

Date: December 6, 2024
To: Persons and Organizations Interested in Rules Relating to Proceedings of the Commission on Judicial Performance
From: Commission on Judicial Performance
Gregory Dresser, Director-Chief Counsel
Subject: Invitation to Comment on Proposed Amendments to Rules of the Commission on Judicial Performance

Policy declaration 3.5 of the Commission on Judicial Performance provides that, every two years, in even-numbered years, the commission shall review its rules and seek public comment on any proposed enactments, amendments, or repeals. (See policy declaration 3.5 for the commission's rules review procedures.)

As part of the 2024 review of its rules, the commission has determined to seek public comment on proposed amendments to rules 121(f) (Remote testimony during hearing); rule 122(l) (Return of discovery, continued confidentiality of discovery), and rule 138(i) (Definitions).

The proposed amendments being circulated for public comment, with a brief explanation of the changes, and a form for submission of comments, can be found on the commission's website at <https://cjp.ca.gov> under "Legal Authority." The deadline for comments is **January 6, 2025**. Thereafter, individuals and organizations may submit responses to comments until **January 21, 2025**.

Copies of proposed rule amendments, comments, and responses to comments are available to the public upon request.

Comments and responses to comments should be submitted in writing by mail or email to:

Commission on Judicial Performance
Attn: Emma Bradford, Legal Advisor to Commissioners
455 Golden Gate Avenue, Suite 14400
San Francisco, CA 94102
rules@cjp.ca.gov

In the following rule proposals, proposed amended language is reflected with *italics*, and deleted language with ~~strike-outs~~.

Rule Proposal No. 1

PROPOSED AMENDMENTS TO RULE 121(f) TO PROVIDE AN EXCEPTION TO SET FORTH THE PROCEDURES FOR TAKING REMOTE TESTIMONY DURING EVIDENTIARY HEARINGS

The proposed amendments are as follows:

Rule 121

(f) (*Remote testimony during hearing*) *Prior to the commencement of the hearing, the respondent judge or the examiner may request that a witness whom the party intends to call be allowed to testify at the hearing via remote video technology. The commission, if the hearing is before itself, or the special masters, after considering any objection by the other party, may, upon good cause shown, permit the testimony of the witness to be taken via remote video technology, provided that the place of the hearing can reasonably accommodate the request; that all parties can simultaneously see and hear the witness; that the witness is in a private, enclosed space with no one else present during their testimony; and that the witness has immediate access to exhibits or other records that might be used during the examination of the witness. If these conditions are not met during the remote testimony, the commission or the special masters may require the witness to appear in person at a hearing and may strike the witness's remote testimony if the witness does not appear in person.*

In a hearing regarding a disability application, remote testimony may be taken only by stipulation of the parties.

Explanation of Proposed Amendments

Interim rule 121(f) regarding remote testimony by witnesses during evidentiary hearings was passed on a two-year interim basis in February 2024. The intent of the rule is to provide clarity for the parties in formal proceedings regarding the procedures for taking witness testimony remotely. The ability to present witness testimony remotely can make formal proceedings more efficient and help mitigate the costs involved in formal proceedings.

The rule would not apply to evidentiary hearings in disability proceedings. The majority of witnesses in disability proceedings are expert witnesses, and the examination of expert witnesses generally involves a large volume of exhibits. Issues can arise with a witness not having access to exhibits that a party may wish to use while examining the witness. When the witness is testifying in person, the parties can provide those exhibits to them, but when a witness is testifying remotely, this can become difficult and cumbersome. Remote testimony, however, may still be taken by stipulation of the parties.

Rule Proposal No. 2

PROPOSED AMENDMENTS TO RULE 122(I) TO PROVIDE FOR THE CONTINUED CONFIDENTIALITY OF DISCOVERY

The proposed amendment is as follows:

Rule 122

(I) (Return of discovery, continued confidentiality of discovery) Upon the completion or termination of commission proceedings, the respondent judge shall return to the commission all materials provided to the judge under this rule that have not become part of the public record. All items provided in discovery pursuant to this rule remain confidential under rule 102 until and unless those items become part of the public record. *The commission considers all items provided in discovery pursuant to this rule to be confidential under Rule 8.3(d) of the California Rules of Professional Conduct (governing the conduct of licensees of the State Bar of California) until and unless those items become part of the public record.*

Explanation of Proposed Amendment

This amendment is intended to ensure that statements made by attorney witnesses in the context of a commission investigation remain confidential until and unless they become a part of the public record. Rule 8.3 of the California Rules of Professional Conduct sets forth an attorney's duty to report professional misconduct by another attorney. Subsection (d) of rule 8.3 states that the rule does not require reporting of information that is otherwise privileged or confidential. The proposed additional language to rule 122(I) would ensure that statements made by attorney witnesses and provided in discovery pursuant to rule 122, which might otherwise be subject to disclosure obligations, remain confidential until and unless those items become part of the public record.

Rule Proposal No. 3

PROPOSED AMENDMENT TO RULE 138(i) TO CLEARLY DESIGNATE “REGULAR BUSINESS HOURS” AS 8:00 A.M. TO 5:00 P.M.

The proposed amendment is as follows:

Rule 138

(i) “Filing” means delivering to commission staff at the commission office during regular business hours: *8:00 a.m. to 5:00 p.m.* A filing received after 5:00 p.m. will be deemed filed on the next court day. A filing may be evidenced by a conformed copy of the cover page of each document submitted for filing. To be filed, a document must be accompanied by a proof of service of the document upon the other party or parties.

Explanation of Proposed Amendment

The amendment is intended to explicitly define what constitutes business hours for purposes of filing with the commission.