

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

**NOTICE OF PROPOSED RULEMAKING
AND INFORMATIVE DIGEST**

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

NOTICE IS HEREBY GIVEN that the Administrative Director of the Division of Workers' Compensation (hereinafter "Administrative Director"), exercising the authority vested in the Administrative Director by Labor Code sections 59, 123.6, 133, and 5307.3, proposes to adopt the proposed regulations described below after considering all comments, objections, and recommendations regarding the proposed action.

PROPOSED REGULATORY ACTION

The Department of Industrial Relations, Division of Workers' Compensation ("DWC"), proposes to amend Article 1.6 of Chapter 4.5, Subchapter 1, of Title 8, California Code of Regulations, commencing with Section 9720.1:

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

TIME AND PLACE OF PUBLIC HEARING

A public hearing has been scheduled to permit all interested persons the opportunity to present statements or arguments, either orally or in writing, with respect to the subjects noted above. The hearing will be held at the following time and place:

Date: January 7, 2008
Time: 10:00 a.m. to 5:00 pm or conclusion of business
Place: Auditorium
Hiram Johnson State Building
455 Golden Gate Avenue
San Francisco, CA 94102

The State Office Building and its Auditorium are accessible to persons with mobility impairments. Alternate formats, assistive listening systems, sign language interpreters, or any other type of reasonable accommodation to facilitate effective communication and program

access for persons with disabilities, are available upon request. Please contact the Statewide Disability Accommodation Coordinator, Adel Serafino, at 1-866-681-1459 (toll free), or through the California Relay Service by dialing 711 or 1-800-735-2929 (TTY/English) or 1-800-855-3000 (TTY/Spanish) as soon as possible to request assistance.

Please note that public comment will begin promptly at 10:00 a.m. and will conclude when the last speaker has finished his or her presentation or 5:00 p.m., whichever is earlier. If public comment concludes before the noon recess, no afternoon session will be held.

The Administrative Director requests, but does not require, that any persons who make oral comments at the hearing also provide a written copy of their comments. Equal weight will be accorded to oral comments and written materials.

AUTHORITY AND REFERENCE

The Administrative Director is undertaking this regulatory action pursuant to the authority vested in the Administrative Director by Labor Code sections 59, 123.6, 133, and 5307.3.

Reference is to Labor Code Section 123.6

INFORMATIVE DIGEST / POLICY STATEMENT OVERVIEW

Existing law establishes a workers' compensation system, administered by the Administrative Director of the Division of Workers' Compensation, to compensate an employee for injuries sustained in the course of his or her employment. Labor Code section 123.6 subjects workers' compensation administrative law judges to the California Code of Judicial Ethics. Pursuant to Labor Code section 123.6 (enacted in 1993 by AB 1252, chapter 483) the Administrative Director adopted regulations to interpret and enforce the provisions of Labor Code section 123.6. In 2002, chapter 6 (AB 749) established the position of Court Administrator, and also amended Labor Code section 123.6 to provide that the Administrative Director was to adopt regulations affecting judicial ethics, in consultation with the Court Administrator.

These proposed regulations, drafted in consultation with the Court Administrator, amend the existing judicial ethics regulations applicable to workers' compensation administrative law judges.

This proposed regulatory change implements, interprets, and makes specific Section 123.6 of the Labor Code as follows:

Section 9720.1 Authority

Outdated terms in this section are changed to reflect the current correct terminology.

Section 9720.2 Definitions

This section sets forth necessary definitions.

(a) "Code of Judicial Ethics". This subdivision provides a definition of *Code of Judicial Ethics*. It is changed to properly identify the Code.

(c) "Complaint". This subdivision alters the definition of complaint to refer to *ethics violations* instead of *misconduct*.

(d) “Ethics violation”. This subdivision is changed to reflect current correct terminology.

(e) “Financial interest”. This subdivision defines *financial interest* to mean a legal or equitable interest of either more than one per cent (1%) or of a fair market value in excess of two thousand dollars (\$2,000). The former definition for *referee* is now changed to a definition of *judge*, and is now in subdivision (h).

(f) “Gift”. This new definition is added to define *gift*, including rules taken from the regulations of the Fair Political Practices Commission (F.P.P.C.). It excepts from inclusion in *gift*, informational materials, gifts from relatives, campaign contributions, comestible items of nominal value not intended for an individual judge, inheritances, and personalized trophies and plaques. It excludes from inclusion within *gift*, admission, refreshments, and travel reimbursements related to events at which a judge is a speaker in the United States. It also excludes from inclusion within *gift*, complimentary admission and refreshments at legal education events to which the judge is invited, but is not a speaker.

