

To: Committee to Review the Operations and Structure of the
California Commission on Judicial Performance

From: Research and Report Subcommittee¹

Date: August 25, 2022

Subject: Chart Comparing the California State Auditor’s Report to
CJP, ABA Best Practices and Other States

Introduction

In 1960, California became the first state to establish an independent constitutional entity to evaluate and investigate complaints of judicial misconduct and, where appropriate, to discipline those judges found to have engaged in ethical misconduct: the California Commission on Judicial Performance (“CJP”). Today, all 50 states, the District of Columbia and several US territories have adopted similar mechanisms for the enforcement of judicial ethics, either by constitutional amendment, statutory enactment or court rule.² Prior to the advent of such judicial conduct commissions, matters of judicial discipline were typically reserved to the courts, where self-enforcement was not especially robust.

The goal of all such commissions is to protect the public by vigorously enforcing judicial ethics and promoting high standards of conduct for judges, who must be (1) free to decide cases on the merits, without untoward or otherwise inappropriate influences, yet (2) held to account for unethical behavior or other conduct – on or off the bench – that is prejudicial to the administration of justice or otherwise brings the judiciary into disrepute. Judicial conduct commissions are not courts. Without exception, they have no authority to reverse a judge’s rulings, remand a case for retrial or otherwise act as an appellate body. Even where they find that a judge was biased or otherwise improperly influenced in the disposition of a case, conduct commissions may discipline the judge, but the aggrieved litigants must resort to the courts for further action on the case itself.

¹ The members of the subcommittee are Cheryl Boudreau, Richard Long, Morris Ratner, Rick Simpson and Robert Tembeckjian. Committee Chair Beth Krom serves *ex officio* on all subcommittees.

² While these entities are variously labeled commissions, boards, councils or offices, for purposes of this discussion, the word “commission” is used.

In 2019, the California State Auditor issued a report, making recommendations regarding the structure and operations of the CJP. Twelve recommendations were directed to the CJP, and three were directed to the California Legislature.

On July 16, 2021, the California Legislature authorized the 15-member Committee to Review the Operations and Structure of the California Commission on Judicial Performance, with a mandate to issue a report and recommendations by March 31, 2023. The Committee's substantive responsibilities include the following, as set forth by the Legislature in Cal Gov Code § 68772.

- (1) Review and consider the following:
 - (A) All findings and recommendations of the California State Auditor in Audit 2016-137.
 - (B) The existing structure and operations of the commission.
 - (C) The existing structures and operations of judicial discipline commissions of other states that are similar in population to the State of California.

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- (3) Study and make recommendations whether any of the following should be changed in order to improve the commission's ability to carry out its mission to protect the public, enforce rigorous standards of judicial conduct, and maintain public confidence in the integrity and independence of the judiciary:
 - (A) The number of commission members.
 - (B) The allocation of appointments to the commission among the appointing authorities.
 - (C) The structure of the commission.
 - (D) The appropriate discipline and remedies available to the commission when it imposes discipline.
 - (E) The policies and procedures governing the commission's operations.
 - (F) Whether the commission currently has adequate financial and personnel resources.

- (G) What, if any, specific funding is necessary to support any recommended improvements to the commission.
- (H) Whether changes to the Constitution and statutes of the State of California, Rules of Court, and rules of the commission are needed.

Appointment of the 15 Committee members was completed in the spring of 2022. The Committee held its organizational meeting on April 19, 2022, and met thereafter on July 11-12, 2022.³ The next meeting is scheduled for September 14-15, 2022.

The accompanying chart identifies and analyzes the following:

- A. The recommendations of the Auditor's Report;
- B. The Auditor's subsequent evaluation of responsive actions taken by the CJP;
- C. Relevant model procedures formulated by the American Bar Association in 1990;
- D. Corresponding provisions in California and other states; and
- E. Pertinent comments and suggestions for the Committee to consider in furtherance of its mission to recommend improvements to the operations and structure of the CJP.

The accompanying chart is intended both as an informational document and as a guide for Committee discussions, inasmuch as it addresses the legislative mandate in § 68772 as quoted above.

³ The meetings were public, and the Committee heard from representatives of judicial and citizen associations and organizations, as well as individuals.

