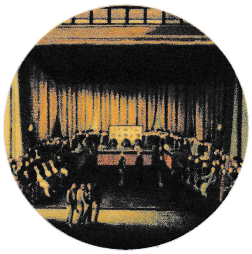

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September 30, 2016

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

Re: Proposed Changes to Rules of Commission on Judicial Performance

Dear Commission:

This document is submitted on behalf of a large, diverse group of members of the public. We propose ten amendments, additions, and repeals of various Rules of the Commission on Judicial Performance for your consideration at the upcoming biennial rules review meeting.

We believe significant changes must be made to bring the commission in line with modern, transparent government and to uphold its constitutional mandate to protect the public against judicial misconduct and to promote public confidence in the court system. Pursuant to commission Policy Declaration 3.5, each proposal includes a rationale as to why the change serves the mandate of the commission.

The following ten proposals are hereby submitted:

1. *Amendment to Rule 102.* Eliminate confidentiality of complaints.
2. *Addition to Rule 102.* Public reporting of complaint data by judge and county.
3. *Addition to Rule 102.* File Orders of Dismissal.

4. *Repeal of Rules 110 (d), 111 (d), 111.5, 113, 114, 116(b)(2), 116(b)(3).* Eliminate private disciplines. Three levels of discipline only: Public Admonishment, Public Censure, and Removal.
5. *Addition to Rule 116*. Live broadcast of public disciplines.
6. *New Rule*. Judicial retaliation aggravating factor, may be separately disciplined even if initial complaint dismissed.
7. *Amendment of Rule 117*. Permanently maintain all complaints and investigative records.
8. *Addition to Rule 109*. Description and establishment of specific criteria for "Preliminary Check"
9. *Amendment to Rule 109*. Definition and establishment of specific criteria for "Staff Inquiry" or "Preliminary Inquiry"
10. *Amendment to Rule 111*. Definition and establishment of specific criteria for "Preliminary Investigation"

PROPOSALS

1. Amendment to Rule 102. Eliminate confidentiality of complaints.

PROPOSAL

Upon adjudication by the commission, all complaints shall be made publicly available without redaction.

If a judge, complainant, or third party wishes to seal a complaint, in part or in whole, prior to its disclosure, a request for sealing must be submitted to the commission. The criteria necessary to seal a complaint shall be the same as those set forth under California Rules of Court, rules 2.550 and 2.551, and governing California case law, which apply to normal civil and criminal proceedings. The commission shall make a determination as to whether or not the criteria for sealing have been satisfied. If sealing is granted, nothing in this rule prohibits the complainant, respondent judge, or anyone other than a commission member or member of the commission staff from disclosing the sealed complaint.

RATIONALE

A. The commission has the power to disclose complaints.

Currently, the commission withholds all complaints from the public. However, California Constitution Article VI, section 18(i)(1) provides:

> "(1) The commission shall make rules for the investigation of judges. The commission **may** provide for the confidentiality of complaints to and investigations by the commission." (bold added)

Therefore, the commission has the power to disclose complaints to the public.

B. Numerous compelling public interests are served by disclosing complaints.

Judges are public officials subject to reelection. Judges decide matters of the utmost importance, from interpretation of public policy to criminal sentencing to child custody. Their decisions permanently impact the lives of the people who appear before them and those who don't through interpretation of laws. California's approximately 2,200 judges decide approximately eight million cases annually.

The public has a strong interest in ensuring its judges are performing their duties with the highest integrity. Withholding complaints of judicial misconduct, or even allegations of misconduct, prevent the public from "seeing what its government is up to." The public should be allowed to decide for itself what information it believes may be true or not, frivolous or not.

By withholding complaints it becomes impossible for the public to obtain information about judges' bias by gender, race, ethnicity, religion, sexual orientation, socioeconomic class, or other demographic. We know these biases exist, but when they exist in a judicial decision it is a violation of the rights to equal protection and due process under the Fourteenth Amendment. Litigants have a right to information that may be relevant to deciding whether or not to exercise a peremptory challenge against a judge in order to receive a fair hearing.

The late federal judge Damon Keith wrote, "When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation. The Framers of the First Amendment 'did not trust any government to separate the true from the false for us.'...They protected the people against secret government." Detroit Free Press v. Ashcroft (2002) 303 F.3d 681.

Complaints contain information that belongs to the people.

