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COMMISSION ON JUDICIAL PERFORMANCE
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**REPORT CONCERNING ADOPTION OF ADDITIONS AND AMENDMENTS TO
RULES OF THE COMMISSION ON JUDICIAL PERFORMANCE
December 30, 2022**

On July 15, 2022, the Commission on Judicial Performance invited public comment on proposals for additions and changes to certain of its rules, pursuant to article VI, section 18, subdivision (i) of the California Constitution and section 3.5 of the Policy Declarations of the Commission on Judicial Performance. At its December 7, 2022 meeting, after considering the comments and responses to the comments received, the commission adopted the proposed rule amendments, with one modification. The text of each amendment is attached,¹ and the final version of the amended rules may be found on the commission's website at <http://cjp.ca.gov>.

This report also discusses rule proposals that were received but were not circulated for public comment, with the commission's explanation for not pursuing those proposals.

¹ The rule amendments eliminating staff inquiries and adopting a new procedure for contesting advisory letters require ancillary changes throughout the rules. The attached text of the amendments reflects only the substantive changes to the rules. A complete copy of all the rule amendments, including the ancillary changes, is available upon request.

I. EXPLANATION OF RULE AMENDMENTS AND DISCUSSION OF PUBLIC COMMENTS

A. Amendment to Rule 102(q) to Provide an Exception to Confidentiality for Disclosure of Information Regarding a Mentee Judge to a Mentor Judge

Explanation of Amendment

Interim rule 102(q) was passed on a two-year interim basis in June 2016 after the mentoring program was 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). The rule provides an exception to confidentiality to allow the commission to disclose relevant information regarding a mentee judge to a mentor judge. The amendment enables the continuing work of both the Northern and the Southern California mentoring programs.

Discussion of Comments

The Los Angeles County Superior Court (LASC) and the California Judges Association (CJA) support the amendment. No comments opposing the amendment were received.

B. Amendment 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

Explanation of Amendment

An interim version of rule 102(s) was passed March 24, 2021, to allow a limited exception to confidentiality rules 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 amendment is intended to ensure that the commission is able to fulfill its mandate to enforce rigorous standards of judicial conduct by prosecuting serious misconduct. The amendment also attempts to protect confidentiality to the extent possible. The amendment therefore includes the requirement that, prior to providing such statements to a respondent judge in formal proceedings, the commission will give notice and an opportunity to be heard to the judge whose statement is being provided and take steps to protect the confidentiality of the judge.

Discussion of Comments

LASC supports a rule ensuring the due process rights of a respondent judge in formal proceedings, as well as notice to the judge whose confidential statements are being provided. LASC proposed including the requirement that the notice be “reasonable.” The commission determined that adding a requirement that the notice be “reasonable” would not significantly improve the rule, particularly in light of the modification to the proposed rule to include an opportunity to object (see, *infra*).

Roger Noor opposed the rule on the basis that it will inform judges under investigation what their staff complained to the commission about. Mr. Noor stated that the commission is more concerned with benefitting judges than protecting court staff and litigants. The commission disagrees – the purpose of the amendment is to provide the commission with the ability to prosecute allegations of misconduct against judges that, without this rule, would have to be dropped. And, the amendment only applies to discovery to respondent judges in formal proceedings, who already have the right to discovery, including the statements of court staff, if they submitted a complaint to the commission or were interviewed by the commission.

CJA opposes the amendment on the grounds that it could have a “negative chilling effect” on the information provided by judges responding to an investigation because there is no assurance that the judge’s statements will remain confidential. CJA argued that the steps outlined to protect confidentiality will not be helpful in situations in which the identity of the judge will be obvious based on the substance of the information provided. CJA proposed instead that any disclosure made under the rule be sealed, the respondent judge should be prohibited from disclosing the sealed information to anyone, and that both the commission and the respondent judge should be prohibited from using the sealed information in the formal proceedings.

CJA also proposed that, if the commission adopted the rule, the rule should include an opportunity for judicial officers to object to the disclosure of the confidential information before it is produced.

