

THE CALIFORNIA JUDGES ASSOCIATION'S  
AMENDED PROPOSAL FOR REVISION TO THE RULES  
OF THE COMMISSION ON JUDICIAL PERFORMANCE

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The California Judges Association (CJA) submits the following proposed changes to the Rules of the Commission on Judicial Performance, in conjunction with the biennial review of such rules.

The CJA is an organization that is well-positioned to voice the ideas and concerns of the judiciary in the State of California, and, accordingly, requests that the Commission give careful and thoughtful consideration to this submission.

The CJA remains ready and willing to engage in a discussion with the designated Commission representatives at any time about these proposals, or otherwise. The CJA appreciates the opportunity to give input into this important process, and looks forward to continuing dialogue.

The CJA recognizes its proposals may require additional editing and modification in order to function within the Commission system and Constitutional mandates. Therefore, the CJA is ready and willing to engage in discussions with the designated Commission representatives at any time about these proposals. The CJA appreciates the opportunity to provide input into this important process.

The following rules highlighted in yellow are those for which the CJA proposes additions or modifications.

Rule 101	Interested Party
<b>Rule 102</b>	<b>Confidentiality and Disclosure</b>
Rule 103	Protection from Liability for Statements
Rule 104	Duty to Cooperate; Response by Respondent Judge
Rule 105	Medical Examination
Rule 106	Judge's Representation by Counsel
Rule 107	Notice Requirements
Rule 108	Extensions of Time
Rule 109	Commencement of Commission Action
<b>Rule 110</b>	<b>Staff Inquiry; Advisory Letter after Staff Inquiry</b>
<b>Rule 111</b>	<b>Preliminary Investigation</b>
<b>Rule 111.1</b>	<b><i>Discovery Procedures in Preliminary Investigation (NEW)</i></b>
<b>Rule 111.4</b>	<b>Legal Error</b>
Rule 111.5	Correction of Advisory Letter
Rule 112	Monitoring
Rule 113	Notice of Intended Private Admonishment
Rule 114	Private Admonishment Procedure
Rule 115	Notice of Intended Public Admonishment

Rule 116	Public Admonishment Procedure
Rule 116.5	Negotiated Settlement During Preliminary Investigation
<i>Rule 116.6</i>	<i>Early Neutral Evaluation Conference During Preliminary Investigation</i> (NEW)
Rule 117	Use and Retention of Commission Records
Rule 118	Notice of Formal Proceedings
Rule 119	Answer
Rule 119.5	Filing with the Commission During Formal Proceedings
Rule 120	Disqualification
Rule 120.5	Suspension; Termination of Suspension; Removal of Suspended Judge
Rule 121	Setting for Hearing Before Commission or Masters
Rule 122	Discovery Procedures <i>in Formal Proceedings</i>
Rule 123	Hearing
Rule 124	Media at Hearing
Rule 125	Evidence
Rule 125.5	Exhibits at Hearing
Rule 126	Procedure Rights of Judge in Formal Proceedings
Rule 127	Discipline by Consent
Rule 128	Amendments to Notice
Rule 129	Report of Masters
Rule 130	Briefs to the Commission
Rule 131	Participation by Non-Parties
Rule 132	Appearance Before Commission
Rule 133	Hearing Additional evidence
Rule 134	Commission Vote
Rule 134.5	Rule of Necessity
Rule 135	Record of Commission Proceedings
Rule 136	Finality
Rule 137	Retroactively
Rule 138	Definitions

**COMMENT:**

While the Commission and the Commission staff should be obligated to keep proceedings confidential, the CJA believes that judicial officers should have the ability to speak about such proceedings as they see fit and appropriate. There is no rule in the State Bar discipline system which requires respondents to keep the proceedings confidential.

The CJA also supports the Commission staff continuing to give admonitions of confidentiality to witnesses, though the admonition should also be clear that the witnesses are not prohibited from speaking to the judicial officer or his/her counsel.

