

# Rules of the Commission on Judicial Nominees Evaluation

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## Chapter 1. General provisions

### Rule 7.1 Commission on Judicial Nominees Evaluation

The Board of Governors of the State Bar of California has established a Commission on Judicial Nominees Evaluation (“commission”) pursuant to statute<sup>1</sup> to confidentially investigate and evaluate the judicial qualifications of those identified by the governor for appointment or nomination to a judicial office.

### Rule 7.2 Membership and terms<sup>2</sup>

The commission, its chair, and its vice-chair are appointed by the Board of Governors 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 members in good standing of the State Bar and the balance public members;
- (B) one of the State Bar members 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.<sup>3</sup>

### Rule 7.3 Temporary commissioners<sup>4</sup>

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<sup>1</sup> Government Code § 12011.5.

<sup>2</sup> *Current Rule VI § 1a: “The membership of the commission shall consist of at least 27, but not more than 38 attorney and public members with the ratio of public members to attorney members determined, to the extent practicable, by the ratio established in sections 6013 [doesn’t exist], 6013.4 [deals with CYLA rep on BOG], and 6013.5, inclusive, of the Business and Professions Code. The membership of the commission should include, when possible, one or more former members of the judiciary, with a preference for those with appellate backgrounds. The membership of the commission shall be broadly representative of the ethnic, sexual, and racial diversity of the population of California and composed in accordance with sections 11140 and 11141 of the Government Code.”*

<sup>3</sup> See Government Code §§ 11140, 11141, and 12011.5.

<sup>4</sup> *Current rule VI § 1b reads, “The JNE Chair may designate past JNE commissioners to sit on assignment as pro tempore commissioners to assist current commissioners in either Northern or Southern California if workload demands necessitate such assistance. Past commission members who sit on assignment will be members of the commission for that assignment only and allowed to vote only on the applicants for whom they are the lead or co-commissioners. To qualify to sit on assignment as a pro tempore commissioner, a past commissioner must, within the past three years, have served three full terms on JNE or three years on JNE Review Committee or*

- (A) The chair may appoint a former member of the commission as a temporary commissioner to assist the commission with its workload. An appointee must recently have been commission chair or served three full terms on the commission or its review committee. A temporary commissioner may lead an investigation.
- (B) A temporary commissioner may participate only in the consideration of and vote on the candidate the chair has assigned the commissioner to investigate.

#### 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 of the Board as failing to perform assigned duties or regularly attend scheduled meetings.

#### 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;<sup>5</sup>
- (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 served;<sup>6</sup>

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*have completed a term as JNE chair. Past JNE commissioners may sit on assignment as either lead or co-commissioners, assignments to be made on a geographical basis."*

<sup>5</sup> *Derived from Rule IV § 7a: "Prohibited Participating in Judicial Candidate's Campaign for Office: During his or her service on the commission, he or she will abstain from endorsing or participating in any judicial candidate's campaign for office, and will refrain from appearing before or voting on any other committee or commission involved in the judicial selection process; provided, however, that the foregoing does not preclude the chair or the chair's designee from appearing before the Commission on Judicial Appointments and presenting the commission's views about appellate court appointees."*

<sup>6</sup> *Derived from current Rule IV § 7b: "Service on the commission results in a relationship between commissioners that may create a conflict of interest if commissioners who have served together later evaluate one another. Therefore, no commissioner shall apply for or accept a State of California judicial appointment, nor permit his or her name to be submitted for evaluation as a candidate for such an appointment while a member of the commission and until such time*

- (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;<sup>7</sup> 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 and then annually.<sup>8</sup>

#### Rule 7.6 Time limit changes<sup>9</sup>

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 7.7 Information on candidates

To evaluate the judicial qualifications of a candidate for a judicial office, each commissioner must consider the following information:

- (A) a current Application for Appointment provided by or to the Governor's office;<sup>10</sup>

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*thereafter as a majority of the commission consists of members with whom that commissioner did not serve . . . .”*

