

(ATTACHMENT A)

DRAFT -- NOT FOR CIRCULATION **(TO BE REVIEWED BY INTERNAL STATE BAR ENTITIES** **FOLLOWING COAF APPROVAL)**

Resource Materials for the Application of California Government Code Section 12011.5(d) In the review and evaluation of Applications for Judicial Appointment

INTRODUCTION

The State Bar Board of Governors JNE Process Review Committee (“Committee”) was formed to review the procedures governing the Commission on Judicial Nominees Evaluation (“JNE”) and to make recommendations for revisions to the process. The Committee discussed the existing criteria for evaluating judicial candidates under California Government Code Section 12011.5 (d). The Committee expressed the need for more specific criteria to define the parameters of the language in Government Code section 12011.5(d) which requires the State Bar to “consider legal experience broadly.” The Committee concluded it would be appropriate for the JNE criteria to be studied in depth by another committee.

The State Bar of California's Council on Access and Fairness (“COAF”) is charged with the task of implementing the State Bar goals and strategies for diversity in the legal profession and elimination of bias in the practice of law. The COAF reviews diversity issues and initiatives along the entire diversity pipeline from early education to college/law school, legal profession and the judiciary. Given its focus on judicial diversity as part of its charge, the COAF, through its Judicial Committee, undertook the task of reviewing Government Code section 12011.5(d) and developing expanded criteria for use by JNE in its ongoing review of judicial applications.

The COAF developed the following commentary elaborating on and providing more specific criteria regarding the expanded definition of “legal experience” in Government Code Section §12011.5 (d). The purpose of this commentary is to provide guidance to JNE Commissioners in evaluating a judicial applicant’s work experience in light of the Government Code’s mandate that legal experience be considered broadly, and is intended for use during the ongoing training of the JNE Commissioners.

CALIFORNIA GOVERNMENT CODE §12011.5 PROVIDE THAT:

(d) In determining the qualifications of a candidate for judicial office, the State Bar shall consider, among other appropriate factors, his or her industry, judicial temperament, honesty, objectivity, community respect, integrity, health, ability, and legal experience. ***The State Bar shall consider legal experience broadly, including, but not limited to, litigation and non litigation 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.*** (Italics added).

COMMENTARY: Further Defining “Legal Experience”

There is a widespread consensus that those selected to become judges typically have the same background, *i.e.*, that of a district attorney or other prosecutor, or public defender or other criminal defense attorney. While criminal jury trial experience is very valuable, the practice of selecting members of the judiciary with the same legal experience ignores the richness of diversity and experience in the legal profession and the valuable work that is being done in courts and legal proceedings other than criminal courts.

A great deal of important and difficult work is done in the civil law arena including civil litigation, transactional, and administrative matters. With regard to civil proceedings, in addition to the traditional civil litigation courts, civil law practitioners also practice in the family, juvenile dependency, juvenile delinquency, probate, mental health and administrative law courts. While many civil matters may not generate headlines, they nonetheless often set in place a course of action that may have a significant impact on society, the community, or an individual’s life. The thoughtful, detailed, specialized, and demanding skills needed for various civil law proceedings are *equally desirable prerequisites* for a judicial appointment as the skills obtained in the practice of criminal law.

Further, attorneys with experience as judicial officers such as judges pro tem and administrative law judges, as well as those in mediation or dispute resolution have a track record for which their demeanor, treatment of litigants, work ethic and ability to make decisions can be measured.

Therefore, it is important to recognize that there are varied and valued skill sets developed in different practice areas that suggest suitability to be a judge. These skills should be taken into consideration in the review process to ensure that legal experience is considered in the broad sense envisioned by Government Code section 12011.5(d).

SKILLS FOR SPECIFIC PRACTICE SETTINGS

Civil Litigation:

Attorneys with practice experience in civil litigation matters have often developed:

- Critical legal and analytical skills to develop litigation strategies
- Expertise in drafting court pleadings and other legal documents applying facts to law to advocate for the client's position
- Oral advocacy skills obtained through motion hearing practice, trial experience, or administrative hearings
- Negotiation and other dispute resolution skills
- A broad range of legal expertise

Juvenile, Family, Criminal Defense, Immigration, and Probate Practice:

Attorneys with practice experience in juvenile, family, probate, criminal, and immigration have often developed:

- Sensitivity to the cultural, emotional/mental and economic differences of the parties that influence court proceedings and outcomes
- A unique ability to work effectively with individuals in extreme crises
- Professional demeanor and distance, despite the emotional nature of the cases, to remain objective and effective
- Knowledge in areas other than the law, including but not limited to real estate, taxation, pensions, child development, substance abuse, immigration and mental illness

Legal Work for Business or Non-Profit Entities:

