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REPORT CONCERNING ADOPTION OF ADDITIONS AND AMENDMENTS TO RULES OF THE COMMISSION ON JUDICIAL PERFORMANCE

Pursuant to its rulemaking authority under article VI, section 18, subdivision (i) of the California Constitution and section 3.5 of the Policy Declarations of the Commission on Judicial Performance, on March 1, 2017, the Commission on Judicial Performance circulated for public comment a set of proposals for additions and changes to certain of its rules. Following consideration of the comments and responses to comments, at its meeting on June 28, 2017, the commission adopted some of the proposed rule amendments, with some modifications, and determined not to adopt others, as summarized below. The text of each addition and amendment is attached and the final version of the amended rules may be found on the commission's website at http://cjp.ca.gov.

This report also discusses rule proposals that were circulated for public comment but not adopted and rule proposals submitted to the commission during its 2016 biennial rule review that were not circulated for public comment, with the commission's explanation for not pursuing those proposals.

The commission is seeking comments on further proposed rule amendments. The invitation to comment can be found on the commission's website.

I. EXPLANATION OF RULE AMENDMENTS AND DISCUSSION OF PUBLIC COMMENTS

A. Amendment to Rule 116.5 to Specify Attorneys Who May Be Designated to Negotiate a Proposed Settlement

Explanation of Amendment

The California Judges Association (CJA) proposed that rule 116.5 be amended to specify that an attorney member of the commission staff, in addition to the examiner, may be designated to negotiate a proposed resolution of a matter during a preliminary investigation. The

commission agrees that it should have discretion to designate any attorney member of the commission staff to negotiate a settlement during a preliminary investigation or an admonishment proceeding. The amendment consistently refers to "legal staff or other designated attorney." This includes the examiner, other legal staff, and outside counsel appointed by the commission.

Discussion of Comments

CJA commented that the rule could be interpreted as precluding staff and the judge from attempting to negotiate a disposition unless the commission authorizes the settlement negotiations. That is not the current practice or intent of the rule. A judge may propose a negotiated settlement to commission staff during a preliminary investigation. If both legal staff or other desiganted attorney and the judge agree on the proposed resolution, it may then be jointly submitted to the commission pursuant to rule 116.5 for the commission's consideration. In response to the comment from CJA, the commission further amended the rule to state that the judge may also initiate settlement discussions with legal staff or other designated attorney.

Joseph Sweeney, Executive Director, Center for Modern Courts commented that the proposed rule amendment further abdicates commission responsibility to staff. This is not the case because the rule states that no agreement between the judge and legal staff is binding unless approved by the commission.

Barbara A. Kauffman, Esq., commented that settlement discussions should not take place unless authorized by the commission. In the commission's view, settlement discussions are appropriate without commission authorization because the commission must approve any negotiated settlement in order for it to become binding.

The Los Angeles Superior Court (LASC) submitted a comment expressing its support for the amendment.

B. Amendment to Rule 120(b) to Modify Standard for Interim Disqualification of a Judge During Formal Proceedings

Explanation of Amendment

Rule 120(b) provides for the interim disqualification of a judge during formal proceedings under specified circumstances. The amendment changes the standard for interim disqualification from a determination that continued service of the judge is "causing immediate, irreparable, and continuing public harm" to a determination that there is "substantial evidence that the continued service of the judge poses a threat of serious harm to the public or to the administration of justice."

Pursuant to the California Constitution, a judge is disqualified from acting as a judge, without loss of salary, while there is pending an indictment or information charging the judge with a felony. (Cal. Const., art. VI, § 18(a).) The constitution also authorizes the commission to disqualify a judge, without loss of salary, upon notice of formal proceedings. (Cal. Const., art.

VI, § 18(b).) Under the rule, the judge must be given notice of the intention to disqualify and an opportunity to respond prior to an order temporarily disqualifying a judge. (Rule 120(b).) Rule 120 also provides for an accelerated disposition of formal proceedings when a judge is temporarily disqualified. (Rule 120(c).) The temporary disqualification remains in effect until further order of the commission or until the pending formal proceedings have been concluded. (Rule 120(d).)

The standard for interim disqualification of a judge was amended to be more consistent with the standard in the American Bar Association (ABA) Model Rules for Judicial Disciplinary Enforcement and the standard set in the majority of states with provisions for interim disqualification or suspension. The commission's current standard for disqualification, particularly the requirement that the harm be irreparable, is so high as to make it virtually impossible to order interim suspension under circumstances recognized by a majority of states and the ABA as justifying suspension pending resolution of the matter. The commission has only once temporarily disqualified a judge under rule 120(b). (*Inquiry Concerning Bradley* (1999) 48 Cal.4th CJP Supp. 84.)

The "irreparable" requirement is not included in the ABA Model Rules or in the provisions for interim suspension in other states. Examples of standards set in other states include: "continued service of a judge is causing immediate and substantial public harm and an erosion of public confidence to the orderly administration of justice" (New Mexico); "upon receipt of sufficient evidence demonstrating that the continued service of any judge is causing immediate and substantial public harm and an erosion of public confidence in the orderly administration of justice and appears to be violative of the Georgia Code of Judicial Conduct" (Georgia); "continued service while proceedings are pending before the Committee poses a substantial threat of serious harm to the administration of justice" (New Jersey); "immediate suspension is necessary for the proper administration of justice" (Michigan); and "judge poses a substantial threat of serious harm to the public or the administration of justice" (Nevada).

The ABA Model Rules for Judicial Disciplinary Enforcement include a provision for interim suspension for conduct other than criminal prosecution, as follows:

> Section II. General Provisions, Rule 15. Interim Suspension
>
> > (3) Other Misconduct. Upon receipt of sufficient evidence demonstrating that a judge poses a substantial threat of serious harm to the public or to the administration of justice, the highest court may transfer the judge to incapacity inactive status or suspend the judge pending a final determination in any proceeding under these Rules.

The proposed amendment to rule 120(b) sets a standard for interim disqualification consistent with the ABA Model Rules.

The provisions requiring notice to the judge and an opportunity to respond prior to an order temporarily disqualifying a judge and an accelerated disposition of formal proceedings when a judge is temporarily disqualified remain the same. The commission is of the view that

the proposed amendment provides greater protection to the public and the administration of justice, while continuing to guarantee the judge's right to due process.