<sup>7</sup> *Derived from current Rule V § 2: “The board shall also remove from office any commissioner when it is reported by the chair to the president that the commissioner has failed to perform assigned duties and failed to attend two consecutive commission meetings, or three commission meetings in a six-month period. The chair of the commission or any commissioner shall report any of the foregoing or any other breaches of applicable law to the president of the State Bar.”*

<sup>8</sup> *Rule III § 6 provides that “Each member of the commission shall take, subscribe to and file the oath of office as required by the Board of Governors. The oath shall be filed with the Secretary of the State Bar.” Rule IV §7c reads, “Conflict of Interest – Statement Under Oath: Upon taking office, and annually thereafter, each commissioner shall complete a statement under oath indicating that they have read and understand Rule IV regarding conflicts of interest and agree to comply with its provisions.”*

<sup>9</sup> *Derived from Rule II § 3g “For good cause, and with the consent of the candidate, the commission may waive compliance with these time requirements.”*

<sup>10</sup> *Derived from two rules, 1) Rule V § 2: “All members of the commission shall receive from staff all biographical material received from the Governor's office concerning all of the candidates, which material shall include, but not be limited to, current Personal Data Questionnaires or Application for Appointment” and 2) Rule V § 3: “When the Personal Data Questionnaire or Application for Appointment pertaining to the judicial candidate is more than one year old at the time the investigation commences, staff shall obtain an updated Personal Data Questionnaire or Application for Appointment.”*

- (B) any past application materials and commission evaluations that have not been deemed unreliable by a Review Committee;<sup>11</sup> and
- (C) past State Bar complaints against and discipline imposed on a candidate, except for complaints based on allegations that the commission deems unfounded.<sup>12</sup>

#### Rule 7.8 Commission records<sup>13</sup>

- (A) Upon completion of his or her 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. After two years, all the forms and other documents related to an investigation or activity must be destroyed, unless the Board of Governors, its President, or the chair instructs otherwise.
- (B) Records related to a Review Committee decision must be destroyed three years after the decision.

### Chapter 2. Standards

#### Rule 7.20 Confidentiality required

- (A) Except as permitted by law<sup>14</sup> or these rules, commission investigations, opinions expressed to the commission by raters or others with regard to a

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<sup>11</sup> Rule V § 4: "Staff will provide copies of prior evaluations to members of the commission for consideration of past commission evaluations of a candidate during a subsequent investigation of the same candidate."

<sup>12</sup> Rule V § 5: "The commission shall obtain information concerning State Bar discipline of a candidate and/or complaints filed with the State Bar concerning a candidate. Notwithstanding designation of a communication as a complaint, if it is determined that such complaint is based upon unfounded allegations, it shall not be deemed to be a complaint of record against a member of the State Bar for purposes of consideration in connection with the appointment of the member to any position."

<sup>13</sup> Derived from Current Rule III § 4: "Each member or former member of the commission shall retain in his or her possession completed "Confidential Comment Forms" returned to him or her concerning potential appointees to the bench investigated by such commissioner for a period of one year and then forward to the Staff Director who will retain the material for an additional two years after the candidate has been acted on by the commission. After two years, the Confidential Comment Forms and all other documents or writings which the investigating commissioners have been authorized to retain shall be destroyed by the State Bar of California, unless otherwise instructed by the Board of Governors, the President of the State Bar, or the Chair of the Commission. Review Committee files in possession of the Staff Director shall be destroyed two years after the Review Committee decision."

<sup>14</sup> Government Code § 12011.5.

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 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 Governors and its members are not permitted to receive copies of commission records,<sup>15</sup> or inspect its records except as authorized by law or these rules.
- (C) This rule applies to the Board of Governors, commissioners, and employees and agents of the State Bar but not to candidates.<sup>16</sup>

#### Rule 7.21 Confidentiality exclusions<sup>17</sup>

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;<sup>18</sup>

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<sup>15</sup> Derived from Rule III § 2a: "No copy or duplicate of writings connected with the activities of the commission shall be distributed to the Board of Governors."

<sup>16</sup> Derived from Rule III § 5: "Members of the Board of Governors, designees of the Board of Governors and employees and agents of the State Bar are prohibited from disclosing confidential information they received in the same manner as provided in this rule for commissioners."

