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COMMISSION ON JUDICIAL PERFORMANCE
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**REPORT CONCERNING ADOPTION OF ADDITIONS AND AMENDMENTS TO
RULES OF THE COMMISSION ON JUDICIAL PERFORMANCE
October 21, 2020**

On July 8, 2020, the Commission on Judicial Performance invited public comment on proposals for revisions to some of its rules, pursuant to article VI, section 18, subdivision (i) of the California Constitution and section 3.5 of the Policy Declarations of the Commission on Judicial Performance. At its October meeting, after considering the comments received, the commission adopted some of the proposed rule amendments. The text of each 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 received but were not circulated for public comment, with the commission's explanation for not pursuing those proposals.

**I. EXPLANATION OF RULE AMENDMENTS AND DISCUSSION OF
PUBLIC COMMENTS**

**A. Amendment to Rule 125 to Make Settlement Negotiations
Inadmissible in Formal Proceedings**

Explanation of Amendment

A new subdivision (c) was added to rule 125 to make settlement negotiations inadmissible in formal proceedings. The purpose of the 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.

Discussion of Comments

The commission received no comments about this amendment.

B. Amendment to Rule 128 to Clarify that the Special Masters Cannot Dismiss Charges in Formal Proceedings

Explanation of Amendment

A new subdivision (c) was added to rule 128 stating that the special masters may not dismiss any charge contained in the notice of formal proceedings. The purpose of the 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).)

Discussion of Comments

The commission received no comments about this amendment.

C. Amendment to Rule 129 to Clarify Due Dates for Proposed Findings of Fact and Conclusions of Law and Special Masters' Report

Explanation of Amendment

Rule 129 was amended 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, run from the receipt of the transcript of the last day of the evidentiary hearing, and not the date of closing arguments. The purpose of the amendment is to ensure consistency in the application of the rule, which has been interpreted in inconsistent ways, and to minimize delay in formal proceedings.

Discussion of Comments

The Los Angeles County Superior Court (LASC) opposed the proposal on the ground that it is not apparent that delay in formal proceedings is a pervasive problem.

Attorneys Paul S. Meyer and Heather L. Rosing objected to the proposal based on their belief that it deprives the parties of the ability to present meaningful argument to the masters in cases where the timing of argument is set after the completion of evidence, and that the change would strip the masters of needed discretion to conduct the formal proceedings in a manner they deem fair and necessary. Attorney Randall A. Miller joined in their objection.

Attorneys Kathleen M. Ewins, Joseph P. McMonigle, and David S. McMonigle asked the commission not to adopt the proposed change because they believe that it could adversely impact the special masters' ability to control the timing of closing arguments, and that special masters should be provided more discretion in fulfilling their duties, not less.

Rule 129(c) states that the deadlines for the submission of proposed findings of fact and conclusions of law to the masters, and the submission of the masters' report to the commission, run from the mailing of the transcript of "a hearing before the masters." Rule 129(c) further provides: "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." This means that argument is optional; it is not unequivocally part of formal proceedings, and the rule does not state that argument must be included in the transcript before the deadline begins to run.

Rule 129 has not usually been interpreted to allow closing argument weeks after the close of evidence, before the submission of the proposed findings of fact and conclusions of law. In five of the 13 formal proceedings where an evidentiary hearing was conducted during the past 13 years, counsel presented argument to the special masters *after* they submitted proposed findings of fact and conclusions of law (MacEachern, McBrien, Stanford, Mills, and Laettner). In six of the past 13 formal proceedings, argument took place immediately after the close of evidence, without counsel having transcripts of the evidentiary hearing (O'Flaherty, Petrucelli, Clarke, Kleep, Mills, and Bailey). And in only two of the past 13 formal proceedings, the parties submitted proposed findings after oral argument when oral argument did not take place immediately after the evidentiary hearing (Saucedo and Johnson).

