

**MEMORANDUM TO THE COMMITTEE TO REVIEW THE OPERATIONS AND
STRUCTURE OF THE COMMISSION ON JUDICIAL PERFORMANCE**

The California Judges Association (CJA) represents approximately 2,200 state bench officers, the majority of whom are currently active and under the jurisdiction of the Commission on Judicial Performance (CJP or commission). CJA members include bench officers who have served on the CJP, the CJA Ethics Committee, the California Supreme Court Committee on Judicial Ethics Opinions (CJEO), the California Supreme Court Advisory Committee on the Code of Judicial Ethics, the Judicial Council which sets the Standards of Judicial Administration, and the Judicial Council Committee on Judicial Education and Research (CJER) which establishes the curriculum for the Qualifying Ethics classes, New Judges Orientation and the Judicial College along with other ethics programs for judges. These members have expertise in the area of judicial ethics. CJA also speaks for the many presiding, assistant presiding and supervising justices and judges in the state who, along with the CJP, oversee judicial conduct¹. CJA offers this submission to the Committee to share its perspective and welcomes questions from the Committee and the opportunity to offer public comment.

In this submission, CJA will be addressing the following issues:

- A. The CJP Should Not Be Changed to a Bicameral Body (page 2)
- B. The Commission Should Continue to Use Judicial Officers as Special Masters to Preside Over Evidentiary Hearings and Report to the Commission (page 5)
 - 1. Practical Considerations Dictate that the Commission Continue to Use Special Masters
 - 2. Judicial Officers Should Continue to Be Special Masters
- C. The Judiciary, Bar and Public Must Have Trust and Confidence in the CJP (page 9)
 - 1. The CJP Is Well Run and a Model in the Country – The Defense Bar’s Perspective
 - 2. The CJP Is Helpful and Responsive – Presiding Judges’ Perspective
- D. Suggested Improvements for the CJP (page 14)
- E. Conclusion (page 15)

¹ The CJP investigates complaints of misconduct, as this Committee knows, and disciplines judges to protect the public. It does not work alone, however, as our legal system provides several protections for the public who are involved in legal proceedings. These protections include the right to appeal, contested judicial elections, recall elections, and complaints to a bench officer’s superior and/or colleagues such as supervising, assistant presiding and presiding judges. This latter class of bench officers can be disciplined themselves if they fail to take appropriate corrective action to address judicial misconduct. Further protection is offered through the public nature of court proceedings and coverage by the media.

A. The CJP Should Not Be Changed to a Bicameral Body

The CJA retained Ms. Janice Brickley as a consultant to opine on the issue of whether the CJP should be restructured into a bicameral body. Ms. Brickley was an investigating attorney for the CJP for two years and the Commission's Legal Advisor for 11 years before her retirement. She served both on the board and as president of the Association of Judicial Disciplinary Counsel and was acknowledged as a reader/reviewer of drafts of chapters for the 2017 Fourth Edition of the California Judicial Conduct Handbook (Forward and Acknowledgements, p. x.) She has also been a frequent speaker on the commission and judicial ethics issues for judges, lawyers, and the public. Ms. Brickley's opinion regarding whether the CJP should be a bicameral body is set forth in this section.

The Auditor recommends that the Legislature submit to voters an amendment to the California Constitution to establish a bicameral structure for the commission. The Auditor's proposal would create two separate bodies: one body that investigates allegations of judicial misconduct and submits an investigative report to the disciplinary body if misconduct is proven; and a second body that issues a notice of charges if warranted, presides over a hearing, and issues discipline. CJA is opposed to implementation of this recommendation. It would result in a significantly slower and more costly process to the detriment of the complainant, the respondent judge and the public.

Like the majority of state judicial disciplinary commissions throughout the country,² California has a unitary commission charged with investigating complaints of judicial misconduct, bringing charges if warranted, and adjudicating the charges. The unitary structure has been in existence since the commission was created by constitution in 1960. (Cal. Const., art. VI, section 8.) In 1995, through the passage of Proposition 190, the composition of the commission was changed from a majority of judge members to a majority of public members, all proceedings after the commencement of formal proceedings became public, and the authority to retire, censure and remove a judge shifted from the California Supreme Court to the commission (subject to discretionary review by the Supreme Court). Despite these significant changes, the unitary structure remained intact.