AUDIT REPORT’S RECOMMENDATIONS TO THE LEGISLATURE

Auditor’s Report	Auditor’s Evaluation of Legislature’s Response	ABA Model Procedures	CJP & Other States	Comments/Suggestions
<p>Recommendation 1</p> <p>Amend the Constitution to</p> <p>(A) Establish a bicameral system with separate entities to (i) investigate and (ii) adjudicate judicial disciplinary matters.</p> <p>(B) Require that hearings be held before the entire CJP, the majority of whom would be public members & compensated; or 3 special maters (1 judge, 2 public members).</p> <p>(C) Direct CJP to institute “corrective actions” that would be considered discipline, subject to follow-up monitoring for compliance.</p>	<p>“No Action Taken”</p>	<p>ABA Rule 3, which has not been adopted as written by any state:</p> <p>(A) Modified bicameral system is preferred, in which the Commission is divided into rotating panels of 3 to investigate and 5 to hear & adjudicate.</p> <p>(B) Hearings should be held before 5 members.</p> <p>(C) “Deferred Discipline Agreement,” tho private, is “discipline” associated with continuing education for minor transgressions, or treatment/rehab for medical issues.</p>	<p>CJP & <i>most</i> states are unicameral: one entity that investigates & adjudicates.</p> <p>(A) Most bicameral states (<i>e.g.</i> PA, IL, AL) have 2 entirely separate entities: a Commission to investigate and a <i>court</i> to adjudicate. One bicameral state with only a Commission (AR) has rotating panels of 3 but also a full complement of alternate members in case of conflicts, in effect, <i>two</i> Commissions.</p> <p>(B) CJP uses panels of 3 judges as special masters for hearings appointed by the Cal Supreme Ct. In some large unicameral states (<i>e.g.</i> OH) 3 law-trained panelists preside; in others (<i>e.g.</i> MI, NY), 1 law-trained hearing officer presides.</p> <p>(C) Private corrective actions are generally considered “disciplines.”</p>	<p>The unicameral model has been consistently upheld in federal & state courts as constitutional.</p> <p>Because constantly dividing a unicameral body into rotating panels is confusing, creates quorum & logistical issues, and provides no guarantee against conflicts, most states have eschewed the practice. Except for AR, those opting for bicameral have two separate entities: a Commission to investigate & a court to decide.</p> <p>Unicameral has not been identified as a major issue by judges or citizen groups, nor has actual harm been alleged or demonstrated.</p> <p>Conducting trials before an entire Commission or even a panel of 5, has been rejected as unwieldy & a guarantee of delay. All states require hearing officers to be law-trained.</p>

<p>Recommendation 2</p> <p>CJP should be adequately funded.</p>	<p>“No Action Taken”</p>	<p>ABA Rule 2(6) Commentary:</p> <p>Public confidence in the system requires funding sufficient to insure “that budgetary constraints do not inhibit the investigation of complaints and presentation of formal charges.”</p>	<p>NY’s Commission is the best funded in the nation at \$7.2 million annually; 46 staff; 3 offices (NYC, Rochester, Albany). It covers 3,400 judges, annually handling 2,000 complaints, averaging 21 public disciplines & 40 private cautions annually.</p> <p>CJP is second at \$6.7 million; 28 staff; covering 1,900 judges, annually handling 1,200 complaints, averaging 5 public disciplines & 30 private advisories or admonitions.</p>	<p>State-by-state comparisons are always nuanced. 70% of all NY disciplines are imposed on part-time town & village court justices who do not have to be law-trained, whereas all judges in California are law-trained.</p> <p>Additional funding could support (A) more robust communications and ombuds role (see Recommendation 10), (B) a southern Cal office, (C) more staff and lower staff-to-case ratio, (D) transcription assistance, etc.</p>
<p>Recommendation 3</p> <p>All courthouses should publicly display info about CJP to enhance awareness & facilitate complaints.</p>	<p>“No Action Taken”</p>	<p>N/A</p>	<p>Judges and court administrators tend to be reticent about advertising disciplinary commissions and appearing to invite complaints against their colleagues. A legislative mandate would be significant but might implicate <i>separation-of-powers</i> issues that the Legislature may wish to avoid, <i>i.e.</i> one branch micromanaging another branch’s functions. However, the courts could voluntarily promote info about CJP in courthouses <i>and</i> more prominently on the Judicial Branch website, where info on filing complaints is not obviously displayed. https://www.courts.ca.gov/2113.htm</p> <p>Any posted courthouse information should enhance public understanding as to CJP’s role & limitations, so as to encourage complaints of ethical misconduct as opposed to a complainant’s dissatisfaction with the outcome of a case. An ombuds office and other outreach could also address this issue. (See Rec #10.)</p>	

