

AGENDA ITEM

NOV 112-B
JNE Process Review
Committee Recommendations-
Return from Public Comment

DATE: October 20, 2010

TO: Board of Governors
Board Committee on Operations

FROM: JNE Process Review Committee

SUBJECT: JNE Process Review Committee Recommendations –Return from Public Comment

EXECUTIVE SUMMARY

The JNE Process Review Committee (“Committee”) was formed to review the rules and procedures governing the Commission on Judicial Nominees Evaluation (“JNE”) and make recommendations for improvements. The Committee had four meetings to discuss potential changes to the JNE process. As part of its review, the Committee considered a comprehensive report and recommendations regarding JNE made to the Board of Governors in 1997 by the Ward Commission. The Committee voted to recommend several new procedures for JNE which, to implement, will require revisions to the State Bar Rules or Government Code section 12011.5. Specifically, the Committee recommended the following new procedures for JNE: (1) require appointment of an investigative committee by the State Bar President within 7 days of any alleged breach of confidentiality; (2) amend Government Code section 12011.5(c) to include an additional rating of “not qualified at this time” to the existing ratings for JNE candidates; (3) expand the size and diversity of the JNE Review Committee, which hears appeals of “not qualified” ratings, and include a new standard of review which would give the Review Committee discretion to rescind a not qualified rating if it finds there is not substantial evidence to support the rating; (4) shorten the time to request review of a not qualified rating from the current 60 days to 30 days from the candidate’s receipt of notice of the rating, and also provide that the entire review process be completed within 90 days of the time a request for review is submitted; and (5) specify that the State Bar may only exercise its discretion to make public a not qualified rating after the review process is completed.

In July, the proposed amendments recommended by the JNE Review Committee were released for a 45 day public comment period, which has now closed. The Bar received one comment from a Vice Chair of the JNE Commission expressing support for all of the proposed changes. A second comment which was received after the comment deadline made general comments about the JNE process but did not comment on the specific rule amendments proposed. This item recommends that the Board Committee

on Operations recommend that the Board of Governors approve the proposed amendments to the State Bar Rules regarding JNE. Copies of proposed amendments to Rule 7.22, 7.65 and 7.66 of the State Bar Rules are attached to this item as Exhibit A. This item also recommends that the Board Committee recommend that the Board direct staff to draft and seek appropriate legislative amendments to Government Code section 12011.5(c) to add an additional rating of “not qualified at this time” to the existing ratings. The JNE Review Committee also discussed whether the criteria used by JNE to evaluate candidates should be expanded or changed and ultimately decided that the Board may want to appoint a new committee to study this issue in depth.

JNE Process Review Committee Recommendations

The Committee voted to recommend the following changes to the statute and the State Bar Rules governing the JNE Commission.

1. **Confidentiality.** In light of allegations made last year of breach of confidentiality regarding a judicial candidate rated not qualified by JNE, the Committee considered what changes in procedure would increase confidence in the JNE process. Given that the statute and rules governing JNE already require strict confidentiality, the Committee decided to recommend a change in the rules that would mandate an immediate investigation upon allegations of breach of confidentiality. The Committee felt that a prompt investigation into any alleged breach of confidentiality would reassure stakeholders that the State Bar takes such allegations seriously. To implement this change, the Committee recommended an amendment to State Bar Rule 7.22 to require the President of the State Bar to appoint an investigative committee within 7 days of any report of breach of confidentiality, subject to Board ratification of the appointments. The intent of the rule amendment is to have an investigative committee appointed as soon as possible after a breach of confidentiality is alleged, subject to Board approval of the appointments. The proposed amendment to Rule 7.22 is as follows:

RULE 7.22 BREACH OF CONFIDENTIALITY

A special committee of the Board of Governors ~~may~~ must investigate a claim of breach of confidentiality ~~by a commissioner.~~¹ The President of the State Bar, subject to the approval of the Board, must appoint the special investigative committee within 7 days of the report of a breach of confidentiality.

2. **Not Qualified Rating.** The Committee reviewed previous recommendations made regarding JNE by the Ward Commission. The Ward Commission’s report, which was presented to the Board of Governors in 1997, included a recommendation that the rating of “not qualified” be changed to “not recommended at this time.” After discussing the issue, the Committee decided that it would be useful to have an additional rating of “not qualified at this time” added to the existing statutory ratings. Use of the “not qualified at this time” rating would help to mitigate a candidate’s feeling that they were being permanently judged as “not qualified.” It would also give JNE a useful tool for rating candidates that had positive feedback, but perhaps not enough experience to be

¹ See Business & Professions Code §§ 6044, 6049, 6050, 6051, 6051.1, and 6052

rated in the qualified range at the time that JNE is considering the candidate. This change would require legislative action since the specific ratings are set forth by statute. Cal. Govt. Code §12011.5(c). Therefore, the Committee recommended that the Board committee recommend that the Board direct staff to prepare and submit appropriate legislative amendments to effectuate this change.

