



State of California
Commission on Judicial Performance
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Date: July 8, 2020
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. (See policy declaration 3.5 for the commission's rules review procedures.)

As part of the 2020 review of its rules, the commission has determined to seek public comment on proposed amendments to rules 115 (Notice of Tentative Public Admonishment) and 116 (Public Admonishment Procedure), 125 (Evidence), 128 (Amendments to Notice or Answer; Dismissals), 129 (Report of Masters), and 138 (Definitions).

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 September 8, 2020.** Thereafter, individuals and organizations may submit responses to comments until **October 8, 2020.**

Copies of proposed rule amendments, comments, and responses to comments are available to the public upon request.

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

Commission on Judicial Performance
Attn: Charlene M. Drummer, Legal Advisor to Commissioners
455 Golden Gate Avenue, Suite 14400
San Francisco, CA 94102
rules@cjp.ca.gov

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 115 AND 116 TO INCLUDE ISSUANCE OF NOTICE OF TENTATIVE CENSURE

The proposed amendments are as follows:

Rule 115. Notice of Tentative Public Admonishment or Censure

If the commission determines following a preliminary investigation that there is good cause for public discipline, the commission may issue a notice of tentative public admonishment *or a notice of tentative censure* to the judge by certified mail. The notice shall include a statement of facts and the reasons for the tentative admonishment *or censure*. 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.

Rule 116. Public Admonishment or Censure Procedure

A judge who receives a notice of tentative public admonishment *or a notice of tentative censure* pursuant to rule 115 has the following options:

(a) (Acceptance of public admonishment or censure) The judge may choose not to object to the tentative public admonishment *or the tentative censure*. If the judge does not demand formal proceedings or an appearance before the commission to object to the tentative public admonishment *or the tentative censure* within 30 days after the mailing of a notice of tentative public admonishment *or a notice of tentative censure*, the admonishment *or the censure* becomes effective.

(b) (Appearance before the commission) The judge may, within 30 days of the mailing of a notice of tentative public admonishment *or a notice of tentative censure*, file with the commission a written demand for an appearance before the commission to object to the tentative public admonishment *or the tentative censure*, and waive the right to formal proceedings under rule 118 and to review by the Supreme Court. A judge who demands an appearance

before the commission shall, within 30 days of the mailing of the notice of tentative public admonishment *or the notice of tentative censure*, submit a written statement of the basis of the judge's objections to the tentative admonishment *or the tentative censure*.

After the time set for the appearance before the commission, the commission may:

- (1) Close the matter without disciplinary action;
- (2) Close the matter with a confidential advisory letter;
- (3) Issue a private admonishment; ~~or~~
- (4) Issue a public admonishment; *or*
- (5) *Issue a censure.*

If the commission determines to issue discipline after an appearance under this rule, it may in its final decision modify the notice in response to the judge's written objections and any oral presentation.

An appearance before the commission under this rule is not an evidentiary hearing. Factual representations or information, including documents, letters, or witness statements, not previously presented to the commission during the preliminary investigation will not be considered unless it is shown that the new factual information is either: (1) (a) material to the question of whether the judge engaged in misconduct or the appropriate level of discipline, and (b) could not have been discovered and presented to the commission with reasonable diligence during the preliminary investigation, (2) offered to correct an error of fact in the notice of tentative public admonishment *or the notice of tentative censure*, or (3) necessary to prevent a miscarriage of justice.

To be considered under this rule, new factual information must be presented at the time the judge submits written objections to the tentative admonishment *or censure*. When newly presented factual information meets the criteria for consideration under this rule, the commission may investigate the new information before proceeding with its disposition pursuant to the appearance process. If this

investigation discloses information of possible other misconduct, that information will not be considered in the disposition of the pending notice of tentative public admonishment *or notice of tentative censure* but may be the subject of a new staff inquiry or preliminary investigation.

(c) (Formal proceedings) The judge may, within 30 days of the mailing of a notice of tentative public admonishment *or a notice of tentative censure*, file with the commission a demand for formal proceedings pursuant to rule 118.

(d) (Extensions of time) The 30 days provided to demand formal proceedings or an appearance before the commission to object to a tentative public admonishment *or a tentative censure* pursuant to subdivisions (b) and (c) may not be extended. The time for filing a written statement of the judge's objections to the tentative admonishment *or censure* pursuant to subdivision (b) may be extended by the chairperson or the chairperson's designee upon a showing of good cause, if the judge has, within 30 days of the mailing of a notice of tentative public admonishment *or a notice of tentative censure*, filed a demand for an appearance with a personal waiver of the right to formal proceedings and to review by the Supreme Court.

Explanation of Proposed Amendments

The commission's current practice, based on commission policy declaration 1.4, is to require the institution of formal proceedings before it can impose a censure. (Judges may also stipulate to a censure without the need for formal proceedings.) This proposal would allow the commission to issue a notice of tentative censure in accordance with the same procedure used for notices of tentative private or public admonishment. The judge would have the option of accepting the censure, requesting an appearance before the commission, or demanding formal proceedings. If the judge accepts the censure or requests an appearance before the commission, it would streamline the process for imposing discipline without the need for formal proceedings, which are costly and time-consuming. The amended rule would not apply to situations involving a censure and bar of a former judge, which is the disciplinary equivalent of removal.

