

Commission on Judicial Performance, Attn. Janice M. Brinckley, Legal Advisor to Commissioners

455 Golden Gate Avenue Ste. 14400

San Francisco, CA 14400

RE: Rule 102 Confidentiality and Disclosure

July 29, 2018

RECEIVED

JUL 31 2018

COMMISSION ON  
JUDICIAL PERFORMANCE

Dear Commissioners,

Your current policy does not protect litigants from judicial retaliation.

Redacted pursuant to policy declaration 3.5(6)

Judicial retaliation in Santa Clara County Family Court is an open secret. You don't investigate. Confidentiality plus refusing to investigate is a core problem of the Commission.

Confidentiality does not serve the public's interests, and there has been no poll of the public to support the Commission's position on confidentiality. Judges want total nondisclosure of complaints and discipline. Perhaps attorneys hope to make complaints privately, but few attorneys believe that their complaints are truly confidential. Pro pers find that, when they suffer judicial retaliations, the Commission fails to investigate. I have read, for example, a portion of a transcript in which attacked a pro per for filing complaints with the State Bar and the Commission. How did he know?

The public is forced to vote blind for judges because we have no information about which judges are accumulating complaints against them, received disciplinary letters or private admonishments; nothing. Yet, when we elect other officials, we have information about their professional and personal lives. Californians time after time when polled express distrust of the judiciary.

You rely on Arizona to support secrecy. If complaints dropped in Arizona after increased transparency, the proper conclusion is that judges retaliate with impunity against those who file complaints and should be removed from office, not that transparency failed. Just as judges do in California under your Rule 102.

So for goodness sakes, begin revising your rules to allow the State Auditor to conduct a complete audit. And don't stop there. Continue to revisit your assumptions about what is in the public's interests, and increase transparency and decrease the percentage of complaints you close without investigation.

Yours truly,

  
Mari-Lynne Earls, M.A.

823 2<sup>nd</sup> Street West

Sonoma, CA 95476

## COMMENT

### Proposed Amendments to Rules of the Commission on Judicial Performance

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AUG 09 2018  
COMMISSION ON  
JUDICIAL PERFORMANCE

Please copy this sheet. Use a separate sheet for each issue.

**Rule:** 102

**Issue:**

privacy of materials involving complaints that have not proceeded to actual proceedings

**Comment:**

I believe that the proponents of this rule change have been very naive.

It is very well known that many of those making complaints to the commission have simply been unhappy with a result before a judge and either misconstrue the obligations of the judge or wish to extract a form of vengeance by making a false or exaggerated claim. There are two likely outcomes that are very predictable from this proposed change.

(see attached page for these items)

**Alternative proposal:**

At the very least, the proposal should be modified to make it clear that the Auditor will be restricted as to which staff may have access and, in any event, the exception language expanded to make clear that not just the actual information reviewed but any summary or other use of the information shall be barred.

(Continue on back or on a separate sheet.)

**Name:** DAVID FLINN **Title:** RETIRED JUDGE

**Address:** 1375 Pine tree Drive, Alamo Ca 94507

**Telephone:** 925-855-9855

Your comment may become public during the review of the proposed amended rules regarding the Commission on Judicial Performance. Thank you for your assistance.

**Please return on or before August 16, 2018.**

Commission on Judicial Performance  
Attn: Janice Brickley, Legal Advisor to Commissioners  
455 Golden Gate Avenue, Suite 14400  
San Francisco, CA 94102  
FAX: (415) 557-1266

First is the problem with leaks. All government offices with substantial staff have been unable to fully prevent any leakage of 'newsworthy information'; the State Auditor office is no exception. The foreseeable result is an aggressive journalist, politically opposed to the judicial result that led to the unjustified complaint, will tarnish the reputation of the jurist as to whom a complaint was filed.

Secondly, while the intention of the commission to seek legislation requiring the Auditor to keep what has been allowed to be seen confidential, there is no assurance that such legislation will be forthcoming and, in any event, such legislation is likely to be filled with exceptions for 'political' reasons.



