THE STATE BAR

OF CALIFORNIA

180 Howard Street
San Francisco, Ca 94105
(415) 538-2000

DATE: February 5, 2009

TO: Members, Board Committee on Operations

FROM: Heidi Schwab-Wilhelmi, Senior Administrative Specialist,
Judicial Nominee Evaluations and Appointments
Lawrence Yee, Acting General Counsel

SUBJECT: State Bar Rules Revision Project, New Title 7, Division 1:
Commission on Judicial Nominees Evaluation of the State Bar of California – Request to Release for Public Comment

EXECUTIVE SUMMARY

Board authorization is sought to release for public comment proposed rules for the Commission on Judicial Nominees Evaluation of the State Bar of California. The proposed rules continue the State Bar rules revision project begun in 2006. In addition to recasting existing rules for clarity and simplicity, the proposed rules would make substantive changes that afford the commission and its chair greater flexibility in responding to circumstantial constraints; strengthen the integrity of investigations and evaluations; eliminate redundant provisions; and conform procedures to current practice. The reasons for the proposed changes are set forth below. The Board Operations Committee considered the proposed rules at its January 10, 2009 meeting. Pursuant to the Board Committee's direction, staff has redrafted proposed Rules 7.20, 7.21 and 7.23.

To provide interested parties adequate time to comment on the proposals, staff requests an extended comment period of ninety rather than the usual forty-five days. The comment period would run from March 9, 2009 through June 8, 2009. If comments do not require substantive changes to the proposals, the earliest that the board could consider adopting the proposals would be its July 2009 meeting.

BACKGROUND

The objective of the State Bar rules revision project is to integrate the State Bar's more than two dozen sets of rules into one comprehensive structure and to make the rules simpler, clearer, and more uniform. Revising all State Bar rules requires the collaboration of many subject matter experts and is being undertaken in stages.

The revised Rules of the State Bar of California have been organized into seven titles: Title 1 contains global rules; Title 2 rules on member rights and responsibilities; Title 3 rules on programs and services; Title 4 rules on admissions and educational standards; Title 5 rules on discipline; Title 6 rules on governance; and Title 7 miscellaneous rules. In addition to the seven titles, the Rules of the State Bar include the California Rules of Professional Conduct and various appendixes. Of the seven titles that make up the revised rules, the board has adopted three in their entirety: the Title 1 Global Provisions; the Title 2 rules on Member Rights and Responsibilities; and the Title 4 rules on Admissions and Educational Standards. It has adopted parts of Title 3, Programs and Services, and Title 6, Governance. Adoption of the rules proposed here for the Commission on Judicial Nominees Evaluation would complete the contents currently contemplated for Title 7, Miscellaneous.

The Rules and Procedures of the Commission on Judicial Nominees Evaluation were originally adopted by the Board of Governors in 1984. Since then, they have been amended on multiple occasions, most recently in 2005. The rules proposed here were initially drafted by State Bar staff. The current chair, vice-chair, and former JNE chairs reviewed and edited the draft rules.

ORGANIZATION

The current JNE Commission rules are organized into the following seven topic areas: definitions; procedures; confidentiality; conflicts of interest; information available to the commission; composition of the commission and appointment and removal of commissioners; and severability. This overall scheme is logical but could be more effective rhetorically. For instance, the first of the current provisions is Not Voting Due to Absence From Meeting Room rather than a framing statement about the purpose of the commission and its composition. The proposed JNE rules move from the general to the particular, a pattern typically followed in the revised Rules of the State Bar, and are grouped under three broad headings: general provisions, standards, and procedures. (See attachment A, page 1.) The general provisions begin with rules about the purpose and membership of the commission and deal with overarching issues, such as duties of commissioners and commission records. The standards deal with confidentiality, conflicts of interest, and ratings. The procedures track the life cycle of a typical investigation and evaluation.

The body of this memorandum highlights the substantive changes proposed here.

APPOINTMENT AS TEMPORARY COMMISSIONER

Instead of the current requirement of Rule VI § 1(b) that a temporary commissioner be a former commissioner who has served three full terms within the past three years as a commissioner, a commission chair, or a member of the JNE Review Committee, proposed Rule 7.3(A) permits the appointment of an eligible person who has served recently in these capacities rather than within the past three years. The change affords the chair discretion in identifying qualified candidates who are reasonably familiar with current procedures.

REMOVAL FOR FAILURE TO PERFORM ASSIGNED DUTIES

Current Rule VI § 2 provides that the board "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." Proposed rule 7.4 presents removal as a board option rather than an obligation and defines the attendance requirement more flexibly: "The Board may remove from office any commissioner whom the commission chair has identified in a report to the President of the State Bar as failing to perform assigned duties or regularly attend scheduled meetings." The change allows the Board to accommodate commissioners temporarily unable to fulfill their obligations because of circumstances beyond their control.

