

AUDIT REPORT’S RECOMMENDATIONS TO THE LEGISLATURE

Recommendation	Auditor’s Report	Committee Discussions and Preliminary Conclusions
1(A)	Establish a bicameral system with separate entities to (i) investigate and (ii) adjudicate judicial disciplinary matters.	The Committee consensus is to maintain the present CJP unicameral system, which has consistently been upheld as constitutional in federal and state courts, and which has not been shown to be unfair or to impede CJP’s operations. Adding a separate second structure to the disciplinary process not only would be very costly but also would increase the time it takes to discipline or exonerate a judge. The unicameral model has not been identified as a matter of concern by judicial or citizen groups, nor has actual harm been alleged or demonstrated.
1(B)	Require that hearings be held before the entire CJP, the majority of whom would be public members & compensated; or 3 special masters (1 judge, 2 public members).	Holding hearings before the entire CJP would be logistically challenging, especially in a multi-day proceeding. The consensus is to maintain the present system of 3 special masters to preside over hearings, <i>i.e.</i> , all specially trained judges appointed by the Cal Supreme Court. CJP’s “public protection” mandate is promoted by proceedings that comport with due process and would more likely withstand appellate scrutiny, thereby contributing to the integrity of the disciplinary system. Assigning non-lawyers to preside over evidentiary legal proceedings could undermine CJP’s credibility and put non-lawyers in the position of practicing law impermissibly. (All states require hearing officers to be law-trained.) Since the report of the special masters and the full record of proceedings go to the CJP for ultimate decision, and a majority of CJP members are neither lawyers nor judges, the public is ably represented in the process.
1(C)	Direct CJP to institute “corrective actions” that would be considered discipline, subject to follow-up monitoring for compliance.	The Committee consensus is that “corrective disciplines” or “deferred disciplines” are useful in appropriate situations. CJP now implements “mentoring” or “monitoring” arrangements on consent of the subject judge. Authorizing CJP to <i>impose</i> such results, or categorizing such dispositions as <i>disciplines</i> , would require a constitutional amendment and is before the Committee for further discussion.

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2	CJP should be adequately funded.	<p>The Committee consensus is that CJP's funding should be increased. Specific recommendations as to what such additional funding should support are addressed in the following sections.</p> <p>Note to Committee: For the final report, we should try to estimate a dollar amount.</p>
3	All courthouses should publicly display info about CJP to enhance awareness & facilitate complaints. (The Auditor directed this recommendation to the Legislature because CJP does not have authority to direct the court system to post such displays.)	<p>The Committee consensus is that more should be done to raise CJP's public profile and to address what appears to be a significant underlying problem, <i>i.e.</i> the widespread conflation of two concepts: disagreement with the outcome of a case and ethical wrongdoing by the judge. Informational displays in courthouses may be one way to do so, but the Committee believes efforts to inform and engage the public should be part of an overall program that might include an Ombudsperson or Public Information Officer for more outreach to citizen groups, judicial associations, the press, etc. Such matters are addressed below. (Note: CJP does not have administrative authority as to court facilities. The responsibility, expense and ongoing duty to install and maintain courthouse signage should not be charged to CJP, if in fact the Legislature adopts this recommendation of the Auditor's Report.) The person serving in such a role could also advise CJP regarding the tone and content of its communications with complainants, to ensure that the vast majority of complainants whose issues fall outside CJP's jurisdiction understand why that is the case.</p>

AUDIT REPORT’S RECOMMENDATIONS TO THE CJP

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4	CJP Mgt should review & approve investigative strategies to ensure comprehensive inquiries.	The Auditor has found that CJP fully implemented this recommendation. Staff attorneys submit written investigative strategies for each active case, which CJP Mgt reviews & approves. CJP protocols are consistent with most states, where senior staff approve strategies & oversee inquiries. The Committee has no further recommendations in this regard.
5	CJP should create & fill an “investigations manager” to review & approve strategies & oversee investigations.	The Auditor has found that CJP fully implemented this recommendation. The position was filled in FY2020-21 when funding was provided. The Committee has no further recommendation in this regard.
6	CJP legal advisor should periodically review quality of closed investigations & where warranted recommend improvements.	The Auditor has found that CJP fully implemented this recommendation. The legal advisor conducts annual review & reports in writing to CJP. The Committee has no further recommendation in this regard.
7	CJP should proactively examine <i>patterns</i> of misconduct when evaluating individual complaints.	The Auditor has found that CJP fully implemented this recommendation. Intake & Investigating Attorneys now routinely take potential patterns into account when evaluating complaints. (“Pattern” investigations more likely flow from alleged discourtesy or failure to maintain professional competence in the law. See Rec # 8). The Committee has no further recommendation in this regard.