# CALIFORNIA JUDGES ASSOCIATION

*The Voice of the Judiciary*

RECEIVED

AUG 10 2018

COMMISSION ON  
JUDICIAL PERFORMANCE

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August 10, 2018

Commission on Judicial Performance  
Attn: Janice M. Brickley, Legal Advisor to Commissioners  
455 Golden Gate Avenue, Suite 14400  
San Francisco, CA 94102

*via email and fax (415) 557-1266*

**RE:** Proposed Amendment to Rule 102 to allow disclosure of confidential records to the California State Auditor

Dear Ms. Brickley:

The California Judges Association (CJA) recognizes and appreciates the Commission's protection of the confidentiality of Commission records, prior to the filing of formal charges. At the same time, as noted by the Commission in the "Explanation of Proposed Amendment," the public has a legitimate interest in an independent and impartial audit of publicly funded state agencies and commissions, including the Commission on Judicial Performance.

The CJA has no objection to the release of confidential information to the California State Auditor, so long as the Auditor is likewise obligated to keep the information confidential and the information is protected from disclosure pursuant to the Public Records Act and otherwise. While the Commission notes that confidentiality is important in order to encourage the filing of valid complaints and to protect complainants from retaliation, confidentiality is also essential to judicial officers across the state and the attendant administration of justice.

Many jurists are the targets of complaints that are outside of the Commission's jurisdiction; that are unmeritorious or otherwise unsupported; that are minor in nature; and/or that are cured through a variety of means, including mentoring. The Commission's 2017 Annual Report demonstrates that in 2017 the Commission had 1,229 complaints, with 1,081 closed after initial review. Of the 148 that proceeded to a staff inquiry or preliminary investigation, 106 were closed without discipline.

The public release of information pertaining to these complaints would have severe repercussions for judicial officers and the administration of justice. Judicial officers would potentially be forced to recuse themselves in large numbers from pending cases and ongoing appeals could be affected. Moreover, the reputations and careers of dedicated jurists could be negatively impacted for no good cause. Complaints and

Proposed Amendment to Rule 102  
August 10, 2018  
Page 2

the Commission process could be improperly utilized in the course of judicial elections and otherwise. The reasons for the continued maintenance of confidentiality are many, all supported by strong public policy.

The CJA understands Commission records obtained by the State Auditor may not be subject to the Public Records Act and attendant production by virtue of Government Code section 8545.1 and 8545.2(b). However, the CJA believes that a legislative amendment is necessary to clarify that records deemed confidential by way of an authorized rule are exempted from the Public Records Act. In this instance, the California Constitution specifically permits the Commission to provide for the confidentiality of complaints to and investigations by the Commission. The Commission has enacted such confidentiality provisions, in Rule 102. A legislative amendment, as sought by the Commission, should confirm the exemption of the records subject to the Rule from production under the Public Records Act. Without such an enactment, the CJA would oppose the amendment to Rule 102.

Thank you for the opportunity to submit comments. Please do not hesitate to contact us for further information or with any questions.

Sincerely,



Lexi Howard, Legislative Director  
California Judges Association  
Email: [lhoward@caljudges.org](mailto:lhoward@caljudges.org)  
925 L Street, Suite 1250  
Sacramento, California 95814  
Phone: 916-441-5050

**COMMENT****Proposed Amendments to Rules of the  
Commission on Judicial Performance**

Please copy this sheet. Use a separate sheet for each issue.

RECEIVED  
AUG 14 2018  
COMMISSION ON  
JUDICIAL PERFORMANCE

Rule: 102

Issue:  
Confidentiality of records

**Comment:**

California Protective Parents Association is in full support of amending Rule 102 to provide access to Commission of Judicial Performance records for a valid performance and fiscal audit. As a former state administrator, I endorse outside audits, which are designed to assist state agencies improve processes and ensure taxpayer dollars are spent wisely.

**Alternative proposal:**

(Continue on back or on a separate sheet.)

Name: Connie Valentine

Address: 850 Pecan Place, Davis, CA 95616

Title: Board member, CA Protective Parents Association

Telephone: 916-233-8381

Your comment may become public during the review of the proposed amended rules regarding the Commission on Judicial Performance. Thank you for your assistance.

