JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on: May 24, 2018

Title
Judicial Administration: Public Disclosure of Settlement Agreements

Rules, Forms, Standards, or Statutes Affected
Cal. Rules of Court, rule 10.500

Recommended by
Rule 10.500 Working Group
Hon. Marsha G. Slough, Chair

Agenda Item Type
Action Required

Effective Date
June 1, 2018

Date of Report
May 17, 2018

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Executive Summary

On April 10, 2018, Chief Justice Tani G. Cantil-Sakauye asked the Judicial Council to take immediate action to revise the court rule on public records to clarify that settlement agreements to resolve sexual harassment and discrimination complaints against judicial officers must be publicly disclosed in response to records requests. She created a working group to review and make recommendations to modify the rule to achieve this goal. The working group recommends that the Judicial Council amend California Rules of Court, rule 10.500, on public access to judicial administrative records, to clarify that settlement agreements must be disclosed in response to public records requests and that the names of judicial officers may not be redacted from those agreements.

Recommendation

The Rule 10.500 Working Group recommends that the Judicial Council, effective June 1, 2018, amend rule 10.500(f)(7), to clarify that:

1. Judicial branch entities, in response to judicial administrative records requests, must disclose any settlement agreement for which public funds were spent in payment of the settlement, including any settlement agreement arising from claims or complaints of sexual harassment or sexual discrimination;

2. The names of judicial officers may not be redacted from the settlement agreement produced; and

3. The names of complainants and witnesses, and any other information that would identify complainants or witnesses, may be redacted.

The text of amended rule 10.500 is attached at pages 13–14.[1]

Relevant Previous Council Action

The public has a strong interest in access to records that show how the people's business is conducted and how public funds are expended. In enacting the California Public Records Act (CPRA) in 1968, the Legislature stated that it "finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." (Gov. Code, § 6250.) The act further states that "every person has a right to inspect any public record[s]" (*id.*, § 6253(a)), "[e]xcept with respect to public records exempt from disclosure by express provisions of law . . . ." (*id.*, § 6253(b)).

Although the CPRA is not directly applicable to the judicial branch, the branch for many years looked to the act for guidance in the disclosure of court administrative records. Then the Judicial Council, effective January 1, 2010, adopted rules of court applicable to judicial branch entities that "provide public access to nondeliberative and nonadjudicative court records, budget and management information." [2]

Rule 10.500 states that it "clarifies and expands the public's right of access to judicial administrative records and must be broadly construed to further the public's right of access." (Cal. Rules of Court, rule 10.500(a)(2).) The rule applies to "judicial branch entities," which are defined as "the Supreme Court, each Court of Appeal, each superior court, and the Judicial

[1] Amended rule 10.500 includes an additional advisory committee comment on subdivision (f)(7). This new comment refers to rule 3-100(A) of the State Bar Rules of Professional Conduct, which will be renumbered as 1.6(a), effective November 1, 2018. The recommendation to the Judicial Council to amend rule 10.500 includes a recommendation that it approve changing the reference in the advisory committee comment from rule 3-100(A) to rule 1.6(a) when that change becomes effective.

[2] Judicial Council of Cal., *Public Access to Judicial Administrative Records* (Dec. 7, 2009)..

Council." (Rule 10.500(c)(3).) The rule also states: "Unless otherwise indicated, the terms used in this rule have the same meaning as under the Legislative Open Records Act (Gov. Code, § 9070 et seq.) and the California Public Records Act (Gov. Code, § 6250 et seq.) and must be interpreted consistently with the interpretation applied to the terms under those acts." (Cal. Rules of Court, rule 10.500(d)(1).)

Analysis/Rationale

Public concern about sexual harassment and discrimination

There is nationwide interest in, and concern about, issues of sexual harassment and discrimination. This type of serious misconduct has been revealed in the movie industry, the media, technology firms, and government. Government entities have recognized that some immediate action is urgently needed to address these concerns. For example, the California Legislature has voluntarily provided responses to requests for records relating to sexual harassment complaints, despite certain exemptions in the Legislative Open Records Act (LORA); and two bills have been introduced in the Legislature to amend LORA to ensure greater public access to records in sexual harassment cases in the future.[3]

Chief Justice's direction for expedited action

The Chief Justice's announcement on April 10 directs a revision of rule 10.500 to ensure that all California courts are required to disclose the names of judicial officers who entered into settlement agreements to resolve sexual harassment and discrimination complaints. As quoted in the announcement, the Chief Justice states, "I want to make sure there's no ambiguity as to whether courts should be required to disclose those records now . . . . The current rule does not make it clear enough that these records should be disclosed. Judicial independence relies in part on judicial accountability. The judiciary relies on the trust and confidence of the public it serves, and the public has the right to know how the judicial branch spends taxpayer funds." [4] Thus, the Chief Justice called for immediate action to revise the rule and appointed a five-member working group to undertake this task.[5]

Amendments to rule 10.500(f)(7)

To implement the task it was assigned, the Rule 10.500 Working Group focused its attention on what amendments should be made to the rule on public access to judicial administrative records to ensure that the public has access to settlement agreements that resolve sexual harassment and discrimination claims against judicial officers. The group concluded this goal can be accomplished expeditiously by amending subdivision (f)(7) of rule 10.500 to clarify the

[3] See Assembly Bill 2032 and Senate Bill 908.

[4] Judicial Council of Cal., "Chief Justice Presses for Expedited Court Rule on Disclosure of Sexual Harassment Claims," *California Courts Newsroom* (April 10, 2018).

[5] The five Judicial Council members appointed to work on the rule change are Justice Marsha G. Slough, Judge Stacy Boulware–Eurie, Judge Kyle S. Brodie, and attorneys Rachel W. Hill and Gretchen Nelson. Justice Harry E. Hull, Jr., chair of the council's Rules and Projects Committee, also participated with the working group.

exemption does not apply to settlement agreements and consequently judicial branch entities must disclose such agreements in response to records requests.

Settlement agreements are public records and therefore are generally disclosable. Under the CPRA, which is used to interpret rule 10.500, courts have recognized that the public has a significant interest in knowing how its government agencies spend public monies, and that records containing such information are subject to disclosure. (*Sonoma County Employees' Retirement Ass'n v. Superior Court* (2011) 198 Cal.App.4th 986, 1005; *San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762, 775, 777–780.) Specifically, the public has a strong interest in the disclosure of settlements agreements that involve the expenditure of public funds. (See *Register Div. of Freedom Newspapers, Inc. v. County of Orange* (1984) 158 Cal.App.3d 893, 909–910.) The public also has a "significant interest" in knowing how a public agency "conducts its business." (See *BRV, Inc. v Superior Court* (2006) 143 Cal.App.4th 742, 757.) Under these criteria, the public has a strong interest in settlement agreements paid for by the public in cases against judicial officers, who are public figures; and such agreements must be disclosed, unless there is a unique exemption that protects settlement agreements from disclosure in cases involving judicial officers.

The only unique exemption that might conceivably prevent disclosure is (f)(7) of rule 10.500. The exemption in (f)(7) is for "[r]ecords related to evaluations of, complaints regarding, and investigations of justices, judges (including temporary judges), subordinate judicial officers, and applicants or candidates for judicial office." (Cal. Rules of Court, rule 10.500(f)(7).) This exemption is unique to the judicial branch; nothing is comparable to it in the CPRA. Based on the language of (f)(7), the scope of the exemption is ambiguous. The exemption could be interpreted narrowly as applying only to records that directly relate to evaluations, complaints, and investigations, which would not include settlement agreements. Alternatively, the exemption could be interpreted broadly as making confidential virtually all records relating to any kinds of evaluations of, complaints regarding, or investigations of judicial officers, which could include settlement agreements.