Discussion of Comments

LASC and attorneys Joseph P. McMonigle, Kathleen M. Ewins, David S. McMonigle, and Kate G. Kimberlin of Long & Levit LLP opposed the proposed amendment. They state that the proposed language is vague, and that it is not clear what the proposed language seeks to accomplish that cannot already be done under the current rules.

In the commission's view, "serious harm to the public or the administration of justice" is not vague. As noted, the ABA Model Rules for interim suspension of a judge during disciplinary proceedings has a similar standard (sufficient evidence demonstrating that a judge poses a substantial threat of serious harm to the public or to the administration of justice). Long & Levit attorneys noted that the commission's proposal is slightly different in that it would require substantial evidence that the judge poses a threat of serious harm, rather than sufficient evidence of a *substantial* threat of serious harm as required in the ABA rule. The commission's amendment actually sets a higher standard for *proving* that there is a threat of harm by requiring substantial evidence of a threat as opposed to the ABA requirement of sufficient evidence. In the commission's view, if there is substantial evidence that continued service of the judge poses a threat of *serious* harm, suspension may be warranted.

The commission believes that the amendment is necessary because the prior standard for interim disqualification, particularly the requirement that the harm be irreparable, was so high as to make it virtually impossible to order interim suspension when necessary to protect the public.

C. Amendment to Rule 122(b)(2) to change "Administrative Office of the Court" to "Judicial Council"

Explanation of Proposed Amendment

The proposed amendment reflects that what was previously referred to as the Administrative Office of the Courts is now the Judicial Council.

Discussion of Comments

LASC supports the amendment. No comments in opposition were received.

D. Amendment to Rule 126(d) to Replace "Insane" with "To be of Unsound Mind"

Explanation of Proposed Amendment

The proposed amendment reflects that the word "insane" is no longer used in the Probate Code.

Discussion of Comments

LASC supports the amendment. No comments in opposition were received.

II. DISCUSSION OF PROPOSED RULE AMENDMENTS NOT ADOPTED AFTER CIRCULATION FOR PUBLIC COMMENT

A. Proposed New Rule for Reconsideration of Closed Complaint

Proposed New Rule

The commission invited comments on the following proposed new rule.

> RECONSIDERATION OF COMPLAINT.
>
> (a) A complainant may request reconsideration of a dismissed complaint if, not later than the 60th day after the date of the communication informing the complainant of the dismissal, the complainant provides new material evidence of misconduct committed by the judge, that provides a sufficient basis for investigation.
> (b) The commission shall consider every request for reconsideration, submitted in accordance with this rule.
> (c) The commission shall deny a request for reconsideration if the complainant does not meet the requirements under subsection (a). The commission shall notify the complainant of the denial in writing.
> (d) The commission shall grant a request for reconsideration if the complainant meets the requirements under subsection (a).
> (e) After granting a request, the commission shall vote to: (1) affirm the original decision to dismiss the complaint; or (2) reopen the complaint.
> (f) The commission shall notify the complainant of the results of the commission's vote under subsection (e) in writing.
> (g) The commission shall conduct an appropriate investigation of a complaint reopened under subsection (e)(2).
> (h) A complainant may request reconsideration of a dismissed complaint under this section only once.

Discussion of Comments and Reason for Not Adopting Proposed Rule

Numerous comments were received in opposition to the proposed new rule. CJA, LASC, and San Joaquin County Superior Court Judge Barbara Kronlund state that the proposed rule would encourage a system where complainants are not required to submit all evidence upfront, resulting in gamesmanship and extending commission proceedings. They also express concern that the rule would deprive judges of a sense of closure from the anxiety resulting from commission proceedings. Judge Kronlund suggests that there should be some parameters to a

rule for reconsideration, such as reconsideration will only be entertained if the new "material evidence" was not available at the time of the submission of the initial complaint, and only when the complainant has acted with due diligence to submit a complete complaint.

Others submitted comments in support of the adoption of a rule for reconsideration of closed complaints, but objected to a 60-day deadline for submitting a reconsideration request.

In response to the comments received, the commission has determined to circulate for public comment an amended version of the proposed rule for reconsideration of closed complaints. The amended new rule would (1) limit requests for reconsideration of closed complaints to matters closed by the commission at initial review for failure to state sufficient facts or information to establish a prima face case of misconduct; and (2) provide for a good cause exception to the 60-day deadline.

The first amendment would alleviate the concern about depriving the judge of a sense of closure, because the commission does not inform judges of complaints that are closed at the initial review for failure to state a prima facie case of misconduct. The good cause exception for the 60-day deadline would allow a complainant, who for good reason does not discover the new information beyond that deadline, to apply for reconsideration. Further explanation for the proposed amendments to the proposed new rule is provided in the invitation to comment.

In the commission's view, Judge Kronlund's alternative proposal sets an unreasonable standard for most complainants who are neither attorneys nor judges. The standard she suggests, that the information could not have been discovered earlier with due diligence, is similar to the standard applicable in courts to new trial motions based on new evidence. In court proceedings, parties are often represented by attorneys, who know or should know to obtain all material evidence at the time of trial. Moreover, considering new information after a matter has been closed at intake does not prejudice the judge (who was not informed of the initial complaint) or require the resources involved in relitigating a trial or hearing.

In the meantime, consistent with its current practice, the commission has adopted Policy Declarations of the Commission on Judicial Performance, policy 1.1.5 [Reconsideration of Complaints Closed upon Initial Review].

> If a matter is closed by the commission at initial review because a complaint does not state sufficient facts or information to establish a prima facie case of misconduct, the complainant shall be informed that if further new information is provided, it will be reviewed and, if sufficient, the complaint will be reconsidered.

B. Proposed Rule Amendments to Eliminate Advisory Letters as Disciplinary Option

Proposed Amendment

The commission sought comment on whether the following rules authorizing the commission to issue an advisory letter following a staff inquiry or preliminary investigation

should be deleted: rules 110, 111(d), 114(b)(2), and 116(b)(2). The deletion of these rules would result in the deletion of rule 111.5 (correction of advisory letter), and an amendment to rule 111.4 (legal error) [to delete reference to advisory letters].