Please return on or before August 16, 2018.

Commission on Judicial Performance  
Attn: Janice Brickley, Legal Advisor to Commissioners  
455 Golden Gate Avenue, Suite 14400  
San Francisco, CA 94102  
FAX: (415) 557-1266

RECEIVED  
AUG 14 2018  
COMMISSION ON  
JUDICIAL PERFORMANCE

## COMMENTS OF THE ALLIANCE OF CALIFORNIA JUDGES IN OPPOSITION TO THE PROPOSED AMENDMENT TO CJP RULE 102

On behalf of the more than 500 judges who make up our organization, we submit the following comments in strong opposition to the proposed amendment to Rule 102. The proposal, designed to accommodate a legislative audit, not only breaches the promise of confidentiality on which judges facing discipline have long relied, but does so for no compelling reason. While we welcome oversight into the workings of the Commission, we believe that the needs of the Auditor can be met without compromising confidentiality by simply redacting identifying information from the records.

**Background:** Rule 102(a) of the Rules of the Commission on Judicial Performance confers confidentiality on all papers and records in commission proceedings prior to the institution of formal proceedings, except under certain enumerated circumstances. In August 2016, the Legislature authorized the State Auditor to conduct an audit of the CJP, specifically directing the Auditor to "examine policies and practices for the handling and resolving complaints against judges." The tension between CJP Rule 102(a) and Government Code, § 8545.2, which grants the Auditor access to confidential files, was resolved in favor of the Commission in a recent lawsuit filed in San Francisco Superior Court. (Commission on Judicial Performance vs. Elaine M. Howle et. al., case no. CPF-16-515308 (2017).)

The Commission now proposes amending the Rules of the CJP to add Rule 102(r), which would retroactively give the Auditor access to all commission records previously deemed confidential. The Alliance of California Judges strongly opposes the proposed amendment for the following reasons:

- **The proposed amendment is a flagrant breach of promised confidentiality.** As described in detail by the Court in CJP vs. Howle, *supra*, the legislative history, the legislative intent, and the case law regarding Rule 102 all indicate that the confidentiality of CJP records prior to the initiation of formal proceedings is absolute. Complainants, judges, and witnesses have relied upon the confidentiality provisions of Rule 102(a) since its inception. Targeted judges have assumed that their cases would

stay confidential in choosing to submit to private discipline rather than fight charges of misconduct and risk public embarrassment. Retroactive alteration of this promise violates all principles of due process and fundamental fairness.

- **The proposed exception is unnecessary, overly broad, and not narrowly tailored to comply with the Auditor's mandate.** The opinion in CJP v. Howle lists 18 specific topics and one catch-all area of inquiry to be covered by the audit. CJP has agreed to cooperate with the Auditor on all but three topic areas:

Topic 2: An analysis of whether the CJP "is taking an appropriate and reasonable course of action for the complaints it reviews and for determining the disposition of each complaint."

Topic 5: An assessment of "the commission's process for evaluating the credibility of evidence, witnesses and statements made."

Topic 12: An evaluation of "the outcomes of a selection of cases and the discipline imposed by the Commission including cases that resulted in private discipline."

The CJP v. Howle opinion found that inquiries into these three areas can infringe on the CJP's "core functions" and therefore violate the separation of powers. The Court declared, and the Auditor acknowledges, that the Auditor is prohibited "from auditing the exercise of the CJP's core functions by re-evaluating or second-guessing decisions made in specific instances." (CJP v. Howle, fn. 2.)

Inquiries into these three areas must be limited to an examination of the Commission's methodology, not a review of the facts of specific cases. Such an approach could be accomplished without compromising judicial confidentiality by summarizing cases and taking care to redact all references that might identify the judge, complainant, witnesses, location and court.

- **Adoption of the proposed amendment before safeguards of confidentiality are in place would be premature and reckless.** The Commission alleges that the Auditor's desire to commence the audit on September 4, 2018, constitutes "good cause" to shorten the time for



analysis of and comment on the proposed amendment. Since there are at least 15 other areas of inquiry involving records on which the Commission is prepared to submit to the Auditor, the "good cause" explanation for expediting this proposed amendment is dubious.