<sup>17</sup> Rule III § 2a: "All phases of the commission's activity, i.e., the results of interviews with any raters, the vote or comments of any individual commissioner or the vote of the commission as a whole, as well as any other matters connected with the investigation, are absolutely confidential and shall not be disclosed to anyone other than another commissioner, a member of the Board of Governors or designees of the Board of Governors appointed pursuant to rule II, section 12 [Notification of Not Qualified Rating; Review of Not Qualified Rating], or rule III, section 7 [Breach of Confidentiality] to review certain matters affecting or relating to the Commission on Judicial Nominees Evaluation, or an appropriate staff member of the State Bar or, subject to the provisions of rule II, section 9 [Reports to Governor], an authorized representative of the Governor's office. No copy or duplicate of writings connected with the activities of the commission shall be distributed to the Board of Governors. Nothing herein is intended to preclude members of the Board of Governors from reviewing the files of the commission at the offices of the State Bar. However, individual commission members may provide information to members of the Board of Governors with the authorization of the chair."

- (D) information required to investigate and determine a claim of breach of confidentiality;<sup>19</sup>
- (E) attendance at commission meetings or inspection of commission records at the offices of the State Bar by members of the Board of Governors;
- (F) information that the chair authorizes individual commissioners to provide to members of the Board of Governors;
- (G) presentations or recommendations, supported with reasons, made by the chair or the chair's designee to the Commission on Judicial Appointments;<sup>20</sup>
- (H) public disclosure as permitted by law of a not qualified rating of a candidate the Governor has appointed to a trial court;<sup>21</sup>
- (I) disclosure by the chair or staff to a candidate of a not qualified rating;<sup>22</sup> and
- (J) any discussion regarding law, rules, or procedures applicable to the commission.<sup>23</sup>

#### Rule 7.22 Breach of confidentiality

A special committee of the Board of Governors may investigate a claim of breach of confidentiality by a commissioner.<sup>24</sup>

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<sup>18</sup> Rule 7.66.

<sup>19</sup> Rule 7.22.

<sup>20</sup> Government Code § 12011.5(h). *Derived from Rule III § 2b 1: "Commission on Judicial Appointment: Reports being made to the Commission on Judicial Appointments presenting the commission's views concerning appellate court candidates or appointees in accordance with subdivision (h) of Government Code section 12011.5."*

<sup>21</sup> Government Code § 12011.5(g). *Derived from Rule III § 2b 4. "Appointment of Candidate Found Not Qualified: When the Governor has appointed a person to a trial court whom the commission has found 'not qualified,' the Board of Governors may, in accordance with subdivision (g) of Government Code section 12011.5, make public this fact after due notice to the appointee of its intention to do so."*

<sup>22</sup> *Derived from Rule III § 2 b 4: "Not Qualified Rating: Communication to candidates of a 'not qualified' rating pursuant to rule II, section 12 [Notification of Not Qualified Rating; Review of Not Qualified Rating]. As provided in subdivision (f) of Government Code section 12011.5, no such communication, disclosure or notice shall constitute a waiver of privilege or breach of confidentiality."*

<sup>23</sup> *Derived from Rule III § 3: "The foregoing does not preclude a commission member from discussing with anyone the statutory provisions relating to the commission or the commission's rules and procedures."*

## Rule 7.23 Disclosure of conflicts of interest<sup>25</sup>

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 7.24 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.<sup>26</sup> If the commissioner determines that the relationship does not require disqualification and the chair disagrees, the determination of the chair prevails.

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<sup>24</sup> See Business & Professions Code §§ 6044, 6049, 6050, 6051, 6051.1, and 6052. *Derived from Rule III § 7: "Upon a claim of breach of confidentiality, a three-member special committee shall be appointed by the Board of Governors pursuant to section 6044 [Investigative Powers] of the Business and Professions Code, to investigate and determine such claim."*

