

**JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS**

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Report

TO: Members of the Judicial Council

FROM: Trial Court Presiding Judges Advisory Committee
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DATE: September 15, 2005

SUBJECT: Complaints About Subordinate Judicial Officers (amend Cal. Rules of Court, rules 6.655(i) and 6.603(c)(4)(C); repeal § 16, Standards of Judicial Administration) (Action Required)

Issue Statement

1. When a presiding judge conducts a preliminary investigation after receiving a complaint about a subordinate judicial officer (SJO), the presiding judge may, but is not required to, give the SJO a copy of the complaint or a summary of the allegations and an opportunity to respond, even when the presiding judge is contemplating disciplinary action.
2. When rule 6.655 of the California Rules of Court, which addresses the handling of complaints about SJOs, was adopted, it made superfluous section 16 of the Standards of Judicial Administration, which also concerns complaints about SJOs.

Recommendation

The Trial Court Presiding Judges Advisory Committee recommends that the Judicial Council, effective January 1, 2006, amend rule 6.655(i) to require presiding judges to give SJOs who have been the subject of a preliminary investigation a copy of the complaint or a summary of the allegations and an opportunity to respond before imposing disciplinary action. The advisory committee also recommends that section 16 of the Standards of Judicial Administration be repealed.

Rationale for Recommendation

Amendment of Rule 6.655

Rule 6.655 sets forth the procedure for presiding judges handling complaints about SJOs. After initial review of a complaint, the presiding judge may close the matter, conduct a preliminary investigation, or conduct a formal investigation. (Rule 6.655(g).) The primary difference between a preliminary investigation and a formal investigation is the type of discipline that can be imposed afterward. After a preliminary investigation, a presiding judge may take “appropriate informal action, which may include a reprimand or warning” (Rule 6.655(i)(4)(B).) If the presiding judge finds a basis for proceeding further, he or she may conduct a formal investigation, which can result in an oral or written warning, a private or public reprimand, suspension, or termination. (Rule 6.655(j)(3).)

If the matter proceeds to a formal investigation, rule 6.655(j)(1)(B) provides that as soon as practicable, the presiding judge “shall give the subordinate judicial officer a copy of the complaint or a summary of its allegations and allow the subordinate officer an opportunity to respond.” There is no such requirement at the preliminary investigation stage even though an SJO is subject to discipline in the form of an informal reprimand or warning. Rather, rule 655(i)(3) states that a presiding judge “*may* give the subordinate judicial officer a copy of the complaint or a summary of its allegations and allow him or her an opportunity to respond.” (Emphasis added.)

Under the proposed amendment to rule 6.655(i), the mandatory language in rule 6.655(j) requiring a presiding judge to give the SJO a copy of the complaint or a summary of its allegations and an opportunity to respond would be applied to preliminary investigations when the presiding judge intends to impose discipline. Currently, because the notice provisions of rule 6.655 relating to preliminary investigations are discretionary, it is possible that a presiding judge could discipline an SJO without providing the SJO an opportunity to respond to the allegations. There is concern that this procedure may not offer sufficient due process protections for SJOs. In addition, affording the SJO notice and an opportunity to respond would allow the SJO to provide important information to the presiding judge to help focus the inquiry and perhaps to help structure the response ultimately sent to the complainant.

Under the proposed amendment, notice and an opportunity to respond would not be required in every preliminary investigation because the investigation might consist of reviewing the case file or a transcript to determine that the complaint has no merit. In such cases, no purpose is served by providing notice and an opportunity to be heard. In fact, giving a copy of the complaint to the SJO could cause the SJO to become prejudiced against the complainant, resulting in disqualification. Therefore, the Trial Court Presiding Judges Advisory Committee

recommends that the rule be amended so that a presiding judge cannot issue a reprimand or a warning to an SJO without affording the SJO notice and an opportunity to respond. If the presiding judge does not intend to take any disciplinary action, providing notice and an opportunity to respond would remain discretionary.

Section 16 of the Standards of Judicial Administration

Adopted effective July 1, 1978, section 16 of the Standards of Judicial Administration, sets forth guidelines for processing complaints against court commissioners and referees. The language of the standards is permissive; the provisions use the term “should” instead of “shall” or “must.”