More significantly, the Commission claims that it will seek a legislative amendment to Government Code, § 8545 to ensure that CJP records in the possession of the Auditor will not be subject to release under the California Public Records Act. Until and unless this Government Code amendment is firmly in place, passage of Rule 102(r) would expose all previously protected information to public scrutiny. As we are now at the end of the 2017-2018 legislative session, there is little likelihood that can be accomplished on the expedited timeline established for this rule change, and confidential information previously protected could be released without adequate protections in place.

## **Alliance of California Judges**

**Ethics Committee**

**Hon. Julie Conger (retired)**

**Hon. Dodie Harmon**

**Hon. Thomas Hollenhorst (retired)**

**COMMENT****Proposed Amendments to Rules of the  
Commission on Judicial Performance****RECEIVED**  
**AUG 16 2018**  
COMMISSION ON  
JUDICIAL PERFORMANCE

Please copy this sheet. Use a separate sheet for each issue.

**Rule:** 102**Issue:**

The Judicial Commission currently does not institute formal proceedings even after it has determined that acts of criminal misconduct have occurred. Instead, the Commission is covering up criminal misconduct by judicial officers by keeping known misconduct confidential.

**Comment:**

An audit of the confidential files of the Judicial Commission will reveal that the Judicial Commission is failing to institute formal proceedings even where it has made findings of felony misconduct by a Judicial Officer. I have personally witnessed the Commission try to keep known felony misconduct confidential.

Redacted per policy declaration 3.5(6)

The Commission will likely try to restrict access to the confidential files for this reason. They have acted as criminals and wish to keep their behavior in the dark.

**Alternative proposal:**

Amend rule 102 (g) to make it mandatory, that upon determination that there is probable cause that any criminal misconduct has occurred, formal proceedings must be commenced immediately and the matter must also be immediately referred to the appropriate agencies for prosecution to the fullest extent of the law. The Judicial Commission has already demonstrated that it has abused its discretion to keep such matters confidential. The current members of Commission on Judicial Performance should resign for the reasons set forth above.

(Continue on back or on a separate sheet.)

**Name:** Matthew Rich  **Title:** Certified Family Law Specialist  
**Address:** 3295 Telegraph Rd. First Floor, Ventura CA 93003

**Telephone:** (805) 628-9049

Your comment may become public during the review of the proposed amended rules regarding the Commission on Judicial Performance. Thank you for your assistance.

Please return on or before August 16, 2018.

Commission on Judicial Performance  
Attn: Janice Brickley, Legal Advisor to Commissioners  
455 Golden Gate Avenue, Suite 14400  
San Francisco, CA 94102  
FAX: (415) 557-1266

**COMMENT**

**Proposed Amendments to Rules of the  
Commission on Judicial Performance**

**RECEIVED**  
**AUG 16 2018**  
COMMISSION ON  
JUDICIAL PERFORMANCE

Please copy this sheet. Use a separate sheet for each issue.

**Rule:** 102

**Issue:** See Comments

**Comment:**

Please see attached page.

**Alternative proposal:**

(Continue on back or on a separate sheet.)

**Name:** Los Angeles Superior Court **Title:** \_\_\_\_\_

**Address:** 111 N. Hill Street, Los Angeles, CA 90012

**Telephone:** (213) 633-1010

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With one important caveat, the Los Angeles Superior Court does not oppose the amendment to Rule 102 regarding disclosure of certain confidential records to the California State Auditor. However, we are concerned about ensuring and preserving the confidentiality of those records after release to the Auditor. As the Commission notes in the Invitation to Comment, confidentiality protects complainants and witnesses who otherwise may not come forward with complaints. Confidentiality also protects judges from unwarranted damage to their reputations based on unsubstantiated complaints. While Government Code section 8545.1 prohibits the Auditor from divulging the contents of records "the disclosure of which is restricted by law from release to the public," that section also states that the Auditor shall not divulge such information "in any manner not expressly permitted by law." A third party could seek disclosure from the Auditor of the confidential records contending that such disclosure is elsewhere expressly permitted by law.