C. Arizona's commission publicly discloses complaints.

Since 2006, pursuant to Arizona Commission on Judicial Conduct, Commission Rules, Rule 9, Arizona has provided online, public access to dismissed complaints, orders of dismissal with comments, and the entire Record for public disciplines:

"(a) Public access. As a general rule, complaints against judges shall be available to the public following, but not before, final disposition, except in formal proceedings, as set forth below.

(1) Dismissed Cases: Only the complaint and the commission's order shall be public after all identifying information pertaining to an individual or court has been redacted.

(2) Other Informal Proceedings: The record, as defined in these rules, shall be public after the complainant and the judge are notified of the outcome of the proceedings and the time provided for further commission review has expired."

Please also see an extended legal analysis of federal and state law supporting the full disclosure of complaints in the **Addendum** attached at the end of this letter, including:

A. *Federal case law supports disclosure of complaints with judges' names unredacted.*
B. *California law and case law support full disclosure of complaints.*
C. *The cases routinely cited by the commission to justify confidentiality of complaints are red herrings.*

2. Addition to Rule 102. Public reporting of complaint data by judge and county.

PROPOSAL

The commission shall compile, and make publicly available, data on the number of complaints filed by county and by judge.

RATIONALE

The public has a strong interest in addressing problematic judges and counties. Reporting complaint data will increase confidence in the courts by reassuring the public that its judges are performing their duties with the highest integrity. Over time, if particular judges receive a disproportionately large number of complaints and those complaints are not frivolous, voters should be permitted to exercise their power at the ballot box to remove an unethical judge.

3. Addition to Rule 102. Commission shall file Orders of Dismissal.

PROPOSAL

Upon dismissal of a complaint, an Order of Dismissal shall be made publicly available by the commission. The Order of Dismissal shall include:

(a) Brief explanation and/or reasons for the dismissal (i.e., lack of jurisdiction, frivolous, false allegations, etc.);
(b) Level at which the complaint was dismissed (e.g., without action, after preliminary check, after preliminary inquiry, after preliminary investigation);
(c) List of documents and/or witnesses whose testimony was considered prior to dismissal (e.g., complaint, judge's response, court pleadings, transcript, etc.)
(d) Votes of commission members;
(e) Any other information deemed relevant by the commission.

RATIONALE

Publishing an Order of Dismissal will assure the public that the commission is not improperly dismissing complaints. Without an ability to review complaints or reasons for dismissal, the commission operates in secrecy and leaves the public with no mechanism to determine the effectiveness of the agency. Orders of Dismissal will increase confidence in the courts by reassuring the public that its sole oversight agency is operating effectively.

Regarding disclosure of votes of commission members, in Recorder v. Commission on Judicial Performance (1999) 72 Cal. App. 4th 258, the Court of Appeal wrote, "We conclude the vote of the members on whether or not to impose judicial discipline is such an essential and integral part of the formal proceedings of the commission - perhaps the single most important act a member takes in his or her capacity as such - that it would be plainly unreasonable to accept the commission's interpretation of its authority under section 18(i) and 18(j)." Recorder at 262.

The same "single most important act" also applies to a member's decision to dismiss a complaint of alleged misconduct. Votes to dismiss complaints are an adjudicatory matter, just as they are in formal proceedings (see legal analysis in Addendum). Therefore, votes should be disclosed in the Order of Dismissal.

Arizona's commission files an Order of Dismissal with each dismissed complaint.

4. Repeal of Rules 110 (d), 111 (d), 111.5, 113, 114, 116(b)(2), 116(b)(3). Elimination of private disciplines. Three levels of discipline only: Public Admonishment, Public Censure, and Removal.

PROPOSAL

Eliminate private disciplines.

RATIONALE

Private disciplines (Private Advisory Letters and Private Admonishments) constitute over 80% of the commission's disciplines. Private disciplines are for instances of actual judicial misconduct. There is a strong public interest in knowing about any instances of actual misconduct, no matter how small. As Judge Keith opined above, the commission should not have the discretion to classify "important" versus "unimportant" misconduct and then withhold what it has deemed "unimportant" misconduct from the public. This is precisely the kind of selective information that the First Amendment protects against.

Moreover, the commission describes what it calls "mitigating factors" in its Annual Reports, such as remorse for one's actions, which it considers in deciding whether to privately or publicly discipline a judge. The public has no ability to discern how these "mitigating factors" are applied. A dispositive factor between issuing a public versus private discipline, even if the misconduct was substantively the same, should not include a subjective call that a judge appeared sorry for his or her misconduct.