**REDLINED TEXT:**

**Rule 102. Confidentiality and Disclosure**

(a) **(Scope of rule)** Except as provided in this rule, all papers filed with and proceedings before the commission shall be kept confidential by commission members and members of the commission staff and all witnesses. Nothing in this rule prohibits the respondent judge from discussing or making statements regarding the conduct underlying a complaint or proceeding, or the complaint or proceeding itself. ~~Nothing in this rule prohibits the respondent judge or anyone other than a commission member or member of commission staff from making statements regarding the judge's conduct underlying a complaint or proceeding.~~

**COMMENT FOR PROPOSED AMENDMENTS TO RULES 110 AND 111:**

The Commission should have the option of educating judicial officers, short of discipline. The CJA understands that the Commission is considering a mentoring program, which would serve this purpose. Another option would be the allowance of an educational letter, in the event that the Commission has determined that it will not close the matter, and it is considering the issuance of an advisory letter. There may, for example, be instances in which the Commission believes that certain conduct is not appropriate under the Canons, but there is no reasonable way that the judicial officer at issue could have known of this expectation. An educational letter would be appropriate in this instance.

The State Bar has at its disposal a variety of options short of actual discipline, all of which serve the goal of protecting the public as well as educating the bar. Similar options in the Commission structure make sense.

The CJA is very cognizant of the authority set forth in the *Oberholtzer* decision, and realizes the challenges in crafting the option of an educational letter that does not conflict with that California Supreme Court opinion. However, the CJA believes there may be ways to accomplish this goal, and urges the Commission to fully explore all available options.

**REDLINED TEXT:**

**Rule 110. Staff Inquiry; Advisory Letter after Staff Inquiry**

(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 specifications 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 issue 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) **(Educational Letter and Advisory letter)**

(i) At any time after notice of a staff inquiry and a reasonable opportunity to respond has been given to the judge, if the commission has determined that it

cannot terminate the staff inquiry in accordance with section (c) above, and is considering the issuance of an advisory letter, the commission shall, prior to the issuance of any advisory letter, consider if a non-disciplinary educational letter is appropriate as an alternative, and, if so, issue one accordingly.

(ii) 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.

[Adopted 12/1/96; amended 5/8/13.]

**REDLINED TEXT:**

**Rule 111. Preliminary Investigation**

(a) **(Notice)** If the commission commences a preliminary investigation, the judge shall be notified of the investigation and the nature of the charge, and shall be afforded a reasonable opportunity in the course of the preliminary investigation to present such matters as the judge may choose. A reasonable time for a judge to respond to a preliminary investigation letter shall be 20 days from the date the letter was mailed to the judge, or, if the judge timely requests discovery pursuant to Rule 111.1, 20 days from the date the discovery is mailed or otherwise provided pursuant to Rule 111.1, unless the time is extended pursuant to rule 108.

(b) **(Preliminary investigation letter)** A preliminary investigation 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 investigation concerns statements made by or to the judge, the letter shall include the text or summaries of the comments.

(c) **(Termination of investigation)** If the preliminary investigation does not disclose sufficient cause to warrant further proceedings, the commission shall terminate the investigation and notify the judge in writing.

(d) (Educational Letter and Advisory letter)

(i) At any time after notice of a preliminary investigation and a reasonable opportunity to respond has been given to the judge, if the commission has determined that it cannot terminate the preliminary investigation in accordance with section (c) above, and is considering the issuance of an advisory letter, the commission shall, prior to the issuance of any advisory letter, consider if a non-disciplinary educational letter is appropriate as an alternative, and, if so, issue one accordingly.

(ii) 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.

[Adopted 12/1/96; amended 5/8/13.]

**COMMENT:**

Even lower forms of discipline can have a tremendous impact on the career, life, and esteem of a judicial officer. A public admonishment can destroy a career that may have spanned decades. In a system where judges are obligated to stand for reelection, any public discipline will be used heavily against the judge.

In light of these consequences, the CJA believes that judicial officers should have a right to some discovery before the formal proceedings stage. No such current right exists.