In response to CJA's comments, commission assistant trial counsel Brad Battson, Esq., stated that the rule will not have a chilling effect on a judge's willingness to provide truthful information to the commission, because judges already have a duty, pursuant to rule 104 and Government Code section 68725, to provide the commission with reasonable assistance and information. Mr. Battson argued that the prospect of disclosure will encourage judges to take greater care to ensure that the information they are providing is accurate.

Mr. Battson also asserted that prohibiting the respondent judge from using the information in formal proceedings means that the examiner may still be required to drop a potential charge, otherwise the respondent judge's due process rights may still be compromised. Mr. Battson asserted that this would defeat the purpose of the proposed rule.

In the commission's view, the amendment will not have a significantly chilling effect on judges responding to an investigation. Judges should be providing accurate and honest information to the commission and are required to cooperate with the commission and bound by the statements they make in response to an investigation. (Rules 104, 106; Govt. Code, § 68725.)

The commission also declined to adopt the suggestion that any disclosure made under the rule be sealed. Prohibiting the respondent judge from using the information in formal proceedings may compromise their due process rights, thus still requiring the examiner to drop the charge. This would defeat the purpose of the proposed rule which is to ensure that the commission is able to fully prosecute serious misconduct.

The commission agreed with CJA that the rule should include an opportunity for judicial officers to object to the disclosure of the confidential information before it is produced and modified the proposed rule accordingly.

C. Amendment to Rule 110 to Eliminate Staff Inquiries

Explanation of Amendment

Rule 110 provides the commission with the option of opening an investigation as a "staff inquiry." Policy declaration 1.2 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.” The nature of an investigation is the same in a staff inquiry as in a preliminary investigation, but the highest level of discipline which may be imposed after a staff inquiry is an advisory letter. If more misconduct is discovered during the investigation, or the misconduct appears more serious than that originally alleged in the complaint, a staff inquiry may be elevated to a preliminary investigation, ensuring that a higher level of discipline may be imposed, if appropriate.

The number of staff inquiries opened by the commission has decreased significantly over the past ten years, while the commission has opened more matters as preliminary investigations. Initiating a matter as a staff inquiry can lead to the delay in the disposition of an investigation if an initial staff inquiry must be returned to the commission with a recommendation that it be elevated to a preliminary investigation. The commission determined that there does not appear to be any significant benefit to retaining staff inquiries as an alternative to preliminary investigations. Rule 110 was therefore deleted to eliminate staff inquiries as a type of investigation for misconduct. Both the rules and policy declarations were also amended throughout to eliminate all references to staff inquiries and rule 110.

Discussion of Comments

CJA opposed the amendment, arguing that (1) there are circumstances where a staff inquiry is appropriate; (2) receipt of a staff inquiry letter is less psychologically stressful for judges, because they know the highest level of discipline the commission can impose after a staff inquiry is an advisory letter; and (3) because an advisory letter is the most severe discipline that may be imposed, judges do not obtain witness interviews or character letters for use in mitigation, making it more likely that the inquiry will remain confidential, and the cost of responding to a staff inquiry lower.

The commission concluded that, while it may be less “psychologically stressful” for judges to receive a staff inquiry letter rather than a preliminary investigation letter, 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.

The commission acknowledged that there may be some validity to CJA’s argument that staff inquiries may be more likely to remain confidential, because a judge does not believe it necessary to reveal the inquiry to other judges in order to ask them for character letters. The commission concluded, however, that it was unlikely that judges would forego obtaining an exonerating witness statement regarding an allegation of misconduct.

The cost of responding to a staff inquiry may be slightly lower because judges' counsel expend less time obtaining witness interviews and declarations, or character letters. The commission concluded, however, that this interest is outweighed by the beneficial purpose the amendment serves in streamlining the process of authorizing investigations, and ensuring that investigations are not delayed because a judge has to be recontacted to initiate a preliminary investigation after an original staff inquiry.

D. Amendment to Rules 111-116 to Provide for Appearances Before the Commission to Contest Advisory Letters and Eliminate Correction Requests

Explanation of 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. After an appearance, the commission may determine to issue the admonishment, impose a lower level of discipline than the tentative admonishment, or modify or withdraw the tentative admonishment.