In determining whether (f)(7) needs to be amended and, if so, how, several matters were considered. First, by its express terms, the exemption in (f)(7) applies to "evaluations," "complaints," and "investigations," and it does not identify "settlement agreements"; hence, if the exemption is narrowly construed, settlement agreements would not be exempt from disclosure under (f)(7). (See *Songstad v. Superior Court* (2001) 93 Cal.App.4th 1202, 1208 ["when a statute contains a specific list of matters, by negative implication the Legislature did not intend to extend that list beyond the specified matters"].) However, if (f)(7) is read more expansively, an argument could be made that because settlement agreements are *related to* "complaints regarding" or "investigations of" judicial officers, they should be exempted under (f)(7).

Second, the exemption in (f)(7) should be harmonized with that in (f)(2). Rule 10.500(f)(2) provides an exemption for records "pertaining to pending or anticipated claims or litigation";

however, this exemption exists only "until the pending litigation or claim has been finally adjudicated or otherwise resolved." Because a settlement agreement resolves a case, a settlement agreement is not subject to the exemption in (f)(2). Under the rules of construction, the exemption in (f)(7) should be harmonized with that in (f)(2). (See *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 122 [conflicting statutes should be construed to give effect to both].) If (f)(7) is narrowly construed and harmonized with (f)(2), once a complaint subject to an exemption under (f)(7) is disposed of by settlement, the settlement agreement would be disclosable. A counterargument might be made that (f)(2) and (f)(7) cannot be harmonized; that (f)(7) is arguably the more specific rule for records related to evaluations, complaints, and investigations against judicial officers; and that therefore (f)(7) exempts any related records, including settlement agreements. To this counterargument, in turn, it may be objected that, though the (f)(7) exemption is more specific to judicial officers, the (f)(2) exemption is more specific as to settlement agreements (i.e., it provides for the disclosure of records after a pending matter is "finally. . . resolved" [rule 10.500(f)(2)]).

Third, the report to the Judicial Council that proposed rule 10.500 provides some clarification as to the intent and breadth of (f)(7), but does not eliminate the ambiguity.[6] It discusses the role of the Commission on Judicial Performance (CJP) in considering and adjudicating complaints against judicial officers (Cal. Const., art. VI, §§ 8, 18), stating that (f)(7) "would support the principles underlying the confidentiality of [Commission on Judicial Performance] proceedings and proceedings under rule 10.703, which apply whether the judicial officer is an elected official or a subordinate judicial officer."[7] Those policy considerations "include maintaining the independence of the judiciary and protecting the judiciary's duty to administer justice in a fair and impartial manner . . . ."[8] Thus, from the report, it is clear that (f)(7) was meant to support the principle underlying the confidentiality of CJP proceedings and proceedings on complaints against subordinate judicial officers. The report, however, does not discuss the confidentiality of the types of publicly funded settlement agreements at issue here.

In considering whether the exemption in (f)(7) should be interpreted expansively as applying to settlement agreements, the California Constitution provides direction. The Constitution requires the public's right to public access to be broadly construed and a rule or statute to be "narrowly construed if it limits the right of access." (Cal. Const. art. I, §3(b)(2).) Under these rules of construction, because (f)(7) is an exemption that restricts the public's right to access, it should be construed narrowly. (See *Marken v. Santa Monica–Malibu Unified School Dist.* (2012) 202 Cal.App.4th 1250, 1262 [exemptions under the CPRA are narrowly construed].)

In the end, the ambiguity about whether the exemption in (f)(7) extends to settlement agreements can and should be promptly resolved. As a matter of law and public policy, it should be clear that

[6] Jud. Council of Cal.., *Public Access*, 15–17, 25.

[7] *Id.*, page 17.

[8] *Id.*, page 16.

publicly funded settlement agreements involving complaints against judicial officers, including agreements in cases involving claims or complaints of sexual harassment or discrimination, must be disclosed to the public on request. This clarification may be accomplished by amending (f)(7) to state unequivocally that the exemption does *not* apply to settlement agreements.

For the foregoing reasons, the working group recommends that the exemption in (f)(7) be amended as follows (to include the new underlined text):

> Records related to evaluations of, complaints regarding, or investigations of justices, judges (including temporary and assigned judges), subordinate judicial officers, and applicants or candidates for judicial office. <u>This exemption does not apply to any settlement agreement entered into on or after January 1, 2010 for which public funds were spent in payment of the settlement, including any settlement agreement arising from claims or complaints of sexual harassment or sexual discrimination. The names of judicial officers may not be redacted from any settlement agreement that is produced under this rule; however, the names of complainants or witnesses, and other information that would identify complainants or witnesses, may be redacted.</u>

(Amended Cal. Rules of Court, 10.500(f)(7).)

These provisions will ensure that the public has full and meaningful access to records of settlements. In addition to clarifying that settlements are not exempt from public disclosure under (f)(7), the new text makes it clear that the disclosure of settlement agreements applies to all settlement agreements entered into since January 1, 2010 (i.e., from the date when rule 10.500, including the exemption in (f)(7), was first adopted). This provision ensures that past as well as future publicly funded settlement agreements against judicial officers are disclosable as a matter of law.

Finally, amended (f)(7) includes a provision stating that the names of judicial officers may not be redacted from any settlement agreement that is produced, while the names of complainants or witnesses, and other information that would identify complainants or witnesses, may be redacted. This provision reflects the caselaw holding that, when a matter involves allegations of misconduct against a public official, the public's interest in disclosure outweighs the privacy interest of the official. (See *BRV, Inc. v Superior Court, supra,* 143 Cal.App.4th at pp.757–759.) Judicial officers, as high level public officials, have a reduced expectation of privacy, and the disclosure of their names appearing in settlement agreements serves the public interest. On the other hand, complainants and witnesses who are not public officials have a greater expectation of privacy and the disclosure of their names may not serve the public interest; hence, where appropriate, their names and identities may be redacted. (*Id.*, at 759.)[9]

[9] Under the amended rule, the issue whether the names of complainants and witnesses are to be reacted from settlement agreements is discretionary (i.e., the names "*may* be redacted" [amended rule 10.500(f)(7)][italics

Advisory Committee Comment to rule 10.500(f)(7)

In addition to the preceding amendments, the working group recommends that a comment on (f)(7) be added to the Advisory Committee Comment on rule 10.500. The comment would explain the purpose of the 2018 amendments, assist in the implementation of the amended rule, and clarify that rule 10.500 and its amendments do not apply to the Commission on Judicial Performance, an independent state agency established under article VI, section 18 of the California Constitution, which has separate rules that apply to its work and records.

The proposed comment would state:

> **Subdivision (f)(7).** The 2018 amendments to (f)(7) clarify that settlement agreements are not exempt from disclosure. All judicial branch entities, including the Judicial Council, must disclose settlement agreements under a rule 10.500 request, given the public nature of these records. (See *Register Div. of Freedom Newspapers, Inc. v. County of Orange* (1984) 158 Cal.App.3d 893, 909.) By clarifying the public nature of settlement agreements and judicial branch entities' obligation to disclose them, the amended rule also clarifies that a judicial branch entity's disclosure of these agreements, whether maintained by the entity or its attorneys, would not implicate any ethical or legal obligations under Business and Professions Code section 6068(e)(1) or rule 3-100(A) of the State Bar Rules of Professional Conduct. The duty of a judicial branch entity to disclose public records of settlements is not constrained by which persons, division, or office within the entity maintains the records.
>
> The 2018 amendments to rule 10.500 do not apply to records maintained by the Commission on Judicial Performance, an independent state entity established under article VI, section 18 of the California Constitution. Rule 10.500 is not applicable to the Commission on Judicial Performance which has separate rules that apply to its work and records.