With this concern in mind, we strongly believe that before Rule 102 can be amended to allow release of confidential Commission records to the Auditor, Government Code section 8545 must be amended to prohibit expressly the disclosure by the Auditor of the confidential records. We agree with the following proposed amendment as Government Code section 8545(e):

*(e) In accordance with Section 8545.1 and subdivision (b) of Section 8545.2, any paper, correspondence, record, document, or information the disclosure of which is restricted from release to the public by a statutory or constitutional provision, a rule that is consistent with such a provision, or a rule adopted pursuant to subdivision (i) of Section 18 of Article VI of the California Constitution.*

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AUG 16 2018

COMMISSION ON  
JUDICIAL PERFORMANCE

## COMMENT

Proposed Amendments to Rules of the  
Commission on Judicial Performance

Please copy this sheet. Use a separate sheet for each issue.

Rule: 102(r)

## Issue:

Necessity of Proposed / amended Rule 102(r)

## Comment:

The Rule is unnecessary. Combined with the proposed legislation that goes with it, nothing changes. The Rule allows audit, but CJP wields power to anoint "absolute confidentiality" on whatever records or information CJP decides, in its sole discretion, must be deep-sixed i.e. kept from the public. The new law, said to be same as the old law, recognizes and bestows upon CJP the right and power to keep confidential from the public, i.e. not to "release" to the public, records and information as CJP decrees. After two (2) years of *CJP v. Auditor* litigation, with many thousands spent on pricey private lawyers representing CJP and the Auditor, all taxpayer paid, the outcome is "kick the can down road". CJP initially refused to let the Auditor in the door; suing the Auditor to stop audit. Now the CJP opens the door, but keeps closed the lids on whatever files and records CJP deems "absolutely confidential". When the Auditor gets to see "absolutely confidential" files, the CJP can prevent the auditor from using the "absolutely confidential" material in the Auditor report, i.e. CJP decides report outcome; CJP controls audit report. It is not an audit because the Auditor does not decide public audit report content. The proposed rule and new law undermine audit.

## Alternative proposal:

No Rule subd. 102(r) There is no need for it. CJP is a state agency subject to audit. The appeal of the case between CJP and the Auditor, ref. below, should go forward with appellate decision.

*CJP v. Elaine Howle, State Auditor* [San Francisco Superior Court No. CPF-165-15308] (Court of Appeal, 1st Dist. A153547)

Name: Patrick Evans, for Padilla, Chodosh, et al. Title: Counsel to Dina Padilla, Floyd Chodosh, et al.

Address: c/o Patrick J. Evans, Law Office of Patrick J. Evans, 16897 Algonquin St., Suite F, Huntington Beach, CA 92649 email: pevans@pevanstlawoffice.com

Telephone: (714) 594-5722; fax (714) 840-6861

Your comment may become public during the review of the proposed amended rules regarding the Commission on Judicial Performance. Thank you for your assistance.

Please return on or before August 16, 2018.

✓ [This comment -1 page -faxed to CJP 8/16/18]

To:

Commission on Judicial Performance  
Attn: Janice Brickley, Legal Advisor to  
Commissioners 455 Golden Gate Avenue, Suite  
14400  
San Francisco, CA 94102  
FAX: (415) 557-1266

**RECEIVED****AUG 16 2018****COMMISSION ON  
JUDICIAL PERFORMANCE****COMMENT****Proposed Amendments to Rules of the  
Commission on Judicial Performance**

Please copy this sheet. Use a separate sheet for each issue.

**Rule:** 102 (r)**Issue:**

Proposed Amendment to CJP Rule 102 (r) to allow a confidentiality exception for the State Auditor to complete the legislatively-approved audit of the Commission

**Comment:**

I support this proposed Amendment to CJP Rule 102 (subdivision r) to allow a confidentiality exception for the BSA to complete the legislatively-approved audit of the Commission. Subdivision (r) would allow the CJP to provide all records to the State Auditor and her staff so they can complete the legislatively-ordered financial and performance audit of the taxpayer-funded Commission on Judicial Performance. Thank you for your consideration.