Rule 6.655, which also contains procedures for handling complaints about SJOs, was adopted effective November 20, 1998. The rule incorporates all the provisions of section 16 except the one stating that the presiding judge should provide the SJO with a copy of the complaint and an opportunity to respond at the preliminary inquiry stage. This provision is addressed above in the proposed amendment to rule 6.655.

The Judicial Council considered whether to retain section 16 when it adopted rule 6.655 in 1998. The council report on rule 6.655 states that section 16 was retained “to provide guidance in the discipline of SJOs in matters not within the jurisdiction of the CJP [Commission on Judicial Performance].” The report adds that the retention of section 16 “keeps the local option of having a different—and perhaps less formal—process for handling complaints alleging other kinds of conduct that would not be within the authority of the CJP.”

Although the Judicial Council report does not specify the types of allegations that would be outside the commission’s jurisdiction, this would include complaints of legal error in rulings and complaints about an SJO’s job performance that fail to rise to the level of misconduct. For example, a complaint might question an SJO’s competence or efficiency or ability to get along with other judicial officers and court staff, but these allegations would be outside the commission’s jurisdiction because they do not constitute misconduct.

Other provisions in the Rules of Court provide guidance for presiding judges to address allegations against SJOs that are not within the commission’s jurisdiction. As to complaints about legal rulings, rule 6.655(h)(1)(A) provides that a presiding judge may close a complaint after initial review if it “[r]elates to the permissible exercise of judicial or administrative discretion by the subordinate judicial officer.” As to complaints about conduct that is outside the commission’s purview, rule 6.655(h)(1)(B) permits the closing of a complaint that “[d]oes not allege conduct that if alleged against a judge would be within the jurisdiction of

the commission under article VI, section 18 of the California Constitution.” If there is concern about an SJO’s ability to perform job duties or to get along well with others, a presiding judge should address the issue as part of his or her responsibility to ensure the effective management and administration of the court. (See Cal. Rules of Court, rule 6.603(a).)

Section 16 of the Standards of Judicial Administration is superfluous and creates ambiguity. First, virtually all the provisions of section 16 were incorporated into rule 6.655; therefore, the only substantive difference is that the rule uses “shall” language while section 16 uses “should” language. Second, as noted in the council report on rule 6.655, courts have discretion to apply the procedure in the rule to complaints about conduct that would not be within the commission’s jurisdiction. However, the repeal of section 16 would not mean that presiding judges are required to employ the rule 6.655 procedure when they handle such complaints. Under rule 6.655(h)(1)(B), the presiding judge can close the matter. If the complaint raises concerns about job performance short of misconduct, the presiding judge can address the issue as he or she deems appropriate. Finally, section 16 provides no guidance on how a presiding judge should handle such complaints.

Because rule 6.655 is more formal than section 16, and because section 16 is unnecessary and creates ambiguity, the Trial Court Presiding Judges Advisory Committee recommends that it be repealed.

Rule 6.603(c)(4)(C) directs presiding judges to “[p]repare and submit to the judges for consideration and adoption procedures for receiving, inquiring into, and resolving complaints lodged against court commissioners and referees, consistent with rule 6.655, giving due consideration to section 16 of the Standards of Judicial Administration.” If section 16 is repealed, the reference to it in rule 6.603 should be removed.

Alternative Actions Considered

Rule 6.655 could be left unchanged, but due process concerns may arise out of the possibility of disciplining an SJO without notice and an opportunity to respond to the allegations in the complaint.

Section 16 could also be left unchanged, but it is unnecessary and creates ambiguity.

Comments From Interested Parties

There were five responses to the invitation to comment. Three of the five responses supported the proposed amendments without comment. One commentator, the president of the California Court Commissioners Association,

stated in support of the amendments, “It is time that there is a uniform procedure. Due process is very important and is often ignored in these situations.”