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added]). In determining whether it is appropriate to redact the names and identifying information of complainants and witnesses from an agreement in a particular instance, guidance is provided by rule 10.500(f)(3), the CPRA (Gov. Code, § 6254(c)), and caselaw. (See *BRV, supra,* 143 Cal.App.4th. [directing the redaction of the names, home addresses, phone numbers, and job titles of any of the students, parents, staff members, or faculty members interviewed or mentioned in a report of alleged misconduct by a school district superintendent]; *Marken, supra,* 202 Cal.App.4th at pp. 1260, 1276 [affirming the redaction of the names and personal information of the complainant and other witnesses referred to in an investigation report into violations of a school district's sexual harassment policy].) The persons in the *BRV* and *Marken* cases whose names and identities were ordered redacted were not public officials and, as far as can be discerned, had not publicly identified themselves; so they had reasonable expectations of privacy. On the other hand, a person who publicly files a lawsuit would generally be in a different situation, having waived his or her right to privacy. Finally, in the situation where a judicial officer is a complainant or witness, and not a respondent, the redaction of the judicial officer's name and identity may be appropriate. In sum, the decision on whether to redact the names of complainants and witnesses from settlement agreements will require a case-by-case determination.

Other issues

The focus of the Rule 10.500 Working Group has been on ensuring public access to settlement agreements. It has sought to accomplish this goal on an expedited basis. Hence, this proposal has concentrated on amending rule 10.500(f)(7) to clarify that publicly funded settlement agreements must be made available to the public in response to public records requests. However, in the course of developing its proposal, the working group identified some other issues concerning public access to court administrative records and other related matters.

A number of these issues are beyond the scope of the proposal to amend rule 10.500. For example, to address issues concerning sexual harassment and discrimination may require improvements in judicial branch entities' complaint processes and additional training. In addition, records requests often involve not only requests for settlement agreements but also for other documents and other kinds of information. And settlement agreements do not always identify the particular judicial officer against whom a complaint was made. As a result, even if the agreement is publicly disclosed under rule 10.500, the name of the judicial officer may remain unknown.

Resolving these and other related issues is beyond the scope of the present rule proposal. These issues may eventually be addressed through future proposals. Meanwhile, for direction and guidance, judicial branch entities should look to rule 10.500, its history and purpose, similar statutes on access to public records, and caselaw.

Policy implications

This rule proposal addresses two major, interconnected policy issues. First, California law recognizes a broad right of public access to public records and other information. (See Cal. Const., article I, section 3(b)(1)("The people have the right of access to information concerning the conduct of the people's business . . . .") Second, national and state interest in information regarding incidents of sexual harassment and discrimination is strong. This proposal focuses on one aspect of these conjoined policies: the disclosure of settlements agreements arising from claims and complaints against judicial officers in sexual harassment and sexual discrimination cases for which public funds were spent in payment of the settlement. The issues raised by this proposal, however, may lead to other important inquiries, which will need to be addressed at a later time.

Comments

The proposal was circulated for comment on an expedited basis from April 26 through May 1, 2018. A total of five comments were received. The commenters included the California Judges Association (CJA), an associate justice of the Court of Appeal, and three superior courts.[10]

The comments were generally positive. The CJA stated that it "fully supports the Chief Justice's policy determination that settlement agreements requiring the expenditure of public funds to

[10] A chart containing the comments and the responses of the working group is attached at pages 15–32.

resolve claims against judicial officers for sexual harassment or sexual discrimination be publicly disclosed." (Comment 1, p. 15.) A presiding judge stated: "I write on behalf of the Los Angeles Superior Court in support of the proposed change to California Rule of Court 10.500 . . . ." (Comment 3, pp. 21–22.) Another presiding judge wrote: "The Tulare County Superior Court supports the proposed amendments. This proposed rule clarifies a gray area of the law." (Comment 5, p. 23.)

In some areas, the commenters recommended clarifications of, or modifications to, the proposed rule amendments. Their suggestions included providing a statement of the independence of the work and records of the Commission on Judicial Performance from the application of rule 10.500, proposing a narrowing of the rule amendments requiring the disclosure of settlement agreements, and expressing concerns about the impacts of confidentiality clauses and mediation statutes on the rule amendments. These comments and the working group's responses are discussed below.[11]

Commission on Judicial Performance proceedings. The CJA expressed concern that the proposed changes, as circulated, did not "clarify that any disclosures made pursuant to CRC 10.500 have no effect on constitutional privacy rights with regard to private proceedings and/or discipline by the Commission on Judicial Performance." (Comment 1, p. 16.) To address this concern, the working group has added an additional comment to the Advisory Committee Comment on rule 10.500. This comment on (f)(7) explains that the 2018 amendments to rule 10.500 do not apply to records maintained by the Commission on Judicial Performance. The comment also explains that rule 10.500 is not applicable to the CJP, which has separate rules that apply to its work and records.

Breadth and scope of the amended rule. Several comments were received expressing concerns that the proposed amendments to rule 10.500 were too broad or too vague. In particular, objections were made to the proposed language amending (f)(7) stating that the exemption did not apply to settlements agreements "arising from a claim or complaint of harassment, discrimination, or other misconduct." The CJA stated: "The rule as proposed . . . appears overbroad when compared with the Chief Justice's stated mandate." (Comment 1, p. 17.) An appellate justice commented that the words "other misconduct" seemed vague, ambiguous, and subject to vast interpretation. (Comment 3, p. 21.) The working group considered these and other related concerns, and has modified its proposed language. For the reasons discussed below, the modified language, though still broad, is clearer and more focused.

The working group's proposed amendments to rule 10.500(f)(7) provide for the disclosure of not just settlement agreements involving sexual harassment and sexual discrimination but also, as further revised after comment, of all types of settlements "*for which public funds were spent in*

[11] Although the working group thinks it has effectively addressed the commenters' concerns, if a judicial officer continues to object to the disclosure of a settlement agreement, a Court of Appeal has recognized that a person who claims that his or her rights would be infringed by a disclosure may file a reverse–CPRA action to challenge the release of documents. (See *Marken, supra,* 202 Cal.App.4th at pp. 1262– 1268.)

payment of the settlement, including any settlement agreement[s] arising from claims or complaints of sexual harassment or sexual discrimination" (italics added). This approach is consistent with the caselaw mentioned above that recognizes that the public has a significant interest in knowing how government agencies spend public monies, and holds that records containing such information are subject to disclosure.

This approach will also ensure that the types of settlement agreements relating to sexual harassment and sexual discrimination that were the specific focus of the Chief Justice's April 10, 2018 announcement are clearly and indisputably disclosable. At the same time, a broad approach to the disclosure of settlement agreements is appropriate because, when requests for settlement agreements are made, other types of publicly funded settlement agreements arising from claims similar to sexual harassment (e.g., arising from claims based on race, sexual orientation, or other protected class) would also be disclosable.

Finally, the vague reference to the disclosure of settlements about "other misconduct" would no longer be included. After a thorough review of the legal and policy issues, the working group concluded that, consistent with the California Public Records Act and caselaw, the rule amendments should clarify that *all* settlement agreements involving the expenditure of public funds should be disclosable and that (f)(7), specifically, should be amended to accomplish this clarification. Hence, that is the group's recommendation.

