

## RESOLUTION 06-07-2008

### DIGEST

#### Judicial Nominees: Mandatory Disclosure of Not Qualified Rating

Amends Government Code section 12011.5 to require the State Bar, when the Governor has appointed a judge who has been found not qualified, to make that fact public.

### RESOLUTIONS COMMITTEE RECOMMENDATION

#### DISAPPROVE

#### History:

No similar resolutions found.

#### Reasons:

This resolution amends Government Code section 12011.5 to require the State Bar, when the Governor has appointed a judge who has been found not qualified, to make that fact public. This resolution should be disapproved because it could unfairly harm a candidate for judicial office by not allowing him or her to bow out of an appointment based on a “not qualified” finding.

The resolution appears to assume that potential appointees know their ratings before they are appointed, but the language of the statute does not bear this assumption out. The current statute requires a “designated agency” of the State Bar to review potential judicial appointees, and to provide the Governor with a confidential rating of a candidate as “exceptionally well qualified,” “well qualified,” “qualified” or “not qualified.” But the statute requires that the rating be kept confidential, and disclosed only to the Governor. While the statute allows the designated agency to disclose to the potential appointee “the subject matter of substantial and credible adverse allegations received regarding the candidate’s health, physical or mental condition, or moral turpitude” (subdivision (e)), it does not make any provision for disclosure of the rating to the potential appointee. Rather, the only notice occurs in subdivision (f), which allows (but does not require) the State Bar to make public the “not qualified” rating of a person “the Governor has appointed” (i.e., someone no longer merely a “potential appointee”). Subdivision (f) allows this disclosure, however, only after the State Bar has provided “due notice” to the appointee of its intention to do so. In effect, this allows an appointee to bow out and avoid potential public humiliation.

This resolution would make such disclosures mandatory, and would eliminate the notice provision. Because the statute does not provide a potential appointee with any other notice of his or her rating, this means the potential appointee would find out about his or her “not qualified” rating only once it was made public. If there is a real concern that the State Bar may choose not to make public the fact that an appointee has been rated “not qualified” for political or professional reasons, the statute should be amended so that the designated agency of the State Bar can disclose to any “potential appointees” the fact that they have been rated “not qualified.” If the potential appointee then chooses to remain in the running despite this notice and is appointed by the Governor, mandatory disclosure of the “not qualified” rating would be justified.

### TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Government Code section 12011.5 to read as follows:

1 §12011.5

2 (a) In the event of a vacancy in a judicial office to be filled by appointment of the  
3 Governor, or in the event that a declaration of candidacy is not filed by a judge and the  
4 Governor is required under subdivision (d) of Section 16 of Article VI of the Constitution  
5 to nominate a candidate, the Governor shall first submit to a designated agency of the  
6 State Bar of California the names of all potential appointees or nominees for the judicial  
7 office for evaluation of their judicial qualifications.

8 (b) The membership of the designated agency of the State Bar responsible for  
9 evaluation of judicial candidates shall consist of attorney members and public members  
10 with the ratio of public members to attorney members determined, to the extent practical,  
11 by the ratio established in Sections 6013.4 and 6013.5 of the Business and Professions  
12 Code. It is the intent of this subdivision that the designated agency of the State Bar  
13 responsible for evaluation of judicial candidates shall be broadly representative of the  
14 ethnic, gender, and racial diversity of the population of California and composed in  
15 accordance with Sections 11140 and 11141 of the Government Code. The further intent  
16 of this subdivision is to establish a selection process for membership on the designated  
17 agency of the State Bar responsible for evaluation of judicial candidates under which no  
18 member of that agency shall provide inappropriate, multiple representation for purposes  
19 of this subdivision.

20 (c) Upon receipt from the Governor of the names of candidates for judicial office  
21 and their completed personal data questionnaires, the State Bar shall employ appropriate  
22 confidential procedures to evaluate and determine the qualifications of each candidate  
23 with regard to his or her ability to discharge the judicial duties of the office to which the  
24 appointment or nomination shall be made. Within 90 days of submission by the Governor  
25 of the name of a potential appointee for judicial office, the State Bar shall report in  
26 confidence to the Governor its recommendation whether the candidate is exceptionally  
27 well qualified, well qualified, qualified, or not qualified and the reasons therefor, and  
28 may report, in confidence, other information as the State Bar deems pertinent to the  
29 qualifications of the candidate.