The reason the Auditor gives for seeking a constitutional amendment to create a bifurcated system is that the commission's unitary structure could pose "problems for a judge's right to a fair hearing before a neutral decision-making body" because it "allows commissioners who make

² There are eight states with separate investigative and adjudicative bodies similar to the system proposed by the Auditor (Alabama, Delaware, Georgia, Illinois, Ohio, Oklahoma, Pennsylvania, and West Virginia). Nine states have a unitary commission with bifurcated functions so that investigative and adjudicative roles are handled by different panels of the commission (Arizona, Arkansas, Florida, Kansas, North Carolina, South Carolina, Tennessee, Vermont, and Wyoming).

disciplinary decisions to be privy to allegations of and facts about possible misconduct that should not factor into their decisions about discipline.” (California State Auditor Report, 2016-137, p. 34 (Auditor’s Report).) Yet, as the Auditor acknowledges, a unitary judicial disciplinary system has repeatedly been upheld against due process challenges. *Withrow v. Larkin* (1975) 421 U.S. 35, 47; *Adam v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 881; *Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 833-835; *McCartney v. Commission on Judicial Performance* (1974) 12 Cal.3d 512, 519 fn. 5.

In CJA’s view, the Auditor’s proposal would not result in a better system for judges. The Auditor notes that the adjudicatory/disciplinary body would have to reserve at least three commissioners who did not take part in issuing the notice of charges so they could make disciplinary decisions. (Auditor’s Report, p. 46.) CJA has serious concerns that this could result in a minority of the commission, possibly as few as three members, making the final disciplinary decision. Under the current system, the full commission of eleven members or at least a quorum make disciplinary decisions. The level of discipline to be imposed, which could include removal, is often the most important aspect of the proceedings to a respondent judge. To have that decided by a minority of the commissioners, which may not include a judge, would not result in a fairer system for judges.

A bicameral system would significantly increase costs to the taxpayer. There would be substantial costs associated with seeking a constitutional amendment through the ballot. If the ballot measure passes, the size of the commission would increase and possibly double. This means higher costs associated with travel and lodging for commission members, as well as increased cost in materials, equipment, mailings, and administration. Moreover, in order to maintain the bright line separation that the Auditor envisions, each body would presumably have their own director, staff, computers, and office space.

A bicameral commission would also be slow and cumbersome to navigate. If the investigative body refers the investigation report to the disciplinary body, a new case would be opened by the second body with the incumbent administrative tasks, the case would be assigned to and reviewed by new support and legal staff, and then the judge or the judge’s counsel would communicate with different legal staff and provide information and background previously given to the investigative staff. There is bound to be unnecessary repetition in the process. This can only result in more delay.³

Delay in the proceedings is a major issue of concern for both complainants and respondent bench officers as well as the judges who supervise the respondents. Speaking on behalf of judges, CJA knows that receiving notice from the commission that an investigation is being conducted is a stressful, unsettling, and time-consuming experience for a judge. The judge, with the assistance

³ According to the Auditor’s report, under the present system, the length of time between the notice of formal proceedings and the final decision can be almost a year. (Auditor’s Report, p. 48.)

of counsel, must conduct the judge's own investigation and carefully respond to the allegations. The toll on the judge's time, emotional state, and reputation increases significantly if formal charges are filed and the matter becomes public. For most judges, life is on hold for the pendency of the formal proceedings. Such a delay also complicates matters for presiding and supervising judges who may be waiting for intervention by the commission in dealing with a judge who has been unwilling or unable to correct misconduct or competency concerns. Of course, delay is also harmful to the complainant and the public who have an interest in a prompt resolution of the complaint. Further, the longer the proceedings go on, the more likely witness memories will fade.

The fact that the commission has been privy to allegations that were previously dismissed when it imposes discipline is similar to a sentencing judge who presided over a trial at which the defendant was acquitted of some charges or jurors who are instructed not to consider evidence that has been stricken from the record. There is a presumption that judges and jurors take their responsibilities seriously and will follow the law and instructions given. Through training and counsel of the Legal Advisor, commissioners know they can only consider proven allegations in deciding the appropriate level of discipline. The Auditor noted that in their review of 30 cases that resulted in public or private admonishment of a judge they did not observe any instances in which the commission formally documented unproven information as support for its disciplinary decisions. (Auditor's Report, p. 34.)