Confidentiality clauses. The CJA's comments stated that "members have expressed concern that the disclosure of settlement agreements would be contrary to the expectations of those individuals that negotiated settlements with the understanding that the agreements would remain confidential despite case law interpreting the CPRA." (Comment 1, p. 15.) The case law on the CPRA, however, is crucial in determining the significance of the confidentiality of an agreement. Rule 10.500 "must be interpreted consistently with the interpretation applied to the terms under [the CPRA]." (Rule 10.500 (d)(1).) Over 30 years ago, an appellate court interpreting the CPRA rejected the argument that a settlement agreement between a public entity and an individual should remain confidential because it was entered into with the expectation that its provisions would remain confidential. The court stated that "[a]ssurances of confidentiality by [a public entity] regarding settlement agreements are inadequate to transform what was a public record into a private one." (*Register Div. of Freedom Newspapers, Inc., supra,* 158 Cal.App.3d. at p. 909.) Settlement agreements involving the expenditure of public funds, as the case law indicates and the proposed amendments to rule 10.500 clarify, are public records. These records are disclosable notwithstanding the parties' expectations of confidentiality.

Mediation confidentiality. The CJA also expressed concern that the law on mediation confidentiality might preclude the disclosure of settlement agreements under rule 10.500. This issue is addressed and resolved within the Evidence Code itself. Although the Evidence Code provides that mediation communications are generally confidential (Evid. Code, § 1119), the code also provides exceptions to the general provisions on confidentiality. One of these exceptions provides that a settlement agreement is not exempt from disclosure if it "provides that it is enforceable or binding or words to that effect" (Evid. Code, § 1123(b)). Because settlement

agreements arising from claims or complaints against judges and providing for the payment of funds in settlement invariably include statements that they are enforceable or binding or words to that effect, these agreements are not confidential and are disclosable under rule 10.500.

Effective date. The proposed effective date of May 25, which provides for only a single day before the rule amendments become effective, may not provide sufficient time for implementation, particularly in light of the Memorial Day holiday on May 28, 2018. Recognizing that it is still very important to make this proposal effective as soon as possible, the proposal now provides for a June 1, 2018, effective date.

Alternatives considered

The working group initially considered focusing on amending rule 10.500 to ensure public access to settlement agreements relating just to complaints against judicial officers for sexual harassment or discrimination. But for the reasons explained above, the group concluded that the rule should be amended to ensure public access to settlement agreements involving claims against judicial officers in all types of cases for which public funds were spent in payment of the settlement.

The group discussed what rule language would most clearly achieve that purpose. To make clear that the rule amendment was meant to be broad, the amendment states "this exemption [in (f)(7)] does not apply to *any* settlement agreement . . . *for which public funds were spent in payment of the settlement* . . . ." (italics added). The group also considered how to clearly state that existing law provides for the disclosure of the types of settlement agreements at issue and that the disclosures of these settlement agreements would not just apply prospectively. It concluded that to achieve this purpose, the rule amendment should expressly state that the exemption does not apply to any publicly funded settlement "entered into on or after January 1, 2010" (that is, the date on which rule 10.500, including (f)(7), became effective).

Finally, the group discussed which examples of disclosable settlement agreements should be included in the rule. It considered adding examples of other settlement agreements besides those arising from sexual harassment and sexual discrimination—for example, claims arising from discrimination based on race, sexual orientation, or other protected class—because settlement agreements relating to those other types of unlawful conduct would also be disclosable. However, in the end, based on the rule's broad language, the group thought it was clear that not only settlement agreements in sexual harassment and discrimination cases must be produced, but so too must settlements in all other types of cases, which would be consistent with the broad scope of access provided for in the laws and policies of the State of California. The decision to provide the example in (f)(7) of settlement agreements arising from sexual harassment and sexual discrimination is not intended in any way as a limitation on the disclosability of settlement agreements in other types of cases but is instead a recognition of the importance of the disclosure of these agreements in sexual harassment and sexual discrimination cases, which is a matter of significant public interest.

Fiscal and Operational Impacts

Providing access to settlement agreements in cases involving complaints against judicial officers should not be too burdensome. Based on the information available to the Judicial Council, the number of settlement agreements against judicial officers in cases involving claims of sexual harassment does not appear so large that the disclosure of the agreements would require significant administrative or operational costs. Clarifying the types of agreements subject to disclosure, as recommended in this report, may somewhat increase the burden on judicial branch entities that must respond to rule 10.500 requests. Nonetheless, the additional amount of work is not expected to be significant.

Insofar as the proposed rule changes are intended to clarify and not change the law, courts would need to produce settlement agreements anyway. The clarification of rule 10.500 should simplify the process of reviewing and responding to public records requests. As one court commenting on the proposal noted: "In fact, we think that there would be cost savings for this court. Like many courts throughout the state, we have received media requests for disclosure of such agreements. This ambiguity in the law has caused us to expend significant staff resources seeking direction and counsel . . . . Having some clarity in how to respond to these requests would make it easier for smaller courts to handle them expeditiously." (Comment 5, p. 24). On the other hand, one larger court has expressed concerns that the proposed rule change may require it to search records back to 2010, retrieve records, redact them if appropriate, and engage in more document productions, which may be burdensome in some cases.

Attachments

1. Cal. Rules of Court, rule 10.500, at pages 13–14
2. Chart of comments, at pages 15–32

Rule 10.500 of the California Rules of Court is amended, effective June 1, 2018, to read:

Rule 10.500. Public access to judicial administrative records

(a)–(e) * * *

(f) Exemptions

Nothing in this rule requires the disclosure of judicial administrative records that are any of the following:

(1)–(6) * * *

(7) Records related to evaluations of, complaints regarding, or investigations of justices, judges (including temporary and assigned judges), subordinate judicial officers, and applicants or candidates for judicial office. This exemption does not apply to any settlement agreement entered into on or after January 1, 2010 for which public funds were spent in payment of the settlement, including any settlement agreement arising from claims or complaints of sexual harassment or sexual discrimination. The names of judicial officers may not be redacted from any settlement agreement that is produced under this rule; however, the names of complainants or witnesses, and other information that would identify complainants or witnesses, may be redacted.

(8)–(12) * * *

(g)–(j) * * *

Advisory Committee Comment

Subdivision (a). * * *

Subdivisions (b)(1) and (b)(2). * * *

Subdivision (c)(2). * * *

Subdivision (e)(4). * * *

Subdivision (f)(3). * * *

Subdivision (f)(7). The 2018 amendments to (f)(7) clarify that settlement agreements are not exempt from disclosure. All judicial branch entities, including the Judicial Council, must disclose settlement agreements under a rule 10.500 request, given the public nature of these records. (See *Register Div. of Freedom Newspapers, Inc. v. County of Orange* (1984) 158 Cal.App.3d 893,

909.) By clarifying the public nature of settlement agreements and judicial branch entities' obligation to disclose them, the amended rule also clarifies that a judicial branch entity's disclosure of these agreements, whether maintained by the entity or its attorneys, would not implicate any ethical or legal obligations under Business and Professions Code section 6068(e)(1) or rule 3-100(A) of the State Bar Rules of Professional Conduct. The duty of a judicial branch entity to disclose public records of settlements is not constrained by which persons, division, or office within the entity maintains the records.

The 2018 amendments to rule 10.500 do not apply to records maintained by the Commission on Judicial Performance, an independent state entity established under article VI, section 18 of the California Constitution. Rule 10.500 is not applicable to the Commission on Judicial Performance which has separate rules that apply to its work and records.