AUDIT REPORT’S RECOMMENDATIONS TO THE CJP

Auditor’s Report	Auditor’s Evaluation of CJP Response	ABA Model Procedures	CJP & Other States	Comments/Suggestions
<p>Recommendation 4</p> <p>CJP Mgt should review & approve investigative strategies to ensure comprehensive inquiries.</p>	<p>“Fully Implemented”</p> <p>Staff attorneys submit written investigative strategies for each active case, which CJP Mgt reviews & approves.</p>	<p>N/A</p>	<p>CJP is consistent with most states, where senior staff approve strategies & oversee inquiries.</p>	
<p>Recommendation 5</p> <p>CJP should create & fill an “investigations manager” to review & approve strategies & oversee investigations.</p>	<p>“Fully Implemented”</p> <p>Position was filled in FY2020-21 when funding was provided.</p>	<p>N/A</p>	<p>Most other states do not have funding for such a dedicated managerial position.</p>	
<p>Recommendation 6</p> <p>CJP legal advisor should periodically review quality of closed investigations & where warranted recommend improvements.</p>	<p>“Fully Implemented”</p> <p>Legal advisor conducts annual review & reports in writing to CJP.</p>	<p>N/A</p>	<p>CJP performs such reviews more often than most states; most states do not have staff or resources for such reviews.</p>	

<p>Recommendation 7</p> <p>CJP should proactively examine <i>patterns</i> of misconduct when evaluating individual complaints.</p>	<p>“Fully Implemented”</p> <p>Intake & Investigating Attorneys now routinely take potential patterns into account when evaluating complaints.</p>	<p>N/A</p>	<p>CJP is consistent with larger & adequately funded states, as against most other states, where staff & resources are limited & (of necessity) inquiries focus on the individual complaint.</p>	<p>“Pattern” investigations more likely flow from alleged discourtesy or failure to maintain prof'l competence in the law (See Rec # 8).</p>
<p>Recommendation 8</p> <p>Upgrade complaint categorizing protocols & track complaints, so as to recognize at intake whether individual complaints of legal error may (when viewed collectively) signal bias or other misconduct.</p>	<p>“Fully Implemented”</p> <p>CJP conducts annual review to determine whether individual closed complaints alleging legal error appear (when viewed collectively) to indicate bias or other misconduct.</p>	<p>ABA Rule 18:</p> <p>While a dismissed complaint “shall not be used for any purpose,” “additional info” may require reinvestigation of original complaint. (Silent as to patterns, bias, etc.).</p>	<p>CJP’s annual reviews are not emulated in most states, where (A) limited resources or protocols prohibit revival of dismissed complaints & (B) annual reviews of this type are rare.</p>	
<p>Recommendation 9</p> <p>New investigation of a judge should include review of all prior complaints, to identify patterns or chronic misconduct justifying expanded inquiry.</p>	<p>“Fully Implemented”</p> <p>Every Case Plan now includes a review of prior complaints for CJP Dir & Members to consider, balancing due process concerns with the public interest in identifying unfit jurists.</p>	<p>ABA Rule 18:</p> <p>While a dismissed complaint “shall not be used for any purpose,” “additional info” may require reinvestigation of original complaint. (Silent as to patterns, bias, etc.)</p>	<p>CJP’s review of prior complaints in evaluating new complaints is not emulated in most states, where (A) limited resources or protocols prohibit revival of dismissed complaints & (B) regular reviews of this type are rare.</p>	

<p>“Recommendation 10”</p> <p>Regular outreach to the general public should be implemented.</p>	<p>“Fully Implemented”</p> <p>CJP holds annual public meetings; agenda every other year includes discussion of agency rules. CJP engages in “targeted outreach to stakeholders.”</p>	<p>N/A</p>	<p>CJP is comparable to larger & adequately funded states & ahead of those with limited staff & resources. Regular outreach is a challenge in most states, where resources are limited, and investigative & mgt responsibilities compete for senior staff’s time.</p>	<p>CJP might consider (and the Legislature fund) an on-staff Ombudsperson or Public Info Officer who would (A) facilitate CJP interaction with citizen groups, judicial groups & other stake-holders, (B) receive & evaluate comments on procedure, organization, etc., for CJP Dir & Members to consider, (C) raise public & judicial awareness of ethics enforcement thru public forums, publications, etc.</p>
<p>“Recommendation 11”</p> <p>Update CJP website to improve transparency & accessibility, <i>e.g.</i> with examples of high-quality complaints.</p>	<p>“Fully Implemented”</p> <p>“CJP updated its website, as recommended.”</p>	<p>N/A</p>	<p>CJP website is comparable to other states; its online complaint portal is more advanced than most.</p>	<p>Many states require conventionally written complaints; others accept PDFs by email; CJP takes mailed complaints <i>and</i> has an online complaint portal.</p>
<p>“Recommendation 12”</p> <p>Complaints should be accepted online.</p>	<p>“Fully Implemented”</p> <p>“CJP updated its website, as recommended.”</p>	<p>N/A</p>	<p>CJP website is comparable to other states; its online complaint portal is more advanced than most.</p>	<p>Many states require conventionally written complaints; others accept PDFs by email; CJP takes mailed complaints <i>and</i> has an online complaint portal.</p>

