



State of California
Commission on Judicial Performance
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Date: March 15, 2019
To: Persons and Organizations Interested in Rules Relating to Proceedings of the Commission on Judicial Performance
From: Commission on Judicial Performance
Gregory Dresser, Director-Chief Counsel
Subject: Invitation to Comment on Proposed Amendments to Rules of the Commission on Judicial Performance

Policy Declaration 3.5 of the Commission on Judicial Performance provides that, every two years, in even-numbered years, the commission shall review its rules and seek public comment on any proposed enactments, amendments, or repeals. As part of the 2018 review of its rules, the commission has determined to seek public comment on proposed amendments to rules 113 (Notice of Intended Private Admonishment), 115 (Notice of Intended Public Admonishment), 122 (Discovery Procedures), 126 (Procedural Rights of Judge in Formal Proceedings), and 128 (Amendments to Notice or Answer).

The proposed amendments being circulated for public comment, with a brief explanation of the changes and a form for submission of comments, can be found on the commission's website at <http://cjp.ca.gov> under "Announcements" on the Home page and under "Legal Authority." **The deadline for comments is May 14, 2019.** Thereafter, individuals and organizations may submit responses to comments until June 13, 2019.

Copies of proposed rule amendments, comments, and responses to comments are available to the public upon request. (See Policy Declaration 3.5 for the commission's rules review procedures.)

Comments and responses to comments should be submitted in writing by mail or facsimile to:

Commission on Judicial Performance
Attn: Charlene M. Drummer, Legal Advisor to Commissioners
455 Golden Gate Avenue, Suite 14400
San Francisco, CA 94102
FAX: (415) 557-1266

In the following rule proposals, proposed amended language is reflected with *italics*, and deleted language with ~~strike-outs~~.

Rule Proposal No. 1

PROPOSED AMENDMENTS TO RULES 113 AND 115 CONCERNING NOTICE OF INTENDED PRIVATE AND PUBLIC ADMONISHMENT

The proposed amendments are as follows:

Rule 113. Notice of ~~Intended~~ *Tentative* Private Admonishment

If after a preliminary investigation the commission determines that there is good cause for a private admonishment, the commission may issue a notice of ~~intended~~ *tentative* private admonishment to the judge by certified mail. The notice shall include a statement of facts ~~found by the commission~~ and the reasons for the proposed admonishment. The notice shall also contain an advisement as to the judge's options under rule 114. The notice may cite any discipline that was imposed on the judge prior to issuance of the notice.

Rule 115. Notice of ~~Intended~~ *Tentative* Public Admonishment

If the commission determines following a preliminary investigation that there is good cause for public discipline, the commission may issue a notice of ~~intended~~ *tentative* public admonishment to the judge by certified mail. The notice shall include a statement of facts ~~found by the commission~~ and the reasons for the proposed admonishment. The notice shall also contain an advisement as to the judge's options under rule 116. The notice may cite any discipline that was imposed on the judge prior to issuance of the notice.

Explanation of Proposed Amendments

The current language of the commission's rules pertaining to notices of intended private admonishment and public admonishment has been misunderstood by some as suggesting that the commission has prejudged the matter when it issues such a notice. In fact, the commission has always considered a notice of intended admonishment to be a tentative decision, which the judge either can accept or contest through demanding an appearance before the commission or demanding formal proceedings. (Rules 114, 116.) A notice of intended, or tentative, admonishment is only issued after the judge has been provided an opportunity to respond to the allegations in the preliminary investigation. The proposed amendments would clarify the commission's current practice.

If the proposed amendments are adopted, other rules that refer to a notice of intended private or public admonishment would be amended to replace "intended" with "tentative." (Rules 107(a), 108(e), 114, 116.)

Rule Proposal No. 2

PROPOSED AMENDMENTS TO RULES 122 AND 126 TO PROVIDE NEW DISCOVERY PROCEDURE FOR SUBPOENAS FOR THE PRODUCTION OF DOCUMENTS

The proposed amendments are as follows:

Rule 122. Discovery Procedures

(h) (Subpoenas for the production of documents) After the filing of the notice of formal proceedings, subpoenas for the production of documents by nonparties shall be allowed as provided in this subdivision. The party requesting the subpoena shall bear all costs for service of process of the subpoena on a nonparty.

(1) The parties shall have the right to the issuance of up to four subpoenas for the production of documents to nonparties, subject to the requirements of this rule. Subpoenas issued to commission members or staff under this rule are not permitted.

(2) If the examiner and judge stipulate in writing that a subpoena for the production of documents may issue, the commission shall issue the subpoena. If the examiner and judge are unable to agree to the issuance of a particular subpoena, the party seeking the subpoena may file an application for the issuance of that subpoena with the commission. The application shall be made on a form provided by the commission and shall include a declaration from the party or the party's attorney establishing good cause and including (a) an itemization, with reasonable particularity, of each document requested, (b) facts establishing why each document is relevant to the issues raised in the formal proceeding, and (c) facts establishing that the witness has the documents requested in the witness's custody or control. Commission files and records are not subject to a subpoena for the production of documents. The application must be served on the other party. Upon a finding of good cause based on the foregoing factors, the chairperson of the commission, the chairperson's designee, or the special masters may issue the subpoena.

Objections to an application for a subpoena for the production of documents shall be filed within seven days of the filing of the application. The commission may place restrictions or conditions on the manner, time, and place of the document production.

