appear before the entire commission in connection with his or her nomination. **OR**

OPTION 2 The team must interview a candidate for the Supreme Court or a Court of Appeal in person, unless the chair authorizes the use of remote means in unusual circumstances. The team must interview a candidate for the Superior Court by remote means, unless the chair authorizes an in-person interview in unusual circumstances. A candidate may not be interviewed by or appear before the entire commission in connection with their ~~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 7.52 adopted effective July 17, 2009.

Article 4. Evaluations

Rule 7.55 Separate evaluation of candidate for superior court and appellate court

When the Governor names a candidate for a superior court and an appellate court, the commission must conduct separate evaluations for each judicial office.

Rule 7.55 adopted effective July 17, 2009.

Rule 7.56 Summary evaluation of candidate previously evaluated for superior court or Court of Appeal

- (A) The commission may conduct a summary evaluation based on a completed evaluation and rating of qualified or higher ~~for~~ within the past twelve months of the Governor's request that the candidate be re-evaluated. The summary evaluation shall apply to:
- (1) a superior court candidate whom the Governor later proposes for the superior court of a different county; or
 - (2) a Court of Appeal candidate whom the Governor later proposes for a different district ~~of the~~ Court of Appeal.

¹⁰ Rule 7.50.

- (B) In determining whether to conduct a summary evaluation, the commission must consider the same factors the chair would consider when the Governor requests a new evaluation of a candidate.¹¹
- (C) In the event that the summary evaluation does not reveal additional negative matters, then the commission shall adopt the prior evaluation submitted to the Governor.

Rule 7.56 adopted effective July 17, 2009.

Rule 7.57 Evaluation of Supreme Court candidate named for Court of Appeal

If the commission has rated a candidate for the Supreme Court as qualified or higher, and the Governor within a reasonable time proposes the candidate for the Court of Appeal, the rating applies for the Court of Appeal vacancy.

Rule 7.57 adopted effective July 17, 2009.

Article 5. Reports

Rule 7.60 Reports to commission

- (A) At the conclusion of an investigation and evaluation, the investigating team must provide the commission with a report detailing the results of its investigation in advance of the JNE Meeting. ~~the team must provide the commission with a written report on the candidate and, absent unusual circumstances, the lead commissioner must present the report in person.~~ 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.
- (B) The commission shall meet in person to consider all candidates. Absent unusual circumstances, the lead commissioner must present the results of its investigation in person at the JNE Meeting. The chair shall consult with State Bar staff regarding the location and schedule of meetings.

Rule 7.60 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).

¹¹ See Rule 7.57.

- (2) 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.
 - (3) 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.
 - (4) 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
 - ~~(3)~~ (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)~~ (D) 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; amended effective November 18, 2021

Article 6. Reconsideration

Rule 7.65 Reconsideration of not qualified rating

Only a candidate rated not qualified is entitled to request reconsideration of the rating. Within ten days of sending the Governor a rating of not qualified, the commission must notify the candidate in writing of the not qualified rating and the right to request reconsideration. The candidate must make a request in accordance with these rules within thirty days of receiving the written notice. The review committee will complete review of a candidate's request for reconsideration not later than 90 days after the State Bar receives the request. The State Bar will not make the not qualified rating public while the review is pending.¹²

Rule 7.65 adopted effective July 17, 2009; amended effective November 19, 2010.

Rule 7.66 Review committee

- (A) To review candidates' requests for reconsideration of a commission rating, the Board of Trustees must appoint a five-member review committee consisting of two members of the Board of Trustees, one of whom shall be a public member and one an attorney licensee, one past member of the commission, and two at large members to be appointed at the discretion of the Board of Trustees. Neither of these at large members will be current members of the Board of Trustees.
- (B) The review committee has absolute discretion to rescind the opinion of the commission if it has good cause to believe that
 - (1) violation of these rules has materially affected the commission's rating;
 - (2) conflict of interest or bias has affected the rating;
 - (3) an inadequate or biased mailing list was used;
 - (4) new evidence, which the candidate had no reasonable opportunity to present, could have changed the rating; or
 - (5) after review of the candidate's record, the commission's rating of not qualified is not supported by substantial evidence.
- (C) If a member of the review committee recuses himself or herself in a particular matter, the Executive Director of the State Bar must assign the matter to a temporary member who has previously served on the review committee.

Rule 7.66 adopted effective July 17, 2009; amended effective November 19, 2010; amended effective January 1, 2012; amended effective January 25, 2019.

¹² Government Code § 12011.5, subd. (g).

Rule 7.67 Candidate's request for new evaluation

If the review committee rescinds a not qualified rating of the commission and the candidate requests a new investigation, the chair must appoint new investigators to conduct the new investigation. The candidate's request must be submitted in writing and be received within thirty days of issuance of notice of the rescission.

Rule 7.67 adopted effective July 17, 2009.

Rule 7.68 Governor's request for new evaluation

- (A) If the Governor requests a new evaluation of a candidate whom the commission has rated not qualified, the chair must determine whether or not a new investigation is required.
- (B) To determine whether or not a new investigation is required, the chair must consider
 - (1) the extent to which the original investigation failed to include facts or information that should have been investigated;
 - (2) the extent to which acts or events occurring after the investigation could change the rating;
 - (3) the extent to which additional information or the candidate's further rebuttal of adverse information would assist the commission in assessing a material issue;
 - (4) whether the original investigation is still timely, "timely" normally meaning concluded within the last twelve months;
 - (5) the candidate's current disciplinary record; and
 - (6) other factors that may be relevant.
- (C) If the chair determines that a new investigation is not required, at its next meeting following receipt of the Governor's request the commission must vote to affirm its rating or assign a new one.
- (D) If the chair determines that a new investigation is required, the chair must assign it to the original team or a new one. Upon receipt of the team's report, the chair must provide it to the commission at its next meeting to vote on the candidate's qualifications.

Rule 7.68 adopted effective July 17, 2009.