The final commentator supported the repeal of section 16 of the Standards of Judicial Administration and the removal of the reference to section 16 in rule 6.603(c)(4)(C). As to the proposed amendment to rule 6.655(i), however, the commentator stated that it would unnecessarily restrict the presiding judge’s ability to investigate and impose minor discipline on SJOs. The commentator, speaking on behalf of the Superior Court of Los Angeles County, also stated that the amendment would grant SJOs greater rights than those enjoyed by other employees in the court as well as greater due process than the law requires. Finally, because so few SJOs have been disciplined in Los Angeles County in the last four years, there is no justification for a change in the rule.

It is unclear how the proposed amendment would restrict a presiding judge’s ability to investigate and impose minor discipline. The amendment would only require that a presiding judge give an SJO notice and an opportunity to be heard when he or she intends to impose discipline following a preliminary investigation. As to the due process objection, the amendment would grant to certain SJOs who are the subject of a preliminary investigation the same due process rights already afforded SJOs who are the subject of formal investigations. Finally, the number of SJOs who have been disciplined is immaterial to the due process concerns addressed by this proposed amendment.

Implementation Requirements and Costs

The recommended amendment will result in no costs.

Attachments

Rule 6.655 of the California Rules of Court would be amended effective January 1, 2006, to read:

1 **Rule 6.655. Complaints Against Subordinate Judicial Officers**

2
3 (a)–(h) * * *

4
5 (i) [Complaints requiring preliminary investigation]

6
7 (1) If after an initial review of the complaint the presiding judge finds a basis
8 for further inquiry, the presiding judge shall conduct a preliminary
9 investigation appropriate to the nature of the complaint.

10
11 (2) The investigation may include interviews of witnesses and a review of
12 court records.

13
14 (3) The presiding judge may give the subordinate judicial officer a copy of
15 the complaint or a summary of its allegations and allow him or her an
16 opportunity to respond. The presiding judge must give the subordinate
17 judicial officer a copy of the complaint or a summary of its allegations
18 and allow the subordinate judicial officer an opportunity to respond
19 before the presiding judge takes appropriate informal action as described
20 in subdivision (i)(4)(B).

21
22 (4)–(5) * * *

Rule 6.603 of the California Rules of Court would be amended effective January 1, 2006, to read:

Rule 6.603. Authority and Duties of Presiding Judge

(a)–(b) * * *

(c) [Duties]

(1)–(3) * * *

(4) (Oversight of judicial officers) The presiding judge shall:

(A) [Judges] Notify the Commission on Judicial Performance of

(i) A judge’s substantial failure to perform judicial duties, including but not limited to any habitual neglect of duty, persistent refusal to carry out assignments as assigned but the presiding judge, or persistent refusal to carry out the directives of the presiding judge as authorized by the rules of court; or

(ii) Any absences caused by disability totaling more than 90 court days in a 12-month period, excluding absences authorized under subdivision (c)(2) of this rule.

(B) [Notice] Give the judge a copy of the notice to the commission under subdivision (A) if appropriate. If a copy is not given to the judge, the presiding judge shall inform the commission of the reasons why so notifying the judge was deemed inappropriate;

(C) [Commissioners] Prepare and submit to the judges for consideration and adoption procedures for receiving, inquiring into, and resolving complaints lodged against court commissioners and referees, consistent with rule 6.655; ~~giving due consideration to section 16 of the Standards of Judicial Administration;~~

(D)–(E) * * *

(5)–(11) * * *

(d) * * *

Section 16 of the Standards of Judicial Administration would be repealed effective January 1, 2006:

1 **Sec. 16. Procedures for handling complaints against court commissioners and**
2 **referees**

3 ~~In establishing procedures for receiving and resolving complaints against court~~
4 ~~commissioners and referees a court should consider the following suggested~~
5 ~~guidelines:~~