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8	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.	The Auditor has found that CJP fully implemented this recommendation. CJP conducts annual review to determine whether individual closed complaints alleging legal error appear (when viewed collectively) to indicate bias or other misconduct. The Committee has no further recommendation in this regard.
9	New investigation of a judge should include review of all prior complaints, to identify patterns or chronic misconduct justifying expanded inquiry.	The Auditor has found that CJP fully implemented this recommendation. All memos re: new complaints include review of prior relevant complaints for CJP members to consider in balancing due process concerns with the public interest in identifying unfit jurists. Intake Attorneys review all prior complaints when evaluating new ones, as do Investigating Attorneys in formulating Case Plans and assessing whether there is a potential pattern to investigate. The Committee has no further recommendation in this regard.

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10	Regular outreach to the general public should be implemented.	<p>The Auditor has found that CJP fully implemented this recommendation. CJP holds annual public meetings; agenda every other year includes discussion of agency rules. CJP engages in “targeted outreach to stakeholders.” Nevertheless, the Committee consensus is that CJP can do more to raise its public profile and interact with the public, including those with limited internet access or skills, such as:</p> <ul style="list-style-type: none"> • Create an Ombudsperson or Public Information Officer to liaise with citizen groups, judicial groups & other stakeholders, and the press; to advise CJP re: tone or content of communications, especially when explaining why complaints fall outside CJP’s limited jurisdiction; and, in appropriate cases, to explain CJP decisions to individuals who have submitted complaints. • Create a graphically dynamic PowerPoint slide show of how the Commission operates. • Publish a regular newsletter. • Produce a Press Kit containing a brochure, the PowerPoint, recent newsletters, recent clippings. • Explore the production of radio and television public service announcements. • Produce & mail informational postcards & flyers about CJP.
11	Update CJP website to improve transparency & accessibility, <i>e.g.</i> with examples of high-quality complaints.	The Auditor has found that CJP fully implemented this recommendation. For example, complaints are now accepted online via the website complaint portal, as well as by mail. Nevertheless, as noted with regard to Recommendation 10, additional enhancements within CJP’s constitutional and statutory authority should be routinely considered and implemented.
12	Complaints should be accepted online.	The Auditor has found that CJP fully implemented this recommendation. The Committee has no further recommendation in this regard.

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13	CJP should hold at least one public meeting during its biennial rulemaking process, with sufficient public notice & opportunity to participate.	The Auditor has found that CJP fully implemented this recommendation. CJP conducted such a meeting by video due to COVID-19 concerns in 2020. Future meetings are expected to be in person, with a live-streaming option for remote attendees. The Committee consensus is that "best practices" be explored to increase attendance, such as maintenance of a "contact list" or "subscription list" by which organizations and individuals may be notified of upcoming meetings or other public events or announcements.
14	CJP should explore options for relocating its office (currently in San Francisco) to save money.	<p>The Committee consensus is that CJP should maintain its present San Francisco office. Whatever savings in rent may be realized would likely be offset by the significant expense and disruption of relocating and duplicating the security associated with the present state government building that houses CJP.</p> <p>The Committee is considering a recommendation to establish an additional CJP office, in southern California, given the state's large geographic size & population, so as to (A) promote public awareness of the agency, (B) facilitate more comprehensive 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>Implementing the foregoing would require significant additional funding for CJP, which should include adequate resources and up-to-date technology to facilitate more efficient and comprehensive investigations throughout the State.</p>
15	CJP should report to the Legislature in 2020, 2021 & 2022 as to its progress in fulfilling Recommendations 3-15.	The Auditor has found that CJP fully implemented this recommendation. The Committee has no further recommendation in this regard.

