



# CALIFORNIA JUDGES ASSOCIATION

*The Voice of the Judiciary*

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## THE CALIFORNIA JUDGES ASSOCIATION'S RESPONSE TO INVITATION TO COMMENT ON PROPOSED AMENDMENTS TO RULES OF THE COMMISSION ON JUDICIAL PERFORMANCE *May 14, 2019*

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### **I. Preface**

The California Judges Association (CJA) appreciates the opportunity to again participate in the Biennial Rules Revision process. The CJA thanks the commission for its thoughtfulness during the last review process and the adoption of several of the suggestions of the CJA with regard to Rule 116.5.

The CJA continues to support mentorship and educational efforts to assist judges in adhering to the Canons and, in particular, for judges with demeanor issues, the promotion of tips and techniques for adjudicating matters in a way that is patient, dignified, and courteous. It is the experience of the CJA that judges are open and amenable to constructive feedback and will conform to best practices if given an opportunity to do so. Rehabilitation and restorative justice are systems that are proven to reform behavior as an alternative to discipline and with greater success. The CJA remains available to assist in all educational and mentoring processes, as a means of ensuring that the people of the State of California have full confidence in the judiciary.

### **II. Comments on the Rule Proposals offered by the commission:**

#### **A. Rule Proposal No. 1**

### **PROPOSED AMENDMENTS TO RULES 113 AND 115 CONCERNING NOTICE OF INTENDED PRIVATE AND PUBLIC ADMONISHMENT**

The CJA supports this revision. It clarifies that the commission has not pre-judged the matter when it issues such a notice.

B. Rule Proposal No. 2

**PROPOSED AMENDMENTS TO RULES 122 AND 126 TO PROVIDE NEW DISCOVERY PROCEDURE FOR SUBPOENAS FOR THE PRODUCTION OF DOCUMENTS**

The right of the judge to subpoena documents in anticipation of a formal proceeding is an important one. Without subpoena power, the judge is placed in a severe disadvantage in crafting his or her defense. The CJA supports a rule that sets forth the procedure for subpoenas. However, CJA believes that applications for subpoena should be heard by the special masters after they have been appointed. They are the ones immersed in the details of the matter and the ones best suited to make a determination about the appropriateness of the subpoena. Moreover, the CJA believes that the rule requires clarification in terms of the timing for the determinations on applications, objections, and the issuance of the subpoena. Accordingly, the CJA offers the following revisions.

**Rule 122. Discovery Procedures**

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***(h) (Subpoenas for the production of documents)** After the filing of the notice of formal proceedings, subpoenas for the production of documents by nonparties shall be allowed as provided in this subdivision. The party requesting the subpoena shall bear all costs for service of process of the subpoena on a nonparty.*

***(1)** The parties shall have the right to the issuance of up to four subpoenas for the production of documents to nonparties, subject to the requirements of this rule. Subpoenas issued to commission members or staff under this rule are not permitted. Commission files and records are not subject to a subpoena for production of documents.*

***(2)** If the examiner and judge stipulate in writing that a subpoena for the production of documents may issue, the commission shall issue the subpoena. If the examiner and judge are unable to agree to the issuance of a particular subpoena, the party seeking the subpoena may file an application for the issuance of that subpoena with the commission, or, if the Special Masters have been appointed, with the Special Masters. The application shall be made on a form provided by the commission and shall include a declaration from the party or the party's attorney establishing good cause and including (a) an itemization, with reasonable particularity, of each document requested, (b) facts establishing why each document is relevant to the issues raised in the formal proceeding, and (c) facts establishing that the witness has the documents requested in the witness's custody or control. A copy of the proposed subpoena shall be attached to the application. Commission files and records are not subject to a subpoena for the production of documents. The application must be served on the other party. Unless objections are submitted as set forth below, the application shall be ruled upon within 12 days of the filing of the application. If good cause is found based on the foregoing factors, the chairperson of the*

commission, the chairperson's designee, or the special masters will issue the subpoena within the same 12 day period of the filing of the application. Upon a finding of good cause based on the foregoing factors, the chairperson of the commission, the chairperson's designee, or the special masters may issue the subpoena.