<sup>25</sup> *Derived from two rules. The first is Rule IV § 1: "This rule is intended to establish standards and procedures to assist the commission and its members in avoiding conflicts of interest, bias or prejudice that may interfere with the commission's ability to discharge its duties." Question: although the rule's title is "Conflict of Interest," this rule concerns avoidance of "conflicts of interest, bias, and prejudice." The second is Rule IV § 2: "If a commissioner has or has had any significant familial, professional, business, social, political or other relationship, either adversarial or allied, direct or indirect, with a candidate, he or she shall immediately disclose to the commission's chair the nature and circumstances of the relationship."*

<sup>26</sup> *Derived from three rules. The first is Rule IV § 3: "If the commissioner having such a relationship determines that it would unduly influence his or her consideration of the candidate's qualifications, the commissioner shall disqualify himself or herself from participating in the investigation, report, deliberations, and ultimate evaluation of the candidate involved in the conflict and refrain from attempting to influence other commissioner's evaluations of the candidates." The second is Rule IV § 4: "Factors to be considered in determining whether the relationship requires disqualification include remoteness in time of the relationship, duration of the relationship (transitory, recurring, or long term), and the extent to which the relationship is distinguishable from a casual, incidental contact." The third is Rule IV § 5: "If a commissioner determines that a particular relationship does not require disqualification, and the chair determines that the relationship does require disqualification, the chair's determination shall prevail."*

- (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.<sup>27</sup>
- (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 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 7.25 Qualities evaluated<sup>28</sup>

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,<sup>29</sup> 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

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<sup>27</sup> Derived from Rule IV § 6: "A disqualified commissioner is not precluded from completing a Confidential Comment Form providing information concerning a candidate. However, a commissioner providing information pursuant to this provision may not be identified during the hearing."

<sup>28</sup> Derived from Rule II § 6: "The commission seeks to find the following qualities in judicial candidates. However, the absence of any one factor on the lists below is not intended automatically to disqualify a candidate.

- a. Qualities for all judicial candidates: impartiality, freedom from bias, industry, integrity, honesty, legal experience, professional skills, intellectual capacity, judgment, community respect, commitment to equal justice, judicial temperament, communication skills, job-related health. In addition, for:
- b. Trial court candidates: decisiveness, oral communication skills, patience.
- c. Appellate court candidates: collegiality, writing ability, scholarship.
- d. Supreme Court Candidates: collegiality, writing ability, scholarship, distinction in the profession, breadth and depth of experience."

<sup>29</sup> Government Code § 12011.5(d).

- (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 7.26 Ratings assigned

- (A) The commission must assign one of the following ratings to candidates for superior court:<sup>30</sup>
- (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
  - (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:<sup>31</sup>

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<sup>30</sup> *Derived from Rule I § 10: “a. Exceptionally Well Qualified: Possessing qualities and attributes considered to be of remarkable or extraordinary superiority so that, without real doubt, the candidate is deemed fit to perform the judicial function with distinction.*  
*b. Well Qualified: Possessing qualities and attributes considered to be worthy of special note as indicative of a superior fitness to perform the judicial function with a high degree of skill and effectiveness.*  
*c. Qualified: Possessing qualities and attributes considered sufficient to perform the judicial function adequately and satisfactorily.*  
*d. Not Qualified: Possessing less than the minimum qualities and attributes considered necessary to perform the judicial function adequately and satisfactorily.”*

<sup>31</sup> *Derived from Rule I § 9: “a. Exceptionally Well Qualified: Possessing qualities and attributes considered to be of remarkable or extraordinary superiority so that, without real doubt, the candidate is deemed fit to perform the appellate judicial function with distinction.*  
*b. Well Qualified: Possessing qualities and attributes considered to be worthy of special note as indicative of a superior fitness to perform the appellate judicial function with a high degree of skill, effectiveness and distinction.*  
*c. Qualified: Possessing qualities and attributes considered sufficient to perform the appellate judicial function with a high degree of skill and effectiveness.*  
*d. Not Qualified: Possessing less than the minimum qualities and attributes listed above.”*

- (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 7.27 Rating imputed<sup>32</sup>

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.

