

**STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF WORKERS' COMPENSATION**

INITIAL STATEMENT OF REASONS

**Subject Matter of Regulations: Ethical Standards of Workers' Compensation
Judges**

**TITLE 8, CALIFORNIA CODE OF REGULATIONS
SECTION 9720.1 - 9723**

| | |
|-----------------|---|
| Section 9720.1 | Authority |
| Section 9720.2 | Definitions |
| Section 9721.1 | Code of Judicial Ethics |
| Section 9721.2 | Gifts, Honoraria and Travel |
| Section 9721.11 | Requirement for Disclosure |
| Section 9721.12 | Disqualification |
| Section 9721.13 | What are not Grounds for Disqualification |
| Section 9721.21 | Restriction on Investments |
| Section 9721.31 | Financial Interests in Educational Programs |
| Section 9721.32 | Duty to Report Ethics Violations |
| Section 9721.33 | Previously Earned Compensation |
| Section 9722 | The Workers' Compensation Ethics Advisory Committee |
| Section 9722.1 | Commencing an Investigation |
| Section 9722.2 | Investigation and Action by the Administrative Director or Court Administrator |
| Section 9723 | Miscellaneous Provisions |

BACKGROUND TO REGULATORY PROCEEDING

Workers' compensation administrative law judges (WCALJs) have been subject to the California Code of Judicial Ethics (previously called the Code of Judicial Conduct) since Labor Code section 123.6 was added to the Labor Code in 1980. In 1993, AB 1252, Chapter 483, added a provision prohibiting WCALJs from accepting honoraria significantly funded by workers' compensation attorneys, unless prior written permission was obtained from the Administrative Director. The amendment also required that the Administrative Director adopt regulations to enforce the section, and provided that the regulations should be consistent with procedures of the Commission on Judicial Performance and the travel restrictions of the Political Reform Act of 1974.

AB 749 of 2002 established the position of Court Administrator and amended Labor Code section 123.6 to require that the Administrative Director's regulations be adopted in consultation with the Court Administrator and with the Commission on Judicial Performance. The Commission on Judicial Performance has been consulted on these proposed amendments to the regulations.

AB 749 also provided that the existing Administrative Director's rules were to remain in existence until new rules, adopted on recommendations of the Court Administrator became effective. The amended rules, proposed on the recommendation of the Court Administrator, are the first new regulations to be adopted since the position of Court Administrator was filled.

In addition to the Administrative Director's rules, WCALJs, as designated employees, are also subject to gift and conflict rules of the Political Reform Act (Government Code sections 85100 and following).

NECESSITY

Labor Code section 123.6 requires the Administrative Director to adopt regulations, on the recommendation of the Court Administrator, to enforce the ethics requirements of Labor Code section 123.6.

TECHNICAL, THEORETICAL, OR EMPIRICAL STUDIES, REPORTS, OR DOCUMENTS

The Division has not relied upon any technical, theoretical, or empirical studies, reports, or similar documents in proposing the above-identified regulations:

SPECIFIC TECHNOLOGIES OR EQUIPMENT REQUIRED (if applicable)

No specific technologies or equipment are required by these proposed regulations.

REASONABLE ALTERNATIVES CONSIDERED: - Gov. Code § 11346.2(b)(3)(A):

None.

REASONABLE ALTERNATIVES THAT WOULD LESSEN THE IMPACT ON SMALL BUSINESSES: - Gov. Code § 11346.2(b)(3)(B):

None.

FACTS ON WHICH THE AGENCY RELIES IN SUPPORT OF ITS INITIAL DETERMINATION THAT THE REGULATIONS WILL NOT HAVE A SIGNIFICANT ADVERSE IMPACT ON BUSINESS

The Administrative Director has determined that these proposed regulations will not have a significant adverse impact on business. The regulations will not apply to any member of the public, but will apply only to WCALJs.

SPECIFIC PURPOSE OF EACH SECTION – GOVERNMENT CODE § 11346.2(b)(1)

The specific purpose of each adoption, and the rationale for the determination that each adoption is reasonably necessary to carry out the purpose for which it is proposed, together with a description of the public problem, administrative requirement, or other condition or circumstance that each adoption is intended to address, is as follows:

SECTION 9720.1 Authority

Specific Purpose of Changes to Section 9720.1

The purpose of the changes in this section are to change the references from the no longer used term *referee* to the newer statutory term, *workers' compensation administrative law judge*. References to *misconduct*, as used in this and subsequent sections are changed to *ethics violations*, because the statutes being interpreted and implemented refer to judicial *ethics* rather than judicial *misconduct*.