Further, there are currently procedures in place to minimize the possible risk of bias in the commission's unitary system. The commission's policy declarations require a separation of the investigative, prosecutorial, and adjudicative functions of the commission staff. (Policy Declarations of Com. on Jud. Performance, policies 3.8, 3.9.) During an investigation, the commission is advised by its investigative staff under the direction of the Director-Chief Counsel. (Auditor's Report, chart at p. 6.) If formal proceedings are instituted, the Director-Chief Counsel and staff do not advise the commission or engage in ex parte communications with the commission. At this point, the Legal Advisor to the commissioners, who has not participated in the earlier investigation of the matter, advises the commission. The Legal Advisor is hired directly by the commission and maintains offices separate from the rest of the commission staff. (Policy Declarations of Com. on Jud. Performance, policy 3.9.)

The special masters provide another important layer of due process protection because they help separate the commission's investigative function from its adjudicatory function. As mentioned below, the special masters are three judges appointed by the Supreme Court to preside over an evidentiary hearing and submit a report to the commission with findings of fact and conclusions of law. (Rules of Com. on Jud. Performance, rules 121, 129.) They have not been privy to the investigation and make their findings of fact and conclusions of law based on evidence presented at a public hearing under the California Evidence Code. (*Id.*, rule 125(a).)

In conclusion, with these safeguards in place, CJA is of the view that a bicameral commission is unnecessary and would cause more problems than solutions.

B. The Commission Should Continue to Use Judicial Officers as Special Masters to Preside Over Evidentiary Hearings and Report to the Commission

As stated above, the CJA opposes the Auditor's recommendation that the second body of a bicameral commission preside over evidentiary hearings. If a bicameral body is not adopted, issues remain regarding the deployment of special masters. The issues are as follows: (1) the commission, in either a unitary or bicameral form, should not preside over its own hearings and (2) special masters should be judges or at least a majority of judges.

1. Practical Considerations Dictate that the Commission Continue to Use Special Masters

With respect to the first point, there is a practical consideration that should be discussed. Currently, the commission has the authority under its rules to preside over evidentiary hearings. One of the reasons this has not happened is that the commission members are not able to take the time to travel to the location of the hearing (usually in the respondent judge's county to facilitate appearances by the witnesses who are generally located in that county) and spend anywhere from one to three weeks presiding over a hearing. This burden falls more heavily on the attorney and public members, but the absence of judicial masters from their courts for an extended period of time would also inconvenience the judges' courts, parties and attorneys as well as court staff. Although the Auditor proposes that commission members be paid for this time, financial remuneration is not the main problem for most commission members. Taking that much time off from their jobs or law practice is just not feasible. If this was required of commissioners, it would undoubtedly be more difficult to appoint qualified commission members⁴. There would also be considerable travel and lodging expense associated with having 11 commission members preside over a one to three-week hearing.

2. Judicial Officers Should Continue to Be Special Masters

The Auditor recommends that the majority of commissioners who hear evidence be members of the public. Currently, the CJP's membership is already dominated by public members with six such members, two attorneys and three judicial officers. These eleven commissioners hear and decide all matters before the commission with the exception of special master proceedings which later come before the commission. CJA believes that the public and the judiciary are best served if all or a majority of special masters are comprised of judicial officers as has been the case

⁴ Taking this time from employment and life commitments is also a burden for the special masters, but they serve infrequently. If commission members were to do this regularly, it would be an unreasonable burden for the commissioners, their clients and customers, employers, co-workers, and families.

since special masters have been utilized by the CJP for presiding over an evidentiary hearing, and submitting their findings of facts and conclusions of law to the commission.

Special masters are recruited and trained by the California Supreme Court. They are also selected and appointed by the Supreme Court. The fact that the CJP and its staff have no hand in selecting and appointing the masters provides a layer of protection for complainants, bench officers and the public since no influence can be exerted by the CJP in these appointments. Moreover, each special master brings a fresh perspective to a case since each master has not otherwise been involved in the case or investigation.

The California Supreme Court has ruled that factual findings of the masters are to be given special weight by the CJP. The masters hear testimony, observe witnesses' demeanor, rule on evidentiary objections and admit evidence. As with hearings and trials in our courts, it is important that a legally trained person preside over the taking of evidence so that correct and fair rulings can be made on the admissibility or exclusion of evidence. Since formal proceedings are directly appealable to the California Supreme Court, an increase in appeals of errors in evidentiary rulings would create a burden on that court which has historically seen few appeals stemming from the CJP's formal proceedings.