REPORT OF FAILURE TO PERFORM ASSIGNED DUTIES

Instead of the current Rule VI § 2 requirement that a commissioner report directly to the Board of Governors through the State Bar president that another commissioner has failed to perform assigned duties, attend meetings, or comply with law, proposed rule 7.5 requires that the report be made to the chair or vice-chair of the commission, who would then be responsible for taking appropriate action.

CHANGES TO TIME LIMITS

Instead of the current possibility provided at Rule II § 3(g) of waiving time requirements only for candidate interviews, proposed rule 7.6 allows the commission to shorten or lengthen any time period prescribed by the rules as circumstances require: "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."

EVALUATIONS BY OTHER BAR ASSOCIATIONS

Current Rule V § 7 provides that "If the chair and an investigating commission member deem it advisable, he or she may submit names of candidates to local or statewide bar associations which may have knowledge of the candidate through judicial evaluation procedures set up by that bar association." Proposed rule 7.7 eliminates this possibility. Because the commission cannot guarantee that another organization's evaluations meet the its rigorous standards, in practice the commission has not used such evaluations.

ELIMINATION OF REDUNDANCY

Current Rule II § 2(e) provides that "Whenever possible the investigating commissioners will not place continuing and exclusive reliance on the same sources of information in evaluating various candidates from any given area." The proposed rules eliminate this provision because the rules address this issue elsewhere in more specific terms. Proposed rule 7.43, based on current rule II § 2b, provides that "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." In addition, proposed rule

7.44 (B), based on current rule II § 2b and 2c, requires that the confidential comment forms be sent to randomly selected recipients.

Current Rule V § 9 provides that “Any claimed violation of these rules and procedures shall not be a basis for invalidating the consideration or vote of the commission on any candidate.” The proposed rules eliminate this provision because the rules proposed for Chapter 3, Article 6, reconsideration, adequately deal with the consequences of a commissioner’s claimed violation.

RECORDS RETENTION

Instead of including the requirement of current Rule III § 4 that a commission member send commission records in his or her possession to the State Bar each year, the proposed rules require that records be returned at the end of the commissioner’s term. Proposed rule 7.8(A) requires that a commissioner return all records at the end of his or her term rather than annually: “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, the State Bar President, or the chair instructs otherwise.”

BOARD ROLE

To ensure the integrity and confidentiality of the commission’s activities and records, current Rule III at § 2a requires that members of the Board of Governors not receive commission records: “No copy or duplicate of writings connected with the activities of the commission shall be distributed to the Board of Governors.” Rule III § 2a then qualifies the restriction: “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.” The proposed rules retain these concepts. Proposed Rule 7.20(B) retains the current restriction on document distribution: “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 or inspect its records except as authorized by law or these rules.” And like current Rule III § 2a, proposed Rule 7.21(E) includes as an exception to confidentiality “attendance at commission meetings or inspection of commission records at the offices of the State Bar by members of the Board of Governors.” The exception is limited, however, by subsequent rules dealing with conflict of interest.

Current Rule IV requires that commissioners disclose “conflicts of interest, bias or prejudice that may interfere with the commission's ability to discharge its duties.” Proposed Rule 7.23 retains this disclosure requirement and extends it to members of the board: “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." Proposed Rule 7.24(C) provides that upon making such a disclosure "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."

PAST EVALUATIONS

Current rule Rule V § 4 provides that "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." Proposed 7.7(B) limits the use of past evaluations to those that have not been "deemed unreliable by a Review Committee." The proposal reflects current practice.

TEAM ASSIGNMENTS IN ABSENCE OF CHAIR

Current Rule II § 1 provides that in the absence of the chair, staff may appoint an investigation team for trial court candidates but not for appellate court candidates. Proposed Rule 7.40 authorizes staff to appoint a team for either a trial court or an appellate court candidate in the absence of the chair: "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 . . . ."

DISTRIBUTION OF FORMS

Current Rule II § 2c requires that confidential comment forms be distributed to a specified number of "members of the bench in each county in which the candidate practices." Rule 7.47 replaces "members of the bench" with "judicial officers" and requires that forms for trial court candidates be distributed not only to judicial officers in a county where the candidate practices but to judicial officers in a county where the candidate seeks appointment.

FISCAL IMPACT

None.

BOARD BOOK IMPACT

None.

PROPOSED BOARD COMMITTEE ACTION

Should the Board Committee accept the recommendation of staff, adoption of the following resolution would be appropriate:

RESOLVED, that the Board Committee on Operations authorizes for publication, in the form attached, for a ninety-day comment period from March 9, 2009 through June 8, 2009 the proposed rules for the Commission on Judicial Nominees Evaluation of the State Bar of California for inclusion in Title 7 of the Rules of the State Bar.

FURTHER RESOLVED that publication of the foregoing is not, and shall not be construed as, a recommendation of approval by the Board Committee.

Attachments:

A: Title 7 Proposed rules of the Commission on Judicial Nominees Evaluation of the State Bar

B: Rules and Procedures of the Commission on Judicial Nominees Evaluation (adopted 1984 and revised as noted through 2005)