SECTION 9720.2 Definitions

Specific Purpose of Changes to Section 9720.2

The purpose of the changes to this section is to update statutory references which have changed, such as *referee* and *Code of Judicial Conduct*, and to add necessary definitions.

Financial interest is newly defined to allow ownership in companies, where the interest is small enough not to affect a judge's decision-making process. The amount of the interest so defined was taken from the limit the legislature allowed to superior court judges in Code of Civil Procedure (C.C.P.) section 170.9, updated for inflation since that section was enacted. If some amount of interest is not defined to be acceptable, judges will remain subject to the absolute prohibition of any interest found in the common law, which has not changed since the revolutionary era.

Gift is newly defined to allow ease of interpretation of what gifts may be legally accepted by a judge. Workers' compensation administrative law judges (WCALJs) are now bound by the limitations on gifts both in the Code of Judicial Ethics and in the Political Reform Act. (They are not bound by the limitations upon superior court judges contained in C.C.P. section

170.9.) Although this definition repeats some of the phrasing of the Code of Judicial Ethics for ease of understanding, it also imposes additional limitations on the travel reimbursement exception to gifts found in the Code of Judicial Ethics. While the Code of Judicial Ethics and C.C.P. section 170.9 allow free admission to all informational conferences and seminars, an additional limitation is imposed on WCALJs in subdivision (f)(8) in order to prohibit WCALJs who are not speakers at events from accepting free admission to private legal education events and events that are not bona fide legal education events.

The limitations on complimentary admission to events are intended to discourage WCALJs from being offered invitations to elaborate or expensive events, which are incidental to or not related to an event to which they might otherwise have free admission. The gift of free admission to such events may cast doubt in the minds of the knowledgeable public on a recipient judge's adherence to the forbearance of gifts required by the Code of Judicial Ethics.

The definition of *honorarium* is taken from C.C.P. section 170.9, which applies to superior court judges. The teaching exceptions to *honorarium* are stated in subdivision (g)(2) so that it is clear that judges are not required to seek permission under Labor Code section 123.6 to accept what otherwise might be considered honoraria. The exceptions are not identical to those in C.C.P. section 170.9, because not all of those are applicable to WCALJs, and some of those exceptions may contradict the intent of Labor Code section 123.6.

The definition of *previously earned compensation* is added in order to make clear exactly what compensation could be accepted by a judge under section 9721.33.

The definition of *spouse* is added in order to make the references to spouses include domestic partners as well.

The definition of *third degree of relationship* is added in order to clarify what relatives are included within the third degree of relationship, a civil law term which is used in C.C.P. section 170.1 in relation to disqualification, as section 9721.12 has adopted the provisions of C.C.P. section 170.1.

SECTION 9721.1 Code of Judicial Ethics

Specific Purpose of Changes to Section 9721.1

The purpose of the changes to this section are to update the reference to *referee*, and to specify what is meant by the word *Code*.

SECTION 9721.2 Gifts, Honoraria and Travel

Specific Purpose of Changes to Section 9721.2

The purpose of the changes to this section is to clarify what WCALJs may and may not accept as gifts, honoraria, and travel.

In subdivision (a), the prohibition on accepting gifts which are prohibited by rules of the State Bar is added to make WCALJs aware that in most circumstances they cannot accept gifts from attorneys. Although a similar prohibition results through the application of the rules of the Code of Judicial Ethics, by also stating the rule in terms of the State Bar rules, it is more easily understandable both to recipient judges and donor attorneys.

Subdivision (b) is rewritten because some of its provisions are now more precisely stated elsewhere, and some of the provisions are found not to be necessary. The first sentence of subdivision (b) essentially repeated the language of Labor Code section 123.6 (b) (except for the five dollar limitation). The Code of Judicial Ethics itself prohibits most gifts to judges, and it is not appropriate for the Court Administrator to approve gifts that would be prohibited by the Code. Later subdivisions in the section specify, within the limitations of the Code of Judicial Ethics, what gifts and honoraria the Court Administrator may approve.