If either the examiner or the judge objects to the subpoena request of the other, an objection must be filed and served within seven days of the filing of the application. The commission or, if the Special Masters have been appointed, the Special Masters, shall determine whether to issue the subpoena within seven days after the filing of the objection. If it is determined that the subpoena shall be issued, the chairperson of the commission, the chairperson's designee, or the special masters will issue the subpoena within the same seven day period of the filing of the application. Objections to an application for a subpoena for the production of documents shall be filed within seven days of the filing of the application. The commission or the Special masters may place restrictions or conditions on the manner, time, and place of the document production.

(3) Applications for subpoenas for the production of documents shall be made in sufficient time for service of the subpoena and the production of documents to be completed 30 days prior to the hearing, unless a later cut-off time otherwise is set by the commission or by stipulation of the examiner and the judge or by the Special Masters.

(4) If an application for a subpoena seeks documents that are personal records as defined by Code of Civil Procedure section 1985.3, or employment records as defined by Code of Civil Procedure section 1985.6, the application shall include a "notice of privacy rights" advising the individual whose records are sought of the subpoena and of the individual's right to object to the subpoena within 7 days of the Notice. If the subpoena is issued, the subpoena, accompanied by the notice of privacy rights, shall first be served on the individual whose records are sought by the subpoena. The notice of privacy rights must be personally served or acknowledged in writing by the individual upon whom the notice was served. A proof of service, or a written acknowledgment of receipt, shall be filed with the commission or, if the Special Masters have been appointed, the Special Masters. The recipient of a notice of privacy rights has seven days to file an objection. If no objection is filed by the individual within seven days, the subpoena may be served on the nonparty custodian of the individual's records. If an objection is filed, the commission, or if the Special Masters have been appointed, the Special Masters, shall determine whether to issue the subpoena within seven days after the filing of the objection. If it is determined that the subpoena shall be issued, the chairperson of the commission, the chairperson's designee, or the Special Masters will issue the subpoena within the same seven day period after the filing of the objection.

(5) Documents shall be produced within 15 days of service of the subpoena., unless an objection has been filed with the commission. If an objection is filed, no documents shall be produced in response to a subpoena until the objection has been considered by the chairperson of the commission or the special masters.

(6) Any motions under this subdivision shall be presented to the commission, or if the Special Masters have been appointed, to the Special Masters. The commission may designate the chairperson or the chairperson's designee (including the Special Masters) to perform all or any part of its duties under this subdivision. If special masters have been appointed pursuant to rule

~~121, subdivision (b), the chairperson may designate one or more of them to perform all or any part of the commission's duties under this subdivision.~~

C. Rule Proposal No. 3

**PROPOSED AMENDMENT TO RULE 128 TO CLARIFY WHETHER THE COMMISSION OR THE SPECIAL MASTERS CONSIDER A MOTION TO AMEND THE NOTICE OF FORMAL PROCEEDINGS**

The CJA supports amendments to this Rule, but feels that the language and concept require further clarification and modification. “If a motion to amend the notice to set forth additional facts not presented at the hearing is made during the evidentiary hearing...” It is the CJA’s understanding from the explanation of the proposed amendment that the intention is to allow the special masters to rule on a motion to amend made during the course of the evidentiary hearing if it is based on evidence presented at the hearing. If, however, the examiner moves to amend the notice during the hearing based on information obtained other than through the evidence presented at the hearing, the chairperson of the commission, or the chairperson’s designee, shall determine who shall hear the motion.