Subdivision (f)(10). * * *

Subdivision (f)(11). * * *

Subdivision (j)(1). * * *

SP18-09

Judicial Administration: Public Disclosure of Settlement Agreements (Amend Cal. Rules of Court, rule 10.500)

All comments are verbatim unless indicated by an asterisk (*).

.	Commenter	Position	Comment	Response of Rule 10.500 Working Group
1.	California Judges Association by Hon. Stuart M. Rice CJA President	AM	The California Judges Association fully supports the Chief Justice's policy determination that settlement agreements requiring the expenditure of public funds to resolve claims against judicial officers for sexual harassment or sexual discrimination be publicly disclosed. However, the proposed modifications to California Rule of Court 10.500 go beyond that articulated policy, do not adequately eliminate ambiguity that currently exists under Rule 10.500 and do not address legitimate issues of concern to judicial officers across the state. There are likely agreements that have been reached since January 2010 that were settled pursuant to confidentiality clauses or through mediation, thereby raising concerns of the interplay between Evidence Code Section 1115, et seq. and CRC 10.500. Some CJA members have expressed concern that the disclosure of settlement agreements would be contrary to the expectations of those individuals that negotiated settlements with the understanding that the agreements would remain confidential despite case law interpreting the CPRA. Additionally,	The Rule 10.500 Working Group appreciates the California Judges Association's (CJA) full support for the Chief Justice's policy determination that settlement agreements requiring the expenditure of public funds to resolve claims against judicial officers for sexual harassment or sexual discrimination be publicly disclosed. The working group considers the proposed amendments to rule 10.500—as modified in light of the comments of the CJA and others—to be an effective means to effectuate the Chief Justice's policy determination on the disclosure of settlement agreements consistent with the law. As discussed below, the working group's post-comment modifications to the rule proposal address a number of the principal concerns of judicial officers. Regarding the CJA's specific comments about the proposed rule, the working group responds as follows: *Confidentiality clauses.* The CJA comments indicate that some judicial officers have expressed concern that the disclosure of settlement agreements would be contrary to the expectations of those individuals who negotiated settlements with the understanding that the agreements would remain confidential despite case law interpreting the CPRA. The case law on the California Public Records Act (CPRA), however, is crucial in determining the significance of the confidentiality of an agreement. Rule 10.500 "must be interpreted consistent with the interpretation applied to those

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			the proposed changes do not clarify that any disclosures made pursuant to CRC 10.500 have no effect on constitutional privacy rights with regard to private proceedings and/or discipline by the Commission on Judicial Performance.	terms under [the CPRA]." (Rule 10.500 (d)(1).) Over 30 years ago, ago, an appellate court interpreting the CPRA rejected the argument that a settlement agreement between a public entity and an individual should remain confidential because it was entered into with the expectation that its provisions would remain confidential. The court stated that assurances of confidentiality regarding settlement agreements are inadequate to transform what was a public record into a private one. (See *Register Div. of Freedom Newspapers, Inc. v. County of Orange* (1984) 158 Cal.App.3d. 893, 909.) Settlement agreements involving the expenditure of public funds, as the case law indicates and the proposed amendments to rule 10.500 clarify, are public records. These records are disclosable notwithstanding the parties' expectations of confidentiality. *Mediation confidentiality*. The concern that mediation confidentiality law may preclude the disclosure of settlement agreements under rule 10.500 is addressed within the Evidence Code itself. Although the Evidence Code provides that mediation communications are generally confidential (Evid. Code, §1119), the code also provides exceptions to the general provisions on confidentiality, including an exception that states that a settlement agreement is not exempt from disclosure if it "provides that it is enforceable or binding or words to that effect" (Evid. Code, §1123 (b)). Because settlement agreements arising from claims or complaints against judges and providing for the payment of funds in settlement include statements that they are enforceable or

				binding or words to that effect, these agreements are not confidential and are disclosable under rule 10.500. *Commission on Judicial Performance proceedings.* To address the concern raised by the CJA and others, rule 10.500 could be amended to clarify that disclosures under the rule do not affect the confidentiality of proceedings and/or discipline by the Commission on Judicial Performance. The working group recommends adding to the Advisory Committee Comment of rule 10.500, the following comment: <u>The 2018 amendments to rule 10.500 do not apply to records maintained by the Commission on Judicial Performance, an independent state entity established under article VI, section 18 of the California Constitution. Rule 10.500 is not applicable to the Commission on Judicial Performance which has separate rules that apply to its work and records.</u>
			The rule as proposed also appears overbroad when compared with the Chief Justice's stated mandate. Articulating that the "exemption does not apply to any settlement agreements entered into on or after January 1, 2010, including settlement agreements arising from a claim or complaint of harassment…" may require the release of all types of settlement agreements and not only those regarding "sexual harassment or sexual discrimination."	*Breadth of the rule amendments* The CJA's comment is correct that the working group's proposed amendments to rule 10.500(f)(7) provide for the disclosure of not just settlement agreements involving sexual harassment and sexual discrimination but, as further revised after comment, for the disclosure of all types of settlements "on which public funds were spent in payment of the settlement, *including* any settlement agreements arising from claims or complaints of sexual harassment or sexual discrimination" (italics added). This approach will

			Finally, the release of "settlement agreements arising from a claim or complaint of harassment, discrimination, or other misconduct" is not similarly limited to the categories specified by the Chief Justice on April 10, 2018. Including a reference to "other misconduct" in the revised rule would require the release of settlement agreements that resolve frivolous and/or meritless claims in order to avoid litigation and thereby save the public additional and needless expenditures. CJA agrees that this is an important issue for the people of California, and vigorously supports their right to know when public funds have been expended to settle claims of sexual harassment or sexual discrimination against judicial officers. However, the proposed rule goes beyond what is necessary to accomplish its intended purpose. We respectfully submit the following suggested amendments to CRC 10.500(f)(7) to address the concerns set forth in this comment: ****** CJA draft (changes in bold and underlined, with deletions noted):	ensure that the types of settlement agreements relating to sexual harassment and sexual discrimination that were the specific focus of the Chief Justice's April 10, 2018 announcement are clearly and indisputably disclosable. At the same time, based on its review of the issues, the working group concluded that a broad approach to the disclosure of settlement agreements is appropriate because, when requests for settlement agreements are made, other types of settlement agreements arising from claims similar to sexual harassment (e.g., arising from claims based on race, sexual orientation, or other protected class) should also be disclosable. In the end, after a thorough review of the legal and policy issues, the group concluded that, consistent with the California Public Records Act, the rule amendments should clarify that any settlement agreement involving the expenditure of public funds should be disclosable and that (f)(7) should be amended to clarify this. Hence, that is the group's recommendation. ****** The Rule 10.500 Working Group, based on the comments, has revised the proposal and recommends the following amendments to 10.500:

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			CRC 10.500 **(f) Exemptions** Nothing in this rule requires the disclosure of judicial administrative records that are any of the following: [(7)] "Records related to evaluations of, complaints regarding, or investigations of justices, judges (including temporary and assigned judges), subordinate judicial officers, and applicants or candidates for judicial office. **Notwithstanding any other provision of law, confidentiality clause or agreement of nondisclosure, ~~T~~this** exemption does not apply to any **publicly funded** settlement agreements **for claims of sexual harassment or sexual discrimination** entered into on or after January 1, 2010**.**~~,~~ ~~including settlement agreements arising from a claim or complaint of harassment, discrimination, or other misconduct~~. The names of judicial officers may not be redacted from any settlement agreement that is produced under this rule~~.~~**, but judicial officers shall otherwise retain all rights to confidentiality under Article VI, Section 18 of the California Constitution and Commission on Judicial Performance Rule 102.**"	**California Rule of Court, 10.500** **(f) Exemptions** Nothing in this rule requires the disclosure of judicial administrative records that are any of the following: Records related to evaluations of, complaints regarding, or investigations of justices, judges (including temporary and assigned judges), subordinate judicial officers, and applicants or candidates for judicial office. This exemption does not apply to any settlement agreement entered into on or after January 1, 2010 for which public funds were spent in payment of the settlement, including any settlement agreement arising from claims or complaints of sexual harassment or sexual discrimination. The names of judicial officers may not be redacted from any settlement agreement that is produced under this rule; however, the names of complainants or witnesses, and other information that would identify complainants or witnesses, may be redacted. Finally, although the working group does not recommend adding the CJA's proposed language about the CJP directly into rule 10.500, it recommends instead adding an additional comment into the proposed comment on