3. **Composition of JNE Review Committee.** Currently, if a candidate requests reconsideration of a not qualified rating, the Board of Governors appoints a review committee consisting of two past members of JNE and a board member who serves as liaison to JNE. In considering the existing composition of the review committee, the Committee felt that since past JNE members may still know existing members and may feel a need to defend JNE, it would be better to have a review committee that was more balanced and impartial. To achieve this goal, the Committee recommended increasing the size and membership of the review committee to include two current board members, one past JNE member, and two at large members who shall not be current members of the Board of Governors. The recommended changes to Rule 7.66(A) are as follows:

RULE 7.66 REVIEW COMMITTEE

(A) To review candidates' request for reconsideration of a commission rating, the Board of Governors must appoint a ~~three~~ *five*-member review committee consisting of ~~two past members of the commission and a board member who serves as liaison to the commission.~~ *two members of the Board of Governors, one of whom shall be a public member and one an attorney member, one past member of the commission, and two at large members to be appointed at the discretion of the Board of Governors. Neither of these at large members will be current members of the Board of Governors.*

4. **JNE Review Committee Scope of Review.** Currently, the rules provide that the JNE Review Committee has discretion to rescind a not qualified rating by JNE if it has good cause to believe that: 1) violation of the JNE rules materially affected the rating; 2) conflict of interest or bias affected the rating; 3) an inadequate or biased mailing list was used; or 4) new evidence, which the candidate did not have an opportunity to present, could have changed the rating. Reviewing these available grounds for rescission, the Committee felt that the JNE Review Committee should be able to rescind a not qualified rating that was not supported by sufficient evidence. An example considered was a situation where the vast majority of comments on a candidate were in the qualified range, but a not qualified rating was issued by JNE apparently on the basis of just one or two negative comments. In order to give the JNE Review Committee the discretion to intervene in a case like this, the Committee recommended that an additional standard for review be added which would allow the JNE Review Committee to rescind a not qualified rating if there are clearly insufficient facts to support the rating. The recommended changes to Rule 7.66(B) appear below:

RULE 7.66 REVIEW COMMITTEE

- (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; or
 - (5) *after review of the candidate's record, the commission's rating of not qualified is not supported by substantial evidence.*

5. Time for Review of Ratings. Currently, the rules provide that a candidate rated not qualified is entitled to request reconsideration of the rating. JNE is required to notify a candidate of their rating within ten days of sending the rating to the Governor. The candidate then has sixty days to request reconsideration. In order to facilitate timely completion of the review process, the Committee recommended that the rules be amended to provide that a candidate has thirty days from receipt of notice of their rating to request reconsideration and that the review process be completed within 90 days of receipt of the candidate's request. The recommended changes to Rule 7.65 appear below.

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 ~~sixty~~ *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.*

6. Public Release of Not Qualified Ratings. Government Code section 12011.5(g) gives the State Bar discretion to make a not qualified rating public in the event that the Governor appoints a candidate to a trial court who was rated not qualified by the JNE Commission. Since candidates rated not qualified have the option to seek reconsideration through the process described above, the Committee recommended that the rules be amended to make clear that the State Bar will not make a not qualified rating public while the JNE Review Committee process is still pending. The additional recommended changes to Rule 7.65 appear below.

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 ~~sixty~~ *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.***^[1]

7. JNE Evaluation Criteria

The Committee discussed the existing criteria for evaluating judicial candidates under the statute and JNE rules and discussed whether these criteria should be supplemented or broadened. One member of the board of Governors addressed the Committee regarding concerns among family law practitioners that judges often do not have specific expertise in the area of family law and that perhaps criteria should be developed to address a candidate's specific areas of expertise. Another concern discussed was whether more specific criteria should be developed to flesh out the parameters of the language in Government Code section 12011.5(d) which requires the State Bar to "consider legal experience broadly, including, but not limited to, litigation and nonlitigation experience, legal work for a business or nonprofit entity, experience as a law professor or other academic position, legal work in any of the three branches of government, and legal work in dispute resolution." After discussing these issues, the Committee concluded that it might be appropriate for the JNE criteria to be studied in depth by another committee or commission.

PUBLIC COMMENT

The proposed amendments were circulated for a 45 day public comment period which closed on September 13, 2010. One comment was received during the comment period from a current Vice Chair of the JNE Commission. This commissioner expressed support for all of the proposed changes. A second comment was received after the close of the comment period. This comment was not specifically focused on the proposed amendments but was rather a general comment about the JNE process and the role of the State Bar. This comment also recommended that the Supreme Court should review all not qualified ratings made by the Commission.

RECOMMENDATIONS

Based on the JNE Process Review Committee's recommendations, staff recommends that the Board Committee on Operations recommend that the Board of Governors approve the proposed amendments to State Bar Rules 7.22, 7.65 and 7.66. Also based on the JNE Review Committee's recommendations, staff recommends that the Board Committee on Operations recommend that the Board of Governors of the State

^[1] Gov. Code § 12011.5, subd. (g).

Bar direct staff to develop and recommend appropriate amendments to section 12011.5(c) to add an additional rating of “not qualified at this time.”

FISCAL IMPACT

None.

RULES IMPACT

State Bar Rules 7.22, 7.65, 7.66

BOARD BOOK IMPACT

None.

PROPOSED RESOLUTIONS

Board Committee on Operations

Should the Board Committee agree with the recommendation, adoption of the following resolutions would be appropriate:

RESOLVED, that following public comment, the Board Committee on Operations recommends that the Board of Governors adopt amendments to State Bar Rules 7.22, 7.65 and 7.66, in the form attached; and it is

FURTHER RESOLVED, that following public comment, the Board Committee on Operations recommends that the Board of Governors direct staff to prepare and submit appropriate legislative amendments to section 12011.5(c) to add an additional rating of “not qualified at this time.”

Board of Governors

Should the Board of Governors agree with the recommendation of the Board Committee on Operations, adoption of the following resolutions would be appropriate:

RESOLVED, that upon recommendation of the Board Committee on Operations, the Board of Governors hereby adopts new State Bar Rules 7.22, 7.65, and 7.66, in the form attached, effective immediately; and it is

FURTHER RESOLVED, that upon recommendation of the Board Committee on Operations, the Board of Governors directs staff to prepare and submit appropriate legislative amendments to section 12011.5(c) to add an additional rating of “not qualified at this time.”

Attachments: A. Proposed Amendments to Rule 7.22, 7.65 and 7.66 of the State Bar Rules.