Until the California Supreme Court's decision in *Oberholzer v. Commission on Judicial Performance* ((1999) 20 Cal.4th 371), advisory letters were not considered discipline. The procedures for contesting advisory letters therefore 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 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. A judge, however, had no right similar to the admonishment procedures to request an appearance before the commission.

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. The proposed amendments would therefore more clearly acknowledge the fact that advisory letters constitute discipline and bring more uniformity to procedures for contesting discipline short of a censure or removal.

Discussion of Comments

LASC and the CJA support the amendment. No comments opposing the amendment were received.

E. Amendments to Rule 119.5 Regarding Filing with the Commission During Formal Proceedings

Explanation of Amendment

Interim amendments to rule 119.5 were passed on February 2, 2022. The purpose of the proposed amendments is to streamline the procedures for filing documents in formal proceedings, and to eliminate the requirement of paper filings, in line with the commission's aim of moving to a mainly electronic filing and case management system.

Discussion of Comments

LASC and the CJA support the amendment. No comments opposing the amendment were received.

F. Amendment to Rule 126 to Clarify that a Respondent Judge in Formal Proceedings is Entitled to a Transcript of the Proceeding Without Cost

Explanation of Amendment

The purpose of the proposed amendment to rule 126 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 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 makes rule 126 consistent with rule 129 and clarifies that the respondent judge is entitled to a copy of the transcripts in formal proceedings, without cost to the judge.

Discussion of Comments

Both CJA and LASC submitted comments in support of the amendment. No comments opposing the amendment were received.

G. Comments Received Which Were Not Related to the Proposed Rule Amendments Included in the Invitation to Comment

During the public comment period, the commission also received comments from two members of the public, Ben Zimmerman and Susan Bassi. Neither of the comments pertained to the proposed rule amendments included in the Invitation to Comment. Mr. Zimmerman commented that rule 102(f), which provides an exception to confidentiality to allow the commission to disclose information concerning a threat to the person threatened or to law enforcement, is insufficient. He proposed that the commission's website include the names of judges who have committed acts of violence against litigants after a threat was made and a description of the acts committed by the judge.

Ms. Bassi's comment relates to the appointment of attorneys by judges to act as referees and the lack of oversight and regulation of retired judges serving as private judges. Ms. Bassi stated that the private judging industry needs stronger oversight. Ms. Bassi proposed amending the rules to ensure that judges are held accountable for the work performed by the referees they appoint and that private judging is better regulated.

Because neither of the comments pertained to the proposed rule amendments included in the Invitation to Comment, they are not discussed further here.

II. DISCUSSION OF RULE PROPOSALS NOT CIRCULATED FOR PUBLIC COMMENT

During its 2022 biennial rules review, the commission received rule proposals from two members of the public: John Hsu and Terri Lynn Day. The commission determined not to circulate the proposals for public comment.

A. Proposal to Change the Language Contained in Closing Letters to Complainants

Proposal

Mr. Hsu proposed that closing letters to complainants should provide more information regarding why the commission determined to close a complaint, and that, where the commission has determined that "the complainant has made [an] error in law" the closing letter should "point directly to the legal error" and "articulate, clearly, what has gone wrong, and where."

Reasons Proposal Was Not Circulated for Public Comment

Neither commission rules, nor the policy declarations address the content of closing letters to complainants. Rule 102(e) requires only that the commission disclose to the complainant whether action was taken against the judge on the basis of their complaint. In 2017, commission staff conducted a comprehensive review of the commission's closing letters to complainants with the goal of providing more information to complainants regarding why their complaints were closed, and also ensuring that the letters could be understood by complainants without a legal background. The commission's closing letters thus currently inform complainants, to the extent possible, why their complainant was closed, and each closing letter also informs the complainant that, if they provide additional information, it will be considered. In the commission's view, the current content of closing letters to complainants is appropriate.