(g) “Honorary”. This subdivision provides a definition of *honorary* which excludes from inclusion income from personal services, provides a definition of *teaching* similar to F.P.P.C. regulation 18932.2, and includes a presumption that teaching at a presentation to the State Bar falls within the bona fide profession of teaching.

(h) “Judge”. This subdivision provides a definition of *judge* instead of the previous *referee*. The amendment updates other language changes.

(i) “Previously earned compensation.” This subdivision provides a definition of *previously earned compensation*, to describe legal fees a judge may have earned before becoming a judge, but which are payable during the term of appointment as a judge.

(j) “Spouse”. This term is defined to include domestic partners.

(k) “Third degree of relationship.” This term is defined to specify the relatives that are to be included within the third degree of relationship, a concept taken from the civil law.

Section 9721.1 Code of Judicial Conduct or Ethics

This section provides that all workers' compensation administrative law judges are to abide by the Code of Judicial Ethics.

Section 9721.2 Gifts, Honoraria and Travel

This section prescribes the rules governing acceptance of gifts, honoraria, and travel payments.

(a) This subdivision is changed to provide that WCALJs may not accept any gifts which they would be prohibited from accepting under the Code of Judicial Ethics or which would be prohibited to transmit to a judge under the State Bar's Rules of Professional Conduct.

(b) This subdivision is rewritten. The prior subdivision contained the complete rules relating to honoraria and gifts. The revised subdivision (b) adopts the annual gift limit of Government Code § 89503, and the biennial adjustment of F.P.P.C. regulation 18940.2.

(c) This subdivision provides exceptions to the limit of subdivision (b). Excepted from the annual gift limit are:

1. Generally, payments for travel expense in the United States related to a governmental purpose or issue of public policy if the travel is either paid for by a government or tax exempt organization, or if the travel is related to a bar or judge function and paid for by the State Bar, an association of judges, or a state bar association.

2. Wedding gifts and the exchange of gifts of similar value on birthdays and holidays.

3. A gift from someone whose pre-existing relationship with the judge would disqualify the judge in relation to that person.

(d) This subdivision describes the situations in which travel is exempt under subdivision (c).

(e) This subdivision provides that travel payments not described earlier are subject to the gift limit.

(f) This subdivision provides that judges may not accept an honorarium unless allowed by the Court Administrator if the cost of the honorarium is paid for by attorneys who practice workers' compensation, or if the judge would have to disclose the honorarium on the annual statement of economic interests.

(g) This subdivision provides that the section does not apply to an honorarium if it is not used, and within 30 days of receipt is either returned to the donor, or given to the State of California.

(h) This subdivision provides that the Court Administrator shall enforce this section's provisions.

(i) This subdivision provides that judges may not accept honoraria, the cost of which is paid for by workers' compensation attorneys, without prior written approval of the Court Administrator. It also provides that the section does not authorize acceptance of honoraria otherwise prohibited by the Government Code §89552.

(j) This subdivision provides that honoraria for speeches or panels are allowed when the event is sponsored by a professional association of judges, the State Bar, a government, a bar association which is not comprised mostly of either defense or applicant workers' compensation attorneys, a tax exempt educational institution, a tax exempt non-profit organization, or the foreign equivalent of a tax exempt non-profit organization.

(k) This subdivision provides that a judge may apply to the Court Administrator to allow an honorarium provided by an organization not listed in subdivision (j).

(l) This subdivision provides that for honoraria allowed by the Court Administrator for a speech or panel presentation sponsored by a professional association of judges, the State Bar, a government, a tax exempt educational institution, a tax exempt non-profit organization, or the foreign equivalent of a tax exempt non-profit organization, payment is allowed for travel including reasonably necessary transportation, lodging and subsistence, provided directly in connection with the speech or panel presentation, limited to the day of, the day before, and the day after the speech or panel presentation, provided that the travel is within the United States.

(m) This subdivision provides that payment is allowed for travel, including transportation, lodging and subsistence, when paid for by a government, a foreign government, a bona fide public or private educational institution, a tax exempt non-profit organization, or the foreign equivalent of a tax exempt non-profit organization, and the travel is reasonably related to

a legislative purpose or an issue of state, national, or international public policy.

(n) This subdivision provides that upon approval by the Court Administrator, payment, provision, or reimbursement for a judge's travel in connection with a speech or panel presentation sponsored by attorneys who practice workers' compensation, will be allowed for actual transportation, reasonably necessary subsistence provided directly in connection with the speech or panel presentation, but meals being limited to a meal served contemporaneously with the speech or presentation and meals consumed while traveling.