5. Addition to Rule 116. Live broadcast of public disciplines.

PROPOSAL

In addition to a written public discipline, a judge shall be required to attend a public hearing wherein they are admonished by the commission on live television. The broadcast shall be archived permanently and made publicly available for viewing on the commission's website.

RATIONALE

Public admonishment deters misconduct. The more public the admonishment, the greater the deterrent. Moreover, culture is changing and individuals are obtaining less information from written media and more information from visual media. The Florida Supreme Court now publicly admonishes judges on live television, and the videos are archived for later viewing. Below is a link to the most recent public admonishment in Florida:

https://www.youtube.com/watch?v=gM7Q5M2Yuy0

The California Supreme Court and the Judicial Council have embraced the trend toward increased use of visual media through the use of livestreaming. The Supreme Court also archives its livestreamed oral argument hearings. The commission should embrace similar practices.

6. New Rule. Judicial retaliation aggravating factor, may be separately disciplined even if initial complaint dismissed.

PROPOSAL

If it is determined that during, or subsequent to, an inquiry, investigative, or disciplinary proceeding initiated by the commission, that a judge retaliated against a complainant for submitting a complaint to the commission, or to any other disciplinary agency, the retaliation shall be considered an aggravating factor to any discipline issued by the commission, or may be disciplined separately even if the initial complaint was dismissed.

RATIONALE

Any person involved in ongoing litigation will affirm that retaliation is the primary deterrent to filing a complaint against a judge.

The commission has previously indicated that even commission members who vote to discipline a judge may be subjected to judicial retaliation. (See Recorder at 279.) If the commission made such a contention about a member of the commission voting for discipline, it can be readily concluded that such a retaliatory judge would also retaliate against the complainant(s).

Maintaining confidentiality of investigations is necessary to "encourage the filing of complaints and the willing participation of citizens and witnesses by providing protection against possible retaliation or recrimination." McCartney v. Commission on Judicial Qualifications (1974) 12 Cal.3d 512, 521.

However, it is not difficult for a judge subject of a complaint to decipher the identity of the complainant based on the allegations made, which is why the threat of retaliation deters complainants and witnesses from filing and pursuing complaints, and also results in unconstitutional bias (embroilment), which itself is a violation of the Code of Judicial Ethics.

Thus, the only way to protect complainants against retaliation is to consider retaliation an aggravating factor to a discipline. It is a judge's duty to recuse himself or herself from any

case in which they believe their impartiality may be reasonably questioned. Implementation of a rule that specifically addresses judicial retaliation would increase protections for complainants and encourage the filing of complaints.

7. Amendment of Rule 117. Permanently maintain all complaints and other records.

PROPOSAL

The commission shall permanently maintain all complaints and other records provided to the commission and all records created by the commission during its investigative processes.

RATIONALE

Similar to the rationale provided to the preceding proposal, the public has an interest in obtaining information about problematic judges, which includes access to an extended history of complaints and disciplines. Such history will allow the public to determine whether or not misconduct, or allegations of misconduct, have decreased or increased over a judge's career, which may be an important factor in reelection, or in a subsequent disciplinary decision by the commission.

With the nominal storage and maintenance costs of modern electronic recordkeeping destruction of important records cannot be justified.

8. Addition to Rule 109. Description and establishment of specific criteria for "Preliminary Check"

PROPOSAL

Define what actions are included in a "Preliminary Check," and describe the circumstances that initiate a "Preliminary Check."

RATIONALE

In response to a report produced by Court Reform LLC exposing the commission's low rates of inquiry and investigation of complaints compared to the commissions of other states, the commission responded that it conducts "Preliminary Checks" on complaints. Commission Director and Chief Counsel Victoria Henley testified to the alleged "checks" at an Assembly hearing on March 28, 2016, and the commission produced a response to Court Reform LLC's report alleging such "checks."

However, “Preliminary Checks” do not appear in any literature produced by the commission during its 55-year history: Rules, Policy Declarations, or Annual Reports. To the public, the term appears to be fabricated in an attempt to justify the agency’s practices and statistics.

More precisely defining what constitutes a “Preliminary Check” and the criteria required to initiate a “Preliminary Check” will provide valuable information to the public and increase its confidence in the agency.