(3) Applications for subpoenas for the production of documents shall be made in sufficient time for service of the subpoena and the production of documents to be completed 30 days prior to the hearing, unless a cut-off time otherwise is set by the commission or by stipulation of the examiner and the judge.

(4) If an application for a subpoena seeks documents that are personal records as defined by Code of Civil Procedure section 1985.3, or employment records as defined by Code of Civil Procedure section 1985.6, the application shall include a "notice of privacy rights" advising the individual whose records are sought of the subpoena and of the individual's right to object to the subpoena. If the subpoena is issued, the subpoena, accompanied by the notice of privacy rights, shall first be served on the individual whose records are sought by the subpoena. The notice of privacy rights must be personally served or acknowledged in writing by the individual upon whom the notice was served. A proof of service, or a written acknowledgment of receipt, shall be filed with the commission. The recipient of a notice of privacy rights has seven days to file an objection. If no objection is filed by the individual within seven days, the subpoena may be served on the nonparty custodian of the individual's records.

(5) Documents shall be produced within 15 days of service of the subpoena, unless an objection has been filed with the commission. If an objection is filed, no documents shall be produced in response to a subpoena until the objection has been considered by the chairperson of the commission or the special masters.

(6) Any motions under this subdivision shall be presented to the commission. The commission may designate the chairperson or the chairperson's designee to perform all or any part of its duties under this subdivision. If special masters have been appointed pursuant to rule 121, subdivision (b), the chairperson may designate one or more of them to perform all or any part of the commission's duties under this subdivision.

If the proposed amendment is adopted, the subsequent subsections of rule 122 would have to be amended to change their subsection letters.

Rule 126. Procedural Rights of Judge in Formal Proceedings

(a) (Enumeration of rights, subpoenas) When formal proceedings have been instituted, a judge shall have the right and reasonable opportunity to defend against the charges by the introduction of evidence, to be represented by counsel, and to examine and cross-examine witnesses. The judge shall also have the right to the issuance of subpoenas for attendance of witnesses to testify or produce books, papers, and other evidentiary matter. *The judge shall also have the right to the issuance of subpoenas for the production of documents, as set forth in rule 122.* Subpoenas are to be issued by the chairperson of the commission, the chairperson's designee, or the special masters. Subpoenas addressed to the commission or its staff may only be obtained from the special masters upon a showing of good cause with notice to the commission.

Explanation of Proposed Amendments

Although commission rule 122, entitled "Discovery Procedures," provides for the taking of depositions and the inspection of documents after formal proceedings are instituted, there is currently no rule or established procedure for the parties to obtain documents from nonparties. The proposed addition to rule 122 is intended to formalize an additional discovery mechanism that allows the parties to obtain documents from nonparties, while providing appropriate protections for those who may be subject to the subpoenas. The issuance of such subpoenas is within the commission's authority under California Government Code section 68750. Although the California Evidence Code applies to formal proceedings (Rule 125), the Code of Civil Procedure does not.

Rule 126, which addresses a judge's rights in formal proceedings, would also be amended to include a reference to the proposed new procedure for the issuance of subpoenas for the production of documents in discovery, as distinct from subpoenas to nonparties to attend formal proceeding hearings.

Rule Proposal No. 3

PROPOSED AMENDMENT TO RULE 128 TO CLARIFY WHETHER THE COMMISSION OR THE SPECIAL MASTERS CONSIDER A MOTION TO AMEND THE NOTICE OF FORMAL PROCEEDINGS

The proposed amendment is as follows:

Rule 128. Amendments to Notice or Answer; Dismissals

(a) (Amendments) ~~The masters commission, at any time prior to the conclusion of the hearing, or the commission, at any time prior to its determination, may allow or require amendments to the notice of formal proceedings and may allow amendments to the answer. During the evidentiary hearing, the special masters may allow amendments to the notice. The notice may be amended to conform to proof or to set forth additional facts, whether occurring before or after the commencement of the hearing. If a motion to amend the notice to set forth additional facts not presented at the hearing is made during the evidentiary hearing, the chairperson of the commission, or the chairperson's designee, shall determine whether the motion shall be determined by the full commission or the special masters.~~ In case such an amendment is made, the judge shall be given reasonable time both to answer the amendment and to prepare and present his or her defense against the matters charged thereby.

Explanation of Proposed Amendment

Rule 128 currently allows either the special masters or the commission to amend the notice of formal proceedings. The proposed rule amendment would give clear direction to the parties and the special masters about whether a motion to amend the notice should be decided by the commission or by the special masters. The commission decides what charges should be included in the notice. (Rule 118.) It is appropriate, therefore, that the commission decide whether the notice should be amended in most cases.

Pursuant to the proposed rule amendment, the commission would decide a motion to amend made prior to the commencement of the evidentiary hearing. An amendment to the notice made shortly before the hearing may require postponement of the hearing to give the judge time to answer the amendment and prepare and present a defense. Thus, the determination of whether to amend the notice requires weighing the seriousness of the new allegations versus delay in the proceedings and any resulting public protection concerns. Because these are commission proceedings, these determinations should be made by the commission.

If the motion to amend is made during the evidentiary hearing, the motion is most likely to be based on facts that were presented through evidence at the hearing to conform to proof. In that case, the special masters are in the best position to rule on the motion because they heard the evidence. There may be circumstances when the examiner moves to amend the notice during the hearing based on information obtained other than through evidence presented at the hearing. In that case, given the need to expedite a decision, the chairperson should be given authority to determine whether the motion should be determined by the commission or the special masters.