Mr. Hsu's assertion that where the commission has determined that "the complainant has made [an] error in law" the closing letter should identify what the legal error is, misunderstands the function of the commission. The commission does not make determinations that a complainant has made an "error in law," nor is the commission a reviewing court.

B. Proposal to Adopt a New Rule Regarding Commission Staff Counsel's Qualifications

Proposal

Mr. Hsu proposed that the commission should consider not employing permanent staff attorneys and that the commission should consider hiring retired judges.

Reasons Proposal Was Not Circulated for Public Comment

The rules do not assign to the commission authority over staff counsel hiring decisions, rather the hiring and appointing authority for staff counsel positions is the Director-Chief Counsel. Further, the invitation for public proposals during the rules review process is not a forum to review staff hiring procedures.

C. Proposed Amendment to Rule 102(a) to Eliminate the Confidentiality of Complaints and Require the Commission to File Public “Orders of Dismissal” When a Complaint Does Not Result in Discipline

Proposal

Terri Lynn Day proposed that, because judicial accountability requires that the public be able to see that justice is being done, all complaints should be made publicly available without redaction. She also proposed that publishing an Order of Dismissal will assure the public that the commission is not improperly dismissing complaints and increase confidence in the courts by reassuring the public that the commission is operating effectively.

Reasons Proposal Was Not Circulated for Public Comment

An almost identical proposal to eliminate confidentiality was proposed by Court Reform LLC and the Center for Judicial Excellence (CJE) during the 2016 rules review process. The commission has consistently declined to adopt such a rule on the following grounds.

In 1995, through an amendment to the California Constitution, California voters entrusted the commission with making rules of confidentiality, with the exception that confidentiality ceases for a matter once a judge is formally charged with misconduct. In the exercise of its rule-making authority, the commission adopted rule 102(a), which makes all papers and records in commission proceedings confidential, other than in formal proceedings and other specified circumstances. The commission’s rules of confidentiality are intended to protect the confidentiality of complainants and witnesses and to protect judges from unwarranted damage to their reputation based on unfounded complaints.

Both the California and United States Supreme Courts have recognized that confidentiality serves important public policy purposes. (See *Landmark Communications Inc. v. Virginia* (1978) 435 U.S. 829, 834-835; *Ryan v. Commission on Judicial Performance* (1988) 45 Cal.3d 518, 527-528; *Mosk v. Superior Court* (1979) 25 Cal.3d 474.) Such confidentiality encourages the filing of valid complaints and provides protection against possible retaliation or recrimination. Many complainants and witnesses, particularly court employees and attorneys, are reluctant to file complaints or cooperate with the commission without assurances of confidentiality out of fear of retaliation.

For these important public policy reasons, the commission, with some limited exceptions, remains steadfast in protecting the confidentiality of complaints, prior to the filing of formal charges.

D. Proposed Amendment to Rule 102(g) to Require the Commission to Disclose to Prosecuting Authorities Information Which Reveals Possible Criminal Conduct by a Judge, Former Judge, or Other Individual or Entity

Proposal

Ms. Day proposed amending rule 102(g) to require the commission to release to prosecuting authorities possible criminal conduct by a judge, former judge, or any other individual or entity. Ms. Day asserts that judges are engaging in criminal acts but are not being held accountable for those acts.

Reasons Proposal Was Not Circulated for Public Comment

Currently, rule 102(g) permits, but does not require, the commission to release to prosecuting authorities possible criminal conduct by a judge, former judge, or any other individual or entity. In 2016, the Socioeconomic Justice Institute (SJI) submitted the same proposal as Ms. Day's, which the commission determined not to circulate for public comment. The same proposal was also submitted during the 2018 rules review process and was not circulated for public comment.

In theory, making disclosure mandatory would prevent misinformed speculation about whether the commission is responsibly exercising its discretionary authority under rule 102(g). On the other hand, under the proposed rule, the commission would arguably be required to turn over to prosecuting authorities any information which reveals possible criminal conduct, even if the information or the complainant appears unreliable (e.g., a complainant with a history of filing unsubstantiated complaints who files a complaint stating that the judge takes bribes, without any factual substantiation). The proposed rule would likely also require an unwarranted use of time and resources for the commission and the prosecuting authorities. For the above reasons, the commission believes the requirement should remain discretionary.