Additionally, without adequate discovery, judges may be obligated to respond to the Commission without knowing the full picture, or exactly what it is they need to respond to. They oftentimes have inadequate information. The proposed rule provides the responding judges with the information needed to fairly confront allegations made against them, without hindering the Commission's ability to effectively investigate complaints.

The following draft rule sets forth certain limited categories of documents that a judicial officer under investigation should be allowed to view, in order to prepare his or her defense, and respond to the serious accusations.

Rule 111.1. Discovery Procedures in Preliminary Investigation

(a) The procedures in this rule shall apply only after initiation of a preliminary investigation. Discovery may only be obtained as set forth in this Rule and Rule 122.

(b) Upon the written request of the judicial officer, which must be made within 10 days of the receipt of the preliminary investigation letter, the judicial officer shall be provided with copies of the following, which are not privileged and are in the possession of the commission: (1) all transcripts or transcriptions of court proceedings related to the preliminary investigation; (2) all pleadings, and court filings and submissions related to the preliminary investigation; (3) all writings referenced in the preliminary investigation letter; and (4) all statements about the subject matter of the preliminary investigation. Such information shall be made available at the commission offices. Alternatively, if a judicial officer requests that the materials be sent to a specific address, the commission shall provide the judicial officer with copies of said documents and information at that address.

(c) The commission shall provide the discovery set forth in section (b) within 30 days of the request of the judicial officer.

**COMMENT:**

Judicial officers across the State of California have a serious concern that the Commission is disciplining the judiciary for legal error. The CJA is aware of the precedent on the issue of legal error in *Oberholtzer*, and believes that the following changes to this rule would reflect the spirit and intent of the Supreme Court, and provide judges with a higher degree of confidence that they indeed will not be disciplined simply for making a mistake of law.

**REDLINED TEXT:**

**Rule 111.4 Legal Error**

Discipline, including an advisory letter, shall not be imposed for mere legal error ~~without more~~. However, a judge who commits legal error which, in addition, clearly and convincingly reflects bad faith, bias, abuse of authority, intentional disregard for fundamental rights, intentional disregard of the law, or any purpose other than the faithful discharge of judicial duty is subject to investigation and discipline.

[Adopted 5/8/13.]

## **COMMENT TO PROPOSED AMENDMENT TO RULES 116.5 AND 116.6:**

It is the CJA's understanding that the Commission is amenable to consideration of proposals to enhance the ability to negotiate and settle preliminary investigation matters, without incurring the expense of the entirety of the proceeding. Often times the judicial officer may be willing to accept a certain level of discipline. Other times, it may behoove the Commission representative to hear informally from the judicial officer in a protected environment before discipline is proposed. The State Bar system has an Early Neutral Evaluation (ENE) process that is effective, and results in the resolution of many matters every year. The CJA's revisions to Rule 116.5, and proposal of Rule 116.6, are designed to simplify the current negotiation process, and provide for an ENE alternative.

### **REDLINED TEXT:**

#### **Rule 116.5. Negotiated Settlement During Preliminary Investigation**

At any time during a preliminary investigation or an admonishment proceeding under rules 113-116, the commission chairperson may designate ~~trial counsel~~ an attorney member of the commission staff or another attorney authorized by the commission to negotiate with the judge a resolution of any matter at issue. The designated attorney shall be fully authorized to negotiate with the judge or the judge's counsel. A proposed resolution shall be jointly submitted to the commission, which may accept it, reject it or return it to the judge and ~~examiner~~ designated attorney to consider modifications to it. No agreement between the judge and ~~legal staff~~ the designated attorney is binding unless approved by the commission. A settlement proposal rejected by the commission cannot be used against the judge in any proceedings. After formal proceedings are instituted, settlement negotiations are governed by rule 127.

**REDLINED TEXT:**

**Rule 116.6. Early Neutral Evaluation Conference During Preliminary Investigation**

(a) At any time during an admonishment proceeding under rules 113-116, the judicial officer may request an early neutral evaluation conference (ENE). The ENEs shall be presided over by a special master. Special masters shall be judges, including retired judges from courts of record. The commission shall seek the approval of the Supreme Court of a roster of special masters for ENEs, and the commission staff shall, upon the request of the judicial officer for an ENE, appoint the next available special master in rotation from said roster.