(o) This subdivision provides that payment is allowed for travel in the United States in connection with a speech or panel presentation, if the event is sponsored by a professional association of judges, the State Bar, a government, a foreign government, a bona fide public or private educational institution, a tax exempt non-profit organization, or the foreign equivalent of a tax exempt non-profit organization, for reasonably necessary transportation, lodging and subsistence, provided directly in connection with the speech or panel presentation, limited to the day of, the day before, and the day after the speech or panel presentation.

Section 9721.11 Requirement for Disclosure

This section enumerates what judges are required to disclose to parties in a case. Required disclosures are: that the judge previously served as a lawyer in the case; that the judge previously provided legal advice to a party in the case; that in the previous two years, a party or officer of a party was client of the judge; that a lawyer in the case or the lawyer's associate is a relative of the judge or judge's spouse; that the judge has actively participated in the drafting of laws involved in the case, or involved in lobbying relating to laws in the case; any information that would be relevant to the issue of disqualification; any situation known to the judge, required to be disclosed by the Code of Judicial Ethics; that the judge has a disputed workers' compensation claim against any party in the case.

Section 9721.12 Disqualification

(a) This subdivision lists reasons why a judge is disqualified in a case. Listed reasons are: that the judge has personal knowledge of evidentiary facts; that the judge served as lawyer for a party in the past two years; that the judge has actual bias in favor of or against any party and the judge has substantial doubt as to his or her capacity to be impartial; that because of physical impairment, the judge is unable to perceive evidence or properly conduct proceedings; that within the past two years, the judge served as a lawyer for an officer, director, trustee of a party; that within the past two years, the judge was associated in private practice, as an employee or on a contract basis, with a lawyer in the proceedings; that the judge, judge's spouse, or child, personally, or as a fiduciary, has a financial interest in the subject matter in a case or in a party to the case; that the judge, judge's spouse, or relative within the third degree of relationship to the judge or spouse is likely to be a material witness; that a party to the case is related within the third degree of relationship to either the judge or judge's spouse; that the judge believes that recusal would further the interests of justice or believes there is a substantial doubt as to the judge's capacity to be impartial; that the judge has actual bias against or in favor of an attorney for a party and the judge has a substantial doubt as to his or her capacity to be impartial.

This subdivision also provides that a judge is not disqualified as to other members or associates in a law firm, or as to the law firm itself, solely because of actual bias against or in favor of individual attorneys in or associated with the firm, and that actual bias in favor of or against an attorney does not in itself create the appearance of bias as to a law firm of which the attorney is a member or associate. This subdivision also provides that a doubt of a person aware of the facts that a judge could be impartial towards a law firm or other members or associates of a law firm, based only on knowledge of a judge's bias in favor of or against an individual attorney or attorneys, is not a doubt which is reasonably entertained. This subdivision also provides that if the workers' compensation appeals board, on a petition for disqualification

alleging bias against or in favor of an attorney, determines that a judge is disqualified because of the appearance of bias or because a person aware of the facts might reasonably entertain a doubt that the judge could be impartial, it shall not be presumed, either as to a law firm of which the attorney is a member or associate, or as to other members or associates of the law firm, either that there is the appearance of bias or that a person aware of the facts might reasonably entertain a doubt that the judge could be impartial.

(b) This subdivision provides that parties may waive disqualification. Waiver of disqualification is to be in writing or on the record. Attorneys may waive disqualification on behalf of their clients, except on behalf of the employee.

(c) This subdivision provides that two types disqualification may not be waived: that the judge or a relative is likely to be a witness in the case, and that the judge has served as a lawyer in the case.

Section 9721.13 What are not Grounds for Disqualification

This section sets forth factors which are not grounds for disqualification. The factors are: that the judge is or is not a member of a particular racial, ethnic, religious, gender, or sexual orientation classification; that the judge has previously expressed a view on a legal or factual issue, except for expressing an unqualified opinion on the merits of the case involved; that the judge has a policy of insurance issued by a party to the proceeding, unless the judge is involved in a pending dispute with the company; that the judge has a currently disputed or recent workers' compensation claim against one of the parties.

Section 9721.21 Restriction on Investments

This section provides that judges are restricted from owning or acquiring interests in companies that write workers' compensation insurance in California. It also provides that judges must divest interests in such companies within one year of the regulation's effective date or the date they later acquired the interest. It also provides that a judge may apply for, and the Administrative Director may grant, an extension of time to dispose of such an interest. It also provides that judges are not to acquire or hold interests in self-insured employers which are reasonably likely to appear as defendants in the district office where the judge is normally employed.

