



State of California  
**Commission on Judicial Performance**  
455 Golden Gate Avenue, Suite 14400  
San Francisco, CA 94102-3660  
(415) 557-1200  
Fax (415) 557-1266  
Website: <http://cjp.ca.gov>

Date: July 15, 2022  
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 2022 review of its rules, the commission has determined to seek public comment on proposed amendments to rules 102 (Confidentiality and Disclosure), 110 (Staff Inquiry; Advisory Letter after Staff Inquiry), 111 through 116 (selected rules regarding the procedures to contest an Advisory Letter), 119.5 (Filing with the Commission During Formal Proceedings), and 126 (Procedural Rights of Judge in Formal Proceedings).

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 <https://cjp.ca.gov> under "Legal Authority." **The deadline for comments is September 13, 2022.** Thereafter, individuals and organizations may submit responses to comments until **October 13, 2022.**

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: Emma Bradford, Legal Advisor to Commissioners  
455 Golden Gate Avenue, Suite 14400  
San Francisco, CA 94102  
[rules@cjp.ca.gov](mailto: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 RULE 102(q) TO PROVIDE AN EXCEPTION TO CONFIDENTIALITY FOR DISCLOSURE OF INFORMATION REGARDING A MENTEE JUDGE TO A MENTOR JUDGE**

The proposed amendments are as follows:

##### **Rule 102.**

\*\*\*

##### **(q) (Disclosure of information to mentor judge)**

*When a judge has agreed to participate in a mentoring program, the commission may provide the mentor judge with the specifications of the allegations before the commission, any materials concerning the allegations the commission deems relevant and necessary for the mentor to perform his or her services, and any prior discipline, including private discipline, imposed on the judge for similar misconduct. The mentor judge will not be given the complaint or witness statements, but may be given a summary of information provided in the complaint and witness statements.*

*If a judge who participated in mentoring is found to have engaged in subsequent misconduct, any resulting discipline, including public discipline, on the subsequent matter may include a discussion of the prior matter that was the subject of the mentoring and that the judge participated in mentoring.*

#### **Explanation of Proposed Amendments**

Interim rule 102(q) regarding disclosure of information to mentor judges was passed on a two-year interim basis in June 2016 (the mentoring program was initially adopted as a two-year pilot program in Northern California). It was re-enacted on an interim basis for another two years in 2018, and during the 2020 biennial rules review process (after the mentoring program expanded to Southern California), and is operative until December 31, 2022. The rule provides an exception to confidentiality to allow the commission to disclose relevant information regarding a mentee judge to a mentor judge. The proposed amendments would enable the continuing work of both the Northern and the Southern California mentoring programs.

## Rule Proposal No. 2

### **PROPOSED AMENDMENTS TO RULE 102(s) TO PROVIDE AN EXCEPTION TO CONFIDENTIALITY FOR DISCLOSURE OF RELEVANT STATEMENTS BY A JUDGE DURING AN INVESTIGATION TO A RESPONDENT JUDGE IN FORMAL PROCEEDINGS**

The proposed amendment is as follows:

#### **Rule 102.**

\*\*\*

**(s) (Disclosure to respondent in formal proceedings)** *In compliance with discovery obligations in formal proceedings, the commission may provide to a judicial officer who is the respondent in formal proceedings pursuant to rule 118 et seq., or to the judicial officer's counsel, any relevant items that might otherwise be confidential under rule 102, including (i) some or all of the written or oral statements of another judicial officer made or obtained during or after a staff inquiry or preliminary investigation of that judicial officer, (ii) any writings or physical items of evidence submitted by or on behalf of the other judicial officer during or after such staff inquiry or preliminary investigation, and (iii) relevant portions of the staff inquiry and preliminary investigation letter(s) sent to that judicial officer. Prior to providing discovery of confidential statements to a respondent judge in formal proceedings, the commission shall give notice to the judicial officer whose confidential statements are being provided. To the extent possible, steps will be taken to protect the confidentiality of the judicial officer who provided the relevant information (e.g., by redacting or sealing documents).*

#### **Explanation of Proposed Amendment**

A version of interim rule 102(s) was passed in March 2021 and is operative until March 25, 2023. (The amendments proposed here contain language not originally included in interim rule 102(s).) The purpose of the proposed amendment is to provide a limited exception to confidentiality rules and is intended to address the following issue: during a preliminary investigation, a judge responds to a preliminary investigation letter and the judge's response includes information potentially relevant to a count of misconduct with which the examiner is planning to charge another judge in formal proceedings. The examiner has a discovery obligation, under commission rules and the Rules of Professional Conduct, to disclose the relevant information from the judge's response to the respondent judge. If the judge declines to waive the confidentiality provisions that prevent disclosure of the relevant information, the examiner cannot fulfill the discovery obligations owed to the respondent judge. The examiner is therefore required to drop the potential charge against the respondent judge, even though the examiner has a good faith belief that the charge could be proven by clear and

convincing evidence. The amendments are intended to ensure that the commission fulfills its mandate to enforce rigorous standards of judicial conduct by prosecuting serious misconduct, while ensuring the due process rights of respondent judges in formal proceedings.