The proposed amendments were in response to proposals submitted by the Center for Judicial Excellence and Court Reform LLC urging the commission to eliminate all private discipline. California Constitution, article VI, section 18(d), adopted by voter initiative, authorizes the commission to privately admonish a judge or former judge found to have engaged in an improper action or dereliction of duty. The commission may not override a constitutional provision by rule. Abolishing the commission's constitutional authority to impose private admonishments would require a constitutional amendment, which must be approved by the California State Legislature and ratified or rejected by the state's voters.

Advisory letters, while grandfathered into the state constitution by virtue of section 18.1 (requiring disclosure to appointing authorities), were created by rule. The practice of issuing advisory letters was codified in the rules of court in 1989, and adopted by commission rule in 1996. The California Supreme Court affirmed the commission's authority to issue advisory letters in *Oberholzer v. Commission* (1999) 20 Cal.4th 371. Because advisory letters were created by rule, the commission has discretion to abolish them as a disciplinary option.

The commission solicited public comment on the proposal to assist in its determination of whether the elimination of advisory letters would be in the best interest of the public and the administration of justice.

Discussion of Comments and Reason for Not Adopting Proposed Rule

Comments in opposition to eliminating advisory letters were received from CJA, LASC, Judge Kronlund, The Trial Court Presiding Judges Advisory Committee, the Ventura County District Attorney's Office, and Attorneys Joseph P. McMonigle, Kathleen M. Ewins, David S. McMonigle, and Kate G. Kimberlin of Long & Levit LLP. The reasons for opposition include the following:

- Advisory letters serve a valuable function in protecting the public and affecting positive change in judicial behavior by serving as a warning to judges who engage in minor misconduct.
- The value of escalating penalties is recognized in many types of legal proceedings, State Bar proceedings, and by other state judicial disciplinary bodies.
- Eliminating advisory letters may result in minor violations being disciplined too harshly or not at all.
- Having two levels of private discipline for minor violations allows the commission to distinguish between those judges who offer substantial mitigation and those judges who do not acknowledge the problematic behavior.

Comments in favor of eliminating advisory letters, as well as all private discipline, were received from Mari-Lynne Earls, Tamir Sukkary, Thomas Portue′, Sharon Noonan Kramer, Abraham Alcaraz, Barbara A. Kauffman, Esq., and Joseph Sweeney. Proponents of eliminating

private discipline stated that the public has a right to know about all disciplinary action taken against judges, and that advisory letters are not sufficient to deter future misconduct.

After careful review and consideration of all comments, the commission has determined not to amend its rules to eliminate advisory letters as a disciplinary option. Doing so would not necessarily provide greater transparency, because most matters which would have resulted in an advisory letter would likely either be closed or result in a private admonishment. As noted, the commission cannot by rule abolish private admonishments, which are authorized in the California Constitution.

Joseph Sweeney suggests that the commission is not required to impose private admonishments, even if given constitutional authority to do so. Given that the constitution has expressly provided for the imposition of private admonishments as a disciplinary option, a policy or practice of not imposing any level of private discipline would be contrary to the constitutional amendment approved by the voters.

The commission is of the view that advisory letters serve an important purpose in cautioning judges about relatively minor misconduct in an effort to prevent future similar misconduct, and should remain a disciplinary option for the commission. Moreover, having two levels of private discipline allows for more options in escalating discipline and considering mitigation when imposing discipline for isolated incidents of relatively minor misconduct.

As an alternative to imposing advisory letters for one-time minor transgressions, CJA and Judge Kronlund propose that the commission consider additional mentoring and educational programs.[1] CJA commends the commission for its pilot mentoring program in Northern California and asks that it be expanded to other areas of the state. (The commission will consider this at the end of the two-year pilot program.) CJA also suggests that the commission mandate educational programs in lieu of discipline in appropriate cases.

The commission's authority is governed by constitution, which does not provide for the imposition of mandatory mentoring or educational programs. On their own initiative, other judges under investigation have participated in ethics and counseling programs. Such remedial efforts are considered mitigating by the commission in determining whether to impose discipline or the appropriate level of discipline. (Policy declaration 7.1(2)(c).) However, the commission

[1] CJA and Judge Kronlund attribute the drop in the number of advisory letters issued after 1998 to the 1999 commencement of mandatory qualifying ethics training for judges who want to participate in the insurance program for CJP representation. (Annual average of advisory letters issued: 1980-1998 was 40; 2000-2009 was 17.5; 2010-2015 was 32.) As noted in the commission's 1990-2009 statistics report, the number of total sanctions per judge declined between 1999 and 2009, which may have been attributable to enhanced ethics training. With respect to the decline in advisory letters specifically commencing in 1999, this was likely attributable to the effect of the 1999 *Oberholzer* decision, which held that advisory letters are discipline. (*Oberholzer v. Commission on Judicial Performance* (1999) 20 Cal.4th 371.) The commission had previously considered them to be non-disciplinary.

does not have the resources or the mandate to develop educational programs for judges. This is something that is generally done through the Judicial Council's Center for Judicial Education and Research.

III. DISCUSSION OF RULE PROPOSALS NOT CIRCULATED FOR PUBLIC COMMENT OR ADOPTED

A. Rule Proposals Submitted by Members of the Public

During its 2016 biennial rules review, the commission received rule proposals from four public groups: Court Reform LLC (Joe Sweeney, founder), Center for Judicial Excellence (Kathleen Russell, Executive Director), Public Trust Committee (Jane & John Q Public), and Socioeconomic Justice Institute.[2] Because there is some duplication and overlap in the proposals, they will be discussed by subject.

1. Proposals to Eliminate Confidentiality in Commission Proceedings

A number of proposals jointly submitted by Court Reform LLC and Center for Judicial Excellence (hereafter CJE) would require amendments to the commission's current rule 102 concerning confidentiality to eliminate confidentiality in all or most commission investigations and proceedings. Those proposals are as follows:

- Make all complaints public, without redaction, upon adjudication
- Require public reporting of complaint data by judge and county
- Require that all orders of dismissal be made public

Complaints filed with the commission are confidential. (Rule 102.) A complaint is only publicly disclosed if formal proceedings are instituted and the complaint is provided to the judge in discovery or admitted at the hearing before the special masters. (Rule 102(b).) Most cases, over 99 percent, are resolved without the institution of formal proceedings. The fact that a complaint is closed also remains confidential, except that the complainant is informed that the commission found no basis for action against a judge or determined not to proceed further with the matter. (Rule 102(e).)