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				subdivision (f)(7) to be included in the Advisory Committee Comment on rule 10.500. As described above, this additional comment explains that the 2018 amendments to rule 10.500 do not apply to records maintained by the Commission on Judicial Performance, an independent state entity established under article VI, section 18 of the California Constitution. The comment also explains that rule 10.500 is not applicable to the CJP which has separate rules that apply to its work and records.
2.	Hon. Carol Codrington, Associate Justice of the Court of Appeal Fourth Appellate District, Division Two Riverside, CA	AM	I read that Chief Justice Tani G. Cantil-Sakauye asked the Judicial Council to take immediate action to revise court rules on public records to ensure that all levels of the state court system be required to disclose the names of judicial officers who entered into settlement agreements to resolve sexual harassment and discrimination complaints. I applaud the hard work and commitment to excellence of the workgroup assigned to this important task of amending CRC, rule 10.500. I recognize and understand the need for transparency, especially where public funds are involved in a settlement and I agree with the following working group recommendation for the most part: …. that the exemption in (f)(7) be amended as follows (to include the new underlined text): Records related to evaluations of, complaints regarding, or investigations of justices, judges	The Rule 10.500 Working Group appreciates Justice Carol Codrington's support for the group's efforts.

			(including temporary and assigned judges), subordinate judicial officers, and applicants or candidates for judicial office. This exemption does not apply to any settlement agreements entered into on or after January 1, 2010, including settlement agreements arising from a claim or complaint of harassment, discrimination, or other misconduct. The names of judicial officers may not be redacted from any settlement agreement that is produced under this rule. (Proposed amended Cal. Rules of Court, 10.500.) However, I have one concern. The term or **"other misconduct"** seems vague, ambiguous and subject to vast interpretation. Our judiciary is being challenged in ways we never anticipated. I think this term creates a slippery slope of information which could be subject to a public records act request. A jurist may decide to settle a case based on a cost benefits analysis and be guilty of no misconduct whatsoever. Would he or she be compelled to disclose a settlement under those circumstances? I can see where an unsubstantiated claim could be used to challenge a sitting judge. Thank you for your consideration of my comments.	The working group's final post-circulation recommendation to the Judicial Council no longer contains the reference to "other misconduct." Instead, the final version of the proposal to amend (f)(7) clarifies that disclosure of settlement agreements involving judicial officers is required in all cases for which public funds were spent in payment of the settlement. The proposed amended rule also includes an Advisory Committee Comment clarifying that rule 10.500 does not apply to the records and work of the Commission on Judicial Performance.
3.	Superior Court of Los Angeles County	A	I write on behalf of the Los Angeles Superior Court in support of the proposed change to California Rule of Court 10.500 (Invitation to	The Rule 10.500 Working Group appreciates the Los Angeles Superior Court's support for the proposed changes to rule 10.500.

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			Comment SP18-09). Please also see the attached letter to the Working Group of April 18, 2018, which further supports this position. The Los Angeles Superior Court shares the Chief Justice's view that "Judicial independence relies in part on judicial accountability. The judiciary relies on the trust and confidence of the public it serves, and the public has a right to know how the judicial branch spends taxpayer funds." (Chief Justice press release of April 10, 2018.) Moreover, as the Rule 10.500 Working Group writes in the Invitation to Comment, "the public has a strong interest in settlement agreements paid for by the public in cases against judicial officers, who are public figures; and the agreements should be disclosed." For these reasons, we support the proposed rule change. Very truly yours, Daniel J. Buckley Presiding Judge *(Presiding Judge Daniel J. Buckley's letter with Attachments is attached to this comment chart.)*	
4.	Superior Court of Shasta County by Melissa Fowler-Bradley, Court Executive Officer	AM	I respectfully request the rule be modified to include consideration for claims settled for economic purposes of a limited value where found to be without merit (nuisance value). This could be applied only to settlement	The Rule 10.500 Working Group considered and does not recommend including in the proposal any threshold figure of settlements under which the settlement would be excluded from disclosure. The settlement of a claim or complaint even for a

			agreements that contain a statement of non-admission of liability. Possibly the work group could consider a threshold figure of settlements under $50,000 to be excluded from disclosure. Absent such, reluctance to settle claims for minimal economic value will likely increase. There is potential for abuse by persons filing meritless claims that will have to be disclosed (for example a dishonest candidate setting up such a situation against a judge running for re-election). While we have no pending claims against any bench officer on this court, nor do we have any past settlement agreements, this suggestion is mindful of potential future claims throughout the branch.	small amount is a matter of public interest. In addition, a Court of Appeal has specifically rejected the argument that settlements should be kept secret to avoid disclosure of suits settled for "nuisance value." The court stressed the importance of the public's interest in decisions relating to public funds. Opening up the settlement process to scrutiny will "put prospective claimants on notice that only meritorious claims will ultimately be settled with public funds. This in turn will strengthen public confidence in the ability of governmental entities to efficiently administer the public purse." (*Register Div. of Freedom Newspapers, Inc. v. County of Orange* (1984) 158 Cal.App.3d 893, 909.)
5.	Superior Court of Tulare County by Hon. Bret D. Hillman, Presiding Judge	A	The Tulare County Superior Court supports the proposed amendments. This proposed rule clarifies a gray area in the law. When I asked for comment from our executive committee, one judge commented that, "I don't see where the Invitation to Comment addresses settlement agreements that contain a confidentiality clause. If that was a bargained for material term of the agreement, it may be an issue in disclosing the document. "When I pointed out that "any" language in the proposed amendment, the judge countered that there was a substantial body of case law supporting the enforceability, confidentiality and privacy of settlement agreements.	The support of the Superior Court of Tulare County for the proposal is duly noted. Although the invitation to comment does not explicitly address settlement agreements that contain confidentiality clauses, the case law does. An appellate court has rejected the argument that a settlement agreement between a public entity and an individual should remain confidential because it includes a confidentiality clause. It stated that "[a]ssurances of confidentiality by the [government entity] regarding settlement agreements are inadequate to transform what was a public record into a private one." (*Register Div. of Freedom Newspapers, Inc. v. County of Orange* (1984) 158 Cal.App.3d. 893, 909.) The amendments to (f)(7) are meant to clarify that

