JUDICIAL COUNCIL OF CALIFORNIA

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INVITATION TO COMMENT

SP18-09

Title
Judicial Administration: Public Disclosure of Settlement Agreements

Action Requested
Review and submit comments by May 1, 2018

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

Proposed Effective Date
May 25, 2018

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

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Executive Summary and Origin

On April 10, 2018, 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. She created a working group to develop the rule changes required 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 must not be redacted from settlement agreements produced in response to these requests.

Background

The adoption of rule 10.500

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 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 records, except as hereafter provided." (Gov. Code, § 6250.)

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 or nonadjudicative court records, budget and management information." [1]

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 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 terms under those acts." (Cal. Rules of Court, rule 10.500(d)(1).)

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.[2]

Chief Justice's direction for expedited action

The Chief Justice's announcement on April 10 states that she wants rule 10.500 revised 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." [3] Thus, the

[1] Judicial Council of Cal., report on Public Access to Judicial Administrative Records (Dec. 7, 2009) (report).
[2] See Assembly Bill 2032 and Senate Bill 908.
[3] Judicial Council of Cal., "Chief Justice Presses for Expedited Court Rule on Disclosure of Sexual Harassment Claims," *California Courts Newsroom*, April 10, 2018.

Chief Justice called for immediate action to revise the rule and appointed a five-member working group to undertake this task.[4]

The Proposal

To implement the task it was assigned, the Rule 10.500 Working Group focused its initial 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 that this goal can be accomplished expeditiously by amending subdivision (f)(7) of rule 10.500 to clarify that that exemption does not apply to settlement agreements and that therefore judicial branch entities must disclose such agreements in response to records requests.

Amendments to rule 10.500(f)(7)

Rule 10.500(f)(7) provides an exemption 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. Based on the rule language, the scope of the exception in (f)(7) is ambiguous. The exception could be interpreted 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. Alternatively, it could be interpreted as applying only to records that directly relate to evaluations, complaints, and investigations, which would not include settlement agreements in sexual harassment and discrimination cases.

In determining whether (f)(7) needs to be amended and, if so, how, several matters were considered. First, even though the language of (f)(7) is broad, 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 broadly, 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

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

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 proceeding subject to an exemption under (f)(7) is disposed of by settlement, the settlement agreement would be disclosable. A counterargument might be made, however, 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. (See *Lake v. Reed* (1997) 16 Cal.4th 448, 464.)

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.[5] 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."[6] 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 . . . ."[7]

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.

In addition, the case law on the California Public Records Act supports the disclosure of settlement agreements. 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. (*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 how a public agency conducts its business and particularly how it "responds to allegations of misconduct." (See *BRV, Inc. v Superior Court* (2006) 143 Cal.App.4th 742, 757.) And where the

[5] Report, *supra*, at pages 15–17, 25.
[6] *Id.*, page 17; see also comment 12, page 115.
[7] *Id.*, page 16.

matter involves a higher–level official or employee, the public's interest in disclosure outweighs the privacy interest of the official or employee. (*Id.*, pp. 758–759.) 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 the agreements should be disclosed.

In the end, 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 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.

Accordingly, 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 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.</u>

(Proposed amended Cal. Rules of Court, 10.500.)

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 (1) 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), and (2) the names of judicial officers cannot be redacted.

As indicated previously, the rule and therefore the amendments apply to the Supreme Court, each Court of Appeal, each superior court, and the Judicial Council. (Cal. Rules of Court, rule 10.500(c)(3).) Rule 10.500 and its amendments do not apply to the Commission on Judicial Performance, which is an independent state agency established under article VI, section 18 of the California Constitution that has separate rules applicable to its work and records.

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 clarify the purpose of the 2018 amendments and assist in the implementation of the amended rule. 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.) 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.

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 to clarify that 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 other related issues concerning rule 10.500 and public access to court administrative records. Those issues may need to be addressed in the future.

For example, 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 would remain unknown. Addressing this problem, however, would require going beyond the scope of the rule on the disclosure of records. A second issue concerns redaction. To provide transparency, the present proposal recommends expressly prohibiting the redaction in settlement agreements of the names of judicial officers, who are higher-level public officials. On the other hand, the caselaw interpreting the California Public Records Act supports redacting in settlement agreements the names of victims and witnesses; this is not expressly addressed in the proposal. A third issue concerns access to other documents besides settlement agreements.

The resolution of these and other related issues is beyond the scope of the present rules proposal. Some of these issues may eventually be clarified through future proposals. Meanwhile, to address these matters, judicial branch entities should look to the text of rule 10.500, its history and purpose, similar statutes on access to public records, and caselaw.

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 on further consideration, the group concluded that the rule

should be amended to ensure public access to settlement agreements in complaints against judicial officers in all types of cases. If this broader approach is taken, settlement agreements in sexual harassment and discrimination cases must of course be produced. But so too must settlements in 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.

Implementation Requirements, Costs, and Operational Impacts

Providing access to settlement agreements in cases involving complaints against judicial officers should not be burdensome. Based on the information available to the Judicial Council, it appears that the number of settlement agreements is not so large that their disclosure would require significant administrative or operational costs. Comments are invited on the scope of the problem and the amount of work that may be required to produce settlement agreements. In the end, insofar as 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.

Request for Specific Comments

In addition to comments on the proposal as a whole, the Rule 10.500 Working Group is interested in comments on the following:

- Does the proposal appropriately address the stated purpose of making settlement agreements accessible?
- Are there any further modifications to the proposed amendments to (f)(7) required to make those amendments clearer or more effective?

The working group also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so please quantify.
- What would the implementation requirements be for courts?
- How well would this proposal work in courts of different sizes?

Attachments

Cal. Rules of Court, rule 10.500, at pages 8–9.

Rule 10.500 of the California Rules of Court would be amended, effective May 25, 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 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;

(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.) 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.

Subdivision (f)(10). * * *

Subdivision (f)(11). * * *

Subdivision (j)(1). * * *