- 6 (1) ~~A complaint received on the conduct of a subordinate judicial~~
7 ~~officer should be directed to the presiding judge. When the~~
8 ~~complaint is not in writing, a memorandum that includes the~~
9 ~~pertinent information should be made.~~
- 10
- 11 (2) ~~A file should be maintained showing each complaint and its~~
12 ~~disposition.~~
- 13
- 14 (3) ~~The presiding judge or a judge or judges designated by the~~
15 ~~presiding judge should review each complaint promptly. A~~
16 ~~complaint that is frivolous or unfounded on its face may be~~
17 ~~disposed of without further action, but the complainant should be~~
18 ~~informed of the disposition and a memorandum should be placed~~
19 ~~in the file.~~
- 20
- 21 (4) ~~A preliminary inquiry should be made on any complaint that has~~
22 ~~possible validity. A copy of the complaint should be supplied to~~
23 ~~the commissioner or referee, who should be allowed an~~
24 ~~opportunity to respond. The preliminary inquiry may be~~
25 ~~terminated if the complaint is found to be lacking in merit or an~~
26 ~~acceptable explanation is offered.~~
- 27
- 28 (5) ~~When the preliminary inquiry indicates that a complaint not minor~~
29 ~~in nature appears to have validity or there is other good cause~~
30 ~~including other complaints, the presiding judge should appoint a~~
31 ~~committee of judges to conduct further investigation. The~~
32 ~~commissioner or referee should be presented a written statement of~~
33 ~~the allegations and provided an opportunity to respond either orally~~
34 ~~or in writing.~~
- 35
- 36 (6) ~~At the conclusion of the investigation the committee should make a~~
37 ~~written report and recommendation for action to be taken by the~~
38 ~~court. The committee may recommend that no further action be~~
39 ~~taken on the complaint, that a reprimand be given the~~

1 commissioner or referee, or that further proceedings be conducted
2 to consider suspension or termination of employment. The court in
3 determining the disposition of the complaint should give due
4 consideration to the committee's recommendation.

5
6 (7) Each complainant should be notified promptly in writing of the
7 receipt and of the disposition of the complaint.

8
9 (8) The complaint at all stages should be handled as promptly as due
10 process allows.

11
12 (9) Except as provided in paragraphs (3) and (7), all papers filed and
13 proceedings conducted on a complaint against a commissioner or
14 referee should be confidential until disciplinary action is ordered
15 by the court.

SPR05-37

Disciplinary Action: Complaints About Subordinate Judicial Officers (amend Cal. Rules of Court, rules 6.655(i) and 6.603(c)(4)(C); repeal Cal. Stds. Jud. Admin., § 16)

1.	Hon. Anthony J. Brandenburg President, California Court Commissioners Association Vista	A	Y	It is time that there is a uniform procedure. Due process is very important and is often ignored in this situation.	No response required.
2.	Ms. Mary Carnahan Criminal Division Program Manager Superior Court of California, County of Solano Fairfield	A	N	No specific comment.	No response required.
3.	Superior Court of California, County of Los Angeles Los Angeles	N	Y	<p>The proposed change to California Rules of Court, rule 6.655 unnecessarily restricts the presiding judge’s ability to investigate and impose minor discipline on commissioners. The proposed rule change would grant commissioners greater rights than those enjoyed by other employees in our court as well as greater due process than the law requires. In our court, very few complaints against commissioners result in any formal discipline. In fact, in the last 4 years, there have been fewer than 10 instances in which the presiding judge imposed any discipline on a commissioner. Those numbers do not justify a change in the rule. Thus, the stated rationale for amending the rule is not supported by the experience of our court.</p> <p>The proposed repeal of section 16 of the Judicial Administration Standards is</p>	It is unclear how the proposed amendment would restrict the presiding judge’s ability to investigate and impose minor discipline. The amendment would only require that a presiding judge give an SJO notice and an opportunity to be heard when the presiding judge intends to impose discipline following a preliminary investigation. As to the due process objection, the amendment would grant to certain SJOs who are the subject of a preliminary investigation the same due process rights already afforded SJOs who are the subject of formal investigations. Finally,

SPR05-37

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				reasonable as its material provisions are reflected in rule 6.655, and the existence of a different provision serves only to confuse the investigation and discipline process. Consequently, it also makes sense to strike any reference to section 16 that appears in the California Rules of Court.	the number of SJOs who have been disciplined is immaterial to the due process concerns addressed by this proposed amendment.
4.	Mr. Stephen V. Love Executive Officer Superior Court of California, County of San Diego San Diego	A	N	No specific comment.	No response required.
5.	Mr. Dean Zipser President Orange County Bar Association Irvine	A	Y	No specific comment.	No response required.