It is difficult to imagine circumstances that would allow an amendment during the formal proceeding that is not based on the evidence presented at the hearing, without violation of the judge’s due process rights. However, in the event that the circumstances arise, the CJA believes that the special masters should still hear the motion and make the determination, since they are in the best position to do so during the course of the hearing.

**III. Rule proposals offered by the CJA:**

A. 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 in determining the imposition of discipline.

**COMMENT:** The CJA believes that its suggested change to this Rule (proposed during the last biennial Rules Revision process) should be re-considered in light of the recent report of the California State Auditor, dated April 25, 2019. The State Auditor recognized issues that the CJP has likewise been concerned about for some time. Here’s the relevant excerpt from the State Auditor’s summary at the beginning of the report:

Additionally, CJP’s structure and disciplinary proceedings are not aligned with judicial discipline best practices because the commission currently serves as a unitary—or single—body. Because of this structure, commissioners are involved in both CJP’s investigatory and disciplinary functions, and as a result, they

are privy to allegations of and facts about unproven misconduct that should not factor into disciplinary decisions. Although it is not identical in nature, CJP's structure is analogous to a jury in a criminal case being composed of the detectives who investigated that case. In contrast, best practices recommend a bicameral—or two-body—structure for judicial discipline commissions. A bicameral structure would have one body responsible for investigating allegations of judicial misconduct while the other would be responsible for issuing discipline.

CJP continues to use judges called *special masters* to preside over evidentiary hearings, which are the public trial portion of disciplinary proceedings. This practice does not fully realize the intent of Proposition 190, which the voters passed in 1994. Proposition 190 sought to increase the public's role in judicial discipline through reforms that included ensuring that the majority of the commissioners were members of the general public rather than judges or attorneys. However, because these public members do not directly hear evidence or observe witnesses to assess their credibility during evidentiary hearings, judges continue to have a significant amount of influence in CJP's disciplinary process. Since CJP's authority and structure stem from the California Constitution, reforming CJP's structure and requiring the commission to hear its own disciplinary proceedings will require an amendment to the California Constitution.

The CJA shares the concern of the State Auditor that the commission is a unitary body that both directs the investigations and ultimately determines the matter. The commission also expressed concern that the commission members making the ultimate disciplinary determinations do not hear the evidence. This corresponds with the CJA's concern that it is, at best, unfair that the commission retains the right to disregard the findings of fact of the special masters, since the special masters are the ones who listen to the evidence and have the opportunity to assess the credibility of the witnesses.

The State Auditor suggests that creating a bicameral body through a constitutional amendment may be the ultimate solution. The State Auditor's concerns could also be addressed, at least as an interim measure, by:

(a) including one commission public member on the panel of special masters for formal proceedings, and

(b) binding the commission to the findings of fact generated by a panel that includes its own appointed public member.

To put it another way, the findings of fact would be generated in part by a commission public member who directly considers the evidence and has the opportunity to assess the credibility of

the witnesses. Including the commission public member on the panel should also resolve any constitutional concerns about the commission being bound by the findings of fact made by the panel of special masters.

The CJA would only be supportive of adding a commission public member to the special master panel if it is accompanied by a Rule that says that the commission is bound by the findings of fact generated by the panel that includes this public member. These two concepts are logically related and, again, together, seem to address a variety of concerns that have been raised, by the State Auditor and otherwise.

B. Rule 111.1. Discovery Procedures in Preliminary Investigation

(a) (Exclusive procedures) 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, 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.

**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. The Rule proposed by the CJA 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.

The CJA appreciates the commission's explanation for the rejection of this proposed rule during the last Biennial Rules Revision process. However, the CJA continues to believe that the fact that discovery is not done in other states is a poor justification for the California commission not adopting a rule that gives its judicial officers an opportunity to respond to the charges. Importantly, the CJA has carefully drafted its proposed Rule 111.1 to narrowly tailor the scope of the discovery, in order to minimize the burden on the commission and its limited resources.

C. 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 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. However, the scope of discovery in the two instances is different.