The commission's rules of confidentiality are intended to protect the confidentiality of complainants and witnesses and to protect judges from unwarranted damage to the judge's reputation based on unfounded complaints. Both the California and United States Supreme Courts have recognized that confidentiality serves important public policy purposes. (See *Landmark Commc'ns Inc. v. Virginia* (1978) 435 U.S. 829, 834-35; *Ryan v. Commission on Judicial Performance* (1988) 45 Cal.3d 526-528; *Mosk v. Superior Court* (1979) 25 Cal.3d 474.) It encourages the filing of complaints and provides protection against possible retaliation or recrimination. With respect to the confidentiality of commission investigations, the California

[2] Court Reform LLC and the Center for Judicial Excellence jointly submitted their proposals.

Supreme Court has stated, "Such confidentiality protects a judge from premature public attention and also protects the witnesses from intimidation." (*Ryan, supra,* 45 Cal.3d at pp. 527-528.)

In the commission's view, public disclosure of all complaints would have a chilling effect on the filing of complaints. Complainants may fear retaliation, regardless of whether the judge would actually engage in retaliatory conduct. Further, complainants may be reluctant to file complaints concerning a matter involving confidential or sensitive information. These concerns exist whether the complaint is made publicly available when received or upon adjudication of the complaint.

When Alabama amended its rules in 2001 to require disclosure of the identity of complainants, among other things, complaints dropped by almost half.[3] An American Bar Association report concluded that Alabama's procedures "conflict with national practice and are not protective of the public. They unduly burden the system, deter the filing of valid complaints, and compromise the ability of the Commission to effectively conduct a proper investigation."[4]

Whistleblowers filing complaints regarding improper governmental activity – including improper activity by judges – are guaranteed protection, including confidentiality, under California's Whistleblower Protection Act.[5] Consistent with whistleblower laws, the commission's rules protect the confidentiality of those who report judicial misconduct.

The proposal that the commission report the number of complaints filed by judge and county would not necessarily disclose the name of the complainant, but would reveal the name of the judge, regardless of whether the complaint was determined to be founded. In the commission's view, such statistics would serve no useful purpose. The number of complaints filed against a judge does not necessarily reflect on the judge's abilities, impartiality, or ethical standards, if the complaints are determined to be unfounded or unsubstantiated. As demonstrated by statistics reported in the commission's annual report, complaints arise out of certain types of court cases (i.e., criminal) far more often than from other types of cases. As such, a judge's assignment may affect whether and how often the judge receives complaints. Further, the proposed rule could result in the filing of frivolous complaints against a judge during an election, and use of those statistics to benefit the opponent.

Another proposed rule would require the commission, in every matter in which a complaint is closed, to issue a public order of dismissal. Under the proposed rule, the order must contain the reasons for dismissal, list of documents and/or witnesses whose testimony was considered prior to dismissal, and provide the vote of commission members. This proposal would not only eliminate the confidentiality of complaints, but would require the commission to

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[3] American Bar Association Standing Committee on Professional Discipline, Alabama: Report on the Judicial Discipline System (March 2009) (ABA report).

[4] ABA report at page 2.

[5] Government Code sections 8547.5, 8547.6, and 8547.7, subdivision (c).

disclose the names and statements of witnesses. For the reasons discussed above, the commission believes this would have a chilling effect on the filing of complaints and witnesses' cooperation with the commission's investigation. Witnesses would be informed that their statements would be made public when the commission's investigation is closed. Thus, witnesses may be reluctant to give a statement out of fear of retaliation or intimidation. Cooperation from witnesses is essential to the commission's investigation, and for the protection of the public.

2. Proposed Live Broadcasting of Public Discipline

CJE proposed an amendment to rule 116, concerning public admonishments, to require a judge who is publicly admonished to appear before the commission to be admonished at a public hearing on live television.

The proposal is based on the practice of the Florida Supreme Court, which requires the judge to appear in court to be publicly admonished by the court. In Florida, the Supreme Court, rather than the disciplinary commission, makes the final determination as to discipline. Public admonishments are read during the court's oral argument calendar for appellate matters. The entire oral argument calendar is broadcast.

The California Commission on Judicial Performance issues a press release when public discipline is issued, with a summary of the decision and directions to the text of the full decision on the commission's website. Public admonishments are routinely reported by the press. The California Supreme Court has stated that the purpose of judicial discipline is not punishment, but protection of the public, maintaining public confidence in the integrity and impartiality of the judiciary, and the enforcement of rigorous standards of judicial conduct. (*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1111-1112.) In the commission's view, the commission's current practice best fulfills this mandate.

3. Proposed New Rule Making Judicial Retaliation an Aggravating Factor and Separate Ground for Discipline

CJE proposed a rule stating that if, during an inquiry or investigation, a judge is determined to have retaliated against a complainant, the retaliation shall be considered an aggravating factor to any discipline imposed, or may be disciplined separately even if the initial complaint is closed.

The commission currently has authority to investigate and discipline a judge for retaliation. Canon 3D(5) of the California Code of Judicial Ethics prohibits a judge from retaliating, directly or indirectly, against a person known or suspected of assisting or cooperating with an investigation of a judge or lawyer. With respect to court employees, California Constitution article VI, section 18, subdivision (h) provides that adverse employment action cannot be taken against a person, by any employer, public or private, based on statements presented by the person to the commission.

If the commission receives information that a judge has retaliated or threatened retaliation against a complainant or witness to a commission's investigation, the commission will investigate the matter. Retaliation is serious misconduct. If proven, the judge may be disciplined for that misconduct, independent of the underlying complaint. Even conduct that creates the appearance of improperly attempting to influence a witness's participation in the commission's investigation has resulted in discipline. (Com. on Jud. Performance, Ann. Rept. (2006) Private Admonishment 10, p. 27; Com. on Jud. Performance, Ann. Rept. (2000) Private Admonishment 2, p. 20; Com. on Jud. Performance, Ann. Rept. (1995) Advisory Letter 2, p. 24.) Moreover, any attempt by a judge to discourage court staff or others from cooperating in the commission's investigation can be considered as an aggravating factor to the initial misconduct. (Policy declaration 7.1(2)(b).)

For these reasons, the commission has determined that current rules and procedures adequately address the issues raised in the proposal.