E. Proposed Amendments to Rules 110(d), 111(d), 111.5, 113, 114, & 116(b)(2) & (3) to Eliminate Private Discipline

Proposal

Ms. Day proposed amending the rules to eliminate all forms of private discipline on the basis that imposition of private discipline does not hold judges accountable for misconduct.

Reasons Proposal Was Not Circulated for Public Comment

The California Constitution, article VI, section 18(d) authorizes the commission to privately admonish a judge or former judge found to have engaged in an improper action or dereliction of duty. The commission may not override a constitutional provision by rule. Abolishing the commission's constitutional authority to impose private admonishments would require a constitutional amendment, which must be approved by the California State Legislature and ratified or rejected by the state's voters.

The practice of issuing advisory letters was codified in the rules of court in 1989 and adopted by commission rule in 1996. The California Supreme Court affirmed the commission's authority to issue advisory letters pursuant to commission rules in *Oberholzer v. Commission on Judicial Performance* (1999) 20 Cal.4th 371. Because advisory letters were created by rule, the commission has discretion to eliminate them as a disciplinary option.

In 2016, CJE and Court Reform LLC also proposed eliminating all private discipline. In its invitation to comment, the commission explained that it did not have the authority to eliminate private admonishments but did have the discretion to eliminate advisory letters. The invitation to comment stated that the commission had not determined whether this would be in the best interest of the public and the administration of justice, but that consideration of the proposal would benefit from soliciting the views of the public and the judiciary. In response, the commission received comments in opposition to eliminating advisory letters on the basis that:

- They serve a valuable function in protecting the public and affecting positive change in judicial behavior by serving as a warning to judges who engage in minor misconduct.
- The value of escalating penalties is recognized in many types of legal proceedings, State Bar proceedings, and by other state judicial disciplinary bodies.

- Eliminating advisory letters may result in minor violations being disciplined too harshly or not at all.
- Having two levels of private discipline for minor violations allows the commission to distinguish between those judges who offer substantial mitigation and those judges who do not acknowledge the problematic behavior.

The commission also received comments in favor of eliminating advisory letters on the basis that the public has a right to know about all disciplinary action taken against judges, eliminating advisory letters would provide greater transparency, and that advisory letters are insufficient to deter future misconduct.

The commission concluded that elimination of advisory letters would not necessarily provide greater transparency, because most matters which would have resulted in an advisory letter would either be closed without discipline or result in a private admonishment. Further, as noted, the constitution explicitly authorizes the commission to privately admonish judges, reflecting the fact that the voters intended that some discipline be private. Advisory letters also serve an important public policy purpose in cautioning judges about relatively minor misconduct in an effort to prevent future, similar misconduct. Moreover, retaining two levels of private discipline allows for more options in escalating discipline and considering mitigation when imposing discipline for isolated incidents of relatively minor misconduct.

F. Proposed New Rule to Require Judges to Attend a Public Hearing to be Admonished by the Commission on Live Television

Proposal

Ms. Day proposed that the commission adopt a new rule requiring judges to attend a public hearing where they are admonished by the commission on live television. Ms. Day asserts that public admonishment deters misconduct and thus “the more public the admonishment, the greater the deterrent.”

Reasons Proposal Was Not Circulated for Public Comment

CJE submitted the same proposal during the 2016 rules review process, which the commission determined not to circulate for public comment. Some states have rules which require the judge to appear before their commission or Supreme Court for a public censure or reprimand. For example, the Florida Supreme Court requires judges to appear in court to be publicly admonished by

the court. The admonishments take place at the beginning of oral arguments, which are broadcast. In Washington, a censure and reprimand include a requirement that the judge appear personally before the commission, and the censure or reprimand is read to the judge in public. In Georgia, it appears that censures are administered to judges in open court.

