

# CALIFORNIA LEGISLATURE

STATE CAPITOL  
SACRAMENTO, CALIFORNIA  
95814

August 3, 2016

The Honorable Freddie Rodriguez  
Chair, Joint Legislative Audit Committee  
Legislative Office Building  
1020 N Street, Room 107  
Sacramento, CA 95814

Dear Assemblymember Freddie Rodriguez,

We respectfully request the Joint Legislative Audit Committee to approve an audit of the Commission on Judicial Performance to examine its policies and practices for handling and resolving complaints against judges. We are specifically interested in whether the Commission's policies and practices comply with the fundamental concepts of constitutional due process. The recent case of the admonishment of Ventura County Superior Court Judge Nancy L. Ayers by the Commission on Judicial Performance for keeping a guide dog-in-training at her feet during proceedings demonstrates a need to audit the Commission on Judicial Performance. According to the Daily Journal:

Judge Nancy L. Ayers received a letter from the commission informing her of two complaints that she brought a dog into her courtroom... The complaints are the first against Ayers in nearly seven years on the bench. One was made by [...] a felon the judge sentenced to life in prison after a third strike case with gang allegations. The second was made soon after by [the felon's] jail cell neighbor of six months.

Both accounts claim the judge paid more attention to her dog than to their cases, and both have been countered in signed declarations by court staff and, in the first instance, by the attorneys on both sides.

Ayers was admonished privately by the commission [and] her appeal was denied [by the commission.]

[She appealed] to the state Supreme Court [. . .] and rejected allegations the dog was noisy or that she attended to the service animal at all[.]

[. . .]

She received approval [to have the dogs at court proceedings] from the Administrative Office of the Courts and from every presiding judge she has served under, according to the Ventura County Superior Court.

[. . .]

The commission denied Ayers' administrative appeal after finding that the act of training guide dogs in itself "necessarily requires some diversion" of attention and as such is inconsistent with the mission of placing judicial duties above all other activities. (Hernandez, *CJP Admonishes Judge for Dog Behind Bench*, Daily Journal (May 2, 2016).)

In challenging the private admonishment of the Commission, Judge Ayers had to choose to proceed with the case as a public matter. Judge Ayers is challenging the Commission's determination that there is clear and convincing evidence warranting her discipline notwithstanding the signed declarations by court staff and by the attorneys on both sides that countered the Commission's finding. The California Supreme Court ordered the Commission on Judicial Performance to either (1) withdraw its advisory letter issued to Judge Ayers, or in the alternative, (2) show cause before the Supreme Court why the relief sought by Judge Ayers should not be granted. The Commission on Judicial Performance chose to withdraw its advisory letter.

The case against Judge Ayers raises a number of issues regarding the process and procedures at the Commission on Judicial Performance.

Additionally, the Commission – a public agency – does not appear to have ever been audited by the State Auditor. Therefore, there has been no investigation or analysis done by the State Auditor as to the staffing or usage of funds by the agency. The Commission has from time to time employed trial attorneys, and from time to time has utilized special prosecutors, such as the Attorney General's office, for the formal proceedings that take place several times per year, on the average. This raises the issue of the most efficient way to staff and conduct formal proceedings. Finally the Commission makes determinations on whether to initiate a preliminary investigation, the level of discipline offered upon completion of the preliminary investigation, and whether to initiate a formal proceeding. In the course of formal proceedings, appointed special masters make findings of fact and determinations of law. Under the current system, the Commission has the right to modify the findings of fact and determinations of law, and impose discipline in accordance with the revised findings. This raises due process considerations, in terms of the Commission both making the decision to prosecute, and then having the ability to alter the findings of the special masters prior to the imposition of discipline. Accordingly, the audit should include, but not be limited to, the following questions:

1. What are the standards used to determine the disposition of the following cases: (a) closing after initial review; (b) closed without discipline after investigation; (c) advisory letter; (d) private admonishment; (e) public admonishment; (f) public censure; and (g) removal. Are there uniform criteria used to determine the disposition of the types of cases detailed above in (a) through (g)? If so, are these criteria being followed? Do these criteria allow the Commission to fulfill its mission, or are they deficient?
2. In what percentage of cases did the Commission on Judicial Performance (Commission) contact the (a) complainants; (b) witnesses; and (c) judges? What are the standards the Commission uses to determine whether and when to contact the (a) complainants; (b) witnesses; and (c) judges?
3. When are judges notified that they are the subject of a complaint? When are judges informed about the nature of a complaint and its bases? When are judges provided with an opportunity to respond to complaints?

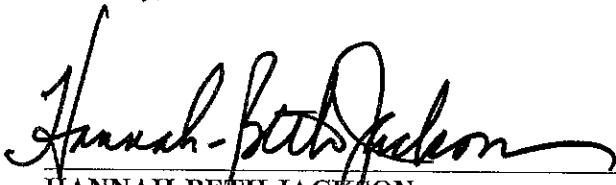
4. What information is provided to the judges by the Commission, in terms of the complaint and the facts revealed by the Commission's investigation, so as to allow the judge to respond to the staffing inquiry or preliminary investigation letter? Are certain facts, information, or documents withheld from the judge during the course of the preliminary investigation, and, if so, why?
5. Are the judges provided due process by the Commission, as would be afforded to parties in the state court system? Specifically, what procedures are in place to ensure that judges receive due process from complaint to resolution?
6. In terms of the standard utilized by the Commission, is the "clear and convincing evidence" standard utilized in all instances? Who within the Commission system makes the determination as to whether or not an alleged violation of the Code of Judicial Ethics meets the clear and convincing standard? Is there any type of "double check" process in place to ensure that the correct standard has been applied?
7. In terms of the materials considered by the Commission, do Commissioners ever consider documents, statements, or testimony that would not be admissible under the Evidence Code in the State of California? If so, why, and what safeguards are in place to ensure that the documents, statements, or testimony are authenticated, credible, and reliable? Specifically, what rules or standards does the Commission have in place with regard to hearsay "evidence"?
8. How does the issue of the credibility of witnesses and statements factor into the Commission's work? How is the credibility of witnesses determined during the course of a preliminary investigation? Does the Commission have the opportunity to ever meet with or assess witnesses, prior to making a determination on a preliminary investigation? How do Commissioners evaluate the credibility of statements reported to them by staff investigators without observing the witnesses, both before the initiation of a preliminary investigation, and then before the notification to the judge of the proposed level of discipline?
9. In the course of formal proceedings in particular, does the Commission itself have the opportunity to meet with or assess witnesses? If not, what is the rationale for the Commission having the authority to alter the findings of fact and conclusions of law made by the special masters, who did actually observe the witnesses?
10. In terms of the information provided to the Commission, what exactly is actually provided to the Commissioners? Are they provided with the entirety of the staff investigator/attorney's investigative file prior to initiating a preliminary investigation? Are they provided with the entirety of the staff investigator/attorney's investigative file prior to determining the level of discipline at the end of a preliminary investigation? Are Commissioners receiving sufficient information from staff upon which to base their decisions?
11. At exactly which stages in the process do the staff attorneys provide recommendations to the Commission? What is the form of those recommendations? How often are staff recommendations adopted or rejected? Generally, what decisions are made by staff as opposed to Commissioners?
12. What are the qualifications of the staff, who evaluate complaints, make preliminary determinations, and recommendations? What experience is required? What legal training? What exposure to judicial proceedings and courtrooms is required? What judicial experience is required? Is there a process to ensure that staff have real-world courtroom and litigation