Subdivision (b) establishes an absolute limit for gifts which are not otherwise prohibited, and which fall within an exception to being a gift. C.C.P. section 170.9 sets out a similar prohibition on gifts to superior court judge's (excepting wedding gifts, gifts from most relatives, and gifts occasionally exchanged where the gifts are of similar value), but that section does not apply to WCALJs. The acceptance of large gifts from non-relatives may tend to create a lack of public confidence in the impartiality of judges. The dollar limit for the affected gifts is established as the gift limit contained in Government Code section 89503, as adjusted for inflation by periodic regulations of the Fair Political Practices Commission. Since this limit was established by the legislature, and was identical to the gift limit originally established by the legislature for superior court judges, the Administrative Director finds that it is reasonable.

Subdivision (c) excludes from the amount limitation of subdivision (b), several types of gift or reimbursement which are similarly excluded from limitations, either in C.C.P. section 170.9 or F.P.P.C. regulation 18942.

Subdivision (c)(1) excludes travel reimbursements set forth in subdivision (d). These include payments for travel which would be allowed to superior court judges pursuant to C.C.P. section 170.9 subdivision (e)(2). Some description of what travel should be exempt from the limitations is necessary. The Administrative Director finds that it is reasonable to adopt the exceptions to the limit which the legislature has allowed to superior court judges. This subdivision does not include as exceptions the types of travel allowed to superior court judges by that subdivision, but which are not also allowed to WCALJs as designated employees

pursuant to Government Code section 89506. This subdivision also excludes some payments for travel which would be allowed to superior court judges pursuant to C.C.P. section 179 subdivision (e)(3). That subdivision excepts travel based on the source of reimbursement. In addition to the exceptions allowed to superior court judges, this subdivision (c)(1) also excepts travel provided by the California State Bar or a section of the State Bar, because these legal organizations, like professional judge's associations, could not be perceived to be making improper payments to judges.

Subdivisions (c)(2) and (c)(3) exclude wedding gifts and exchanged holiday gifts, and also gifts from a person with so close a relationship to the judge that the relationship would disqualify the judge from hearing a case involving that person. These exceptions are taken from subdivisions (b)(2) and (b)(3) of C.C.P. section 170.9, applicable to superior court judges. The purpose of these subdivisions is to make the exceptions from the gift limit as close as feasible to the similar exceptions for superior court judges.

The purpose of subdivision (e) is to make clear that payments or reimbursements for travel which are not described in the regulations as exceptions, are subject to the gift amount limitation.

The purpose of subdivision (f) is to state explicitly for what honoraria WCALJs must first obtain the written approval of the Court Administrator. Subdivision (f)(2) is included because in most cases, honoraria falling under this classification would be prohibited by Government Code section 89502. Requiring prior Court Administrator approval for honoraria covered by subdivision (f)(2) would allow the Court Administrator to deny approval for those which would be prohibited by Government Code section 89502, and prevent them having to be returned after being accepted.

Subdivision (g) replicates the exceptions to honoraria included in C.C.P. section 170.9, applicable to superior court judges, except for that subdivision's exception for payment for performance of a marriage.

The purpose of subdivision (h) is to make clear that the new position of Court Administrator will enforce the provisions of these regulations.

The purpose of subdivision (j) is to state a general rule that, unless excepted elsewhere in the regulations, WCALJs must obtain the Court Administrator's prior written approval before accepting any travel payment or honorarium in connection with a convention, meeting, or social event. The subdivision also makes clear that it cannot be construed as authority to accept honoraria which are otherwise prohibited by Government Code section 89502.

The purpose of subdivision (j) is to specify honoraria that will be allowed, by category of sponsor of the event in connection with which the payment is to be made. The organizational sponsors specified are of the type for which travel reimbursement would be allowed to

superior court judges pursuant to C.C.P. section 170.9, and are not primarily composed of attorneys who practice workers' compensation.

The purpose of subdivision (k) is to specify that a WCALJ is to request approval of an honorarium offered by an organization not of the type specified in subdivision (j).

The purpose of subdivision (l) is to specify the conditions for which travel payments may be accepted in connection with a speech or panel presentation given by a WCALJ, if the speech may be subject to prior approval requirements of subdivision (f). The subdivision adopts most of the similar provisions of C.C.P. section 170.9, Government Code section 89506, and F.P.P.C. regulation 18950.3, which specify when travel payments may be accepted in connection with speeches or panel presentations.