Of course any appeal would be taken from the commission's decision, but since the commission must give special weight to the special masters' factual findings, error in these findings may increase errors for appellate review. Additionally, errors in factual findings will certainly increase the workload of the CJP and its staff which would be required to conduct a de novo review of the facts, meaning review the facts anew. This would more than double the work of the commission and its staff, causing delay and increased costs. The current system with judicial masters works well as borne out by the fact that since 1999 – a period of 23 years – the California Supreme Court has not ruled to overturn a single CJP decision.

Retired Judge Russell Hom of the Sacramento Superior Court, served as a special master in the *Inquiry Concerning Judge John Laettner* (Nov. 2019). That case involved 28 allegations of misconduct. The masters considered the testimony of 60 witnesses and approximately 332 admitted exhibits in a hearing that lasted ten weekdays. Judge Hom states:

My experience serving as a former Presiding Judge and Special Master reinforces my belief that it is important the fact finding process in judicial disciplinary hearings remain vested in individuals who are judicial officers or former judicial officers. The issues that arise during most of the hearings are extremely nuanced and require an understanding of both substantive and procedural law. The scope of responsibility of a judicial master requires not only assessing credibility of witnesses and evidence but also requires ruling on the admissibility of evidence as well as substantive procedural matters. Although there are disciplinary charges that involve matters of common knowledge and community standards, other issues require a unique understanding of the law, “accepted” or “best” judicial court practices and court process are more easily grasped

by individuals with extensive judicial experience. Whether a judge committed “legal error” or “abused his discretion” in handling a matter is best resolved by a judicial officer. This is truly unique to this type of disciplinary hearing. Although it is possible that a lay person could develop sufficient familiarity with the law, legal procedure and “best” or “acceptable” judicial practices, it would require the presentation of extensive evidence on the specific subject and unnecessarily extend the evidentiary hearing.

The purpose of any disciplinary process is multifaceted. Most importantly, the actions of CJP are designed to protect the public from conduct of a judge who is engaging in misconduct. It is equally important that the actions of the CJP and the integrity of the disciplinary process itself are accepted by both the public and all California judicial officers. The removal of experienced judicial officers from this process diminishes that objective.

As this Committee knows, the special masters determine the level of misconduct in their findings. Their duties include addressing whether the behavior constitutes willful misconduct, prejudicial misconduct or improper action. Improper action consists of conduct that violates the Code of Judicial Ethics, but does not rise to the level of prejudicial misconduct. *Inquiry Concerning Judge Kevin Ross*, (2005) 49 Cal.4th CJP Supp. 79. 89. The distinction between improper action and prejudicial misconduct is not easy to make and any analysis must draw upon a comparison of other judicial misconduct in a myriad of cases involving judicial ethics. Here again, a bench officer is better suited to review the facts in comparison to precedent and make factual and legal determinations based upon that special master’s work experience in the judiciary.

Another technical concept that special masters must grapple with is the legal error defense as set forth by the California Supreme Court in *Oberholzer v. Commission* (1999) 20 Cal.4th 371. This standard is one that is often debated by legal minds and has presented a significant concern for the CJA in the past. While the CJP public members – who along with all the commissioners deliberate over hundreds of cases each year – have done well with this concept, it takes training and reviewing multiple cases to have the expertise to determine what is and is not legal error. Since there are only a few formal proceedings each year and a special master might only serve once or twice over a career, CJA believes a layperson would not have the exposure to sufficiently address this concern when compared to special masters who are bench officers and legally trained. Again, this would be an area in which increased appeals may be seen if it is believed that error has been made.

The special masters also author their own decisions. The *Laettner* special masters’ report was 144 pages. Often the lead drafter of the panel’s decision is the appellate justice who does not have a daily calendar. This allows for time to draft the masters’ decision. In addition, appellate justices may obtain assistance from their research attorneys who can conduct the legal research necessary to arrive at a decision and to explain it cogently. While a lay person may be able to draft

such a decision, the resources that the special masters have provided to the judiciary, at no cost, has worked well for the California disciplinary system. If a layperson were to draft the masters' opinion, a research attorney might need to be hired to conduct the research, adding cost to the process.

One might argue that the masters could be comprised of a solitary bench officer and two public members. This approach should be disfavored. Currently, three judicial officers hear all the evidence and bring their experience and education to bear in deliberating and deciding the fate of a respondent bench officer. As judges see in jury trials over which they preside, jurors often defer to the foreperson with some experience in a given area. If the public members defer to the single bench officer who would most likely then be required to draft the masters' decision, that single judge would have too much sway over the decision. As judicial officers, we see the benefit of deliberation and multiple perspectives daily when we preside over our calendars. The current system of three bench officers serving as masters works well and should not be changed.