**Alternative proposal:**

None.

(Continue on back or on a separate sheet.)

**Name:** Tamir Sukkary **Title:** Adjunct Professor of Political Science  
**Address:** 2001 Club Center Drive #8112  
Sacramento, CA 95835  
**Telephone:** (916) 806-9617

Your comment may become public during the review of the proposed amended rules regarding the Commission on Judicial Performance. Thank you for your assistance.

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Commission on Judicial Performance  
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455 Golden Gate Avenue, Suite 14400  
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**RECEIVED****COMMENT****AUG 16 2018****Proposed Amendments to Rules of the  
Commission on Judicial Performance****COMMISSION ON  
JUDICIAL PERFORMANCE**

Please copy this sheet. Use a separate sheet for each issue.

**Rule:** 102 Confidentiality and Disclosure. (r) Disclosure to California State Auditor

**Issue:**

The confidentiality and disclosure of confidential CJP records to the California State Auditor, after a two-year delay and a costly, unnecessary legal battle aimed at thwarting legislative oversight and obstructing transparency in an agency that was created in 1960 to protect the public and has never been audited in 58 years.

**Comment:**

Our organization fully supports the proposed Rule change and has stated for 2 years that the CJP should amend its Rule 102 to grant the Auditor access to its confidential records, as all other state agencies do. The Center for Judicial Excellence co-led the 2016 statewide campaign to convince the Joint Legislative Audit Committee to order a fiscal and performance audit of the CJP. The audit was requested due to the agency's extremely low discipline rates on complaints from court users (less than 4%), the secrecy shrouding the agency's operations, and its lack of accountability to the Legislature. The CJP has wasted significant taxpayer dollars and thwarted critical oversight for two solid years by blocking the audit in a costly, unnecessary lawsuit over the confidentiality of its records, when an amendment to its rules has been an obvious option all along. An amendment to Gov't Code Section 8545 is redundant. It should not take a threatened \$500K budget cut to get the state's only judicial oversight agency to comply.

**Alternative proposal:**

(Continue on back or on a separate sheet.)

**Name:** Kathleen Russell **Title:** Executive Director, Center for Judicial Excellence  
**Address:** PO Box 150793 San Rafael, CA 94915

**Telephone:** 415-444-6556

**Your comment may become public during the review of the proposed amended rules regarding the Commission on Judicial Performance. Thank you for your assistance.**

**Please return on or before August 16, 2018.**

Commission on Judicial Performance  
Attn: Janice Brickley, Legal Advisor to Commissioners  
455 Golden Gate Avenue, Suite 14400  
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LAW OFFICES OF  
**BARBARA A. KAUFFMAN**

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COMMISSION ON  
JUDICIAL PERFORMANCE

August 16, 2018

Commission on Judicial Performance  
Attn: Janice M. Brickley, Legal Advisor to Commissioners  
455 Golden Gate Avenue, Suite 14400  
San Francisco, CA 94012

Re: Support for Amendment to Rule 102

Dear Ms. Brickley:

I am writing to express my support for a) the Commission's recognition that the public has a legitimate interest in an independent and impartial audit of publicly-funded state agencies and commissions, including the Commission on Judicial Performance; and b) the adoption of proposed Rule 102(r).

I am confident the State Auditor will conduct the audit of the Commission with integrity, diligence, and in compliance with the law, as she has in the past.

Sincerely,



BARBARA A. KAUFFMAN



Sharon Noonan Kramer  
2031 Arborwood Place  
Escondido, CA 92029

August 16, 2018

Janice M. Brickley, Legal Advisor to Commissioners  
Commission on Judicial Performance (CJP)  
Fax: (415) 557-1266

RECEIVED  
AUG 16 2018  
COMMISSION ON  
JUDICIAL PERFORMANCE

RE: Public comment on proposed change to CJP Rule 102

Dear Ms. Brickley,

Thank you for all your hard work on this issue to improve ethics-oversight of California's nearly 1800 judges and justices.