ADDITIONAL ISSUES CONSIDERED PURSUANT TO THE COMMITTEE’S LEGISLATIVE MANDATE

There are some issues the Auditor did not highlight but were identified or alluded to in the legislation creating this Committee, or that speakers have raised, and the Committee members have discussed or mentioned in public meetings to date. They are identified below as “Item” numbers beginning with 16, to maintain the sequence following Recommendations 1-15 of the Audit Report.

Item	Post-Audit Issues	Committee Discussions and Preliminary Conclusions
16	<p>Statute of Limitations</p> <p>Generally, a Statute of Limitations (SOL) sets the maximum time that a party has to initiate formal legal proceedings, dating back to when the alleged offense occurred. Here, CJP must complete its proceedings within a tight SOL framework.</p>	<p>Under Article VI, section 18(d) of the California Constitution, CJP may only retire a judge for disability, and censure or remove a judge for misconduct, for “action occurring not more than 6 years prior to the commencement of the judge’s current term or of the former judge’s last term ... [emphasis added].” Even among the few states where there is a disciplinary Statute of Limitations (“SOL”), this one is unusually constricting. It gives CJP virtually no time to investigate or discipline a judge for newly discovered serious misconduct that occurred 6 years ago. It also effectively ends such an inquiry if the judge starts a new 6-year term, because the alleged misconduct would very quickly fall outside the 6-year SOL. Some states comparable to California in judicial population, such as New York, do not have a SOL for judicial ethics violations.</p> <p>The Committee did not conclude discussions on whether to propose</p> <ul style="list-style-type: none"> • ending the SOL, • adopting a flat period of time for the SOL (<i>e.g.</i> 10 years) without tying it to a judge’s <i>current</i> term, and/or • tolling or suspending the SOL if and when CJP commences formal disciplinary charges against a judge. <p>In all other pertinent realms – civil, criminal, attorney discipline – the SOL is tolled when formal charges are filed.</p>

Item	Post-Audit Issues	Committee Discussions and Preliminary Conclusions
17	Standard of Proof	<p>The Committee did not conclude discussions on whether to recommend a change in the standard of proof applicable to CJP disciplinary proceedings.</p> <p>There are various standards of proof in American civil, administrative and criminal law, by which the party with the burden of persuasion— <i>i.e.</i> 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:</p> <ul style="list-style-type: none"> • <i>Preponderance of the Evidence</i>: The adjudicator must find that the CJP attorneys demonstrated that it is more likely than not that the alleged misconduct occurred. This is the lowest standard, typically applied to some issues in civil cases. • <i>Clear and Convincing</i>: The adjudicator must find that the CJP attorneys demonstrated that a particular fact or charge is highly and substantially more likely than not to be true. This is an intermediate standard, typically applied in civil cases for claims of fraud and to establish punitive damages. • <i>Beyond a Reasonable Doubt</i>. 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 that no other logical explanation can be inferred or deduced from the evidence. This is the highest standard, typically applied in criminal cases. <p>In CJP as well as attorney disciplinary cases, as determined by the California courts, the <i>Clear and Convincing</i> standard applies. Thus, CJP and most states are consistent with ABA Model Rule 7. Some states, such as NY, utilize <i>Preponderance of the Evidence</i>. The Committee is considering the following recommendation: Where the results of an investigation indicate the alleged misconduct could be established by a <i>preponderance of the evidence</i> rather than by <i>clear and convincing evidence</i>, the CJP should consider disposing of the matter with a private sanction or warning in lieu of initiating formal disciplinary proceedings aimed at a public sanction.</p>