### Chapter 3. Procedures

#### Article 1. In general

#### Rule 7.40 Assignment of commissioners<sup>33</sup>

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:

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<sup>32</sup> Derived from Rule II § 13 (Appointment by Governor Following Election to Judicial Office): "Notwithstanding any provision to the contrary in these rules and procedures, the name of a potential appointee for a vacancy in a judicial office in the superior court shall be deemed submitted and reported 'qualified' if that potential appointee has been elected to fill that particular judicial office, and following his or her election the Governor determines to appoint him or her to fill the vacant and unexpired term immediately preceding his or her own."

<sup>33</sup> Derived from Rule II § 1 (Assignment of Commissioners): "Trial Courts: The chair (or staff, in the chair's absence) shall assign two or more commissioners to investigate and report to the commission any candidate for the trial bench. At least one assigned commissioner shall be a lawyer member" (subsection 1). Unlike the provision proposed above, subsection 2 of this rule does not state that staff can assign a team in the absence of the chair: "Appellate Courts: Three or more commissioners shall be assigned to investigate and report to the commission any candidate for appellate courts. At least one of the assigned commissioners shall be a public member." The use of the passive "shall be assigned," however, arguably could be read as permitting assignments by staff.

- (A) for a candidate for superior court, a team of two or more commissioners, one of whom is a State Bar member; and
- (B) for a candidate for the Court of Appeal or Supreme Court, a team of three or more commissioners, one of whom is a public member.

#### 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.

### Article 2. Confidential Comment Forms

#### Rule 7.45 Candidate's contact list<sup>34</sup>

Upon receiving the name of a candidate, the team must ask the candidate to provide the names of and contact information for 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 7.46 Commission's contact list

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.<sup>35</sup>

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<sup>34</sup> Derived from Rule II § 2 a: "Upon receiving the name of a candidate, the commissioners charged with investigating the candidate's qualifications shall request the candidate provide fifty (50) to seventy-five (75) names of persons who are reasonably likely to have knowledge of the candidate's qualifications, and to whom confidential questionnaires will be sent."

<sup>35</sup> Derived from Rule II § 2 b: "Upon receiving the name of a candidate, the commissioners charged with investigating the candidate's qualifications shall prepare a list of persons who are reasonably likely to have knowledge of the candidate's qualifications, and to whom confidential questionnaires may be sent. Each such list should reflect a broad cross-section of the names of attorneys in the counties and the areas of law in which the candidate practices. The list shall be kept with the investigating commissioner's file for a period of at least one year after the action taken by the commission as provided in section 4 of rule III [Confidentiality/Retention of Materials] of these rules and procedures."

Rule 7.47 Required distribution<sup>36</sup>

- (A) The objective of the team must be to obtain a return of at least fifty Confidential Comment Forms that provide information that is sufficient and credible for a fair evaluation.<sup>37</sup>
- (B) Absent unusual circumstances, the team must send 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 selected at random from the commission's mailing list;
  - (3) all judicial officers in each county where a candidate practices and seeks appointment, except for the County of Los Angeles;
  - (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) all or at least fifty randomly selected prosecutors and criminal defenders, whichever number is less, in any county where a candidate practices criminal law and any other county where the candidate seeks appointment.

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<sup>36</sup> *Except as noted for the first and last provisions, derived from Rule II § 2 c: "Absent unusual circumstances, the commissioners charged with investigating the candidate's qualifications shall send confidential questionnaires to the following:*

- 1. Seventy-five (75) names selected at random from the mailing list prepared pursuant to subdivision b of this section;*
- 2. All members of the bench in each county in which the candidate practices, except the County of Los Angeles, where the confidential questionnaire shall be sent to a reasonable number of judges who are representative of the judges before whom the candidate practices and to all members of the bench in the branch and division of the superior court before whom the candidate primarily practices;*
- 3. All names listed in the candidate's Personal Data Questionnaire or Application for Appointment and all other persons whose names are submitted by the candidate; and*
- 4. If the candidate is in criminal law practice, all district attorneys and public defenders in the county in which the candidate practices. If there are more than fifty (50) names in a category, then confidential questionnaires should be sent to a minimum of fifty (50) names at random from each category."*

<sup>37</sup> *Derived from Rule II § 2 d: "The goal of the commission shall be to base reports on a minimum total return of fifty (50) responses indicating knowledge."*

- (C) 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.<sup>38</sup>

### Article 3. Candidate interviews

#### Rule 7.50 Prior disclosure of substantial and credible adverse allegations<sup>39</sup>

At least four business days before interviewing a 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, 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 7.51 Purpose and timing of candidate interviews

- (A) When the lead commissioner determines that a reasonable time has lapsed 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;<sup>40</sup> and

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<sup>38</sup> Derived from Rule II § 2 d: "Any commissioner who receives negative or adverse comments concerning a candidate shall make reasonable efforts to contact the source or sources of said comment and report to the commission the results of that contact."