(b) ENEs may take place telephonically, in person, or with some participants in person and some participating telephonically. No more than three hours shall be designated for ENEs, except under extraordinary circumstances.

(c) The special master shall accept briefs from the judicial officer and from the attorney member of the commission staff or another attorney authorized by the commission to participate in the ENE. Such briefs shall be no longer than 10 pages each.

(d) If, and only if, the judicial officer and the attorney member of the commission staff (or other attorney authorized by the commission to participate in the ENE) are able to agree upon a resolution with the assistance of the special master, the special master shall submit a recommendation for resolution to the commission chairperson, in a form designated by the commission, which shall then go to the full commission for consideration and approval. If a resolution cannot be agreed upon, the special master shall so inform the commission chairperson in writing. In either instance, the special master shall have 20 days to submit the recommendation or notice of a lack of resolution to the commission chairperson. The commission staff shall transmit any submissions from the special master to the judge within 10 days of receipt.

(e) The commission must accept the recommendation of the special master, unless the judicial officer objects to the submission from the special master, or the commission believes that accepting the recommendation would cause harm to the public or the administration of justice. In accepting the recommendation of the special master, the commission retains the right to make non-substantive modifications to the recommendation, though the judicial officer must also agree to any modifications, in order for the outcome to be final.

(f) Admonishment proceedings shall be stayed from the date of the request by the judge for the ENE until the following: (1) in the instance where the special master informs the commission chairperson that there is no resolution, the date on which the commission staff notifies the judicial officer of such; or (2) in the instance where the special master issues a recommendation but no resolution is consummated, the date on which the commission staff notifies the judicial officer that resolution has not been reached, and the commission is recommencing with the admonishment proceeding.

(g) The ENE proceeding shall be protected as a mediation in accordance with California Evidence Code section 1119.

**COMMENT:**

The changes to this rule clarify that discovery may be obtained in the context of formal proceedings, and, as set forth in proposed Rule 111.1, in the context of preliminary investigations. The scope of discovery in the two instances is different, however.

**REDLINED TEXT:**

**Rule 122. Discovery Procedures in Formal Proceedings**

(a) ~~(Exclusive procedures)~~ The procedures in this rule ~~shall apply shall constitute the exclusive procedures for discovery. Discovery may be obtained~~ only after a written notice of formal proceedings is issued. Discovery may only be obtained as set forth in this Rule and Rule 111.1.

**COMMENT:**

The special masters in the context of formal proceedings hear all of the evidence and argument, and assess the credibility of the witnesses. The Commission members do not participate in these formal proceedings, and therefore do not have the opportunity to assess the matter in the way that the special masters do. The CJA is not critical of this delegation of responsibilities to special masters, but, if the responsibility to hear and accept the evidence, and the responsibility to assess the witnesses, is so delegated, the Commission should be obligated to accept the findings of fact and conclusions of law of the special masters.

It is fundamentally unfair for the Commission to adjust these findings, often to the detriment of the judicial officer, upon the mere reading of a written record. While the CJA agrees that the Constitutional ability to impose discipline lies exclusively with the Commission members, the Commission should be bound by the findings of the special masters in determining the level of discipline, if any.

This CJA also recognizes that there are alternatives to the proposed language, such as a rule that requires the Commission to accept the findings of fact, absent the existence of clearly erroneous findings, and requires the Commission to give the conclusions of law great deference. Another option is a rule that requires the Commission to be bound by findings of fact and to give great deference to the conclusions of law.

The CJA is prepared to work with the Commission to assist in crafting language that meets the goal stated in this comment.

**REDLINED TEXT:**

**Rule 129. Report of Masters**

(d) **(Content of report of masters)** The report of the masters shall contain findings of fact and conclusions of law, along with an analysis of the evidence and reasons for the findings and conclusions, but shall not contain a recommendation as to discipline. The commission shall be bound by the findings of fact and conclusions of law of the masters in determining the imposition of discipline.