### **Rule Proposal No. 3**

#### **PROPOSED AMENDMENT TO RULE 110 TO ELIMINATE STAFF INQUIRIES**

The proposed amendment is as follows:

##### **~~Rule 110. Staff Inquiry; Advisory Letter after Staff Inquiry~~**

~~(a) (Notice prior to issuance of advisory letter) If the commission makes a staff inquiry, the judge shall be notified of the inquiry and the nature of the charge, before the commission issues an advisory letter. The respondent judge so notified shall be afforded a reasonable opportunity in the course of the inquiry to present such matters as the judge may choose. A reasonable time for a judge to respond to an inquiry letter shall be 20 days from the date the letter was mailed to the judge unless the time is extended pursuant to rule 108.~~

~~(b) (Staff inquiry letter) A staff inquiry letter shall include specification of the allegations, including, to the extent possible: the date of the conduct; the location where the conduct occurred; and, if applicable, the name(s) of the case(s) or identification of the court proceeding(s) in relation to which the conduct occurred. If the inquiry concerns statements made by or to the judge, the letter shall include the text or summaries of the comments.~~

~~(c) (Termination of staff inquiry) If the staff inquiry does not disclose sufficient cause to warrant issuance of a confidential advisory letter or further proceedings, the commission shall terminate the staff inquiry and notify the judge in writing of such action if the judge was notified of the staff inquiry pursuant to subdivision (a).~~

~~(d) (Advisory letter) At any time after notice of a staff inquiry and a reasonable opportunity to respond has been given to the judge, the commission may determine that the judge's conduct does not constitute a basis for further proceedings and issue a confidential advisory letter to the judge.~~

## **Explanation of Proposed Amendment**

Policy declaration 1.2 (*Staff Inquiries*), which was approved in 1997, states that: “A staff inquiry may, but need not, precede a preliminary investigation. The purpose of a staff inquiry is to determine whether sufficient facts exist to warrant a preliminary investigation.” Policy declaration 1.2 also states that, after a staff inquiry, the commission may close the matter, authorize a preliminary investigation, or issue an advisory letter.

The number of staff inquiries opened by the commission has decreased significantly over the past 10 years, while the commission has opened more matters as preliminary investigations. In practice, it is not clear that there is any significant benefit, either to the commission or to a judge, to opening a staff inquiry rather than a preliminary investigation. The opening of a staff inquiry provides no certainty to a judge that discipline will not exceed an advisory letter, because a staff inquiry can always be elevated to a preliminary investigation if more misconduct is discovered, or the misconduct appears more serious than that originally alleged in the complaint. Further, the nature of the investigation in a staff inquiry is the same as that in a preliminary investigation. Initiating a matter as a staff inquiry can also lead to the delay in the disposition of an investigation if an initial staff inquiry must be elevated to a preliminary investigation, and the judge recontacted.

If the proposed amendments are adopted, all references to rule 110 and staff inquiries would be eliminated throughout the rules and policy declarations.

### **Rule Proposal No. 4**

#### **PROPOSED AMENDMENTS TO SELECTED RULES 111-116 TO PROVIDE FOR APPEARANCES BEFORE THE COMMISSION TO CONTEST ADVISORY LETTERS AND ELIMINATE CORRECTION REQUESTS**

The proposed amendments are as follows:

##### **Rule 111.**

\*\*\*

~~(d) (Advisory letter) At any time after notice of a preliminary investigation and a reasonable opportunity to respond has been given to the judge, the commission may determine that the judge’s conduct does not constitute a basis for further proceedings and may terminate the investigation by issuing a confidential advisory letter to the judge.~~

\*\*\*

### **Rule 111.5. Correction of Advisory Letter**

~~A judge who receives an advisory letter under either rule 110(d) or rule 111(d) may, within 30 days of the mailing thereof, apply to the commission for correction of an error of fact or law or both. The application shall be determined by the commission without an appearance by the judge before the commission unless the commission determines otherwise. Factual representations or information, including documents, letters, or witness statements, will be considered only if the factual information is relevant to the question of whether the advisory letter contains an error of fact.~~

\*\*\*

### **Rule 113. Notice of Tentative Advisory Letter, Private Admonishment, or Public Admonishment**

If after a preliminary investigation the commission determines that there is good cause for an *advisory letter*, private admonishment, or *public admonishment*, the commission may issue a notice of tentative ~~private admonishment~~ *discipline* to the judge by certified mail. The notice shall include a statement of facts and the reasons for the tentative ~~admonishment~~ *discipline*. 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 114. Advisory Letter, Private Admonishment, and Public Admonishment Procedures**