9. Amendment to Rule 109. Definition and establishment of specific criteria for “Staff Inquiry” or “Preliminary Inquiry”

PROPOSAL

Define what actions are included in a “Staff Inquiry” or “Preliminary Inquiry,” and describe the circumstances that initiate a “Preliminary Inquiry.”

RATIONALE

In response to a report produced by Court Reform LLC exposing the commission’s low rates of inquiry and investigation of complaints compared to the commissions of other states, the commission responded that its “Preliminary Inquiries” are actually equivalent to “Preliminary Investigations” of other states. Commission Director and Chief Counsel Victoria Henley testified to the alleged equivalency at an Assembly hearing on March 28, 2016, and the commission produced a response to Court Reform LLC’s report baldly alleging the equivalency.

“Preliminary Inquiry” is not precisely defined in the Rules, nor is the circumstances that give rise to an inquiry. More precisely defining what constitutes a “Preliminary Inquiry” and the criteria required to initiate a “Preliminary Inquiry” will provide valuable information to the public and increase its confidence in the agency.

10. Amendment to Rule 111. Definition of and establishment of specific criteria for “Preliminary Investigation”

PROPOSAL

Define what actions are included in a “Preliminary Investigation,” and describe the circumstances that initiate a “Preliminary Investigation.”

RATIONALE

In response to a report produced by Court Reform LLC exposing the commission's low rates of inquiry and investigation of complaints compared to the commissions of other states, the commission alleged that its "Preliminary Investigations" are somehow equivalent to "Full Investigations" of other states. Commission Director and Chief Counsel Victoria Henley testified to the alleged equivalency at an Assembly hearing on March 28, 2016, and the commission produced a response to Court Reform LLC's report baldly alleging the equivalency.

"Preliminary Investigation" is not precisely defined in the Rules, nor is the circumstances that give rise to an investigation. More precisely defining what constitutes a "Preliminary Investigation" and the criteria required to initiate a "Preliminary Investigation" will provide valuable information to the public and increase its confidence in the agency.

Thank you for considering these proposals.

Sincerely,

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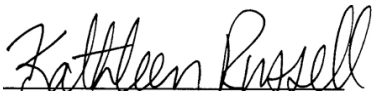

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ADDENDUM

Legal analysis supporting disclosure of complaints

A. Federal case law supports disclosure of complaints with judges' names unredacted.

On July 29, 2016, a federal Court of Appeal addressed public disclosure of judicial complaints for the first time. In American Immigration Lawyers Association v. Department of Justice (2016) D.C. Circuit. No. 1:13-cv-00840, the American Immigration Lawyers Association (AILA) filed a Freedom of Information Act (FOIA) request to the Department of Justice requesting complaints filed against federal immigration judges. The Department of Justice responded to the request by providing copies of the complaints with judges' names and other information categorically redacted. AILA filed suit against the DOJ demanding the production of the unredacted complaints. The circuit court found that the district court erred in permitting the DOJ's redactions:

> "First, the government invoked one of FOIA's statutory exemptions in redacting the immigration judges' names from all of the disclosed records. The government reasoned that, as a blanket matter, the privacy interest of immigration judges in avoiding disclosure of their names necessarily outweighs the public's interest in learning any of the judges' names. We conclude that the government's across-the-board approach cannot be sustained in light of the variety of privacy and public interests that may be at stake in connection with the disclosure of an immigration judge's name. We therefore remand for a more individualized inquiry into the propriety of redacting judges' names."

The circuit court weighed the public interest of disclosing judges' names against the privacy interest of the judges and found there to be no basis for categorical redaction of judges' names. In pertinent part, the circuit court wrote:

> "The records at issue encompass all complaints OCIJ received during the relevant time period: whether substantiated or unsubstantiated, whether related to serious issues or comparatively trivial ones, and whether about immigration judges' conduct on the bench or their conduct outside the workplace. Moreover, the privacy interests at stake encompass those of each immigration judge subjected to any of the wide variety of types of complaints: whether a sitting immigration judge or someone no longer on the bench, whether a judge who has faced only one complaint or a judge who has repeatedly been the target of complaints, and whether the judge has been subjected to some type of discipline or has avoided disciplinary action (and the reasons why). Given the variety in types of complaints and circumstances of individual immigration judges, not every judge has the same privacy interests at stake and not every complaint would equally enlighten the public about "what their government is up to." [Citations.]