Moreover, in our country's system of justice, each person is entitled to a jury of one's peers. As stated above, special masters are the fact finders in CJP's formal proceedings. As such, judges are entitled to be judged by fact finders who are similarly trained and who have had similar work experience. This principle ensures judicial independence. In fact, this exact premise was recognized by the Legislature when it considered Assembly Constitutional Amendment 46 (Willie Brown) which became Proposition 190, effective March 1, 1995. At that time, comments made during the Senate review of the bill reflected concern about the separation of powers where Legislative and Executive Branch appointees could be seen as encroaching upon the independence of the Judicial Branch. A good balance has been struck over the years with the special masters being comprised of bench officers and the commission itself being comprised of a majority of public members. This system is efficient because the judicially trained masters make the factual findings and legal conclusions upon which the publicly-dominated commissioners determine the level of discipline.

The CJA believes that the special masters should be a panel of all judges or at least a majority of judges. A review of disciplinary bodies from other professions demonstrates that it is widely understood that those working in the field are best suited to review for conduct below that profession's standards. For physicians and psychiatrists the state Medical Board is comprised of a majority of physicians (8 of the 15 members). Similarly the state Board of Psychology and the state Physician Assistant Board are comprised of a majority of those practicing in that professions (5 of 9 members for psychology and 7 medical professional of 11 for physician assistants). Other examples exist: for accountants, the state Board of Accountancy is comprised solely of those with an active accountancy license; for contractors, the state Contractors License Board is comprised of a majority of licensees (8 specialty contractors of the 15 members). Real estate agents' disciplinary matters are decided by a formal hearing process before an administrative law judge at the Office of Administrative Hearings. Each of these bodies adhere to a clear and convincing standard of proof.

Finally, there is a misconception that judicial special masters and commissioners are more lenient than public members would be. There is much evidence that this is not true. For example,

in the *Inquiry Concerning Judge Gary G. Kreep* (2017) 3 Cal.5th CJP Supp. 1, all three bench officers on the commission voted to remove Judge Kreep from office. A majority of public members and attorneys on the commission voted for a severe public censure instead⁵. Judges, given their experience in the courtroom and having received the training available to all bench officers, are more realistic in determining whether bench officers can change and improve their conduct and they recognize that bad judicial behavior harms the entire judiciary. As such, they will and have held judges to task. As the South Dakota Supreme Court stated *In the Matter of Judge A.P. Fuller* (2011) 2011 S.D. 22:

Judge Fuller has not only damaged his judicial office but those of every other judge in this state. Each judge's decisions, judgments and decrees are not enforced by armies or by force. They are chiefly enforced by the voluntary compliance of our citizens through their respect for the rule of law. Judge Fuller's misconduct makes it more difficult for every judge in this state to maintain that respect for our courts and thus our own ability to effectively resolve society's legal disputes.

In conclusion, the CJP should continue to utilize special masters for evidentiary hearings and the masters should be comprised of a panel of three bench officers. A judge's expertise in making evidentiary rulings and presiding over hearings and trials, as well as a judge's knowledge of the procedural background that is often necessary in order to understand the nature of the misconduct (particularly with respect to legal error and abuse of authority) is necessary to ensure confidence of the judiciary in CJP proceedings. The judges who serve as masters are specially selected by the Supreme Court and have special training and knowledge of the canons and a judge's ethically duties. Factual determinations and legal conclusions are often intermingled in CJP proceedings since charges often involve complex legal procedures and judicial officers are best equipped to deal with these issues.

C. The Judicial, Bar and Public Must Have Trust and Confidence in the CJP

As this Committee knows, the majority of complaints received by the CJP are dismissed without investigation because the complainant is expressing dissatisfaction with the bench officer's ruling. This data is true for judicial conduct commissions throughout the nation. Unfortunately, litigants' dissatisfaction with rulings can carry forward with litigants' dissatisfaction with the CJP's closure of a complaint without investigation or discipline. Being mindful of this dynamic brings perspective to some of the public criticism of the CJP.

