

May 22, 2009

Heidi Schwab-Wilhelmi
Senior Administrative Specialist
Judicial Nominee Evaluation Commission
180 Howard Street
San Francisco, CA 94105

Re: Public Comment on Proposed Changes to Rule JNE Rule 7.43 (sic) [Rule 7.46] and elimination of Current Rule II section 2(e) prohibiting Commissioners from placing "continuing and exclusive reliance on the same sources of information" during the evaluation process.

Dear Ms. Schwab-Wilhelmi,

This letter is to ask the parties considering the Commission on Judicial Nominee Evaluations rules revision not to eliminate the provisions of current Rule II section 2(e). The current Rule II section 2(e) simply 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." It is the only rule prohibiting an investigating Commissioner from giving one rater, or one source of information, undue or exclusive weight. Ms. Schwab-Wilhelmi's memorandum dated February 5, 2009 concerning proposed changes to the JNE Commission rules, includes a section entitled "Elimination of Redundancy." (See p. 3) The memorandum states that current Rule II section 2(e) is being eliminated because "the [proposed] rules address this issue elsewhere in more specific terms." **This important provision is NOT covered anywhere else in the proposed rules.**

Although the memorandum points to several new rules and states that they are "more specific" equivalents to the important rule being eliminated, the new rules cited clearly do not address the same purpose. The rules cited govern how the mailing lists of raters are to be compiled.¹ In other words, these rules govern which community members will be sent questionnaires and asked to comment about the judicial candidate. By contrast, current Rule II section 2(e) speaks to what the investigating JNE Commissioners are supposed to do, or rather not to do, with the information once they receive it from the community members. The legal conclusion that Rule II section 2(e) is adequately covered elsewhere in the proposed rules is simply 100% wrong. A side-by-side comparison reveals that the requirement that JNE commissioners refrain from crediting one source of information too heavily has been eliminated from the new rules.

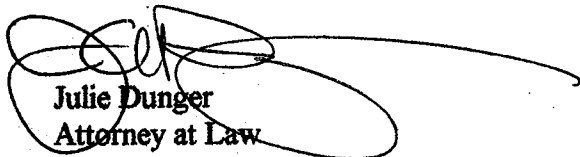
Rule II section 2(e) succinctly and simply embodies the idea that commissioners should not become swayed by the opinion of one person or entity in the community to the exclusion of the other voices. Making this process as objective and removed from political influence as humanly

¹ "Proposed rule 7.43" (sic; now proposed Rule 7.46), "based on current Rule II section 2b" [lists must reflect a "broad cross section"] and "Proposed rule 7.44(B) (sic. now proposed Rule 7.45, 7.46, 7.47), based on current rule II section 2b and 2c" [lists must contain some randomly selected questionnaire recipients as well as others, such as judicial officers, district attorneys, public defenders, as specified.] (February 5, 2009 memorandum, at p. 3)

possible helps maintain public confidence in the important work of the JNE Commission. This rule becomes very important in a small community, like the one where I practice. Within the previous few years, we saw three candidates subjected to vile and unjustified character attacks spearheaded by a small group of highly motivated individuals. This directly led to a fourth candidate, who was well qualified and well liked, withdrawing her application so as not to be subjected to the same senselessly harsh treatment. Although Rule II section 2(e) does not eliminate the possibility of skewed investigation results, it adds to the other provisions which are aimed at ensuring that candidates are given a fair investigation in the first place or a fair review when the evaluation process leads to an erroneous result. One of the three candidates was able to get his original disappointing JNE rating rescinded based, in part, on Rule II section 2(e). He is now a sitting Superior Court judge. Please retain existing Rule II section 2 (e).

There are other provisions of the proposed rules which eliminate or change some of the other checks and balances currently built into the judicial selection process², but none are as noteworthy as the attempt to eliminate Rule II section 2 (e).

Very truly yours,



Julie Dunger
Attorney at Law

cc: Lawrence Yee, Acting General Counsel, State Bar Of California
Patti White, State Bar Bd. of Governors, Dist. 3 Representative, Commission for Impartial Courts
John Dutton Law Offices, State Bar Board of Governors, District 1 Representative
Paul Kramer, State Bar Board of Governors, District 2 Representative
John E. Peterson, State Bar Board of Governors, District 5 Representative
Hon. Ronald B. Robie, Associate Justice of the Court of Appeal, Third Appellate District, Chair,
Task Force of Judicial Selection and Retention, Commission for Impartial Courts Steering
Committee
Hon. Barbara J. Miller, Judge, Alameda County Superior Court, Commission for Impartial Courts

² The existing discretionary ability of the Commission under current Rule V section 7 to seek input from local bar associations has been eliminated. (Feb. 5, 2009 memorandum, at p. 3) The Commission's ability to accurately assess a candidate's suitability for judicial office is only as good as its sources of information. Occasionally checking in with the local bar association might afford an important perspective about the inner workings of the legal community into which they will potentially be sending new judges. Also, current rule-II section 12 sets forth the JNE Commission's responsibility to notify the candidate, "upon the request of the Governor," of a NQ rating within 10 days of sending its report to the Governor and to advise the candidate of review rights. This is the current practice and should be written in as a mandatory fair notice practice rather than eliminated. This notice and advisement of review rights has not been incorporated into proposed rule 7.65 as stated in footnote 52 of the annotated proposed rules.