4. Proposed Amendment to Rule 117 to Require the Commission to Permanently Maintain All Complaints and Other Records

CJE proposes that all complaints and other records be maintained permanently because the public has an interest in obtaining information on problematic judges. In the commission's view, the public's interest is served by the commission's current record retention policy. When a judge is disciplined at any level, the file is retained indefinitely. Thus, there is a permanent record of "problematic judges." If a complaint is closed without discipline, it cannot be presumed that the judge was "problematic."

The commission retains files on closed non-disciplinary complaints for 12 years for trial court judges and 18 years for appellate justices. The commission's file retention policy tracks the statute of limitation imposed by the constitution (a judge cannot be censured or removed for conduct occurring more than 6 years prior to the commencement of the judge's current term). To retain records of closed matters indefinitely would be burdensome and costly with little or no benefit to the public.

5. Proposed Rules Concerning Criteria for Preliminary Checking, Inquiry or Investigation of a Complaint

CJE proposes that the commission adopt rules defining the criteria used by the commission in conducting a "preliminary check," "preliminary inquiry," or "preliminary investigation" of a complaint.

Upon receipt of a complaint or on its own motion, the commission may (1) determine that the statement is obviously unfounded or frivolous and dismiss the proceeding or (2) if the statement is not obviously unfounded or frivolous, authorize a staff inquiry or preliminary investigation into the complaint. (Rule 109.) A staff inquiry is authorized where the allegations, if true, would not warrant commission action greater than issuance of an advisory letter or where further information is necessary to determine whether a preliminary investigation is warranted. Where the allegations, if true, would warrant consideration of commission action greater than

issuance of an advisory letter or when the use of investigation subpoenas and more formal investigative procedures are contemplated, the commission may commence with a preliminary investigation. (Rules 109, 110, 111; policy declarations 1.2, 1.4.)

Staff may not conduct a staff inquiry or preliminary investigation without authorization from the commission. However, staff may do some preliminary checking of a complaint during the initial intake and prior to placing the matter before the commission when further information is required to determine whether there is a basis for opening a staff inquiry or preliminary investigation. For instance, staff may call the complainant for more information, contact the complainant's attorney, or obtain public documents.

In the commission's view, the commission's current rules and policy declarations adequately define the circumstances and criteria for the commission's different levels of inquiry and investigation.

6. Proposed Rule Requiring Judge Commission Member to Recuse From Complaints Against a Judge From the Same County

Current rule 101 states that a judge who is a member of the commission or the Supreme Court shall not participate in commission matters involving themselves. Public Trust Committee (PTC) proposes to expand this rule to include commission matters involving judges from the same county as the judge commission member.

In the commission's view, the commission's existing recusal standards for judge members of the commission assure impartiality and the appearance of impartiality. Policy declaration 6.1 (code of ethics for commission member recusal) states that a commission member shall recuse himself or herself when, among other reasons, the member does not think he or she is able to act fairly and impartially in a matter, or when a reasonable person aware of the facts would entertain a substantial doubt that the member would be able to be impartial. Judge members of the commission often recuse when a commission matter involves a judge of their court. However, there are situations when a judge member can fairly and impartially participate in a matter involving a judge of the member's own court and where it would not cause an appearance of impropriety. For instance, if the member is from a large county with multiple courthouses (e.g., Los Angeles), the member may not even know the judge personally who has a matter before the commission.

Moreover, given that there are only three judge members of the commission and no alternate members, requiring recusal of a judge member from a large county in every matter involving a judge from that county could result in numerous recusals, difficulty ensuring a quorum, and undermine confidence in the commission's decisions.

7. Proposed Rules Concerning Attorneys Serving as a Pro Tem Judge, Private Judge, or Referee

PTC proposed a number of rule amendments related to attorneys serving as private judges, pro tem judges, referees, and subordinate judicial officers (SJO).

The commission shares authority with local courts over discipline of SJO's, who are hired by the local court. (Cal. Const., art. VI, § 18.1.) Attorneys acting as referees, pro tem judges or special masters by appointment are appointed by the local court, which has authority under the rules of court to handle complaints. In some instances, referral to the State Bar may be appropriate. The commission defers to the State Bar the handling of complaints against attorneys, who are appointed by the local court to serve in these capacities.

PTC proposes a rule requiring any lawyer acting as a referee, special master, pro tem, private judge, or SJO to maintain their certificate, oath and disclosure on file and with the county and with CJP. This is something that would have to be done through legislation and is outside the commission's authority and jurisdiction.

PTC also proposes a rule requiring private judges, referees and special masters to report all income they make during the scope of a judicial assignment. These individuals are not within the commission's jurisdiction. Moreover, enactment of reporting requirements is outside the commission's authority and would require legislative enactment.

8. Proposal to Require Publication of Conflict of Interest Disclosures

Referring to canon 3E(2)'s requirement that disclosure of information relevant to disqualification be made on the record, PTC proposes that all such disclosures be published by the commission and made available to any member of the public. Disclosures of information relevant to disqualification are made in court and not required to be reported to the commission. Further, while the commission has authority to discipline a judge for failure to disclose when required, it does not have the constitutional authority to publish disclosures.

9. Proposed Rule Requiring Commission to Find Violations of the Whistleblower Protection Act and Report to the State Auditor

The Socioeconomic Justice Institute (SJI) proposes a new rule stating that a judge who violates any state or federal law or regulation, or California Rule of Court, commits an improper governmental activity under the Whistleblower Protection Act (Act), which the commission shall be required to report to the California State Auditor.

If a judge is found to have violated the Act based on applicable law, the conduct might be subject to discipline (if the conduct constitutes more than legal error). (Canon 2A [judge shall respect and comply with the law].) However, the commission does not have authority to legislate what activities are subject to the Act.

Rule 102(p) permits the commission to release to a regulatory agency information which reveals a possible violation within the agency's jurisdiction by a judicial officer, provided the commission has commenced a preliminary investigation. Thus, the commission can release information revealing a violation of the Act to the State Auditor, who has authority to investigate and report on violations of the Act. (Gov. Code, § 8547.4.)

10. Proposed Amendment to Rule 102(g) to Require Release of Information to Prosecuting Authorities

Currently, rule 102, subsection (g), provides that the commission may provide to a prosecuting agency at any time information which reveals possible criminal conduct by a judge, or any other individual or entity. SJI proposes that "may" be amended to "shall," making disclosure mandatory.[6] SJI asserts that the commission rarely, if ever, exercises its discretionary authority under this rule. That is not the case. The commission has on multiple occasions reported possible criminal conduct to prosecuting authorities.