1. **The proposed language of Rule 102(r) seems appropriate to me with one exception:**

"Rule 102. Confidentiality and Disclosure

(r) (Disclosure to California State Auditor) The commission shall provide to the California State Auditor, or an authorized employee of the Auditor, access to confidential commission records pursuant to the provisions of Government Code sections 8545.1 and 8545.2 in connection with an audit mandated by statute or requested by the California State Legislature. This subdivision applies to confidential records in the commission's possession prior to the enactment of subdivision (r) of rule 102."

Shouldn't that last sentence say, *"Including, but not limited to, this subdivision applies to confidential records in the commission's possession prior to the enactment of subdivision (r) of rule 102."*

The reason that I think this wording change is needed is because I am aware that audits can sometimes take up to two years to complete. Audits are intended to help state agencies and commissions perform better in the future.

It seems that the confidential files created by the CJP in the coming months and years while the audit is underway will be equally, if not more important for the State Auditor to be able to examine, than those created prior to the audit commencing in the fall of 2018.

2. **Government Code 8545.1 and 8545.2 changes via AB 1845 appear ambiguous in intended scope.**

It looks to me that it needs to clarify that this change pertains to audits of the CJP only. The proposed changes to Government Code 8545.1 & 8545.2 state:

"The people of the State of California do enact as follows:

SECTION 1. Section 8545 of the Government Code is amended to read:

8545. The California State Auditor shall not destroy any papers or memoranda used to support a completed audit sooner than three years after the audit report is released to the public. All books, papers, records, and correspondence of the office pertaining to its work are public records subject to Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 and shall be filed at any of the regularly maintained offices of the California State Auditor, except that none of the following items or papers of which these items are a part shall be released to the public by the California State Auditor, his or her employees, or members of the commission:

- (a) Personal papers and correspondence of any person providing assistance to the California State Auditor when that person has requested in writing that his or her papers and correspondence be kept private and confidential. Those papers and correspondence shall become public records if the written request is withdrawn or upon the order of the California State Auditor.
- (b) Papers, correspondence, memoranda, or any substantive information pertaining to any audit not completed.
- (c) Papers, correspondence, or memoranda pertaining to any audit that has been completed, which papers, correspondence, or memoranda are not used in support of any report resulting from the audit.
- (d) Any survey of public employees that the California State Auditor determines should be kept confidential because the employees have expressed fear of retaliation by their employer if they respond to the survey.
- (e) In accordance with Section 8545.1 and subdivision (b) of Section 8545.2, any paper, correspondence, record, document, or information the disclosure of which is restricted from release to the public by a statutory or constitutional provision, a rule that is consistent with such a provision, or a rule adopted pursuant to subdivision (i) of Section 18 of Article VI of the California Constitution."

It seems to go beyond the scope of accommodating CJP's concerns for confidentiality: "except that none of the following items or papers of which these items are a part shall be released to the public by the California State Auditor, his or her employees, or members of the commission:" (followed by a through e).

Does that mean that none of the State Auditor's work may ever been released to the public?

Why is this change pertaining to "any audit"? (See (b) above) Shouldn't it be "any audit of the CJP"?

Why is the State Auditor's work for "any audit" being subjected to subdivision (i) of Section 18 of Article VI of the California Constitution?

- (i) The Commission on Judicial Performance shall make rules implementing this section, including, but not limited to, the following:
  - (1) The commission shall make rules for the investigation of judges. The commission may provide for the confidentiality of complaints to and investigations by the commission.

(2) The commission shall make rules for formal proceedings against judges when there is cause to believe there is a disability or wrongdoing within the meaning of subdivision (d).

3. CJP Rule 102(g) is in dire need of amending, too. It states:

"(g) (Disclosure of information to prosecuting authorities) The commission may release to prosecuting authorities at any time information which reveals possible criminal conduct by the judge or former judge or by any other individual or entity."

It should be nondiscretionary that CJP commissioners report possible criminal conduct to the state's chief law enforcement officer, California's Attorney General. Rule 102(g) should say "*shall release*", not "*may release*".

