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**Report and Recommendation to the MSBA Regarding the
Judicial Plebiscite**

Judiciary Committee

April 15, 2022

RECOMMENDATION

RESOLVED, that the MSBA modify the rules related to the judicial plebiscite and send the plebiscite to all MSBA attorney members effective with the 2022 elections.

REPORT

Background

For many years the MSBA has conducted a plebiscite (poll) to determine members' preferences of candidates in contested appellate judicial races. We do not include district court races in the MSBA poll; it is up to each district bar to decide whether or not to conduct a poll for any local contested district court races.

In 2010, the last time the entire MSBA attorney membership received the plebiscite, only 2,014 out of 16,288 eligible members (12.5%) voted in the two contested Supreme Court races on the ballot that year. That was down from 2008 and 2006, when 17% and 20% of eligible members voted. *See Appendix 1.*

In 2012, the MSBA Assembly approved a change to the plebiscite rules to make the results more meaningful and increase the participation rate. Rather than surveying the entire MSBA membership, staff was directed to include in the plebiscite only those sections whose members were most likely to have direct contact with appellate candidates.

The impetus behind the change was a belief that a plebiscite limited to MSBA section members most likely to have courtroom experience would yield more reliable results and a higher response rate.

The Civil Litigation, Appellate Practice, and Criminal Law section members were invited and encouraged to participate in the 2012 and 2014 judicial plebiscite.

In 2012, 33% of the 1,874 members who received the poll voted. In 2014, 39% of those surveyed voted out of the 2,036 MSBA members who received the poll.

In 2016, the Assembly expanded the plebiscite's reach by allowing any section to affirmatively choose to have all its members receive the poll and to allow any individual attorney member the ability to proactively opt-in to receive the poll. These changes were made in recognition of the fact that there are MSBA members who may be familiar with appellate court candidates and wish to vote in the plebiscite yet are not members of the three sections that received the poll.

The Judiciary Committee reviews the plebiscite procedures every so often and considers whether to recommend any changes to the Assembly. Following three meetings on the topic in January, February and April of this year, the Committee recommends the MSBA return to the original way it conducted the poll, which is to send it automatically to all attorney members. The Committee believes that with recent increased attention on judicial decisions in controversial cases, members may be more focused on judicial elections now.

The Committee acknowledges the importance of encouraging participation by as many bar members as possible to set an example for the community for democratic participation. Sending the poll to all members ensures that all those who do have interest are allowed and encouraged to participate without having to go through the hurdle of affirmatively opting in to receive the poll.

The Committee also acknowledges that there may be good reasons why some members of the bar do not respond to the poll. It is reasonable for members of the bar to abstain if they feel they do not have the knowledge to voice their choice of a judicial candidate or wish to defer to the opinions of others within the bar on the election.

The Committee observes that, based on the history of the poll, the participation/response rate is unlikely to crest 50 percent or more regardless of how the bar membership is divided into voting and non-voting groups. The focus of the Committee is on the result. Most if not all elections are decided by those that show up. If members of the bar choose not to engage with the plebiscite, that does not take away from those that chose to do so. To that end, the Committee encourages reporting the end result of the poll in percentages and total number of voters, rather than response rate. This is the most practical and respectful way of providing the public with information about the bar's view of the judicial elections.

Appendix 1

MSBA Judicial Plebiscite History 2006-2020

Year	Who Received Poll	Voting Percentage
2006	Entire membership	19.6%
2008	Entire membership	17%
2010	Entire membership	12.5%
2012	Criminal, Civil Litigation, Appellate Practice section members only	33%
2014	Criminal, Civil Litigation, Appellate Practice section members only	38.7%
2016	Any Section and Individual Member Opt-in*	34.5%
2018	Any Section and Individual Member Opt-in**	30%
2020	Any Section and Individual Member Opt-in***	29.5%

*10 sections opted-in plus 254 individuals (there was some overlap between individuals who opted-in and sections that opted-in)

**16 sections opted-in plus 500 individuals (note overlap issue referred to above)

***15 sections opted-in plus 559 individuals (overlap issue)