From the perspective of those who are in court regularly – attorneys, court staff and bench officers – the CJP is respected and its process is invoked when needed. Decades long data tells us

⁵ This example is offered since no examples of public special masters' votes versus judicial masters' vote exist. This example of the commissioners' votes in a formal proceeding is, however, analogous.

that complaints from attorneys, court staff and bench officers comprise only 5 percent⁶ of the complaints received by the CJP. Yet, this 5 percent results in 34 percent of the actual discipline meted out by the CJP. This statistic tells us that the bar and those working in the courts trust the CJP and its processes and will use the CJP when needed. If the CJP adopts rules and procedures that are perceived to be unbalanced, unfair or biased against bench officers, those who are in court regularly will be hesitant to make complaints to the CJP.

Currently, The CJP has struck a good balance in serving the public, the bar and those working in the judiciary⁷. As set forth below by defense counsel and presiding judges, the CJP has earned the respect of those working against it and with it.

1. The Defense Bar's Perspective

Heather L. Rosing of the Klinedinst PC law firm has represented bench officers before the CJP for approximately 17 years. She also advises bench officers on judicial ethics, and she speaks and teaches in the areas of CJP procedure and the Code of Judicial Ethics. Ms. Rosing has participated in the CJP's Biennial Rules Revision Process for approximately a decade, observing the evolution of the Rules of the Commission on Judicial Performance ("Rules") and the suggestions to modify the Rules. In terms of her service to the legal community, Ms. Rosing served as the inaugural president of the California Lawyers Association, as well as the inaugural president of the California Lawyers Foundation and a president of the San Diego County Bar Association. She is the CEO of Klinedinst PC, a statewide law firm with approximately 90 attorneys.

The following are Ms. Rosing's observations and impressions of the judiciary that is subject to the jurisdiction of the CJP, and of the CJP as a disciplinary agency, in her own words:

The charge of the Committee is, in part, to review the auditor's report and the structure and operations of the CJP. This discussion includes not only a review of what enhances the public protection mission of the CJP, but what due process rights the judges – as with any party to an adjudicative

⁶ This 5 percent also includes confidential complaints which the CJP has reason to believe are made by attorneys, court staff and bench officers who wish to remain anonymous in filing a complaint.

⁷ This balance includes the CJP's burden of proof which has been embedded as *stare decisis*, precedent, in numerous decisions of the commission since its inception over sixty years ago. The California Supreme Court confirmed "[t]he proper standard of proof was by clear and convincing evidence sufficient to sustain a charge to a reasonable certainty." *McComb v. Commission on Judicial Performance* (1977) 19 C.3rd Supp 1. Similarly, while some states have a different burden of proof for disability proceedings, all states have "clear and convincing" evidence as the standard of proof in judicial discipline proceedings except North Carolina and Washington ("clear, cogent and convincing"), Wisconsin ("clear, satisfactory, and convincing"), Colorado ("clear and convincing" for formal proceedings but "preponderance" of the evidence for other proceedings), New Jersey ("beyond a reasonable doubt" for removal proceedings), and Maine, Michigan, New York, Rhode Island, Texas, and Utah ("preponderance" of the evidence). No information could be found for Oklahoma, South Dakota and the District of Columbia.

proceeding – must be afforded in order to ensure a fair process. Due process rights are a fundamental aspect of who we are as a democratic nation.

Every two years, the CJP conducts a Biennial Rules Revision Process, giving the judiciary and members of the public an opportunity to propose changes to the CJP's Rules, as well as to comment on changes proposed by the CJP itself. Certain groups within the judiciary, including the CJA, have participated in this Biennial Rules Revision Process, making suggestions such as the following:

- Enhancing the mentoring program (with mentoring a proven methodology to correcting behavior that does not conform with the Canons),
- Allowing the issuance of educational or warning letters,
- Expanding the process to achieve voluntary settlements (whereby judges voluntarily agree to a certain level of discipline), and
- Allowing judges discovery prior to formal proceedings, as a means of permitting them to better understand the allegations against them.

If any suggestion has been made in the course of the proceedings before this Committee that judges are treated too leniently by the CJP system that is directly contrary from my observations in representing judges before the system for almost two decades. The referenced Rules, which govern the CJP system, are designed to afford the highest level of public protection. Far from any suggestion that they favor judges, there has been debate about whether they are too harsh on the judiciary and whether greater due process rights should be afforded to this body of public servants. While the Committee is justifiably focused on the interests of those who appear in our California courts, the Committee cannot overlook the critical importance of ensuring that judges are accorded the highest level of fairness in the inquiries and proceedings against them. Ultimately, in these proceedings, the judge's livelihood is at stake.