As to the argument that there is insufficient evidence that formal proceedings are getting delayed, of the 13 formal proceedings in the last 13 years, closing argument has been set approximately eight weeks (MacEachern, McBrien), seven weeks (Stanford, Mills, Laettner), and six weeks (Johnson) after the close of evidence. "Unnecessary delay in commission proceedings is incompatible with the commission's mandate to protect the public and the judiciary in general." (Policy declaration 3.12.)

As to the argument that the special masters should have more discretion to control formal proceedings, the institution of formal proceedings, including what charges to file and when and where the proceedings should be held, is within the commission's jurisdiction (rule 118(a), rule 121(a) and (e)). The role of the special masters is to "hear and take evidence in the matter" and to report to the commission (rule 121(b)). If good cause can be established for an extension of time to submit proposed findings or the masters' report, the chairperson has the authority to grant it under rule 108(d) and (e) and rule 129(c).

D. Amendment to Rule 138 to Clarify that "Mailing" Includes "Emailing"

Explanation of Amendment

Subdivision (h) to rule 138 was amended to clarify that "mailing" includes "emailing." The purpose of the amendment is to clarify that emailing is an additional permissible means of transmitting documents.

Discussion of Comments

The commission received no comments about this amendment.

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

A. Proposed Amendment of Rules 115 and 116 to Allow Notice of Tentative Censure

Proposal

The California Judges Association (CJA) proposed amending rules 115 and 116 to allow the commission to issue a notice of tentative censure, like the notice procedure used for private and public admonishments, rather than requiring formal proceedings before a censure can be imposed. 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 have allowed 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. The purpose of the proposal

was to streamline the process for imposing discipline without the need for formal proceedings, which are costly and time-consuming.

Comments and Reasons for Not Adopting Proposed Rule

In addition to proposing the amendment, CJA commented that, as a matter of fundamental fairness, judges should be accorded additional rights and options in cases of potential censure, which is serious discipline. These options should include the ability to meet privately with the commission before the matter becomes public. CJA also expressed concern that there is no interim step or notification between the judge's response to a preliminary investigation letter and the initiation of formal proceedings, which deprives the judge of an audience with the commission until the end of formal proceedings many months later. CJA stated that, unless the judge chooses to initiate settlement discussions without knowing how the commission views the judge's response to the preliminary investigation letter, the opportunity to resolve the matter with a censure is usually not until after formal proceedings have commenced, the matter has gone public, and a flurry of activity is underway.

Objections to the proposal were received from the Alliance of California Judges, LASC, and attorneys Edith R. Matthai, Kathleen M. Ewins, Joseph P. McMonigle, David S. McMonigle, James A. Murphy, and Randall A. Miller on the following grounds: (1) The significant difference between a public admonishment and a censure will be lost if the same procedure applies to both levels of discipline. (2) If the commission is not required to carefully consider whether imposing a censure warrants the effort and expense of formal proceedings, the commission may be more likely to simply impose the higher level of discipline due to the ease of the notice procedure. (3) Because censure is for more serious misconduct, and is one step away from removal, greater due process should be afforded to judges, including the right to discovery and right of review by the Supreme Court. Otherwise, judges have to take the risk that, if they request an appearance, they will still end up with a censure, but will not have had the opportunity to review the evidence against them.

Attorneys Ewins and McMonigle propose that the commission institute a formal policy of having the commission confer with the judge's counsel about the possibility of a negotiated censure in advance of making a final decision to institute formal proceedings.

The commission determined not to adopt CJA's proposal because it agreed there are good reasons to maintain a significant qualitative distinction between a public admonishment and a censure, and that the procedure for a censure should therefore remain different from the procedure for admonishments. The commission

also agreed that, because a censure is more serious discipline and is closer to removal, it is appropriate that there be more due process protections. There is support in the California Constitution for the distinction between disciplinary levels. Article VI, section 18, subdivision (d)(2) states, in part, that the commission may censure or remove a judge for action that constitutes willful misconduct in office or prejudicial misconduct. Subdivision (d)(2) also includes a statute of limitations applicable to censures and removals. Subdivision (d)(3) states, in part, that the commission may publicly or privately admonish a judge or former judge found to have engaged in improper action or dereliction of duty. Subdivision (d)(3) does not impose a statute of limitations on admonishments.