Currently, the commission issues a press release when public discipline is issued, with a summary of the decision and directions to the text of the full decision on the commission's website. Legal media outlets routinely include an article about the decision and other media outlets, particularly in the judge's jurisdiction, often report on the decision.

The Supreme Court has stated that the purpose of judicial discipline is not punishment, but protection of the public, maintaining public confidence in the integrity and impartiality of the judiciary, and the enforcement of rigorous standards of judicial conduct. (*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1111-1112.) In the commission's view, a press release best fulfills this mandate, without the appearance that the commission is punishing the judge.

G. Proposed Amendment to Rule 117 to Require the Commission to Permanently Maintain All Complaints and Other Records

Proposal

Ms. Day proposed that all complaints and other records be maintained permanently because the public has an interest in obtaining information on "problematic" judges. She argues that accessing a judge's history will allow the public to determine whether or not misconduct, or allegations of misconduct, have decreased or increased over a judge's career, which may be an important factor in reelection.

Reasons Proposal Was Not Circulated for Public Comment

CJE submitted the same proposal during the 2016 rules review process, which the commission determined not to circulate for public comment (although rule 117 was later amended to resolve a separate issue).

The commission retains files on closed complaints for 12 years for trial court judges and 18 years for appellate justices. (Policy Declaration 3.10 *Records Disposition Policy*.) When a judge is disciplined at any level, the file is retained forever.

If a complaint is closed, it cannot be presumed that the judge was “problematic.” Additionally, staff counsel is required, both at the intake stage and at the investigative stage, to review all prior complaints against the judge for allegations similar to the current complaint, or a potential pattern of misconduct, and to evaluate whether a pattern investigation may be warranted.

In the commission’s view, the public’s interest is served by the commission’s current records retention policy, and to retain records of closed matters indefinitely would be burdensome and costly with little or no benefit to the public.

H. Proposed New Rule to Make Judicial Retaliation an Aggravating Factor

Proposal

Ms. Day proposed a new rule that would make judicial retaliation an aggravating factor which can be separately disciplined even if an initial complaint is dismissed. Ms. Day stated that such a rule would increase protections for complainants and encourage filing of complaints.

Reasons Proposal Was Not Circulated for Public Comment

CJE submitted the same proposal during the 2016 rules review process, which the commission determined not to circulate for public comment. The commission already has the authority to investigate and discipline a judge for retaliation. Canon 3D(5) of the California Code of Judicial Ethics prohibits a judge from retaliating, directly or indirectly, against a person known or suspected of assisting or cooperating with an investigation of a judge or lawyer. With respect to court employees, California Constitution article VI, section 18, subdivision (h) provides that adverse employment action cannot be taken against a person, by any employer, public or private, based on statements presented by the person to the commission.

If the commission receives information that a judge has retaliated or threatened retaliation against a complainant or witness to a commission’s investigation, the commission will investigate the matter. Retaliation is serious misconduct. If proven, the judge may be disciplined for that misconduct, independent of the underlying complaint. Even conduct that creates the appearance of improperly attempting to influence a witness’s participation in the commission’s investigation has resulted in discipline. (Com. on Jud. Performance, Ann. Rept. (2016) Private Admonishment 10, p. 27; Com. on Jud.

Performance, Ann. Rept. (2000) Private Admonishment 2, p. 20; Com. on Jud. Performance, Ann. Rept. (1995) Advisory Letter 2, p. 24.)

The commission concluded that its current rules and procedures adequately address the issues raised in the proposal.

I. Proposed New Rule Requiring that Any Violation of the Code of Ethics Will Result in Removal

Proposal

Ms. Day proposed a new rule that judges who commit any violation of the Code of Ethics, or the “Oath of Office,” will be removed from office. Ms. Day argues that, in the interest of preserving respect for the rule of law, the highest possible standards must be applied to judges.

Reasons Proposal Was Not Circulated for Public Comment

The proposal was not circulated for comment for the following reasons. A judge may only be removed from office based on willful misconduct or prejudicial misconduct; a judge cannot be removed for solely improper action. (Cal. Const., art. VI, § 18, subd. (d).) The commission may not override a constitutional provision by rule. The proposed rule would require a constitutional amendment, which must be approved by the California State Legislature and ratified or rejected by the state’s voters.