> The interests on both sides of the Exemption 6 balancing test might vary in substantial measure with respect to different immigration judges (and perhaps different complaints). A retired immigration judge—who, after all, is a private citizen—presumably would have a greater privacy interest in avoiding disclosure of her name than would an immigration judge who sits on the bench today. Similarly, the public interest likely would be more pronounced in the case of a sitting immigration judge, who continues to make decisions as an employee of the Department of Justice, than in the case of a former judge. Additionally, disclosing the name of an immigration judge subject to numerous and/or serious substantiated complaints might shed considerable light on matters of public interest, whereas disclosing the name of an immigration judge subject to a single, unsubstantiated complaint might not. For instance, in the case of a sitting judge with a substantial number of serious and substantiated complaints, knowledge of her identity would enable the public to examine her official actions (including decisions), both past and future, and to assess any possible implications of those complaints for the conduct of her official responsibilities. By enabling the public to make such connections, knowing the identity of that judge could shed considerably more light on "what the government is up to," [Citation.], than simply knowing about the existence of some anonymous judge with a certain number of complaints against her."

The same reasoning must be applied to complaints filed with the commission. The public has an interest in knowing about allegations of misconduct, particularly those involving judges currently sitting on the bench.

Californians have an even more compelling interest in full disclosure of complaints than do federal judges – unlike federal judges, California's judges are subject to reelection and the public has a right to information that may be relevant to an election. The public should be allowed to decide for itself the importance or truthfulness of information contained in a complaint.

B. California law and case law support full disclosure of complaints.

While the Commission on Judicial Performance is not encompassed by the California Public Records Act (Government Code§ 6250 et. seq.) or California Rules of Court, rule 10.500, we ask that the proposed changes to its Rules be construed in accordance with these provisions and the legislative findings set forth in Government Code § 54950:

> "[T]he Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly. The people of this State do not yield

> their sovereignty to the agencies which serve them. The people, in delegating authority, do not to give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created."

California Constitution, Article 1 § 3 provides:

> "(b) (1) The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.
>
> (2) A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access."

California Rules of Court, rule 10.500(a) provides:

> "(1) The Judicial Council intends by this rule to implement Government Code section 68106.2(g), added by Senate Bill X4 13 (Stats. 2009-10, 4th Ex. Sess. ch. 22), which requires adoption of rules of court that provide public access to nondeliberative and nonadjudicative court records, budget and management information.
>
> (2) This rule 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."

The commission should also consider the voters' message in passing Proposition 190, adopted in 1994 to increase the openness of the commission's proceedings. In Recorder v. Commission on Judicial Performance (1999) 72 Cal. App. 4th 258, 274, the Court of Appeal, citing the ballot arguments in support of Proposition 190, found:

> "[T]he primary purposes of Proposition 190 were to eliminate secrecy in the commission's formal disciplinary proceedings and to ensure public accountability of the commission for its disciplinary determinations. The proponents of Proposition 190 could not have been more clear about this, as stated in their ballot argument: 'Proposition 190 is an important and timely reform measure. Judges are public servants and play a critical role in our society. The public must have confidence and trust in those holding judicial office...CALIFORNIA MUST ELIMINATE SECRECY AND ENSURE INTEGRITY IN THE DISCIPLINARY PROCESS...'" (Upper case and italics in original.)

The Court of Appeal's decision in Recorder, and the ballot measure from which it stemmed, should guide the way in the commission's consideration of these rules changes, and the commission should be mindful of the "clearly expressed intent to inspire public confidence in the California system of judicial discipline by eliminating the secrecy that shrouded formal disciplinary proceedings in the past." (Recorder at 275.)

Though these proposed changes go beyond formal disciplinary proceedings, we believe access to other aspects of the commission's operations is important because if very few complaints result in formal proceedings, the result is that nearly all of the commission's operations escape public scrutiny. The public has an interest in knowing about cases in which public officials are exonerated as well as those in which formal discipline is imposed. See, e.g., BRV v. Superior Court (2006) 143 Cal. App. 4th 742, 759-60; Caldecott v. Superior Court (2015) 243 Cal. App. 4th 212, 222 ["the public was entitled to know why he was exonerated and how the district dealt with the charges against him"].