Attorneys who have represented business or non-profit entities, including transactional and in-house lawyers, often have well developed skills in:

- Planning and negotiation
- Legal research
- Drafting written agreements, corporate transactional documents, etc.
- Foreseeing potential obstacles and averting them
- Preparing legal memoranda applying facts to law to advise clients, or to advocate the opposing position
- A broad range of legal expertise

- Advocacy in administrative or quasi-judicial proceedings, or in the legislative process

Legal Work in the Three Branches of Government:

Attorneys who practice in any of the three branches of government, including a member of the Legislature or members of administrative bodies, have often developed superior communication and legal skills including:

- Effective public speaking
- Research and analysis
- Persuasive writing including drafting regulations, interpretive memoranda, legislative history, bills, codes, and statutes
- Ability to motivate, interest and inspire
- Expertise in complex areas

Dispute Resolution, Arbitration and Mediation Practice:

Attorneys with experience in dispute resolution, including arbitrators and mediators often have experience:

- Conducting pre-hearing conferences including case management conferences
- Ruling on preliminary motions including discovery matters
- Conducting hearings, which may include written or oral testimony and cross-examination
- Assessing credibility of witnesses, weighing evidence and ruling on evidentiary issues
- Preparing findings of fact and conclusions of law and issuing oral and written decisions

Administrative Law Judges, Judges Pro Tem, Commissioners Referees, and Federal Magistrate Judges:

Attorneys with judicial experience, such as an administrative law judge, a judge pro tem, a superior court commissioner, a superior court referee, or a federal magistrate judge often have experience:

- Acting as presiding judicial officer assigned to a particular courtroom, managing court calendar and staff
- Processing ex parte matters
- Instructing parties as to their rights and the court process
- Conducting pre-trial conferences, and ruling on pre-trial motions
- Conducting contested hearings, which may include written or oral testimony and cross-examination, receiving documentary evidence, assessing credibility of witnesses, weighing of evidence and ruling on evidentiary issues
- Analyzing and evaluating facts and the law

- Rendering oral/and or written decisions and opinions
- Sentencing or rendering disposition

Administrative Law Practice:

Attorneys who practice administrative law *including, but not limited to*, those with experience with the following administrative / governmental agencies: Workers' Compensation Appeals Board, Social Security Administration, Unemployment Insurance Appeals Board, State Welfare Commission, Occupational Safety and Health Administration, Federal Communications Commission, Securities and Exchange Commission, Social Security Office of Disability Adjudication and Review, Immigration Court, and the Equal Employment Opportunity Commission, often have developed skills such as:

- Expertise in the inner workings of state and federal government, and complicated legal issues with proceedings involving governmental law and regulation
- Knowledge of a broad range of issues such as business and economic regulation, industry restructuring and deregulation, contracting and project development, trade regulation, and legislative consultation and lobbying registration and reporting requirements
- Gathering the necessary, appropriate evidence
- Presenting evidence
- Eliciting testimony from witnesses

Academic Setting – Law Professors and Lecturers:

Attorneys who also have experience as professors or lecturers often have highly developed skills such as:

- Ability to motivate and inspire
- Effective public speaking
- Effective listening and mediating
- Strong legal research and analysis capabilities
- Ability to break down complex concepts in a way that makes them understandable
- Persuasive writing including authoring articles and books
- Expertise in complex areas including ethics
- Proven ability to work with people of diverse cultural and economic backgrounds
- Effective planning and implementation capacity
- Professional demeanor
- Ability to understand trends in the law and the role of precedent, as well as the interaction between the legislative, executive, and judicial branches
- Ability to undertake sustained analysis on discrete legal issue with the goal of achieving the proper result

Legal Aid, Pro Bono and Diversity Activities:

Attorneys with legal aid or pro bono experience or who participate in diversity pipeline programs frequently demonstrate:

- An understanding of the ethical responsibility to improve access to the legal system and to make it more responsive to the needs of the underprivileged and the communities served
- An ability to communicate and work with populations from diverse cultural and socio-economic backgrounds
- An understanding of the need to provide crucial legal services to the traditionally underserved such as the impoverished, defenseless and those in rural communities who cannot afford traditional legal representation
- A recognition that diversity in the profession is important to enhance the administration of justice, as well as being good for the profession, good for business, good for our communities and critical for enhancing the public's confidence in the legal profession and judicial system
- An ability to work collaboratively with individuals and groups; to organize, lead, teach, motivate and inspire individuals from underrepresented groups to enter or advance in the legal profession
- Legal skills including drafting pleadings, interviewing, and presenting oral argument; leadership ability; lead counsel experience; consensus- and coalition-building skills, an ability to develop successful client relations; good interpersonal skills; and an ability to operate within a bureaucracy