The commission believes the requirement should remain discretionary. Under the proposed rule, the commission would be required to turn over to prosecuting authorities any information which reveals possible criminal conduct, even if the information is determined to be unsubstantiated. This would require an unwarranted use of time and resources for the commission and the prosecuting authorities.

B. Rule Proposals Submitted by California Judges Association

By letters dated September 28, 2016 and October 21, 2016, the California Judges Association (CJA) submitted proposed rule amendments and additions for consideration during the commission's biennial rules review. CJA is a private, dues supported, association of California active and retired judicial officers.

After consideration of each of the proposals submitted, the commission determined not to circulate for public comment or adopt the following proposals.

1. Proposed Amendment to Rules to Allow for Educational Letters

CJA proposed that the commission amend its rules to require the commission, prior to the issuance of an advisory letter, "to consider if a non-disciplinary educational letter is appropriate as an alternative, and, if so, issue one accordingly."

Prior to the Supreme Court decision in *Oberholzer v. Commission on Judicial Performance* (1999) 20 Cal.4th 371, advisory letters were generally not considered discipline. The commission issued advisory letters to caution or express disapproval of a judge's conduct. In *Oberholzer*, the Supreme Court held that the commission had authority to issue advisory letters, and that they constitute disciplinary action. The court noted that the amendments to the constitution pursuant to Proposition 190 codified the commission's practice of issuing advisory letters by stating that "the text of any private admonishment, *advisory letter, or other*

[6] In response to the commission's solicitation of public comments on proposed rules, Sharon Noonan Kramer proposed a similar rule amendment, which would require the commission to notify state and federal prosecuting authorities when a judge is alleged to have engaged in willful felony acts. Her proposal is not addressed independently in this report because it was received after the time for submission of proposed rule amendments had expired. However, the response to SJI's proposal is also responsive to her proposal.

disciplinary action," of a person under consideration for state or federal judicial appointment shall be turned over to appointing authorities. (Cal. Const., art. VI, § 18.5, italics added; *Oberholzer, supra,* 20 Cal.4th at pp. 388-389.)

In the commission's view, issuing non-disciplinary letters to a judge who has violated the canons would be contrary to the holding in *Oberholzer.* CJA states that it is cognizant of the holding in *Oberholzer,* but believes there may be ways to craft the option of an educational letter that does not conflict with *Oberholzer.* However, CJA does not propose how that could be done.

Further, in the commission's view, there are sound public policy reasons for not adopting the rule proposed by CJA. In *Oberholzer,* the Supreme Court found advisory letters to be disciplinary action in part because they were considered by the commission in subsequent proceedings and were disclosed to appointing authorities. (*Oberholzer, supra,* 20 Cal.4th at p. 389.) Thus, if educational letters are to be non-disciplinary as proposed by CJA, they could not be disclosed to appointing authorities or considered in subsequent discipline. In the commission's view, not disclosing an educational letter to appointing authorities when the commission has made a determination that the judge engaged in misconduct may deprive the appointing authority of relevant information and would not protect the public.

Also, the commission is permitted to cite prior private or public discipline imposed on a judge in issuing a private or public admonishment. (Rules 113, 115.) Further, any prior disciplinary action may be received in evidence in formal proceedings. (Rule 124(b).) However, as noted, the commission could not consider a non-disciplinary letter in subsequent discipline. The inability to refer to the fact that the judge engaged in similar misconduct in subsequent discipline concerning similar misconduct removes from consideration an important factor in determining the appropriate level of discipline – whether the judge has previously engaged in similar misconduct. As such, the proposed rule would diminish the commission's ability to protect the public.

1. Proposed Amendment to Rule 111.4 Regarding Legal Error

CJA proposes the following amendments to rule 111.4 (Legal Error):

> Discipline, including an advisory letter, shall not be imposed for mere legal error ~~without more~~. However, a judge who commits legal error which, in addition, clearly and convincingly reflects bad faith, bias, abuse of authority, *intentional* disregard for fundamental rights, intentional disregard of the law, or any purpose other than the faithful discharge of judicial duty is subject to investigation and discipline.

Rule 111.4 was adopted in 2013 in response to a proposal from CJA. The commission modified the language proposed by CJA to precisely track the holding of the Supreme Court in *Oberholzer v. Commission on Judicial Performance, supra,* 20 Cal.4th at p. 398.

In the current proposal, CJA asks the commission to modify the *Oberholzer* standard set forth in rule 111.4 to preclude discipline for disregard of a fundamental right unless the commission can prove by clear and convincing evidence that the disregard was intentional. The commission does not impose discipline in every instance in which there is a denial of a fundamental right; rather, it requires clear and convincing evidence of a *disregard* of a fundamental right. A disregard may include an element of intent, but not necessarily. A judge may disregard a fundamental right through a reckless indifference of a well–established fundamental right. (*Inquiry Concerning Judge Joseph W. O'Flaherty* (2004) 49 Cal.4th CJP Supp. 1, 21.) An example can be found in *Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 851, the case cited in *Oberholzer* as constituting a disregard of a fundamental right warranting discipline. There, the Supreme Court determined that a judge's issuance of a bench warrant in violation of the Penal Code – for a defendant who had not been ordered to appear personally – was prejudicial misconduct despite the judge's representation that he reasonably believed he had authority to issue the warrant. In *Kloepfer*, the court also found that the judge engaged in willful and prejudicial misconduct in denying a defendant's request for counsel before being found in violation of probation, despite the judge's assertion that he assumed the defendant's prior appearances without counsel constituted a continuing waiver.