The commission also declined to adopt the suggestion that it implement a policy requiring it to negotiate with the judge or judge's counsel before the issuance of a notice of formal proceedings. The commission noted that settlement negotiations are always an option and frequently occur before the issuance of a notice of formal proceedings, and there is opportunity for settlement negotiations between service of the notice of formal proceedings and when the matter becomes public.

III. DISCUSSION OF RULE PROPOSALS NOT CIRCULATED FOR PUBLIC COMMENT

A. Proposed Amendment of Rules 110(c) and 111(c) to Add Educational Opportunities and Conditions in Lieu of Discipline

Proposal

CJA proposed amending rule 110(c), regarding the termination of staff inquiries, and rule 111(c), regarding the termination of preliminary investigations, to "allow for the imposition of certain educational programming in lieu of discipline for one-time minor transgressions." CJA proposed giving the commission the authority to "mandate" a judge's participation in educational programming as an expansion of the model used for the commission's mentoring program. It suggested that the programming could be in a variety of areas, including general ethics, elimination of bias, judicial elections, and workplace interactions. Its rationale was that an educational program "will have the practical effect of strongly motivating judges to engage in self-reflection and self-improvement."

Reasons Proposal was Not Circulated for Public Comment

The commission's authority is governed by constitution, which does not provide for the imposition of mandatory mentoring or educational programs. A judge's participation in the commission's mentoring program is voluntary. The

commission also does not have the resources to develop educational programs for judges. This is something that is generally done through the Judicial Council's Center for Judicial Education and Research. On their own initiative, some 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).)

B. Proposed Amendment of Rule 129 to Make Special Masters' Findings Binding on Commission

Proposal

Rule 129 pertains to the preparation and submission to the commission of the special masters' report containing findings of fact and conclusions of law in formal proceedings. CJA proposed that, "if constitutional amendments are enacted that affect the commission's structure," as proposed in the April 2019 Audit Report, rule 129 would be amended to state that, "The commission shall be bound by the findings of fact in determining the imposition of discipline."

CJA has unsuccessfully advanced this proposal in the past, but suggests that the commission reconsider the proposal in light of the Audit Report, which recommends a bicameral structure for the commission, with one body investigating allegations of judicial misconduct, and the other body imposing discipline. CJA says it shares the State Auditor's concern that the commission is a unitary body that directs investigations and determines outcomes. CJA is also concerned that commission members do not hear the evidence and can disregard the findings of the special masters, who have heard the evidence and assessed the credibility of witnesses.

Reasons Proposal Was Not Circulated for Public Comment

The Audit Report states that, because the commission's authority derives from the California Constitution, reforming the commission's structure and operations would require a constitutional amendment. The auditor has recommended that this be undertaken by the California Legislature. Because CJA's proposal is contingent upon the passage of a constitutional amendment restructuring the commission, it is premature. Any possible restructuring may address who makes the ultimate determination regarding factual findings. Further, if the commission were to be restructured as a bicameral body, it seems likely that commission members in the adjudicatory body, and not special masters, would preside over formal proceedings, and there would be no need for

special masters or for the two-step process of having masters' factual findings adopted (or not) by the commission.

CJA advanced a similar proposal in 2016 and 2018. As stated in the July 8, 2019 public report regarding the 2018 proposal:

When the commission institutes formal proceedings and requests the appointment of special masters pursuant to rule 121, the California Supreme Court appoints three judges as special masters to preside over a public evidentiary hearing and to submit a report to the commission with findings of fact and conclusions of law, along with an analysis of the evidence and reasons for their findings and conclusions. (Rule 129(d).) CJA has proposed adding to rule 129(d), "The commission shall be bound by the findings of fact [of the special masters] in determining the imposition of discipline."