Another observation I offer involves the quality of our bench in California, and the most common types of violations of the Code of Judicial Ethics. While the mention of a judicial discipline system evokes images of judges engaged in scandal, bribery, and rampant abuse of their powers, the truth is far different. I have represented somewhere in the range of 130 judges, and I have observed the behavior of hundreds of others through my work in this arena. The vast majority of bench officers in our Superior Court

system are hard-working, well-intentioned, and deeply committed to achieving justice through the application of the rule of law. While there is an occasional judge who engages in egregious conduct in violation of the Code of Judicial Ethics, this is a rarity. It is important for the Committee to know that most lawyers apply to the bench (or run for election for the bench) in the first place because of a deep commitment to public service. Importantly, they do not seek the job because of the pay; to the contrary, many of them take substantial pay cuts to go on the bench. They become judges because they want to use their legal training to provide a service in applying the rule of law to the disputes that come before them.

As demonstrated by the CJP statistics set forth in its Annual Reports, judges by and large are disciplined for human failings that constitute a violation of the Canons, with this behavior being eminently correctable. Representing judges gives one great insight into how judges respond to discipline. With few exceptions, the judges wholly embrace the lessons learned from the disciplinary process and reform their conduct accordingly.

The 2021 Annual Report sets forth the types of conduct resulting in discipline. The highest instance of discipline was in the areas of demeanor and decorum (imposition of discipline nine times). The second highest incidence of discipline was in the areas of bias or appearance of bias, which oftentimes is intertwined with demeanor or evidenced through demeanor issues (imposition of discipline five times). In my experience, these are judges who are faced with a crowded dockets, heavy stressors, inadequate resources, and sometimes difficult or obstreperous parties or attorneys, and the judges simply lose their composure or cool, or use poorly selected verbiage on the record. Far from being intentional violations, these are judges who fell prey to their own natural human frustrations, and who worked mightily to implement techniques to ensure no repeat occurrences.

Another observation I offer pertains to the running of the CJP as a governmental entity. The CJP defense bar would be a natural critic of the agency that prosecutes the judges whom we defend. From my perspective, however, the CJP is a well-run agency. While many judges disagree with the outcomes (believing that the discipline is too harsh or out of proportion to the conduct), few can quarrel with the manner in which the CJP moves along its cases at a brisk pace, in order to ensure prompt resolution, in the interest of public protection.

To give the Committee a better sense of the timing, every staff inquiry letter or preliminary investigation letter includes a deadline to respond.

While the CJP will generally give one extension, multiple extensions are rare. In the event that the judge submits his or her response at least 45 days prior to the next CJP meeting, it is highly likely that the matter will be on the CJP's agenda, and the resolution will be sent to the judge within two weeks of that CJP meeting. In the event that the CJP feels it needs additional information, supplemental preliminary investigation letters are promptly issued. In the event of formal proceedings, the Rules provide for a tightly regimented process that culminates in the evidentiary hearing usually within four months. The structure of the Rules (again, revisited and updated every two years) have short timeframes set forth in them for every step of the investigatory and disciplinary process – and these time frames are enforced. A hallmark of well-run disciplinary agency is adherence to timelines that allow for prompt disposition of the matters, for the benefit of the public.

Next, in my experience, the influence and control of the public members on the CJP cannot be underestimated. The public members are diligent and thoughtful, asking good questions at the hearings that are permitted in the event of a proposed private or public admonishment. The same public members have the ultimate authority to make the final determination, to the exclusion of the legal professionals, if they choose to do so. While anecdotal, I have seen many instances where the vote of the CJP members demonstrates that the legal professionals (lawyers and judges) are more critical of the conduct of the judge than the public members. In other words, judges are harder on fellow judges who violate the Canons than anyone else ever would be. It is my belief that this stems from most judges being ardent supporters of maintaining the image of the judiciary as fair, balanced, and transparent. It is very important to every judge that I have ever represented that the public have confidence in the system. If the judge perceives that one of his or her colleagues is undermining that confidence through a violation of the Code of Judicial Ethics, the reaction that I have seen is that the judicial officer is more inclined to impose discipline.