A judge who receives a notice of tentative *advisory letter*, private admonishment, or *public admonishment* pursuant to rule 113 has the following options:

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

**(b) (Appearance before the commission)** The judge may, within 30 days of the mailing of a notice of tentative *advisory letter*, private admonishment, or *public admonishment*, file with the commission a written demand for an appearance before the commission to object to the tentative *discipline* ~~private admonishment~~, and waiving any ~~the~~ right to formal proceedings under rule 118 (*if applicable*) 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 *advisory letter*, private admonishment, or *public admonishment*, submit a written statement of the basis of the judge's objections to the tentative *discipline* ~~admonishment~~.

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~~ *Issue the tentative discipline*; or
- (3) ~~Issue a private admonishment~~ *lesser discipline*.

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 *discipline* ~~private admonishment~~, 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 *discipline* ~~private admonishment~~. 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 a ~~tentative private admonishment~~ of *tentative discipline*, 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 private *or public* admonishment, 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 *advisory letter*, private admonishment, *or public admonishment* 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 *discipline* admonishment 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 ~~the~~ notice of tentative ~~private admonishment~~, filed a demand for an appearance with *any applicable* personal waiver of the right to formal proceedings and/or to review by the Supreme Court.

#### **~~Rule 115. Notice of 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 tentative public admonishment to the judge by certified mail. The notice shall include a statement of facts and the reasons for the tentative 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.~~

#### **Rule 116. Public Admonishment Procedure**

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

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

~~(b) (Appearance before the commission) The judge may, within 30 days of the mailing of a notice of tentative public admonishment, file with the commission a written demand for an appearance before the commission to object to the tentative public admonishment, 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, submit a written statement of the basis of the judge's objections to the tentative admonishment.~~

~~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.~~

~~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 (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. 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 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, 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 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 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, 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 Amendment**

The purpose of the proposed amendment is to expand the rights of judges who receive advisory letters.

In 1996, the commission adopted rules 114 and 116, which provided judges who received a tentative private or public admonishment with the right to request an appearance before the commission. Before the California Supreme Court's decision in *Oberholzer v. Commission on Judicial Performance* ((1999) 20 Cal.4th 371), however, advisory letters were not considered discipline. Consequently, the rules do not explicitly refer to advisory letters as discipline, but refer to investigations being "closed" with an advisory letter, because there is "no basis for further proceedings," rather than to discipline being "issued"; and the procedures for contesting an advisory letter evolved

separately than that of public and private admonishments. In 2005, because there was no procedure in place for a judge to request any kind of review by the commission of an advisory letter, the commission adopted rule 111.5 to allow a judge to request that an advisory letter be corrected if it contained an error of law or fact or both. Currently, however, a judge has no right to request an appearance before the commission to contest an advisory letter.

The proposed amendments would create a notice of tentative advisory letter and provide judges with the choice of either accepting the tentative advisory letter or requesting an appearance before the commission and waiving their right to review by the Supreme Court. As such, the proposed amendments would more clearly acknowledge the fact that advisory letters constitute discipline. Additionally, the amendments would bring more uniformity to procedures for contesting discipline short of a censure or removal.

If the proposed amendments are adopted, all relevant/applicable references would be eliminated throughout the rules and policy declarations.

### **Rule Proposal No. 5**

#### **PROPOSED AMENDMENTS TO RULE 119.5 REGARDING FILING WITH THE COMMISSION DURING FORMAL PROCEEDINGS**

The proposed amendments are as follows:

##### **Rule 119.5 Filing with the Commission During Formal Proceedings**

**(a) (Procedures for filing)** After the institution of formal proceedings, all briefs and other ~~papers~~ *documents* to be filed *shall be filed* with the commission ~~shall be delivered to the commission office during regular business hours by hand delivery or by mail, or electronic or facsimile transmission as provided in this rule, and shall be accompanied by a proof of service of the document upon the other party or parties, and upon the special masters if they have been appointed in the matter. This includes documents submitted in conjunction with a hearing before the special masters, other than exhibits to be admitted at the hearing. Exhibits admitted at a hearing before the masters shall be transmitted to the commission office pursuant to rule 125.5. A document is *deemed* filed with the commission as set forth in subparagraph (c)(1) below when the original is stamped or otherwise marked "filed" with the date. The commission's agent for purposes of filing documents after institution of formal proceedings is the Legal Advisor to Commissioners or the Legal Advisor's designee. A filing~~

may be evidenced by a conformed copy of the cover page of each document submitted for filing.

~~(b) (Facsimile filing)~~ Facsimile filing means the transmission of a document by facsimile, directed to the Legal Advisor to Commissioners or the Legal Advisor's designee.