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				settlement agreements involving claims against judicial officers are public records subject to disclosure.
			From my perspective the proposed amendment is clear in that it refers to "any" settlement agreement, but perhaps language should be considered to make it clear that all such agreements are to be disclosed, notwithstanding any language contained within the settlement agreements. This would also solve the potential problem of an agreement drafted after the changes to Rule 10.500, which references the new statute, and attempts to have the parties enter into a knowing agreement to waive the amended statute.	The presiding judge correctly interprets the proposal. The amendments to clarify that the exception in (f)(7) does not apply to "any" settlements is meant to require the disclosure of all settlement agreements that are public records. To further clarify which settlement agreements are subject to disclosure, the rule amendment has been further revised to require disclosure of settlements "for which public funds were spent in payment of the settlement, including any settlement agreements arising from claims or complaints of sexual harassment or sexual discrimination." The report clarifies that this language is meant to be very broad.
			We think implementation would not be a problem for us and could be done at a minimal cost. In fact, we think that there would be cost savings for this court. Like many courts throughout the state, we have received media request for disclosure of such agreements. This ambiguity in the law has caused us to expend significant staff resources seeking direction and counsel. I have spent time on these requests, as has our CEO and many members of our management staff. Tulare County is considered to be a medium size court, with 20 judges. We don't have the resources for a full time media relations staff as do many of the larger courts. Having some clarity in how to respond to these	The court's comments on implementation are appreciated. The working group's immediate goal in proposing the amendments to rule 10.500 is to clarify that settlement agreements, particularly in cases involving claims of sexual harassment and discrimination against judicial officers, must be disclosed in response to rule 10.500 requests. If the proposed amendments are able to achieve this purpose and reduce the costs and time it takes to respond to the requests, those will be benefits for the court system and the public.

			requests would make it easier for smaller courts to handle them expeditiously.	

The Superior Court
STANLEY MOSK COURTHOUSE
111 NORTH HILL STREET
LOS ANGELES, CALIFORNIA 90012
CHAMBERS OF
DANIEL J. BUCKLEY
PRESIDING JUDGE

TELEPHONE
(213) 633-0400

May 1, 2018

Hon. Marsha G. Slough, Chair
Rule 10.500 Working Group
Associate Justice of the Court of Appeal
Fourth Appellate District, Division Two
3389 Twelfth Street
Riverside, CA 92501

Re: Invitation to Comment: SP18-09, Amend Cal. Rules of Court, rule 10.500

Dear Justice Slough:

I write on behalf of the Los Angeles Superior Court in support of the proposed change to California Rule of Court 10.500 (Invitation to Comment SP18-09). Please also see the attached letter to the Working Group of April 18, 2018, which further supports this position.

The Los Angeles Superior Court shares the Chief Justice's view that "Judicial independence relies in part on judicial accountability. The judiciary relies on the trust and confidence of the public it serves, and the public has a right to know how the judicial branch spends taxpayer funds." (Chief Justice press release of April 10, 2018.) Moreover, as the Rule 10.500 Working Group writes in the Invitation to Comment, "the public has a strong interest in settlement agreements paid for by the public in cases against judicial officers, who are public figures; and the agreements should be disclosed."

For these reasons we support the proposed rule change.

Very truly yours,

DANIEL J. BUCKLEY
Presiding Judge

Enclosure

c: Hon. Kevin C. Brazile, Assistant Presiding Judge
Sherri R. Carter, Executive Officer/Clerk of Court
Ivette Peña, Chief Deputy, Legal Services/Court Counsel

The Superior Court
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April 18, 2018

Hon. Marsha G. Slough
Associate Justice of the Court of Appeal
Fourth Appellate District, Division Two
3389 Twelfth Street
Riverside, CA 92501

Re: Revision of Rule 10.500 of the Cal. Rules of Court

Dear Justice Slough:

We write to share with you, as a member of the Judicial Council work group Chief Justice Tani Cantil-Sakauye appointed to revise Rule 10.500 of the California Rules of Court (Work Group), the views of the of the Los Angeles Superior Court with respect to the Chief Justice's plan.

The April 10, 2018 press release from the Judicial Council quotes the Chief Justice as seeking "to ensure that all levels of the state court system be required to disclose the names of judicial officers who entered into settlement agreements to resolve sexual harassment or sexual discrimination complaints." The Los Angeles Superior Court shares the Chief Justice's view that "Judicial independence relies in part on judicial accountability. The judiciary relies on the trust and confidence of the public it serves, and the public has a right to know how the judicial branch spends taxpayer funds." For that reason, our Court supports the disclosure of the names of judicial officers who enter into settlement agreements to resolve sexual harassment or sexual discrimination claims. However, we want to ensure that any new rule or modification to existing exemptions within Rule 10.500 does not expand administrative records disclosure obligations beyond the Chief Justice's stated intent, or interfere with the constitutional powers and obligations of the Commission on Judicial Performance by eroding existing exemptions for records related to evaluations of, complaints regarding, or investigations of judicial officers.

As the Work Group fulfills its charge, we urge you to consider critical distinctions between judges and other public officials that justify protecting the exemptions in Rule 10.500. Unlike

other public officials, a robust Code of Judicial Ethics governs judges. Judges' conduct and performance are subject to review by a separate, constitutionally created Commission on Judicial Performance (Commission) which involves public members in the review of judicial conduct. The Commission protects the confidentiality of its investigations and is empowered to issue private discipline. However, once it recommends serious discipline (public admonishment, public censure, or removal), it discloses the name of the judge as well as the allegations that led to the discipline. That system holds judges who fail to fulfill their work or ethical obligations accountable, documents their transgressions and publicizes those findings. The enclosed letter sets forth in detail our Court's analysis on the exemptions from disclosure applicable to complaints against judges.

We strongly believe that evaluations of and investigations of allegations of judicial misconduct must remain confidential. It would be inconsistent with the constitutional structure of the CJP to require disclosure of investigations required in support of the work of the CJP unless and until there is public discipline. Presiding Judges and other judges with administrative responsibilities are required to take prompt, appropriate corrective action in response to allegations of misconduct (of any nature), and have reporting responsibilities to the CJP. An effective judicial discipline system requires seamless integration of these responsibilities with those of the CJP. In addition, it is essential to protect the identities of complaining witnesses who have asked for confidentiality. All of this requires that we retain the current exemptions to Rule 10.500, in particular 10.500(f)(7).

I am available to discuss these very important issues with you at your convenience.

Very truly yours,

DANIEL J. BUCKLEY
Presiding Judge

Enclosure

c: Hon. Kevin C. Brazile, Assistant Presiding Judge
Sherri R. Carter, Executive Officer/Clerk of Court
Ivette Peña, Chief Deputy, Legal Services/Court Counsel

SHERRI R. CARTER
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Superior Court of California
County of Los Angeles

April 10, 2018

Cheryl Miller
The Recorder/National Law Journal
Sacramento Bureau
cmiller@alm.com

Re: Administrative Records Request, e-mailed March 23, 2018

Dear Ms. Miller:

By e-mail dated March 23, 2018, you requested certain administrative records from the Los Angeles Superior Court ("Court") pursuant to Rule 10.500 of the California Rules of Court. The Court does not accept administrative records requests delivered by e-mail or facsimile transmission. As the Court's website reflects,[1] such requests must be submitted in writing and either mailed or delivered. As a one-time courtesy, we will respond to your e-mail request.

You indicate that in response to a similar administrative records request to the Judicial Council of California, the Judicial Council provided you only summary responsive information asserting the rest was privileged. You ask that the Court waive the applicable privileges to enable the Judicial Council to release the records you requested. You also request the following from the Court:

- *Records, including settlement documents, indicating the number of sexual harassment/sexual* misconduct/hostile workplace investigations/sexual discrimination cases, including any conducted in-house as well as those contracted to third-party vendors, e.g., law firms, involving judicial officers facilitated by or initiated by your court from 1998 to present date; and

- Records indicating cost of sexual harassment / sexual misconduct / hostile workplace investigations / sexual discrimination cases, including any conducted in-house as well as those contracted to third-party vendors, e.g. law firms, involving judicial officers facilitated by or initiated by your court from 1998 to present date.