30 (d) In determining the qualifications of a candidate for judicial office, the State  
31 Bar shall consider, among other appropriate factors, his or her industry, judicial  
32 temperament, honesty, objectivity, community respect, integrity, health, ability, and legal  
33 experience. The State Bar shall consider legal experience broadly, including, but not  
34 limited to, litigation and nonlitigation experience, legal work for a business or nonprofit  
35 entity, experience as a law professor or other academic position, legal work in any of the  
36 three branches of government, and legal work in dispute resolution.

37 (e) The State Bar shall establish and promulgate rules and procedures regarding  
38 the investigation of the qualifications of candidates for judicial office by the designated  
39 agency. These rules and procedures shall establish appropriate, confidential methods for  
40 disclosing to the candidate the subject matter of substantial and credible adverse  
41 allegations received regarding the candidate's health, physical or mental condition, or  
42 moral turpitude which, unless rebutted, would be determinative of the candidate's  
43 unsuitability for judicial office. No provision of this section shall be construed as

44 requiring that any rule or procedure be adopted that permits the disclosure to the  
45 candidate of information from which the candidate may infer the source, and no  
46 information shall either be disclosed to the candidate nor be obtainable by any process  
47 that would jeopardize the confidentiality of communications from persons whose opinion  
48 has been sought on the candidate's qualifications.

49 (f) All communications, written, verbal, or otherwise, of and to the Governor, the  
50 Governor's authorized agents or employees, including, but not limited to, the Governor's  
51 Legal Affairs Secretary and Appointments Secretary, or of and to the State Bar in  
52 furtherance of the purposes of this section are absolutely privileged from disclosure and  
53 confidential, and any communication made in the discretion of the Governor or the State  
54 Bar with a candidate or person providing information in furtherance of the purposes of  
55 this section shall not constitute a waiver of the privilege or a breach of confidentiality.

56 (g) If the Governor has appointed a person to a trial court who has been found not  
57 qualified by the designated agency, the State Bar ~~may~~ shall promptly make public this  
58 fact ~~after due notice to the appointee of its intention to do so~~, but that notice or disclosure  
59 shall not constitute a waiver of privilege or breach of confidentiality with respect to  
60 communications of or to the State Bar concerning the qualifications of the appointee.

61 (h) If the Governor has nominated or appointed a person to the Supreme Court or  
62 court of appeal in accordance with subdivision (d) of Section 16 of Article VI of the  
63 California Constitution, the Commission on Judicial Appointments may invite, or the  
64 State Bar's governing board or its designated agency may submit to the commission its  
65 recommendation, and the reasons therefor, but that disclosure shall not constitute a  
66 waiver of privilege or breach of confidentiality with respect to communications of or to  
67 the State Bar concerning the qualifications of the nominee or appointee.

68 (i) No person or entity shall be liable for any injury caused by any act or failure to  
69 act, be it negligent, intentional, discretionary, or otherwise, in the furtherance of the  
70 purposes of this section, including, but not limited to, providing or receiving any  
71 information, making any recommendations, and giving any reasons therefor. As used in  
72 this section, the term "State Bar" means its governing board and members thereof, the  
73 designated agency of the State Bar and members thereof, and employees and agents of  
74 the State Bar.

75 (j) At any time prior to the receipt of the report from the State Bar specified in  
76 subdivision (c) the Governor may withdraw the name of any person submitted to the  
77 State Bar for evaluation pursuant to this section.

78 (k) No candidate for judicial office may be appointed until the State Bar has  
79 reported to the Governor pursuant to this section, or until 90 days have elapsed after  
80 submission of the candidate's name to the State Bar, whichever occurs earlier. The  
81 requirement of this subdivision shall not apply to any vacancy in judicial office occurring  
82 within the 90 days preceding the expiration of the Governor's term of office, provided,  
83 however, that with respect to those vacancies and with respect to nominations pursuant to  
84 subdivision (d) of Section 16 of Article VI of the California Constitution, the Governor  
85 shall be required to submit any candidate's name to the State Bar in order to provide an  
86 opportunity, if time permits, to make an evaluation.

87 (l) Nothing in this section shall be construed as imposing an additional  
88 requirement for an appointment or nomination to judicial office, nor shall anything in this  
89 section be construed as adding any additional qualifications for the office of a judge.

90 (m) The Board of Governors of the State Bar shall not conduct or participate in, or  
91 authorize any committee, agency, employee, or commission of the State Bar to conduct  
92 or participate in, any evaluation, review, or report on the qualifications, integrity,  
93 diligence, or judicial ability of any specific justice of a court provided for in Section 2 or  
94 3 of Article VI of the California Constitution without prior review and statutory  
95 authorization by the Legislature, except an evaluation, review, or report on potential  
96 judicial appointees or nominees as authorized by this section.