If this proposed amendment is adopted, policy declaration 1.4 would be amended as follows:

At the conclusion of a preliminary investigation, or at the conclusion of a period of monitoring under rule 112, the commission may take any of the following actions:

- (1) Close the matter;
- (2) Issue an advisory letter;
- (3) Issue a notice of tentative private admonishment, ~~or~~ notice of tentative public admonishment, or *notice of tentative censure*; or
- (4) Institute formal proceedings.

A judge must receive an inquiry letter and be afforded an opportunity to respond before an advisory letter may issue. A judge must receive a preliminary investigation letter and be afforded an opportunity to respond before a notice of tentative private admonishment, a ~~or~~ notice of tentative public admonishment, or a *notice of tentative censure* may issue or formal proceedings may be instituted.

In addition, rules 107(a), 108(e) and 116.5, and policy declarations 2.1 and 3.9, would be amended to include references to a notice of tentative censure.

Rule Proposal No. 2

PROPOSED AMENDMENT TO RULE 125 TO MAKE SETTLEMENT NEGOTIATIONS INADMISSIBLE IN FORMAL PROCEEDINGS

The proposed amendment is to add the following provision:

Rule 125. Evidence

(c) (Settlement discussions) Evidence of any settlement offer made by the judge, the examiner, or the commission to resolve any or all of the charges against the judge, or of any written or oral statements made during settlement discussions between the judge and the examiner or commission staff, shall be inadmissible in all public proceedings before the commission or masters. Nothing in this rule shall limit the admissibility, during formal proceedings, of the written responses of the judge or the judge's counsel to preliminary investigation or staff inquiry letters.

Explanation of Proposed Amendment

The purpose of the proposed amendment is to encourage settlement negotiations by keeping them confidential and preventing them from being used by either party to attempt to influence findings of fact by the special masters or decisions regarding the level of discipline by the commission in formal proceedings.

Rule Proposal No. 3

PROPOSED AMENDMENT TO RULE 128 TO CLARIFY THAT THE SPECIAL MASTERS CANNOT DISMISS CHARGES IN FORMAL PROCEEDINGS

The proposed amendment is to add the following provision:

Rule 128. Amendments to Notice or Answer; Dismissals

(c) (Dismissals by special masters) The special masters may not dismiss any charge contained in the notice of formal proceedings.

Explanation of Proposed Amendment

The purpose of the proposed amendment is to clarify that the special masters who preside over formal proceedings lack the authority to rule on motions to dismiss charges. The authority to rule on such motions rests with the commission. (See rules 119(a) and 121(b).)

Rule Proposal No. 4

PROPOSED AMENDMENT TO RULE 129 TO CLARIFY DUE DATES FOR PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The proposed amendment is as follows:

Rule 129. Report of Masters.

(a) (Transcript) Upon the completion of *the presentation of evidence at a hearing before the masters*, a transcript of the hearing shall be promptly prepared and submitted to the Legal Advisor, who shall promptly mail a copy to each of the special masters, the examiner and the respondent judge.

(b) (Submission of proposed findings of fact and conclusions of law) Unless the masters specify an earlier date, the examiner and the respondent judge shall submit to the masters proposed findings of fact and conclusions of law, with citations to the transcript and exhibits, no later than 30 days after mailing of the hearing transcript *described in rule 129(a)*. Submission to the masters shall occur by a delivery method that results in actual receipt by them of the documents on or before the specified due date for submission. The masters may waive the submission of such proposed findings and conclusions.

(c) (Preparation of report of masters) Within 45 days after mailing of the hearing transcript *described in rule 129(a)* or within 15 days after submission of the parties' proposed findings of fact and conclusions of law, whichever occurs later, the masters shall submit a report to the commission. Prior to the submission of their report, the masters may require such additional briefing and argument by the examiner and the respondent judge as the masters may desire. Upon request of the presiding master, the chair of the commission or the chair's designee may grant additional time for the submission of the report of the masters to the commission.

Explanation of Proposed Amendment

The purpose of the proposed amendment is to clarify that the deadlines for the submission of proposed findings of fact and conclusions of law to the special masters, and the submission of the special masters' report to the commission, runs from the receipt of the transcript of the last day of the evidentiary hearing, and not the date of closing arguments, which has sometimes been well after the close of evidence. The proposed amendment minimizes delay in the completion of formal proceedings. If more time is needed for the parties to submit their proposed findings and conclusions, or the masters need more time for their report, the chairperson has the authority to grant additional time under commission rule 108, subdivisions (d) and (e), and commission rule 129(c).

Rule Proposal No. 5

PROPOSED AMENDMENT TO RULE 138 TO CLARIFY THAT "MAILING" INCLUDES "EMAILING"

The proposed amendment is as follows:

Rule 138. Definitions

(h) "Mail" and "mailed" include ordinary mail, *email*, and personal delivery.

Explanation of Proposed Amendment

The purpose of the proposed amendment is to clarify that email is an additional permissible means of transmitting documents.