In San Bernardino County Dept. of Public Social Services v. Superior Court (1991) 232 Cal.App.3d 188, the Court of Appeal wrote, “Denying public access to full information about the commission’s disciplinary decisions deprives the voters of an “ability to understand how the system operates and, in turn, its ability [to] make informed decisions regarding the need for positive changes to the system...”

In response to the commission’s argument in opposition of disclosing votes of commission members in Recorder, the Court of Appeal wrote:

> “[W]e fail to see the merit of a system in which public officials, sitting in judgment of other public officials regarding charges of official misconduct, are allowed to hide behind a veil of secrecy when making the “tough calls” necessary to any adjudicatory regime. A certain amount of courage and a “thick skin” are essential attributes for anyone who purports to perform “judicial” functions. We should expect, and accept, no less from members of the commission.” Recorder at 280.

Virtually every government agency has rapidly evolved towards increased transparency. “[T]he history of constitutional provisions governing judicial discipline in California shows a trend toward greater openness and less secrecy...” Recorder at 258, citing Adams v. Commission on Judicial Performance (1994) 8 Cal.4th 630 at 646.

Indeed, the Sunshine Amendment (California Constitution, Article 1 § 3) was enacted in 2004, and California Rules of Court, rule 10.500 was enacted in 2010. The transparency of the commission has changed minimally since its inception 55 years ago. Its policies must evolve to satisfy the public’s growing demand for government transparency, especially since it is the sole agency responsible for maintaining the integrity of California’s $3.5 billion

court system – ensuring that its 2,200 judges are acting ethically across the 8 million cases they decide annually.

C. The cases routinely cited by the commission to justify confidentiality of complaints are red herrings.

The commission routinely cites cases like McCartney v. Commission on Judicial Qualifications (1974) 12 Cal.3d 512, 521 and Landmark Communications, Inc. v. Virginia (1978) 435 U.S. 829 to justify why complaints should be private. However, these citations are red herrings because they apply to the confidentiality of *ongoing investigations and hearings*, not to the disclosure of ***adjudicated*** complaints.

Indeed, the California Supreme Court in Mosk v. Superior Court (1979) 25 Cal.3d 474 opined:

> "The confidentiality **of investigations and hearings** by the Commission is based on sound public policy. Confidentiality encourages the filing of complaints and the willing participation of citizens and witnesses by providing protection against possible retaliation or recrimination. (McCartney v. Commission on Judicial Qualifications (1974) 12 Cal.3d 512, 521 [116 Cal.Rptr. 260, 526 P.2d 268]; Landmark Communications, Inc. v. Virginia (1978) 435 U.S. 829 [56 L.Ed.2d 1, 98 S.Ct. 1535, 1539].) Confidentiality protects judges from injury which might result from publication of **unexamined and unwarranted complaints** by disgruntled litigants or their attorneys (Landmark Communications, Inc. v. Virginia, supra), or by political adversaries. Confidentiality of **investigations** by the Commission preserves confidence in the judiciary as an institution by avoiding premature announcement of groundless claims of judicial misconduct or disability. (Landmark Communications, Inc. v. Virginia, supra.)" Mosk at 491. (bold added)

It is not being requested that investigations, hearings, or meetings wherein commission members deliberate about whether to dismiss or investigate a complaint be opened to public, as there is a compelling interest in confidentiality for such proceedings. It is merely requested that the final disposition of the complaints and the complaints themselves be made public, which are ***adjudicated*** matters. The clear distinction between deliberative and adjudicatory actions was cited in Recorder as a primary reason why formal proceedings of the commission must be open to the public:

> "At the risk of sounding repetitious, the point is that when the commission acts in an adjudicatory capacity...the proponents of Proposition 190 intended the commission to conduct its formal "proceedings" as a court does in a criminal case and as the State Bar Court does in attorney discipline cases..." Recorder at 281.

Further, complaints will not have been "unexamined" upon disclosure because the commission will have acted upon complaints it deemed worthy of inquiry or investigation. Therefore, the potential injury to a judge caused by disclosing "unexamined and unwarranted complaints of disgruntled litigants or their attorneys" would be little to none.

When allegations contained in a criminal or civil complaints are later found to be false, the records of those proceedings, including the original complaints, remain available to the public. There appears to be no compelling governmental interest served by withholding complaints from the public.

Thus, nondeliberative and non-investigative actions of the commission should be open to the public. This includes the final disposition of complaints, votes of commission members regarding those complaints, and the complaints themselves.