CJA asserts that judges have a serious concern that the commission is disciplining judges for legal error, yet it has not provided any examples or citations to the commission's annual report summaries to support that assertion. In fact, the commission only imposes discipline based on legal error when there is clear and convincing evidence of one of the *Oberholzer* "plus" factors. The commission recognizes that a judicial decision later determined to be incorrect legally does not in itself constitute judicial misconduct and that "judges must be free not only to make the correct ruling for proper reasons, but also to make an incorrect ruling, believing it to be correct." (*Oberholzer, supra,* 20 Cal.4th at p. 398.) However, as stated by the Supreme Court, a judge who commits legal error which *in addition* clearly and convincingly reflects bad faith, bias, abuse of authority, disregard for fundamental rights, intentional disregard of the law, or any purpose other than the faithful discharge of judicial duty engages in misconduct and is subject to investigation and discipline. This standard ensures that judges are not subject to discipline based on mere legal error. (*Ibid.*)

2. Proposed Amendment to Rule 129(d), Report of Special Masters

When formal proceedings are instituted by the commission, three judges are appointed by the Supreme Court as special masters to preside over a public evidentiary hearing, and then submit a report to the commission with findings of fact and conclusions of law, along with an analysis of the evidence and reasons for the findings and conclusions. (Rule 129(d).) CJA proposed adding to rule 129(d), "The commission shall be bound by the findings of fact and conclusions of law of the masters in determining the imposition of discipline."

The commission determined not to adopt this proposal because it would inappropriately delegate the commission's constitutional authority and mandate to judges who are appointed as special masters. The California Constitution vests with the commission the authority to investigate complaints of judicial misconduct, to determine whether a judge has engaged in misconduct, and to impose discipline. (Cal. Const., art. VI, § 18.) In 1994, by approval of

Proposition 190, the voters of California changed the compostion of the commission from a majority of judge members to a majority of public members.

Even before the passage of Proposition 190, when the commission only made recommendations to the Supreme Court on factual findings, legal conclusions, and discipline (see Cal. Const., art. VI, § 18, former subd. (c)), the Supreme Court held that because "[t]he Commission, not the masters, is vested by the Constitution with the ultimate power to recommend to this court the censure, removal or retirement of a judge[,]" the commission is "free to disregard the report of the masters and may prepare its own findings of fact and consequent conclusions of law." (*Geiler v. Commission* (1973) 10 Cal.3d 270, 275.)[7] Further, when the legal conclusions of the masters and the commission varied, the Supreme Court gave deference to the conclusion of the commission "because of its expertise in matters of judicial conduct." *(McCullough v. Commission on Judicial Performance* (1989) 49 Cal.3d 186, 191.) Since the voters of California have entrusted the commission with the ultimate authority to make determinations of judicial misconduct and discipline, subject to discretionary Supreme Court review, and have changed the composition of the commission to a majority of public members, it is even more important that the commission independently review the record and make its own findings and conclusions.

3. Proposed New Rule Providing For Early Neutral Evaluation Conference During Preliminary Investigation

CJA proposed adoption of a new rule requiring the commission to seek from the Supreme Court the appointment of an active or retired judge to serve as a special master to preside over an early neutral evaluation conference whenever requested by a judge who has been issued a notice of intended private or public admonishment under rules 113-116. If the judge and commission legal staff agree on a resolution with the assistance of the special master, the special master would be required to submit a recommendation for resolution to the commission chairperson. The proposed rule states that the commission "*must*" accept the recommendation of the special master for resolution of the matter, unless the judge objects or the commission believes that accepting the recommendation "would cause harm to the public or the administration of justice." The commission would be authorized to make "non-substantive" modifications to the special master's recommendation, as long as the judge agrees to the modifications.

The commission agrees with CJA that, in many matters, early resolution benefits the judge, the commission and the public. Commission rule 116.5 currently allows the judge and staff to propose negotiated dispositions to the commission for consideration during a preliminary investigation. However, in the commission's view, CJA's proposal would inappropriately delegate the commission's constitutional mandate to determine the appropriate disposition of a matter to a judge special master, rendering the special master's recommendation binding upon the commission. This is contrary to the commission's constitutional mandate to investigate

[7] Indeed, the masters are not part of the constitutional framework and serve only if the commission requests the Supreme Court to appoint them to hear and take evidence in a particular case. (See rule 121(b).)

allegations of judicial misconduct and determine whether to impose discipline and, if so, the appropriate level of discipline. (Cal. Const., art. VI, § 18.)

The proposal would also contravene the intent of the voters of Proposition 190, which changed the composition of the commisison from a majority of judges to a majority of public members, by delegating the commission's authority to one judge.

Consistent with the commission's constiutional mandate, proposed dispositions should be negotiated by the judge and commission legal staff or other designated attorney and presented to the commission to be accpeted, rejected or returned to the judge and legal staff or other designated attorney to consider modifications. Current rule 116.5 allows for this process.

4. Proposed Amendment to Rule 102(a) to Exempt Judges From Confidentiality Requirement

The California constitution provides that the "commission may provide for the confidentiality of complaints to and investigations by the commission." (Cal. Const., art. VI, § 18, subdivision (i), par. (1).) Rule 102(a) provides that all papers filed with and proceedings before the commission shall be confidential, with specified exceptions. An exception is made for disclosure after the institution of formal proceedings. The rule is intended to prevent disclosure of an ongoing commission investigation about a judge, prior to the institution of formal proceedings. This protects the confidentiality of witnesses, complainants and the judge, as well as the integrity of the commission's investigation. The judge and others are not prohibited from discussing the underlying conduct if they have independent knowledge of the event or conduct, so long as the fact that there is a pending investigation is not disclosed. The current rule does not prohibit a judge, through counsel, from interviewing witnesses concerning the allegation(s) against the judge.

CJA proposed amending rule 102(a) to permit a judge to discuss or make statements regarding the complaint or commission proceeding. In CJA's view, the judicial officer should have the ability to speak about commission investigations and proceedings as they see fit and appropriate. However, under the proposal, commission staff, witnesses, and complainants would still be subject to the confidentiality provision.

The commission determined not to circulate this rule for public comment because, in the commission's view, the rules of confidentiality are an important tool in protecting the integrity of the commission's investigation and in protecting the confidentiality of witnesses, complainants, and judges. As discussed in relation to proposals from public groups to eliminate confidentiality in commission proceedings, both the California and United States Supreme Courts have recognized that confidentiality serves important public policy purposes. (See *Landmark Commc'ns Inc. v. Virginia* (1978) 435 U.S. 829, 834-35; *Ryan v. Commission on Judicial Performance* (1988) 45 Cal.3d 526-528; *Mosk v. Superior Court* (1979) 25 Cal.3d 474.) It encourages the filing of complaints and provides protection against possible retaliation or recrimination. Further, it protects from unwarranted damage to the judge's reputation based on unfounded complaints. With respect to the confidentiality of commission investigations, the California Supreme Court has stated, "Such confidentiality protects a judge from premature

public attention and also protects the witnesses from intimidation." (*Ryan, supra*, 45 Cal.3d at pp. 527-528.)