On final note, the fundamental purpose of the CJP must be kept in mind. Like most professional regulatory and disciplinary bodies, it exists to ensure adherence to an ethical code – in this instance, the Code of Judicial Ethics. The Code is detailed, with multiple interpreting authorities. Through adherence to the Code, the judiciary ensures its integrity and independence and gives people confidence in the system. The CJP does not exist, however, to address legal error, for good reason. To further explain, the rule of law in California is based on a complex series of constitutional provisions, statutes, and regulations promulgated or enacted by other authorities, which every judicial officer must study and try to apply to the best of his or her abilities. Sometimes judicial officers are

faced with questions that are unresolved by the existing body of law. Often the body of law allows the judicial officer to make a variety of different decisions. Sometimes judicial officers do their best to apply the law, but other interpretations exist. If a judicial officer, in deciding an issue or a matter, makes an error of law, there is a multilevel appellate system to address such issues, and that system does this job well. In my experience, many misunderstand the role of the CJP. It is not, nor could it be, an appellate or reviewing court. That is squarely within the jurisdiction of others within our system of government. Put another way, the appellate courts and the CJP play different – and equally important – roles in ensuring the smooth functioning of justice. The CJP’s mandate is to address judicial misconduct (and judicial incapacity), while the appellate court’s mandate is to review decisions made by the lower courts to ascertain if they are in accordance with the law. Each agency within our government fulfills a unique and ultimately complimentary role.

2, Presiding Judges’ Perspective

CJA has invited presiding judges through the state Trial Court Presiding Judges Advisory Committee (TCPJAC) to provide input on the issues being considered by this Committee. We attach a letter dated September 9, 2022 from Judge Erick Larsh, the Presiding Judge of the Superior Court in Orange County. When additional input is received, it will be forwarded to this Committee.

D. Suggested Improvements for the CJP

The CJA agrees with the Auditor’s recommendation that the CJP’s budget should be augmented. An increased budget would allow the CJP to hire additional staff for the commission, Examiners, and the Office of the Legal Advisor which would presumably reduce delays in investigation. Neither the public nor the judiciary are served when investigations are delayed and pending without resolution for an extended time. The CJP’s infrastructure can also be modernized to allow for more efficiencies with technology.

The CJA also urges the Committee to seek the expansion of the CJP Mentor Program. This program has suffered the loss of mentors through judicial retirement. It is a proactive program through which the CJP can act to correct judicial misconduct. Historically, bench officers are not removed for poor judicial demeanor despite receiving discipline. The discipline may garner the bench officer’s attention, but if proactive measures are not taken to correct the conduct, the judicial officer cannot improve without instruction. The CJP Mentor Program has been successful in changing behavior, has been lauded by the mentors, and was well received by the Auditor. (Auditor’s report, page 43.)

Not only should the CJP Mentor Program be expanded to address demeanor related misconduct, it should grow to encompass cases involving decisional delay where mentoring can be a helpful intervention. Other areas where the mentor program can be useful are in cases involving judicial interactions with staff and in the area of bias. The judicial branch, among many disciplines, is seeking ways to eliminate implicit and explicit bias. Regarding implicit bias, judicial officers may not be aware of their prejudices and leanings. Mentoring can be a great support in teaching bench officers to be more aware and alert to their biases. Expanding the Mentor Program will do much to elevate the level of practice for the judiciary and improve the experience of litigants, attorneys and court staff in the courthouse.

As an aside, in discussing the CJP Mentor Program, the Auditor suggests additional authority be provided to the commission to enable it to require counseling, instruction and other interventions. The Auditor asserts that a bicameral system would enable the commission staff to oversee a judge's progress. This assertion, however, overlooks the fact that commission staff currently reviews judges who are in the CJP Monitoring Program. These judges might be dealing with mental health or addiction issues. As such, these bench officers participate in therapy, drug and alcohol rehabilitation and mental health services. CJP staff receives reports about these judges from care providers and prepares updates for the commission members. The CJP also regularly review judges who are on disability. Some of these judges have mental health or medical issues which led to their disability retirement and the commission makes determinations regarding whether the disability is ongoing. Here too, the CJP staff obtains ongoing updates from care providers and reports to the commission. All this information currently enables the commission to oversee a judge's progress while being monitored or on disability status. All this can continue to be done with respect to counseling, apologies and training without the seismic shift of moving to a bicameral system.

E. Conclusion

The CJA thanks this Committee for its work and appreciates the Auditor's and Legislature's review of the CJP's procedures. The CJA also appreciates the work of the CJP which is an important tool in the justice system to protect the public and ensure a high standard of ethical conduct for bench officers in this state. CJA believes that the CJP has been operating efficiently and fairly and has demonstrated good stewardship of the public's interest. CJA does not believe that significant and drastic change to the commission's structure and processes will improve what is widely recognized as a model judicial disciplinary agency in the nation.