

**STATE OF CALIFORNIA
COMMISSION ON JUDICIAL PERFORMANCE
455 Golden Gate Avenue, Suite 14400
San Francisco, California 94102
(415) 557-1200
Fax (415) 557-1266**

**REPORT CONCERNING ADOPTION OF AMENDMENT 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 August 29, 2017, the Commission on Judicial Performance circulated for public comment proposals for additions and changes to certain of its rules. Following consideration of the comments and responses to comments, at its meeting on January 31, 2018, the commission adopted an amendment to rule 117, and determined not to adopt the proposed new rule for reconsideration of closed complaints in view of its adoption of policy declaration 1.1.5. The text of the amendment to rule 117 is attached and the final version of the amended rule may be found on the commission's website at <http://cjp.ca.gov>.

**EXPLANATION OF RULE AMENDMENT AND DISCUSSION OF PUBLIC
COMMENTS**

**A. Amendment to Rule 117: Delete Time Limitation on the Use of Complaints Closed
After Initial Review**

Explanation of Amendment

The amendment to rule 117 deletes subdivision (a), which previously provided that commission records of complaints against a judge shall not be used for any purpose if the complaints relate to actions occurring more than six years prior to the commencement of the judge's current term and did not result in discipline.¹ The amendment also deletes the requirement in previous subdivision (b) that the commission adopt a records disposition program to dispose of the records that could not be used pursuant to subdivision (a). The amended rule states the commission shall adopt a records disposition program designed to be consistent with constitutional language and case law, which shall be published in the Policy Declarations of the Commission on Judicial Performance. The commission's record disposition policy can be found in policy declaration 3.10.

¹ Rule 117 was adopted in 1996, when the commission was given rulemaking authority by constitutional amendment pursuant to Proposition 190. It is almost identical to former California Rule of Court, rule 904.6(1), adopted by the Judicial Council; the only difference is that the former rule of court made no reference to public admonishments, which did not exist prior to 1995.

Prior to the amendment, some judges subject to commission investigation had contended that rule 117 precluded the commission from considering complaints not previously investigated concerning alleged conduct that took place more than six years prior to the judge's current term. In the commission's view, this interpretation is not required by the constitution and would hinder the commission in the exercise of its constitutional mandate to protect the public. Thus, the commission determined that the rule should be amended, consistent with the constitution, to avoid any ambiguity as to the commission's authority to investigate conduct that occurred more than six years prior to the judge's current term, when that conduct did not result in discipline.

The time limitations in previous rule 117 tracked the time limitations provided in the California Constitution for censure and removal of a judge. The California Constitution states that a judge may be censured or removed for willful or prejudicial misconduct "occurring not more than 6 years prior to the commencement of the judge's current term." (Cal. Const., art. VI, § 18(d).) There is no similar constitutional time limitation on the issuance of public or private admonishments or advisory letters. In *Dodds v. Commission on Judicial Performance* (1995) 12 Cal.4th 163, two justices pointed out in a concurring and dissenting opinion, "The Commission's constitutional power of private admonishment derives from a discrete, self-contained sentence which, unlike the provisions for censure and removal, specifies *no* time limitation on the conduct which may be considered. [Citation.] It appears the Commission may therefore take the 1987 incident [beyond the constitutional time limitation] into account for admonishment purposes, and I do not read the majority's opinion as holding otherwise." (*Id.* at p. 185, fn. 6.)

In determining whether to open an investigation and impose discipline, the commission takes the age of the conduct into consideration, particularly in terms of the memory of witnesses and the availability of evidence. There can, however, be matters in which the age of the conduct does not detrimentally affect the investigation and the judge's right to present a defense, such as when there is a transcript or the judge admits the conduct. Also, at times, there is good reason why the complaint did not come to the commission's attention until long after the alleged misconduct occurred. Investigation and consideration of misconduct beyond the time limitations in the previous version of rule 117 is particularly important and relevant when there are also allegations of recent similar misconduct. Whether the conduct is an isolated incident or reflects a pattern of misconduct is an important factor in the commission's determination of the appropriate level of discipline. (E.g., *Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 918.)

For these reasons, the commission concluded that rule 117 should be amended to assure that the commission may consider and investigate complaints concerning conduct that occurred more than six years prior to the judge's current term and impose discipline as permitted by the constitution, when appropriate.

Discussion of Comments

1. Deletion of Subdivision (a): Use of Commission Records

Comments were received from the California Judges Association (CJA) and the Los Angeles County Superior Court (LACSC). Both groups mistakenly assumed that the proposed

amendment was intended to allow the commission to reopen old complaints that were previously opened, investigated, and closed. CJA stated that it is not fair to allow old complaints that did not result in discipline to be used against a judge many years later. Assuming the “older complaint already went through a deliberative process,” CJA stated that, if merited, discipline would have been imposed at the time. LACSC stated that “[r]e-investigation of an earlier complaint for the purpose of imposing possible discipline for the prior conduct is not justified where the prior investigation concluded that the conduct was not serious enough to support issuance of any discipline at that time.”

The deletion of subdivision (a) does not allow the commission to reopen a complaint that was previously closed after investigation and contacting the judge. As a practice, regardless of the age of the alleged conduct, the commission will not reopen a closed complaint, unless it was closed at initial review for failure to establish a prima facie case of misconduct (when the judge has not been contacted), and then only when new information is provided. (See Policy Declaration 1.1.5.) If the prior complaint resulted in discipline, the commission may consider the prior discipline for purposes of determining the appropriate level of discipline in the new matter, but does not reopen the old matter.