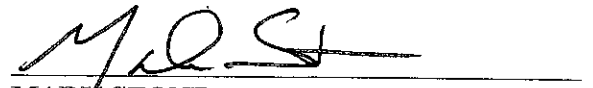
- experience, in order to assess the complaints? What type of training do the staff attorneys receive, initially and on an ongoing basis?
13. Does the Commission employ trial attorneys for formal proceedings? What qualifications are required for these positions? What are they paid? What responsibilities do they have in addition to the prosecution of formal proceedings? Does the Commission utilize outside prosecutors, such as attorneys from the Attorney General's office? What criteria or processes are used to determine whether a formal proceeding will be prosecuted by an in-house trial attorney, or an outside attorney from the Attorney General's office, for example? What is the cost of using an outside prosecutor, as opposed to an in-house attorney?
  14. In terms of the Commissioners, what type of orientation and training are they provided? Are there processes for allowing them to visit courtrooms or observe busy calendars in particular?
  15. The Commission rules have provisions regarding confidentiality. What is the rationale for requiring the judicial officers to keep any type of inquiry or investigation confidential?
  16. How often does the Commission investigate legal error? What standards are utilized for determining whether a complaint is one of legal error? Has discipline been imposed for legal error? What protections exist within the Commission system to ensure that judges are not being disciplined for legal error?
  17. What considerations does the Commission give to situations where there is no clear legal precedent as to whether or not a judge's conduct is in violation of the Code of Judicial Ethics? Does the Commission consider whether the judge has any notice that the conduct under investigation could possibly constitute a violation of the rules?
  18. What is the justification for taking any disciplinary action, including the initiation of an investigation, without providing the target of the investigation an opportunity to provide information? What is the justification for compelling a judge to sacrifice confidentiality in order to challenge a disciplinary decision? Does the Commission provide all parties sufficient opportunities to provide information related to an investigation? Determine the outcome of case and types of discipline imposed. Please review a sample of cases that result in private discipline.
  19. For 2010 through 2015, determine and assess the number of cases, case-processing time, and outcome of each case within each stage of the Commission on Judicial Performance's discipline process.
  20. Determine and assess the Commission on Judicial Performance's total revenues, expenditures, and fund balances for 2010 through 2015.
  21. Determine the size and composition of the Commission on Judicial Performance's staff. Analyze whether the staffing level, training, and staff qualifications are appropriate for the Commission on Judicial Performance's mission.
  22. Determine whether the Commission on Judicial Performance's budget for administration and staffing is consistent with the best practices of one or more comparable organizations. What is the average cost of an inquiry or investigation? Are the costs reasonable and in line with those of other state judicial ethics commissions? What is the cost of investigations that go beyond the initial review?

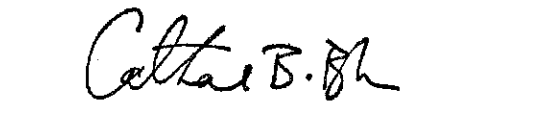
23. Does the Commission on Judicial Performance retain records of past complaints and outcomes filed against a judge? If so, how long are those records retained? Do protocols and procedures include reviewing past complaint history of a judge if a subsequent complaint is filed? When making a determination if an investigation should be conducted, does the Commission weigh whether multiple complaints have been lodged against a judge? Does the Commission consolidate complaints? Are there cases that do not get "full investigation," and if so, how many?
24. Over the past five years, are there any cases where a judge has been publicly admonished, censured, or removed, after having had prior admonishments, advisory letters, or complaints closed after or without investigation?
25. Does the Commission have policies for expediting complaints? Over the past five years, how many complaints were expedited or deferred and for what reasons?
26. Are there disparities in investigation rates, discipline rates, and budget efficiencies between the Commission and similar judicial commissions in other states?

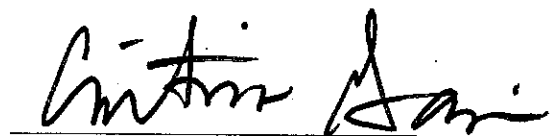
If you have any questions or concerns, please contact Margie Estrada, Chief Counsel of the Senate Committee on Judiciary, at (916) 651-4113.

Sincerely,

  
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