CJA's proposal would allow judges to publicly discuss the proceedings and investigation, while prohibiting witnesses and complainants from doing so, which could create an appearance of unfairness in the commission's investigation.

5. Proposed New Rule for Providing Discovery to Judge Prior to Formal Charges

CJA proposed a new rule that would require the commission, upon request of a judicial officer, to provide discovery during a preliminary investigation, including all witness statements. Currently, the commission provides discovery to a judicial officer after the initiation of formal proceedings. (Rule 122.)

In 2012, CJA proposed a similar rule requiring the commission to provide discovery, including complaints and witness statements, during the commission's investigation and prior to the initiation of formal proceedings. In response, the commission amended rules 110 and 111 to incorporate the commission's long-standing practice of informing the judge of the specifics of the allegation(s) in staff inquiry and preliminary investigation letters and offering the judge an opportunity to respond as stated in policy declarations 1.3 and 1.5. However, the commission determined not to adopt the rule as proposed by CJA, which would have required the commission to provide discovery of complaints and witness statements, among other things.

CJA's proposed rule was not adopted in 2012 because the commission believes eliminating confidentiality of complainants and witnesses would severely compromise the commission's investigation of complaints of judicial misconduct and would jeopardize protection of the public. The commission's practice, as reflected in the 2013 amendments to rules 110 and 111, is consistent with the majority of state judicial disciplinary commissions in the country. Only one state – Alabama – requires the discovery requested by CJA *before* a formal charge is filed in judicial disciplinary proceedings. When Alabama amended its rules in 2001 to require disclosure of the identity of complainants, among other things, complaints dropped almost by half.[8] An ABA report concluded that Alabama's procedures "conflict with national practice and are not protective of the public. They unduly burden the system, deter the filing of valid complaints, and compromise the ability of the commission to effectively conduct a proper investigation." [9]

CJA's current proposal would similarly compromise the commission's investigation of complaints and deter the filing of valid complaints. In the commission's view, current rules provide the judge with fair notice of the allegations while protecting confidentiality of

[8] ABA report at page 14.

[9] ABA report at page 17. In addition to the discovery provisions discussed in this report, Alabama's amended rules require verification of complaints.

complainants and witnesses, thus, also ensuring that the commission complies with its mandate to efficiently and effectively investigate complaints of judicial misconduct and to protect the public.

Staff inquiry and preliminary investigation letters sent to the judge describe the alleged conduct with as much detail as possible without disclosing the identity of the complainant or witnesses. The judge is informed of the date and location of the alleged conduct, if known to the commission. When applicable, the judge is informed of the name of the court case during which the alleged conduct occurred. If the investigation concerns statements made by or to the judge, the letter to the judge includes the text or summaries of the comments, and, if a transcript is available to the commission, pertinent quotes and citations to the transcript are included. In the commission's view, this degree of specificity provides the judge with adequate notice to be able to effectively respond to the allegations.

The California Supreme Court has upheld the commission's confidentiality protections and discovery rules, finding that they satisfy due process requirements.[10] There has never been a finding of fundamental unfairness in the commission's proceedings.

[10] *Oberholzer v. Commission on Judicial Performance* (1999) 20 Cal.4th 371; *Ryan v. Commission on Judicial Performance* (1988) 45 Cal.3d 518, 526-529.

TEXT OF AMENDED RULES

Deleted language is printed in ~~strikeout type~~ and new language is printed in *italic type*.

AMENDMENTS TO RULE 116.5

Rule 116.5. Negotiated Settlement During Preliminary Investigation

At any time during a preliminary investigation or an admonishment proceeding under rules 113-116, the commission may ~~designate trial counsel~~ *authorize legal staff* or ~~an~~other *designated* attorney ~~authorized by the commission~~ to negotiate with the judge a resolution of any matter at issue. *The judge may also initiate settlement discussions with legal staff or other designated attorney.* A proposed resolution *agreed to by the judge and legal staff or other designated attorney* shall be jointly submitted to the commission, which may accept it, reject it or return it to the judge and ~~examiner~~ *legal staff or other designated attorney* to consider modifications to it. No agreement between the judge and legal staff *or other designated attorney* is binding unless approved by the commission. A settlement proposal rejected by the commission cannot be used against the judge in any proceedings. After formal proceedings are instituted, settlement negotiations are governed by rule 127.

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AMENDMENTS TO RULE 120(b)

Rule 120(b). Disqualification

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(b) (Disqualification upon notice of formal proceedings) Before the commission has reached a determination regarding removal or retirement of a judge, the commission may temporarily disqualify a judge without loss of salary upon notice of formal proceedings pursuant to article VI, section 18(b) of the California Constitution if the commission determines that *there is substantial evidence that* the continued service of the judge ~~is causing immediate, irreparable, and continuing public harm~~ *poses a threat of serious harm to the public or to the administration of justice.*

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AMENDMENT TO RULE 122(g)(2)(a)

Rule 122. Discovery Procedures

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(g) (Depositions)

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(2) (Discovery depositions)

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a. The judge shall have the right to take depositions of up to four material witnesses, and the examiner shall have the right to take depositions of the judge and up to three other material witnesses. Depositions of commission members or staff are not permitted. Bench officers, other than the respondent judge, and court staff shall be afforded counsel for the deposition, upon request, by the ~~Administrative Office of the Courts~~ *Judicial Council*.

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AMENDMENT TO RULE 126(d)

Rule 126. Procedural Rights of Judge in Formal Proceedings

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(d) (Appointment of conservator) If the judge is adjudged ~~insane~~ *to be of unsound mind* or incompetent, or if it appears to the commission at any time during the proceedings that the judge is not competent to act for himself or herself, the commission may petition a court of competent jurisdiction for the appointment of a conservator unless the judge has a conservator who will represent the judge. If a conservator is or has been appointed for a judge, the conservator may claim and exercise any right and privilege and make any defense for the judge with the same force and effect as if claimed, exercised, or made by the judge, if competent, and whenever these rules provide for serving, giving notice or sending any matter to the judge, such notice or matter shall be served, given, or sent to the conservator.

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