CJA urged the commission to apply the constitutional time limitation applicable to censure and removal to all levels of discipline for the sake of uniformity and fairness. In the commission’s view, in order to fulfill its mandate to protect the public, it should maintain the discretion to impose private discipline or a public admonishment based on misconduct that occurred more than six years prior to the judge’s current term. A complaint may allege a course of misconduct that includes recent and older conduct, or the investigation into a complaint about recent misconduct may reveal that the judge has engaged in similar misconduct in the past. In those situations, not being able to use records related to the older conduct for any purpose prevents the commission from considering an important factor – whether the conduct is isolated or part of a pattern. Moreover, as noted, at times there is good reason why a complaint did not come to the commission’s attention closer in time to the conduct, and there can be matters in which the age of the case does not detrimentally affect the investigation and the judge’s right to present a defense, such as when there is a transcript or the judge admits the conduct. In those situations, the commission should have the ability to consider the complaint and impose discipline as appropriate and within its constitutional authority.

2. Amendment to Subdivision (b): Retention of Commission Records

Prior to the amendment, subdivision (b) of rule 117 provided that the commission shall adopt a records disposition program to dispose of records that cannot be used for any purpose “under this rule” (in reference to subdivision (a)). In view of the proposed deletion of subdivision (a), the commission proposed rule 117 be amended to state that the commission shall adopt a records disposition program designed to dispose of records of complaints against a judge “taking into consideration constitutional language and case law.”

LACSC opposed the proposed amendment on the grounds that it was vague and did not provide certainty or guidelines as to the records disposition policy, and recommends the

commission propose a specific records disposition policy and invite public comment on the proposal.

The commission does have a specific records disposition policy in its public policy declarations, which is consistent with constitutional language and case law. (See Policy Declaration 3.10.) Policy declarations reflect internal procedural detail neither duplicative of nor inconsistent with constitutional mandate or statutes or commission rules. For purposes of transparency and clarity, the commission determined to modify the proposed amendment accordingly:

The commission shall adopt and maintain a records disposition program designed to dispose of ~~those~~ records of complaints against a judge. The commission's records disposition program shall be consistent with constitutional language and case law and shall be published in the Policy Declarations of the Commission on Judicial Performance ~~which cannot be used for any purpose under this rule or which are no longer necessary for the performance of its duties.~~

B. Proposed New Rule for Reconsideration of Closed Complaints

The following proposed new rule was circulated for public comment.

- (a) A complainant may request reconsideration of a complaint closed by the commission at initial review for failure to state sufficient facts or information to establish a prima facie case of misconduct, if the complainant provides new material evidence of misconduct committed by the judge that provides a sufficient basis for investigation.
- (b) A request for reconsideration must be made not later than 60 days after the date of the communication informing the complainant of the dismissal, unless there is good cause for submitting the request beyond that time.
- (c) The commission shall consider every request for reconsideration, submitted in accordance with this rule.
- (d) 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.
- (e) The commission may grant a request for reconsideration if the complainant meets the requirements under subsection (a).
- (f) After granting a request, the commission shall vote to: (1) affirm the original decision to dismiss the complaint; or (2) reopen the complaint.
- (g) The commission shall notify the complainant of the results of the commission's vote under subsection (f) in writing.

- (h) The commission shall conduct an appropriate investigation of a complaint reopened under subsection (f)(2).
- (i) A complainant may request reconsideration of a dismissed complaint under this section only once.

During the 2016 biennial rules review, the commission solicited comments on a similar proposed new rule for reconsideration of closed complaints. In view of comments received, the commission revised the proposed new rule and sought public comment on the amended version. Additionally, in 2017, the commission adopted policy declaration 1.1.5, which states:

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.

Comments on the proposed new rule were received from CJA and LACSC. Both opposed the proposed new rule, particularly the good cause exception to the 60-day requirement for seeking reconsideration.

LACSC suggested the proposed rule is unnecessary because the complainant can file a new complaint if he or she discovers new information at some later date. Noting that the invitation to comment stated that the proposed rule would be contingent on additional funding, LACSC also stated that formalizing a procedure without the funding to implement it seems unnecessary and inadvisable.

In practice, the commission will reconsider a complaint closed at initial intake if new information reflecting a prima facie showing of misconduct is provided. As noted, this practice has now been codified into a policy declaration. (Policy Declaration 1.1.5.) After much consideration, the commission determined that this policy declaration best serves the public and the judiciary, without adoption of a rule that could require additional funding for implementation and make the process more bureaucratic and cumbersome for complainants.

TEXT OF AMENDED RULE

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

AMENDMENT TO RULE 117

Rule 117. ~~Use and Retention of Commission Records~~ *Records Disposition Program*

~~(a) (Use of records outside the limitation period)~~ Commission records of complaints against a judge shall not be used for any purpose if the complaints (1) relate to actions occurring more than six years prior to the commencement of the judge's current term and (2) did not result in issuance of an advisory letter, public or private admonishment, censure, or removal of the judge.

~~(b) (Records disposition program)~~ The commission shall adopt a records disposition program designed to dispose of ~~these~~ records *of complaints against a judge. The commission's records disposition program shall be consistent with constitutional language and case law and shall be published in the Policy Declarations of the Commission on Judicial Performance* ~~which cannot be used for any purpose under this rule or which are no longer necessary for the performance of its duties.~~