[1] "Subject to reasonable accommodation for individuals with special needs, requests to inspect or copy the Court's administrative records other than case information must be made in writing by mail or delivery. Email and facsimile requests are not accepted. Requests to inspect or copy the court's administrative records should be submitted in writing by mail or delivery to: Administrative Records Request, Stanley Mosk Courthouse, Room 109, 111 N. Hill St. Los Angeles, CA 90012." http://www.lacourt.org/generalinfo/publicnotice/GI_PN003.aspx

The Court does not maintain records of the information you requested, i.e., the number of, and costs associated with, investigations and cases involving sexual conduct. *See* Cal. Rules of Court, Rule 10.500(e) (1) ("Nothing in this rule requires a judicial branch entity to create any record or to compile or assemble data in response to a request for judicial administrative records if the judicial branch entity does not compile or assemble the data in the requested form for its own use or for provision to other agencies.")

Rule 10.500 "provide[s] public access to nondeliberative and nonadjudicative court records, budget and management information" and "clarifies and expands the public's right of access to judicial administrative records and must be broadly construed to further the public's right of access." Rule 10.500(a). However, it exempts from disclosure certain categories of records as well as records that "would not be subject to disclosure under the Legislative Open Records Act or the California Public Records Act." Rule 10.500(d) (2). Among the categories of records Rule 10.500 exempts from disclosure are:

> Records related to evaluations of, complaints regarding, or investigations of justices, judges (including temporary and assigned judges), subordinate judicial officers, and applicants or candidates for judicial office.

Rule 10.500(f) (7) of the Cal. Rules of Court.

This exemption is required by the California Constitution, as explained below.

In California, judicial officers, unlike officials in the Legislative and Executive branches of government, or private individuals, are subject to enhanced oversight with respect to their conduct and compliance with the Code of Judicial Ethics. The California Constitution vests the Commission on Judicial Performance (CJP) with responsibility for handling judicial misconduct and discipline. Cal. Const. Art. 6, Sec. 18. Any person may submit a complaint to the CJP and may do so anonymously. Commission on Judicial Performance Policy Declarations, 1.1, CA ST J Perf Comm 1.1.

The CJP is an independent body, answerable only to the California Supreme Court, and its membership consists of "one judge of a court of appeal, two judges of superior courts, two attorneys, and six citizens who are not judges, retired judges, or members of the State Bar of California. [2] Cal. Const. Art. 6, Section 8. The California Constitution provides for types of discipline that may be imposed on judges including removal from office, suspension without pay, public censure, public admonishment, private admonishment, and advisory letters. The CJP operates transparently within its Constitutional mandate. It issues decisions explaining the circumstances and reasons for public sanctions. It publishes a yearly report listing specific instances of judicial misconduct with a summary of the circumstances, including the name of the judicial officer, except in instances of private admonishment, as to which the incident

[2] The Supreme Court appoints the judicial officers, the Governor appoints the attorneys and two of the citizen members, the Senate and the Assembly each appoint two citizen members. Cal. Const. Art. 6, Sec. 8 (a).

leading to private discipline is summarized anonymously. Thus, even absent the exemption in Rule 10.500(f) (7) concerning evaluations and complaints regarding judicial officers, the California Constitution expressly provides that discipline for lesser instances of misconduct remains private. It follows that the investigations leading to such discipline and investigations that result in no discipline must remain private.

The Code of Judicial Ethics articulates a great number of requirements pertaining to judges' conduct, including that they perform their adjudicative duties without bias or prejudice, that they require that their staff, other court personnel, and attorneys appearing before them refrain from manifesting bias or prejudice, that they personally observe high standards of conduct, and that they "respect and comply with the law and act in a manner that promotes public confidence in the integrity and impartiality of the judiciary." *Id.*, canons 3B (5), (6), C (3), 1, and 2A. Moreover, the Code of Judicial Ethics also requires that any time a judge has "reliable information that another judge has violated any provision of the Code of Judicial Ethics, that judge shall take appropriate correction action, which may include reporting the violation to the appropriate authority." Cal. Code of Judicial Ethics, canon 3D (1). If a Presiding Judge or a Supervising Judge does not meet his or her responsibility to investigate and report misconduct, the Presiding Judge or Supervising Judge is subject to discipline by the CJP. *See, e.g.*, Com. on Jud. Performance, Ann. Rept. (2011), Private Admonishment 9, p. 24 [A presiding judge failed to take appropriate corrective action after receiving reliable information about serious wrongdoing by another judge on the court]; Public Admonishment of Former Judge Robert A. Schnider (2009). While a trial court has an obligation to take action when it has reliable evidence of judicial misconduct, it does not have any independent authority to impose discipline on a judge of the court. Cal. Const. Art. 6, Section 18. Instead, should it occur, a trial court's investigation of any allegation of judicial misconduct related to sexual harassment or otherwise, is an extension of the disciplinary responsibilities of the CJP.

With regard to subordinate judicial officers and temporary judges, acting through the Presiding Judge, trial courts are required to investigate written complaints, to respond to the complainant, to take appropriate corrective action, and to report to the CJP when they impose discipline on a subordinate judicial officer. Cal. Rules of Court, Rules 10.703 and 10.743.

The Code of Judicial Ethics requires judges to cooperate with the CJP. *Id.*, canon 3D (4). Gov. Code, § 68725.[3] That cooperation includes the obligation to provide the CJP the Court's investigatory file. Cal. Rules of Com. on Jud. Performance, rule 104; Cal. Rules of Court, Rule 10.703(j). There is no broader permission to disclose local court investigative files under the Constitution than the rule applicable to the CJP. Investigations leading to private discipline or finding no basis for discipline must remain private.

[3] "State and local public bodies and departments, officers and employees thereof, and officials and attaches of the courts of this State shall co-operate with and give reasonable assistance and information to the commission and any authorized representative thereof, in connection with any investigations or proceedings within the jurisdiction of the commission."

Cal. Const. Art. 6, Section 18.5, Cal. Rules of Com. on Jud. Performance, rule 102.

When litigation is threatened or a lawsuit is filed, the Judicial Council, not the Court, is responsible for the representation, defense and indemnification of trial courts, judicial officers and court employees. Cal. Rules of Court, Rule 10.202. The request for legal representation, indemnity and defense typically follows the filing of a claim against the Court or a judicial officer. The filing of an action may, in and of itself, result in a CJP inquiry.

In litigation against a trial court and a judge of the court, the trial court and the judge may be represented jointly or, if there is a potential conflict between the court and the judge, the judge may be represented separately. In either instance, under general rules governing attorney-client privilege, the court does not have authority to waive the attorney-client privilege on behalf of the judge. Further, in some instances the complaining party asks for anonymity and may be permitted to file litigation as a "Doe" litigant or using initials to maintain his or her privacy. In such instances the court also does not have the authority to disclose information that would reveal the identity of the complaining party.

For these reasons, the Court cannot waive the complicated privileges that would attach to any such litigation or threatened litigation. It has no authority to waive privileges held by individual judicial officers. As to its own privileges, it must decide whether it is permissible and appropriate to waive an applicable privilege on a case-by-case basis and only after reviewing specific records, documents, and/or information. At this time, the Court is not waiving any applicable privileges or any pertinent exemptions under Rule 10.500(f) (1), (2), (3), (5), (7), (11) and (12). Moreover, as set forth above, the Constitution precludes the court from waiving the exemption provided by Rule 10.500(f) (7).

We hope this information is useful to you.

Very truly yours,

Ivette Peña
Chief Deputy, Legal Services/Court Counsel