<sup>39</sup> Derived from Rule II § 3 d: "The subject matter of substantial and credible adverse allegations received regarding factors relevant to the candidate's suitability for judicial office, including temperament, industry, integrity, ability, experience, and health, physical or mental condition, or moral turpitude which, unless rebutted, would be determinative of the candidate's unsuitability for judicial office, shall be disclosed to the candidate, as specifically as possible, without any breach of confidentiality, as provided for in Government Code section 12011.5, and these rules and procedures, not less than four days before the interview. The adverse allegations that are taken from the confidential comment forms must be corroborated prior to disclosure to the candidate."

<sup>40</sup> Derived from Rule II § 3 d: "At the interview, the commissioners should discuss with the candidate all factors relevant to the candidate's qualifications for the bench. The discussion should be as specific as possible without any breach of confidentiality as provided for in Government Code section 12011.5 and these rules and procedures, and should include both positive and negative information."

- (2) afford the candidate the opportunity to respond to the adverse information provided to the candidate<sup>41</sup> and present additional information regarding qualifications that support his or her candidacy.<sup>42</sup>
- (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.<sup>43</sup>

#### Rule 7.52 Conduct of candidate interviews

- (A) 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.<sup>44</sup>
- (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.<sup>45</sup>
- (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.<sup>46</sup>

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<sup>41</sup> Rule 7.50.

<sup>42</sup> *Derived from Rule II § 3 e: "The purpose of an interview is to provide a candidate with a reasonable opportunity to respond to adverse information and to present any additional information that may support his or her qualifications."*

<sup>43</sup> *This proposed rule is derived from two rules. First is Rule II § 3 f: "After the interview, a candidate may submit to the commission additional information or material in response to adverse allegations raised in the interview; the interview should be scheduled, when practicable, at least two to three days before the commission meeting when the rating of the candidate is to be determined." The second rule from which this derives is from Rule II § 3 a: "All commissioners charged with reporting to the commission should personally interview the candidate. The interview should not be the first step in the investigation. Thus, the personal interview with the candidate shall be held after a majority of the questionnaires have been received but leaving sufficient time prior to the reporting date for the candidate's rebuttal of adverse comments."*

<sup>44</sup> *Derived from Rule II § 5: "Candidates will not be interviewed by the entire commission, nor will they be allowed to appear before the commission in connection with their nomination."*

<sup>45</sup> *Derived from Rule II § 3 h: "No provision of these rules shall be construed to permit the disclosure to the candidate of information from which the candidate may infer the source, and information shall not be disclosed to the candidate or be obtainable by any process that would jeopardize the confidentiality of communications from persons whose opinions have been sought on the candidate's qualifications."*

<sup>46</sup> *Derived from Rule II § 3 e: "All interviews shall be tape recorded with the candidate's consent and the tape recording of an interview of a candidate shall be retained with the lead investigating commissioner's file for at least one year and then forwarded to the Staff Director who will retain*

## 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 7.56 Summary evaluation of candidate previously evaluated for superior court or Court of Appeal<sup>47</sup>

- (A) The commission may conduct a summary evaluation based on a completed evaluation and rating of qualified or higher for
- (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.
- (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.<sup>48</sup>

### Rule 7.53 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.<sup>49</sup>

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*the material for an additional two years after the action of the commission as provided for in rule III, section 4 [Confidentiality/Retention of Materials]. The candidate's consent to that recording shall be a precondition to any review under rule II, section 12 [Notification of Not Qualified Rating; Review of Not Qualified Rating] of these rules."*