In 2016, CJA proposed a similar addition to rule 129(d), which was, "The commission shall be bound by the findings of fact and conclusions of law of the masters in determining the imposition of discipline." This year, CJA has eliminated "and conclusions of law" from its proposal. It also suggests including one public member on the panel of special masters, but only if its proposed rule is adopted. CJA says that the commission should consider its proposal in light of the April 2019 Audit Report, which recommended that the Legislature propose and submit to voters an amendment to the California Constitution establishing a bicameral structure for the commission that includes an investigative body and a disciplinary body, with a majority of public members in each body. It is the commission's understanding that the Legislature is considering that recommendation, and that the proposed change to the commission's structure requires a constitutional amendment.

The commission determined not to adopt CJA's 2016 proposal, and determined not to adopt the current proposal, because it would inappropriately delegate the commission's current 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 composition 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 on Judicial Performance* (1973) 10 Cal.3d 270, 275.)

Although CJA is only seeking to have the commission bound by the special masters’ findings of fact in its current proposal, because 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, the commission should independently review the record and make its own findings of fact, in addition to its own conclusions of law.

C. Proposed Addition of Rule 111.1 to Allow Judges Discovery in Preliminary Investigations

Proposal

CJA proposed a new rule 111.1 that would allow judges to receive discovery after the initiation of a preliminary investigation, but before formal

proceedings are instituted. Currently, rule 122 sets forth the procedure for judges to obtain discovery, which can only occur after a written notice of formal proceedings is issued. During the preliminary investigation stage, judges receive written notice of the allegations and an opportunity to respond, but they do not receive a copy of the complaint, witness statements, or other documents related to the investigation. The proposed new rule would allow judges to request in writing and receive all transcripts; pleadings, court filings, and submissions related to the preliminary investigation; all writings referenced in the preliminary investigation letter; and all statements about the subject matter of the investigation.

Reasons Proposal Was Not Circulated For Public Comment

A new rule allowing judges to get discovery before the institution of formal proceedings was proposed by attorney Rosing in 2010 and by CJA in 2006, 2012, and 2018. The commission has consistently declined to adopt such a rule on the grounds that judges have sufficient due process under the current rules, and providing discovery, particularly witness statements, could have a chilling effect on the filing of complaints and a detrimental effect on commission investigations.

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, and the name of the court case if applicable, when this information is known to the commission. 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. 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. In *Oberholzer v. Commission on Judicial Performance* (1999) 20 Cal.4th 371, 390-395, the California Supreme Court upheld the commission's discovery rules in the face of a due process challenge and rejected the judge's contention that, before the commission could issue an advisory letter, he was entitled to review the evidence and have a hearing. The court concluded that the commission's process provided the judge with sufficient notice of the focus of, and evidentiary basis for, the commission's investigation and granted the judge a sufficient opportunity to address the commission's concerns and defend himself against the allegations of misconduct. Balancing the judge's interests "in

maintaining a judicial career free of the infliction of disciplinary measures and the [c]ommission's interests in the effective and efficient safeguarding of the public from aberrant action by judicial officers," the court concluded that due process did not require the additional protections urged by the judge. (*Ibid.*) Further, in *Ryan v. Commission on Judicial Performance* (1988) 45 Cal.3d 518, 528, the Supreme Court noted that, during the preliminary investigation, the "judge does not have the right to defend against a proceeding that has not yet been brought."

TEXT OF AMENDED RULES

Language deleted from the current rules is printed in ~~strikeout type~~ and new language is printed in *italic type*.

AMENDMENT TO RULE 125

Rule 125. Evidence

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(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.*

AMENDMENT TO RULE 128

Rule 128. Amendments to Notice or Answer; Dismissals

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

AMENDMENT TO RULE 129

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.

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AMENDMENT TO RULE 138

Rule 138. Definitions

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

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