The purpose of subdivision (m) is to specify the conditions under which travel payments may be accepted when the travel is related to a legislative or governmental purpose or to an issue of state national or international public policy. The subdivision adopts most of the similar provisions of C.C.P. section 170.9 and Government Code section 89506.

The purpose of subdivision (n) is to specify what payments may be accepted in connection with a speech or panel presentation if the event is sponsored by attorneys who practice before the Workers' Compensation Appeals Board.

The purpose of subdivision (o) is to specify what payments may be accepted when advance approval of the Court Administrator is not required, in connection with travel provided by a government, the State Bar, a bar association, or an association of judges. The subdivision adopts most of the similar provisions of C.C.P. section 170.9, Government Code section 89506, and F.P.P.C. regulation 18950.3, which specify when travel payments may be accepted in connection with speeches or panel presentations.

SECTION 9721.11 Requirement for Disclosure

Specific Purpose of Section 9721.11

The purpose of this section is to specify what information judges must disclose to litigants, even though the judge may not believe the information is disqualifying. The requirement for such disclosure arises from Canon 3(E) of the Code of Judicial Ethics. That Canon also requires that judges are to disqualify themselves where disqualification is required by law. For superior court judges, this would refer to C.C.P. section 170.1, which sets forth the circumstances in which the judges must disqualify themselves. This section requires judge's to disclose disqualifying circumstances, as well as what is required to be disclosed by Canon number 3(E).

SECTION 9721.12 Disqualification

Specific Purpose of Section 9721.12

The purpose of this section is to set forth the circumstances in which a judge is disqualified. C.C.P. section 170.1 sets forth the circumstances in which a superior court judge is disqualified. However, since the C.C.P. section does not apply to WCALJs, actual reasons for disqualification are stated in this section. Without stating circumstances which are considered disqualifying, the requirement for disqualification would be vague. This section adopts most of the circumstances set forth in C.C.P. section 170.1. In addition, subdivision (11) of this section addresses the problem of disqualification resulting from bias, former bias, or apparent bias against a particular attorney, but not against the entire law firm with which the attorney is associated. In workers' compensation practice, there are often large law firms, comprised of many attorneys, representing clients in workers' compensation cases. It is not reasonable to conclude that if a judge is, has been, or apparently is biased in relation to a particular attorney, that the judge is necessarily also biased in relation to all the other members and associates of the law firm with which that attorney is associated. Persons may harbor doubts about a particular judge's ability to be impartial. If the doubt is a reasonable doubt, it may be grounds for disqualifying the judge. The Administrative Director has determined that it should not be presumed that such a doubt, about an entire law firm, is reasonable, when it is based only on past, present, or apparent bias toward an individual member of that firm.

SECTION 9721.13 What are not Grounds for Disqualification

Specific Purpose of Section 9721.13

The purpose of this section is to specifically state what are not grounds for disqualification, even though the reasons are commonly thought to be disqualifying by lay persons, some judges and some attorneys. These grounds are taken from C.C.P. section 170.2, applicable to superior court judges, which states what are not grounds for disqualification of superior court judges. Additionally, having a currently disputed compensation claim against a party is not automatically disqualifying.

SECTION 9721.21 Restriction on Investments

Specific Purpose of Section 9721.21

The purpose of this section is to reduce the incidence of disqualifications or recusals of judges, based on their financial interests. Canon 4(D)(4) of the Code of Judicial Ethics requires that judges manage their financial activities and investments so as to minimize the need for disqualification. Judges are required to divest themselves as soon as possible of financial interests that would require frequent disqualification. This section makes those duties more specific by specifying certain financial interests that WCALJs should not own, and establishing times by which they are to divest themselves of those interests. This section

also provides for a WCALJ to apply to the Administrative Director on the basis of hardship, for an extension of the time in which the WCALJ must dispose of financial interests. This section prohibits WCALJs from owning, individually or as a fiduciary, interests in workers' compensation insurance companies. Because many large employers in California are not insured, but self-insured, the section also prohibits WCALJs from owning interests in self-insured employers which are likely to be defendants in cases at offices at which a particular WCALJ is employed.