The proposed rule is also antithetical to policy declaration 7.1 which sets forth the factors relevant to the level of discipline, and the preamble to the canons which states:

Whether disciplinary action is appropriate, and the degree of discipline to be imposed, requires a reasoned application of the text and consideration of such factors such as the seriousness of the transgression, if there is a pattern of improper activity, and the effect of the improper activity on others or on the judicial system.

J. Proposed New Rule Prohibiting Any Current or Former Judges from Sitting on the Commission

Proposal

Ms. Day proposed, without further explanation, that no former or current judges should be allowed to sit on the commission.

Reasons Proposal Was Not Circulated for Public Comment

The California Constitution, article VI, section 8(a) states that the commission shall consist of “one judge of a court of appeal, and two judges of superior courts,” two attorneys and six lay citizens. The commission may not override a constitutional provision by rule. Eliminating judge members of the commission would require a constitutional amendment, which must be approved by the California State Legislature and ratified or rejected by the state’s voters. Further, judge members of the commission play an important role in understanding and bringing a distinctive perspective to the role of judges.

K. Proposed Rule that Any Disciplinary Action by the Commission Voids All Prior Orders in the Underlying Matter

Proposal

Ms. Day proposed, without further explanation, that any disciplinary action by the commission should void all prior orders and rulings in the underlying matter.

Reasons Proposal Was Not Circulated for Public Comment

The proposal was not circulated for comment because the commission is responsible for investigating complaints of judicial misconduct and disciplining judges. (Cal. Const., art. VI, § 18.) The commission is not an appellate court and does not have the authority to change a decision made by any judicial officer.

TEXT OF AMENDED RULES

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

AMENDMENT TO RULE 102(q)

Rule 102. Confidentiality and Disclosure

* * *

(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.

AMENDMENT TO RULE 102(s)

Rule 102. Confidentiality and Disclosure

* * *

(s) (*Disclosure to respondent in formal proceedings*) *In compliance with discovery obligations in formal proceedings, the commission may provide to a judge who is the respondent in formal proceedings pursuant to rule 118 et seq., or to the judge'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 judge made or obtained during or after a staff inquiry under former rule 110 or preliminary investigation of that judge, (ii) any writings or physical items of evidence submitted by or on behalf of the other judge during or after such staff inquiry under former rule 110 or preliminary investigation, and (iii) relevant portions of the staff inquiry under former rule 110 and preliminary investigation letter(s) sent to that judge. Prior to providing discovery of confidential statements to a respondent judge in formal proceedings, the commission shall give notice and an opportunity to be heard to the judge whose confidential statements are being provided. To the extent possible, steps will be taken to protect the*

confidentiality of the judge who provided the relevant information (e.g., by redacting or sealing documents).

REPEAL OF RULE 110

Rule 110. Staff Inquiry; Advisory Letter after Staff Inquiry [*Repealed*]

~~(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.~~

AMENDMENTS TO RULES 111, 111.5, 113, 114, 115, 116

Rule 111. Preliminary Investigation

* * *

~~(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 *[Repealed]*

~~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 Procedure

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 private admonishment *discipline*. If the judge does not demand formal proceedings (*if applicable*), or an appearance before the commission to object to the tentative private admonishment *discipline* 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 ~~private admonishment discipline~~, and ~~waive the~~ *waiving any* 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 ~~admonishment discipline~~.

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 ~~private admonishment discipline~~; 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 discipline~~. 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 private 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 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 admonishment *discipline* 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 a *any applicable* personal waiver of the right to formal proceedings and to review by the Supreme Court.

Rule 115. Notice of Tentative Public Admonishment *[Repealed]*

~~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 *[Repealed]*

~~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.~~

AMENDMENTS TO RULES 119.5

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 when the original is stamped or otherwise marked "filed" with the date as set forth in subparagraph (c)(1) below. 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.~~

~~(e)~~ **(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.*

AMENDMENTS TO RULES 126(b)

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.*

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