



**STATE OF CALIFORNIA
COMMISSION ON JUDICIAL PERFORMANCE
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**REPORT CONCERNING ADOPTION OF ADDITIONS AND AMENDMENTS TO
RULES OF THE COMMISSION ON JUDICIAL PERFORMANCE
February 28, 2025**

On December 6, 2024, 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. The commission did not receive any public comment in response to the invitation. At its January 29-30, 2025 meeting the commission adopted the proposed rule amendments. The text of each amendment is attached, 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.

I. EXPLANATION OF RULE AMENDMENTS

**A. AMENDMENT TO RULE 121(f) TO SET FORTH THE
PROCEDURES FOR TAKING REMOTE TESTIMONY DURING
EVIDENTIARY HEARINGS**

Explanation of Amendment

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 was 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 does 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 in disability proceedings, however, may still be taken by stipulation of the parties.

No comments supporting or opposing the amendment were received.

**B. AMENDMENT TO RULE 122(I) TO PROVIDE FOR THE
CONTINUED CONFIDENTIALITY OF DISCOVERY**

Explanation of 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 additional language to rule 122(I) will 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.

No comments supporting or opposing the amendment were received.

**C. AMENDMENT TO RULE 138(i) TO CLEARLY DESIGNATE
"REGULAR BUSINESS HOURS" AS 8:00 A.M. TO 5:00 P.M.**

Explanation of Amendment

The amendment explicitly defines what constitutes business hours for purposes of filing with the commission.

No comments supporting or opposing the amendment were received.

II. DISCUSSION OF RULE PROPOSALS NOT CIRCULATED FOR PUBLIC COMMENT

During its 2024 biennial rules review, the commission received two rule proposals from the California Judges Association (CJA). The commission determined not to circulate the proposals for public comment.

A. PROPOSED AMENDMENT TO RULE 113

Proposal

CJA proposed amending rule 113 (Notice of Tentative Advisory Letter, Private Admonishment, or Public Admonishment) to include language that the notice of tentative discipline shall include a statement of facts, “*with a specific delineation of the facts the commission believes are undisputed,*” and the reasons for the tentative discipline. CJA asserted that “[W]e are concerned that the current rules do not inform the judge what the [c]ommission believes are the undisputed facts [contained in the tentative discipline],” and “these changes are necessary to accurately inform the judge what facts the [c]ommission is relying upon and believes to be undisputed.” CJA stated that this “would aid the judge in tailoring ... objections and evidence at the appearance before the [c]ommission.”

Reasons Proposal Was Not Circulated for Public Comment

The proposal was not circulated for comment for the following reasons. In the commission’s view, this proposal is based on a misunderstanding of the commission’s policies and procedures. The commission does not include disputed facts in notices of tentative (or final) discipline. If a judge disputes any of the facts underlying an allegation that would be necessary to a finding of misconduct, the commission will omit the alleged misconduct from tentative discipline (though the commission may advise the judge that, should the judge demand formal proceedings, the alleged misconduct may be charged).

The commission determined, however, to explicitly include in notices of tentative discipline that the proposed statement of facts is based upon undisputed facts.

B. PROPOSED AMENDMENT TO RULE 114

Proposal

CJA also proposed the following amendments to rule 114(b) (amendments in italics and deletions in strike through), which would significantly alter a judge’s ability to

present new evidence during an appearance before the commission. CJA states that “we are concerned that the current rules do not allow the judge an opportunity to present evidence that might dispute or explain facts that the [c]ommission believes to be undisputed.”

Rule 114 (Advisory Letter, Private Admonishment, and Public Admonishment Procedure)

(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 discipline, waiving any right to formal proceedings under rule 118 (if applicable) and 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 discipline. *With the objections, the judge may present any evidence or information, including new documents, letters, or witness statements, supporting said objections, and the commission shall consider the same. If the commission determines that any new evidence is material and merits additional investigation, the commission may investigate the new information before proceeding with its disposition pursuant to the appearance process.*

The appearance before the commission is not an evidentiary hearing.

After the time set for the appearance before the commission, the commission may:

- (1) Close the matter without disciplinary action;
- (2) Issue the tentative discipline; or
- (3) Issue a 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 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 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 but may be the subject of a new preliminary investigation.~~

Reasons Proposal Was Not Circulated for Public Comment

The proposal was not circulated for comment for the following reasons. The language in rule 114 limiting the admission of any new evidence at appearances was added in 2011, in response to a number of judges who were submitting new evidence in the form of witness declarations, documents, and letters during the appearance process. This presented problems because the appearance process is not an evidentiary hearing and factual disputes and questions cannot be resolved at the appearance. If the information is presented in the judge's response to the preliminary investigation, the assigned investigating attorney can conduct further investigation so that the commission can have complete information before making a dispositional decision. Once a notice of tentative discipline is issued and the judge waives formal proceedings, however, the matter is no longer in the investigation stage: the preliminary investigation is concluded.

The amendment to rule 114 in 2011, adding the language regarding new evidence, garnered significant debate and the commission considered several versions of the rule. CJA and respondents' counsel also submitted a large

number of comments, objections, and suggested modifications to the proposed amendment. The commission considered a number of factors, including the importance of ensuring that final decisions were factually accurate, the importance of respondent judges responding fully to allegations during the preliminary investigation process, and avoiding procedural problems associated with the late submission of evidence.

The final language in the first subsection that the new evidence must be “(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,” was modelled on the standard used by courts in determining whether to grant a new trial based on new evidence in civil and criminal trials. (See, Code Civ. Pro. § 657(4) [Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.]; Pen. Code § 1181(8) [When new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial.].) The other two exceptions: if the new evidence is offered to correct an error of fact in the notice of tentative discipline, or necessary to prevent a miscarriage of justice, were added to ensure that the commission has the discretion to make certain any final discipline is accurate and fair, even if all the evidence was not presented in a timely manner

The commission concluded the language and limitations currently in place strike the appropriate balance in protecting judges if, in fact, there is new evidence relevant to the allegations, safeguarding the accuracy of final decisions by the commission, and ensuring that judges are required to present all available, relevant evidence at the appropriate stage during the process, wherein that evidence can be investigated further, if necessary. CJA’s proposed amendment which would allow a judge to present “*any evidence or information, including new documents, letters, or witness statements*” and “*if the commission determines that any new evidence is material and merits additional investigation, the commission may investigate the new information before proceeding with its disposition pursuant to the appearance process*” would potentially open the door to an entirely new investigation after tentative discipline has issued, with no showing why the evidence was not presented during the preliminary investigation.