<sup>47</sup> *Derived from Rule II § 8b: "When the Governor first submits a name as a candidate for judge of the superior court or of the court of appeal and a report is made to the Governor following the investigation and evaluation, and the Governor then submits the same name as a candidate for the same level court in a different county or appellate district, the commission may conduct a summary evaluation and rate the person as a candidate for the subsequent court based on the previously completed evaluation if the information contained therein is sufficient. In determining whether such information is sufficient, the commission shall follow the procedure set forth in section 7 of this rule. If such information is insufficient, or if the rating of a summary evaluation is 'not qualified,' a separate and full evaluation shall then be made of the person as a candidate for the other court position."*

<sup>48</sup> See Rule 7.57.

<sup>49</sup> *Derived from Rule II § 8: "Candidate's Name Submitted for Two Courts*

## Article 5. Reports

### 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 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.<sup>50</sup>

### Rule 7.61 Reports to Governor

- (A) A commission report to the Governor regarding the qualifications of a candidate must include the names of the team members; the number of Confidential Comment Forms mailed and the number returned; and the number of commission votes for each rating, except when the commission has found the candidate not qualified on the basis of substantial and credible information. When a report includes the number of commission votes, it must also provide the number of any commissioners who were

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*When the Governor submits at the same time a name as a candidate for judge of a higher and lower court, the commission shall conduct a separate evaluation of the candidate for each judicial office.*

*b. Resubmission for Same Level Court Following Initial Evaluation*

*When the Governor first submits a name as a candidate for judge of the superior court or of the court of appeal and a report is made to the Governor following the investigation and evaluation, and the Governor then submits the same name as a candidate for the same level court in a different county or appellate district, the commission may conduct a summary evaluation and rate the person as a candidate for the subsequent court based on the previously completed evaluation if the information contained therein is sufficient. In determining whether such information is sufficient, the commission shall follow the procedure set forth in section 7 of this rule. If such information is insufficient, or if the rating of a summary evaluation is "not qualified," a separate and full evaluation shall then be made of the person as a candidate for the other court position.*

*c. Resubmission of Candidate for Court of Appeal*

*When the Governor first submits a name as a candidate for Justice of the Supreme Court and a report rating the candidate 'qualified' or above is made to the Governor following the investigation and evaluation, and the Governor then submits within a reasonable time thereafter the same name as a candidate for judge of the court of appeal, the name of the potential candidate or appointee shall be deemed rated based on the previously completed evaluation."*

<sup>50</sup> *Derived from Rule II § 4: "The form and manner of any individual commissioner's report to the commission shall be set by the commission and include information as determined by each commissioner. Each report shall include the number of questionnaires mailed, the numerical breakdown of the responses and ratings, a summary of the substantial and credible information received and the recommended evaluation. Except in unusual circumstances, reports will not be given via telephone conference calls."*

present for the discussion of a candidate but then abstained from voting for any reason.

- (B) If the commission has found a candidate not qualified, the report must also
- (1) state that “at least 75% of the commissioners voting or abstaining find the candidate not qualified” and not provide the number of votes; or
  - (2) state that “a majority that is less than 75% of the commissioners voting or abstaining finds the candidate not qualified with the number of votes” and provide the number of votes.
- (C) If unusual circumstances prevent a team from creating mailing lists, distributing Confidential Comment Forms, obtaining responses, or otherwise meeting the requirements of these rules, the team must identify those circumstances in its report to the Governor.
- (D) If a State Bar complaint against a candidate is pending when the commission votes on the candidate, the commission must ~~request~~ ask the Governor to withdraw the name unless the candidate is a sitting judge and the complaint concerns activity that occurred before the candidate assumed judicial office. If the commission votes such a candidate not qualified, it must notify the Governor's office that the basis for the not qualified rating is the open complaint.
- (E) If half the commissioners voting or abstaining rates a candidate not qualified and half rates the candidate qualified or better, the candidate is reported as qualified. A candidate is reported as not qualified only if more than half the commissioners voting or abstaining rate the candidate not qualified.<sup>51</sup>
- (F) In general, the commission makes reports to the Governor in the order in which the Governor has submitted the names of candidates. The commission may consider a candidate out of order if the chair determines that there are reasons to do so.