<p>“Recommendation 13”</p> <p>CJP should hold at least one public meeting during its biennial rulemaking process, with sufficient public notice & opportunity to participate.</p>	<p>“Fully Implemented”</p> <p>CJP conducted such a meeting by video due to COVID-19 concerns in 2020.</p>	<p>N/A</p>	<p>CJP plans to conduct such meetings in person as public health conditions permit.</p>	<p>Most states do not have such a requirement or practice. Rules reviews are more episodic.</p>
<p>“Recommendation 14”</p> <p>CJP should explore options for relocating its office (currently in San Francisco) to save money.</p>	<p>“Pending”</p> <p>CJP has explored the option but not yet found a cost-effective alternative. CJP has valid arguments against moving the office, <i>e.g.</i> high relocation costs, duplicating the security in its current gov’t office space, and the lack of evidence that changing locations would improve CJP’s functions or increase public access/awareness of its work.</p>	<p>N/A</p>	<p>N/A</p>	<p>Given California’s large geographic size & population, CJP & the Legislature should consider adding staff and an office in southern Cal so as to (A) promote public access to the agency, (B) facilitate investigations, particularly where in-person witness interviews, depositions, court observations, etc., would be necessary, and (C) relieve respondents and witnesses from having to travel to San Francisco, and SF-based staff from having to relocate for days or weeks at a time when required downstate.</p>

<p>“Recommendation 15”</p> <p>CJP should report to the Legislature in 2020, 2021 & 2022 as to its progress in fulfilling Recommendations 3-15.</p>	<p>“Partially Implemented”</p> <p>All such reports have been made, but certain recommendations (<i>e.g.</i> relocating CJP office) have not been achieved. (See Rec # 14.)</p>	<p>N/A</p>	<p>N/A</p>	
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ADDITIONAL ISSUES NOT HIGHLIGHTED IN THE AUDIT REPORT

There are some issues the Auditor did not highlight, that are not otherwise addressed above, or were referred to generally but not spelled out in detail by the Legislature.

Statute of Limitations

Generally, a Statute of Limitations (SOL) sets the maximum time that a party has to initiate legal proceedings, dating back to when the alleged offense occurred. In the judicial disciplinary setting, there may also be a limitation on the amount of time a commission has to complete its proceedings.

CJP operates under a unique, multi-layered Statute of Limitations (SOL) that imposes different time frames for the completion of investigations *and* formal disciplinary proceedings, depending on the court in which the accused judge sits. Additionally, unlike a traditional SOL, in which the statute is tolled (*i.e.* the time clock stops running) when a civil lawsuit is filed or a criminal defendant is indicted, the CJP’s clock does not stop when the judge is formally charged with misconduct. CJP must still complete all proceedings in the limited time allotted. In most

other states, there is no statute of limitations as to judicial misconduct. And in most states that do have such statutes, the clock stops when the judge is formally charged with misconduct.¹

The Committee should consider recommending the elimination of the SOLs as to judicial misconduct, or at a minimum make it uniform and stop the clock when a judge is formally charged with misconduct.

Standard of Proof

There are various standards of proof in American civil, administrative and criminal law, by which the party with the burden of proof – *i.e.* the CJP attorneys in judicial disciplinary cases, a District Attorney in criminal cases, the plaintiff in a civil suit, or an agency attorney in an administrative proceeding – must establish their case:

Preponderance of the Evidence: The adjudicator must find that the CJP attorneys demonstrated that just over 50% of the evidence favored their position. This is the lowest standard, typically applied to some issues in civil cases.

Clear and Convincing: The adjudicator must find that the CJP attorneys demonstrated that a particular fact or charge is substantially more likely than not to be true. This is an intermediate standard, typically applied in civil cases.

Substantial Evidence. The adjudicator must find that the CJP attorneys demonstrated enough evidence that a reasonable mind could accept as adequate to support a particular conclusion. This is another intermediate standard, typically applied in administrative agency matters.

Beyond a Reasonable Doubt. The adjudicator must find to a moral (not mathematical) certainty that the only logical explanation that can be derived from the facts is that the defendant committed the alleged crime, and

¹ The one exception appears to be Texas, where regardless of *when* the alleged misconduct occurred, its Commission must complete all its work on a complaint within seven months.

that no other logical explanation can be inferred or deduced from the evidence. This is the highest standard, typically applied in criminal cases.

In CJP as well as attorney disciplinary cases, as determined by the California courts, the *Clear and Convincing* standard applies. Thus, CJP and most states are consistent with ABA Model Rule 7. Some states, such as NY, utilize *Preponderance of the Evidence*.