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18	<p>Expanding the Dispositions CJP May Render.</p> <p>At present, CJP may issue the following determinations:</p> <ul style="list-style-type: none"> • Advisory Letter (Private) • Private Admonishment • Public Admonishment • Public Censure • Removal from Office / Involuntary Retirement 	<p>The Committee discussed but did not reach conclusions on whether and to what extent the dispositions available to CJP should be expanded.</p> <p>Among the topics proposed to and/or considered (but undecided) by the Committee:</p> <ul style="list-style-type: none"> • <u>Imposing</u> mentorship or continuing education/training mandates, rather than relying on the judge’s voluntary agreement to do so. (As noted in Recommendation 1(C) above, this would require a constitutional amendment.) • Broadening CJP’s authority to refer matters to other entities where appropriate, <i>e.g.</i> other ethics entities, licensing boards, law enforcement & prosecution officials, etc. • Allowing confidential, non-disciplinary “comment” in the nature of best-practices recommendations. Since CJP’s mission is to protect the public, this would be a tool to prevent misconduct rather than punish a judge for it after it occurs.
19	<p>Encouraging More Stipulated Disciplines</p>	<p>Attorneys who have represented judges asked the Committee to encourage CJP to enter into more agreed-upon disciplinary dispositions.</p> <p>The Committee consensus is that when both sides agree on the outcome, abbreviating the process with a stipulated disposition would appear to serve the public interest, expedite matters, and conserve resources. In California as elsewhere, especially in cases where removal is not sought, the inability to resolve the matter by stipulation is more likely to derive from the accused judge’s reluctance to admit to wrongdoing.</p>

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20	Allowing Pre-Charge Discovery	<p>Attorneys who have represented judges asked the Committee to recommend expanding CJP’s discovery obligation to the investigative stage. (Discussion among the Committee began but was not completed.) It was pointed out that this would be uncommon, and unwise for many reasons– e.g. protecting complainant & witness confidentiality, safeguarding the integrity of CJP inquiries from potential interference by judges and others – and that amending the practice should be based on a showing that the present traditional discovery obligation – which arises at the hearing stage, not the investigative stage – has led to unfair results.</p> <p>Generally, in disciplinary matters, “discovery” is the process whereby the prosecuting entity (in this case, CJP) – in advance of the formal disciplinary hearing – makes available to defense counsel the documents it intends to introduce into the record, the names of witnesses it will call, the statements those witnesses made during the investigation, etc. Some states, such as NY, also require defense counsel to provide discovery to the judicial conduct commission – again, in advance of the hearing.</p>
21	Expanded Statistical Tracking of CJP Matters	<p>Attorneys who have represented judges suggested that complaints, investigations, and disciplines be tracked by race, gender and ethnicity, in addition to the standard tracking by judicial position, geographic location. The Committee has not yet discussed this suggestion.</p>
22	More Descriptive Written Communications	<p>The Committee consensus was that CJP’s letters to complainants and judges should be more descriptive when notifying them that complaints were dismissed. For example: underscoring that the entire Commission sees and decides all complaints, explaining why a complaint was dismissed as involving a matter outside CJP’s jurisdiction, indicating that a grievance was administrative rather than ethical in nature, etc.</p>

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23	Number of CJP Members; Appointing Authorities	<p>There are 11 members of the CJP. 3 are judges appointed by the Cal Supreme Court, 2 are Cal attorneys appointed by the Governor, and 6 are neither Cal lawyers nor judges nor retired judges. (Of those 6, 2 each are appointed by the Gov, the Senate Rules Committee and the Speaker of the Assembly.)</p> <p>The Committee has heard no proposals and has not itself identified any reason to change either the composition of CJP membership or the appointing authorities.</p>
24	Recommendations Beyond the Scope of CJP's Authority & Responsibility	<p>Much of the public comment addressed to the Committee has focused on matters related to CJP tangentially, if at all, such as disagreement with the outcomes of individual cases, especially in family court matters. Some suggestions offered to enhance public confidence in the courts and the disciplinary system are not necessarily within the purview of CJP or the Committee, but because they were voiced during Committee proceedings, communicating them to the Legislature and court system officials seems appropriate. For example:</p> <ul style="list-style-type: none"> • Should all new judges be assigned a mentor, who may be a sitting or retired judge? (What would such a program cost?) • Should there be cameras in all courtrooms to livestream proceedings and make them truly available to the broader public without requiring one's physical presence in the relatively limited spectator section? • Should there be posted signs in all courthouses, describing and providing contact information for CJP? • Are there issues unique to the structure or nature of family court matters as to which the Committee should opine and make recommendations? • Should judges be subject to performance evaluations that should be made public? • Should funding for court reporting services be enhanced by the Legislature, to promote more fair and prompt resolution of trial and appellate issues?