## Article 6. Reconsideration

### Rule 7.65 Reconsideration of not qualified rating

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<sup>51</sup> *Derived from Rule II § 10: “3. Basis of ‘Not Qualified’ Rating: The commission may find a candidate to be ‘not qualified’ on the basis of substantial and credible information received in the investigation of the candidate and on a majority vote of at least ten (10) commissioners only, or of a quorum of the commission, whichever is the greater. If the vote of the commission is tied such that the two ratings receiving the largest and equal number of votes are ‘qualified’ and ‘not qualified,’ the report to the Governor shall give the count and state that the candidate is considered ‘qualified.’”*

Only a candidate rated not qualified is entitled to request reconsideration of the rating. The candidate must make a request in accordance with these rules within sixty days of receiving written notice of the rating.<sup>52</sup>

Rule 7.66 Review committee<sup>53</sup>

- (A) To review candidates' requests for reconsideration of a commission rating, the Board of Governors must appoint a three-member review committee consisting of two past members of the commission and a board member who serves as liaison to the commission.
- (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; or
  - (4) new evidence, which the candidate had no reasonable opportunity to present, could have changed the rating.
- (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.

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<sup>52</sup> Derived from Rule II § 12: "The commission's report to the Governor constitutes the commission's opinion. An opinion of 'not qualified' may be rescinded as herein provided upon written request of the candidate made within sixty (60) days of the date the candidate is notified of such opinion" and section a of this same provision: "Upon request of the Governor, the chair of the commission, or in the discretion of the chair, the staff director shall, within ten days of sending to the Governor an opinion of 'not qualified,' notify the candidate in writing of the 'not qualified' rating and the review rights available under this section."

<sup>53</sup> Derived from Rule II § 12: "A three-member committee consisting of one member of the Board of Governors who serves as liaison to the commission and two past members of the commission shall be appointed by the Board of Governors to review requests for reconsideration. The committee may in its absolute discretion rescind the opinion of the commission upon its good cause belief that any of the following has occurred:

1. Violation of the rules or procedures of the commission materially affecting the processing of the evaluation;
2. Conflict of interest or bias in the processing of the evaluation;
3. Inadequate or biased mailing list used in the evaluation; or
4. New evidence is available that the candidate had no reasonable opportunity to present, which evidence if presented, could have changed the result."

## Rule 7.67 Candidate's request for new evaluation<sup>54</sup>

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 a 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 7.68 Governor's request for new evaluation<sup>55</sup>

- (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;

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<sup>54</sup> Derived from Rule II § 12c: "In the event the opinion of the commission is rescinded and, upon written request of the candidate made within thirty (30) days of the candidate's being notified of such rescission, the chair may institute a new investigation with new investigators."

<sup>55</sup> Derived from Rule II § 7: "a. Resubmission of Candidates: When the Governor resubmits to the commission the name of a candidate whom the commission has recently evaluated and found 'not qualified,' the commission shall vote again upon the qualifications of the person.  
b. Procedure: Prior to voting, and at its first meeting following receipt of the resubmittal, the commission shall proceed, as outlined below. The chair will determine at that time whether it will investigate further or rely upon the commission's earlier investigation. In making this determination, the chair shall consider all relevant factors, including but not limited to the following:  
1. whether there may be facts or information not previously investigated or concerning acts or occurrences since the previous investigation;  
2. the extent to which additional facts or information would aid the commission as to the determination of a material issue;  
3. the extent to which affording a candidate a further opportunity to rebut adverse information would assist the commission in determining a material issue or merely be cumulative; and  
4. the nature and extent of the previous investigation and its timeliness.  
(a). Absent unusual circumstances, a previously completed investigation should not be deemed timely if more than twelve (12) months have lapsed between the time of the completion of the prior investigation and the Governor's resubmission of the candidate for consideration.  
(b). In any event, there shall be a current disciplinary record check before the commission votes.  
(c). If the chair determines that further investigation and evaluation is required, the chair will decide whether the investigating commissioners shall be those who conducted the original investigation or whether new investigators are assigned." I find this rule very confusing. We need to discuss.

- (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.