The reason this is important is because of what caused the audit in the first place, which was public outcry for CJP's lack of punishment for willful judicial legal errors occurring in legal proceedings in violation of CJP Rule 111.4. Many of the public's reporting of problems are for judicial acts that are not merely unethical but are criminal. (rewarding perjury & suborning of perjury, relying upon falsification of court documents & electronic case files, etc.)

It is not within the CJP's mandate to decide if crimes will be prosecuted or not. It seems unwise and unfair to all involved to leave the commissioners of the CJP in a position of having to decide if they will report complaints containing evidence of crime occurring in legal proceedings. As the saying goes, "*If you see something, say something*".

Since the CJP is already amending Rule 102 to add (r) please also amend (g) in the best interest of the people of California and the commissioners themselves.

Again, thank you for all your hard work on this issue. It appears that progress is being made.

Sincerely,



Sharon Noonan Kramer

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COMMISSION ON  
JUDICIAL PERFORMANCE

August 16, 2018

**VIA FAX AND U.S. MAIL**

Janice M. Brickley, Legal Advisor to Commissioners  
Commission on Judicial Performance  
455 Golden Gate Avenue, Suite 14400  
San Francisco, California 94102

**Re: Invitation to Comment on Proposed Amendment to Rules of the Commission on  
Judicial Performance**

Dear Ms. Brickley:

Our Firm has, of course, followed the Commission's ongoing litigation with the State Auditor's office, the Commission's proposed rule amendment, and the related legislative efforts to amend the Government Code with great interest. Before providing our Firm's comments in response to the Commission's invitation, we would first express our appreciation of the Commission's longstanding commitment to strict rules of confidentiality.

As to the substantive issues, we have reviewed the comments provided by the California Judges Association and the Alliance of California Judges and agree with both organization's reasoning and conclusions regarding the importance of strict confidentiality to the discipline process. Confidential proceedings provide important protection to our judiciary, but also protect the public from the negative effects that would result from an open process, including, but not limited to, politicization of the process at the expense of judicial independence. Though we understand the Commission is working to protect the process and judiciary from these negative impacts, we do have concerns about the rule amendment and the related legislative effort the Commission has taken in response to the State's authorized audit, which we set forth below.

**A. Implementing An Amendment to Rule 102 Prior To A Legislative Amendment  
Leaves The Commission's Confidential Records Without Adequate Protections.**

As set forth in your explanation of the proposed amendment to CJP Rule 102, the Commission insists it "will promptly seek a legislative amendment to Government Code section 8545 to assure that confidential records in the Auditor's possession are not subject to release under the

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California Public Records Act (CPRA).” It is concerning that the Commission would amend the Commission’s rules regarding confidentiality prior to an amendment to the Government Code.

Until an amendment to Government Code section 8545 is drafted, voted upon, and codified, Rule 102(r) leaves the papers and records of the Commission significantly unprotected. There are no assurances the legislature will receive enough votes to change the language of section 8545, let alone take a form necessary to assuage the Commission’s, and the judiciary’s, concerns regarding specific language required to justify an amendment to Rule 102. Implementation of a legislative amendment is a critical first step in protecting the confidentiality of the Commission’s investigations and proceedings from the CPRA.


**B. The Commission Should Redact Information Irrelevant to Any Audit.**

“The confidentiality of investigations and hearings before the Commission was considered essential to the success of the Commission from the outset.” *Mosk v. Superior Court* (1979) 25 Cal. 3d 474, 490. While we understand and appreciate the arguments in favor of an Audit, we believe that a fair and thorough evaluation can be conducted without jeopardizing the confidentiality that has long been relied upon by judges, complainants, and witnesses by simply redacting irrelevant identifying information from the Commission’s papers and records. It cannot be the case the State Audit needs to assess all records without redactions.

In sum, we reiterate our support of the Commission’s efforts, but we do not support a rule that allows the State Auditor access to unredacted confidential records in the Commission’s possession, or any effort to amend the Rules before the legislative process has unfolded and the Commission has confirmed adequate protections are in place.

We appreciate the opportunity to comment on this proposed rule amendment and are available to discuss with the Commission at any time.


Very truly yours,




Joseph P. McMonigle



David S. McMonigle



Kathleen M. Ewins



Sydney E. Allen