SECTION 9721.31 Financial Interests in Educational Programs

Specific Purpose of The Changes to Section 9721.31

This section generally prohibits WCALJs from having ownership interests in educational programs which service the workers' compensation community. The purpose of the section was to eliminate the possibility of WCALJs having a financial relationship with attorneys who practice workers' compensation. The section did not prohibit customary royalties paid by commercial publishers. The purpose of the changes to this section is to eliminate any ambiguity as to what was intended to be covered by the phrase *customary royalties or residuals* when the WCALJ was the publisher, and to provide for a required plan for the publication and income collection, where a WCALJ self-publishes, and approval of the plan by the Court Administrator. The consideration and approval of the plan by the Court Administrator is intended to prevent situations where a WCALJ might inadvertently engage in self-publishing that would be violative of this section.

SECTION 9721.32 Duty to Report Ethics Violations

Specific Purpose of Changes to Section 9721.32

This section generally requires WCALJs to report or take appropriate corrective action in respect to judges, lawyers, parties, and other persons who engage in improper conduct. The purposes of the changes to this section are to update the references for outdated terms, to eliminate an incorrect reference to disciplinary action, and to make clear that a WCALJ is only responsible pursuant to this section for dealing with improper conduct that the WCALJ becomes aware of through personal knowledge or through reliable and competent information.

SECTION 9721.33 Previously Earned Compensation

Specific Purpose of Section 9721.2

The purpose of this section is to clarify that it is permissible for WCALJs to receive compensation that was earned or accrued on account of private work which the WCALJ performed before being appointed to be a judge.

SECTION 9722 The Workers' Compensation Ethics Advisory Committee

Specific Purpose of Changes to Section 9722

The purpose of the changes to this section is to update terminology, and to allow a designee of the Administrative Director to appoint members to the Committee.

SECTION 9722.1 Commencing an Investigation

Specific Purpose of Changes to Section 9722.1

The purpose of the changes to this section is to update terminology, clarify ambiguities, to allow the committee more flexibility in the analysis and investigation of complaints, and to eliminate the requirement that the Administrative Director inform the WCALJ of the investigation during its course. The changes will allow the committee to take steps to obtain information to determine whether a complaint might have merit before a full investigation is begun. The deletion of subdivision (e) will also allow the committee more flexibility in determining when and whether a complaint should be referred to the Administrative Director or Court Administrator. The deletion of subdivision (f) will eliminate a requirement that a WCALJ be informed of the complaint. Complaints are treated as confidential, and to the extent possible, are investigated anonymously. Members of the committee never learn the identities of either the complainant or of the WCALJ. The Administrative Director finds that most complaints are not substantiated after analysis or investigation by the Committee, and that not unnecessarily informing WCALJs of the existence of complaints which are not substantiated is better for the morale of WCALJs. It is also likely to decrease the possibility of a WCALJ becoming biased against a complainant. WCALJs are informed of complaints if initial investigation of a complaint by the committee substantiates the complaint, and do have the opportunity to respond at that time.

SECTION 9722.2 Investigation and Action by the Administrative Director or Court Administrator

Specific Purpose of Changes to Section 9722.2

The purpose of the changes to this section is to update terminology, to provide for the role of the Court Administrator, and to allow for the possible application of laws other than Government Code sections 19574 and 19590(b) to disciplinary actions taken by the Administrative Director or Court Administrator. The regulation currently provides that disciplinary or other actions taken by the Court Administrator or Administrative Director in regard to an ethics complaint shall be in accordance with Government Code sections 19574 and 19590(b). The change will clarify that other relevant laws may be applicable to these actions.

SECTION 9723 Miscellaneous Provisions

Specific Purpose of Changes to Section 9723

The purpose of the changes to this section is to update terminology, to add the Court Administrator to the Administrative Director regarding the administration and management under that article, reflecting the creation by the legislature of the new position of Court Administrator and the duties and powers granted to the Court Administrator. The changes also clarify what ethics complaints may not be kept in a WCALJ's personnel file. The current regulation precludes the personnel file from retaining "complaints which warrant no further action." The deletion of that phrase and the change of the term *unsustained complaints* to *unsubstantiated complaints* are intended to clarify that only complaints which the Committee has found to be substantiated shall be retained.