97 The provisions of this subdivision shall not be construed to prohibit a member of  
98 the State Bar from conducting or participating in an evaluation, review, or report in his or  
99 her individual capacity.

100 (n) (1) Notwithstanding any other provision of this section, on or before March 1,  
101 2007, and on or before March 1 of each year thereafter, all of the following shall occur:

102 (A) The Governor shall collect and release, on an aggregate statewide basis, all of  
103 the following:

104 (i) Demographic data provided by all judicial applicants relative to ethnicity, race,  
105 and gender.

106 (ii) Demographic data relative to ethnicity, race, and gender as provided by all  
107 judicial applicants, both as to those judicial applicants who have been and those who  
108 have not been submitted to the State Bar for evaluation.

109 (iii) Demographic data relative to ethnicity, race, and gender of all judicial  
110 appointments or nominations as provided by the judicial appointee or nominee.

111 (B) The designated agency of the State Bar responsible for evaluation of judicial  
112 candidates shall collect and release both of the following on an aggregate statewide basis:

113 (i) Statewide demographic data provided by all judicial applicants reviewed  
114 relative to ethnicity, race, gender, and areas of legal practice and employment.

115 (ii) The statewide summary of the recommendations of the designated agency of  
116 the State Bar by ethnicity, race, gender, and areas of legal practice and employment.

117 (C) The Administrative Office of the Courts shall collect and release the  
118 demographic data provided by justices and judges described in Article VI of the  
119 California Constitution relative to ethnicity, race, and gender, by specific jurisdiction.

120 (2) Any demographic data disclosed or released pursuant to this subdivision shall  
121 disclose only aggregated statistical data and shall not identify any individual applicant,  
122 justice, or judge.

123 (o) If any provision of this section other than a provision relating to or providing  
124 for confidentiality or privilege from disclosure of any communication or matter, or the  
125 application of the provision to any person or circumstances, is held invalid, the remainder  
126 of this section to the extent it can be given effect, or the application of the provision to  
127 persons or circumstances other than those as to which it is held invalid, shall not be  
128 affected thereby, and to this extent the provisions of this section are severable. If any  
129 other act of the Legislature conflicts with the provisions of this section, this section shall  
130 prevail.

(Proposed new language underlined; language to be deleted stricken.)

**PROPONENT:** Los Angeles County Bar Association

## **STATEMENT OF REASONS:**

Existing Law: Makes a disclosure of the “not qualified” rating of a person appointed to a trial court discretionary with the State Bar Board of Governors. This creates the possibility of non-disclosure based on political considerations or personal regard for the appointee.

This Resolution: Would require disclosure in all instances, in the public interest. Inasmuch as the discretion would be removed from the Board of Governors, a forewarning to the appointee would serve no purpose inasmuch as dissuasion would no longer be a possibility. Such a change would foreseeably deter the offering of such appointments by the Governor’s Office or the acceptance of such appointments by candidates. It would remove the prospect of political bargaining with the State Bar for conferring of benefits in exchange for non-disclosure.

The Problem: Whether the State Bar reveals that a person who has been appointed by the governor to a Superior Court judgeship was rated “not qualified” by the Commission on Judicial Nominees Evaluation is left to chance, whim, or varying attitudes of Board of Governors’ members from year to year. The board might also be subject to pressures in some instances not to make a public disclosure which, in all instances, would be detrimental to the governor. At a time when the Legislature has passed a dues bill and it is before the governor for signature or veto, displeasing the governor might seem politically unwise. Disclosure would, however, deter the making of bad appointments, and maintaining a judiciary of a high caliber should not be influenced by political considerations. The public interest would in *all* instances be served by disclosure, while the current law creates discretion which could in some instances be exercised to keep secret from the public that which it should know.

## **IMPACT STATEMENT**

This resolution does not affect any other law, statute or rule.

**AUTHOR AND/OR PERMANENT CONTACT:** Jo-Ann W. Grace, 210 South Spring Street, Los Angeles, CA 90012, (213) 628-4384, fax (213) 680-9467, jo-ann@mnc.net

**RESPONSIBLE FLOOR DELEGATE:** Jo-Ann W. Grace

## **COUNTERARGUMENT**

### **SAN DIEGO COUNTY BAR ASSOCIATION**

The mandatory disclosure rule of a "not qualified" rating could be extremely detrimental to a judicial nominee. As presently structured, the nomination process allows a nominee to appeal a determination of "not qualified," and allows the State Bar the flexibility to reconsider a determination as to the nominee's qualifications based upon evidence received in the appeal. This resolution should be disapproved because it fails to provide adequate protection to judicial nominees in the event of an error in the initial decision of the individual's qualifications.