~~(c)~~ **(b) (Electronic filing)** Electronic filing means the transmission of a document by electronic service to the electronic address of the commission, directed to the Legal Advisor to Commissioners or the Legal Advisor's designee. The electronic address for filing pursuant to these rules is filings@cjp.ca.gov.

~~(d)~~ **(c) (Conditions for facsimile and electronic filing)** After the institution of formal proceedings, parties or non-parties pursuant to rule 131 may *shall* file documents with the commission electronically ~~or by facsimile~~, subject to the following conditions:

~~(1)~~ **(1)** Original paper documents, with any required signatures, shall be delivered to the commission office by mail or hand delivery within five calendar days of the facsimile or electronic filing, and shall be accompanied by proof of service.

~~(2)~~ **(1)** A document transmitted electronically ~~or by facsimile~~ shall be deemed filed on the date received, or the next *business court* day if received on a non-*business court* day or after 5:00 p.m., ~~provided the original paper document is received pursuant to subsection (1) of this subdivision.~~

~~(3)~~ **(2)** The document shall be considered filed, for purposes of filing deadlines and the time to respond under these rules, at the time it is received electronically ~~or by facsimile by the commission~~ as set forth in subsection ~~(2)~~ **(1)** of this subdivision.

~~(4)~~ **(3)** Upon receipt of a facsimile ~~or an~~ electronically filed document, the commission shall promptly send the filer confirmation that the document was received.

**(4)** *Electronically filed documents must be text searchable when technologically feasible without impairment of the document's image.*

*(5) By electronically filing a document, the party filing represents that the original signed document is in the party's possession or control. Notwithstanding any provision of law to the contrary, including Evidence Code sections 255 and 260, a signature produced in an electronic filing is deemed to be an original.*

~~(e) (d) (Signatures)~~ When the document to be filed requires the signature of any person, the document shall be deemed to have been signed by that person if filed electronically ~~or by facsimile.~~

*(e) (Signatures under penalty of perjury) When a document to be filed electronically provides for a signature under penalty of perjury of any person, the document is deemed to have been signed by that person if filed electronically, provided that the declarant, before filing, has physically signed a printed form of the document. By electronically filing the document, electronic filers certify that they will produce the original, signed document upon request by the Legal Advisor.*

~~(f) (Electronic and facsimile service)~~ After the institution of formal proceedings, documents ~~may shall~~ be served by electronic means ~~or by facsimile~~ on another party, a party's attorney, or the special masters ~~when the party, attorney, or special master has agreed to accept electronic service and/or facsimile service, provided the documents have been submitted to the commission office at the same time by the same method of service with the original to be submitted in accordance with subdivision (d), subsection (1).~~

*(g) (Document in paper form) When it is not feasible for a party or other person to convert a document to electronic form by scanning, imaging, or another means, the commission may, upon request, allow the party to file the document in paper form via either hand delivery or by mail.*

### **Explanation of Proposed Amendment**

Interim amendments to rule 119.5 were passed on February 2, 2022, and are operative until February 3, 2023. The purpose of the proposed amendments is to streamline the procedures for filing documents in formal proceedings, and eliminate the requirement of paper filings, in line with the commission's aim of moving to a mainly paperless system. The Legal Advisor's Office would maintain an electronic docket and file in all formal proceedings and continue to make those documents available to the public upon request.

## Rule Proposal No. 6

### **PROPOSED AMENDMENT TO RULE 126 TO CLARIFY PROCEDURE FOR PROVIDING TRANSCRIPTS TO JUDGES IN FORMAL PROCEEDINGS**

#### **Rule 126. Procedural Rights of Judge in Formal Proceedings**

\*\*\*

**(b) (Transcripts)** When a transcript of the testimony has been prepared at the expense of the commission, a copy thereof shall, ~~upon request, be available for use by~~ *be provided to* the judge and his counsel in connection with the proceedings ~~at the judge's expense, or the judge may arrange to procure a copy from the reporter at the judge's expense.~~ The judge shall have the right, without any order or approval, to have all or any portion of the testimony in the proceedings transcribed at the judge's expense.

\*\*\*

#### **Explanation of Proposed Amendment**

The purpose of the proposed amendment is to make it consistent with rule 129. Rule 126(b) states that when the transcript of testimony has been prepared at the expense of the commission, a copy shall be available for use by the judge and his counsel at the judge's expense or the judge shall procure a copy from the reporter at the judge's expense. Rule 129 (*Report of Masters*), states that upon completion of the evidentiary hearing before the masters, the Legal Advisor *shall* promptly mail a copy of the transcript to the respondent judge (and others): the commission does not charge the respondent judge for the transcript of the hearing. The amendment would make rule 126 consistent with rule 129 to clarify that the judge is entitled to a copy of the transcripts in formal proceedings, without cost to the judge.