Section 9721.31 Financial Interests in Educational Programs

This section provides that judges are not permitted to own or to receive income from workers' compensation educational programs.

(a) This subdivision is changed to correct the reference from *referee* to *workers' compensation administrative law judge*.

(b) This subdivision is rewritten, with a new paragraph (2) added. The new paragraph provides that usual and customary royalties from self-published books are not considered included within revenues from educational programs. Such self-published books are not to be distributed by Division of Workers' Compensation employees, and self-publishing judges are to provide a plan to the Court Administrator for approval regarding the self-publishing.

Section 9721.32 Duty to Report Ethics Violations

This section is changed to correct the reference from *referee* to *workers' compensation*

administrative law judge. The section provides that judges are to take or initiate corrective action, including reporting, for fraudulent, unprofessional, or improper conduct. It is amended to restrict the requirement of reporting to situations when the judge becomes aware of the conduct through personal knowledge or through reliable and competent information.

Section 9721.33 Previously Earned Compensation

This section provides that judges may receive compensation for services performed prior to being appointed a judge.

Sections 9722 The Workers' Compensation Ethics Advisory Committee

This section is changed to correct the references from *referee* to *workers' compensation administrative law judge* and to make reference to the Court Administrator as well as to the Administrative Director.

Section 9722.1 Commencing an investigation

This section is changed to correct the references from *referee* to *workers' compensation administrative law judge* and to make reference to the Court Administrator as well as to the Administrative Director.

(b) This subdivision is changed to eliminate a restriction on inquiries by the Committee to *brief, informal*, inquiries, and to provide that the Committee may also seek information to determine if the complaint might have merit.

(c) This subdivision is changed by changing a reference to *misconduct* to *an ethics violation*.

(e) and (f) These subdivisions are deleted.

Section 9722.2 Investigation and Action by the Administrative Director

This section is changed to correct the references from *referee* to *workers' compensation administrative law judge* and to make reference to the Court Administrator as well as to the Administrative Director.

(a). This subdivision is changed by changing *engaged in misconduct* to *committed an ethics violation*.

(b) This subdivision is deleted.

Section 9723 Miscellaneous Provisions

This section is changed to correct the references from *referee* to *workers' compensation administrative law judge* and to make reference to the Court Administrator as well as to the Administrative Director.

(e) This subdivision is deleted.

DISCLOSURES REGARDING THE PROPOSED REGULATORY ACTION

The Administrative Director has made the following initial determinations:

- **Significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states:** None.
- **Adoption of this regulation will not: (1) create or eliminate jobs within the State of California; (2) create new businesses or eliminate existing businesses within the State of California; or (3) affect the expansion of businesses currently doing business in California.**
- **Effect on Housing Costs:** None.
- **Cost impacts on representative private person or business:** The Administrative Director has made an initial determination that the proposed regulations will have no cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed regulations: The regulatory changes apply only to workers' compensation administrative law judges and others exercising judicial functions within the Division of Workers' Compensation, and have no applicability to private persons or businesses.

FISCAL IMPACTS

- **Costs or savings to state agencies or costs/savings in federal funding to the State:** No costs, and no savings.
- **Mandate on Local Agencies:** None. The proposed regulations will not impose any new mandated programs or increased service levels on any local agency or school district. If there were any potential costs imposed on all public agency employers by these proposed regulations, although not a benefit level increase, they would not be a new State mandate because the regulations apply to all employers, both public and private, and not uniquely to local governments. The Administrative Director has determined that the proposed regulations will not impose any new mandated programs on any local agency or school district. The California Supreme Court has determined that an increase in workers' compensation benefit levels does not constitute a new State mandate for the purpose of local mandate claims because the increase does not impose unique requirements on local governments. See County of Los Angeles v. State of California (1987) 43 Cal.3d 46. If there were any potential costs that might be imposed on public agency employers and payors by these proposed regulations, although not a benefit level increase, they would similarly not be a new State mandate because the regulations apply to all employers and payors, both public and private, and not uniquely to local governments.
- **Cost to any local agency or school district that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4 of the Government Code:** None. (See "Local Mandate" section above.)
- **Other nondiscretionary costs/savings imposed upon local agencies:** None. (See "Local Mandate" section above.)

EFFECT ON SMALL BUSINESS

The Administrative Director has determined that the proposed regulation will not affect small business because the regulations only affect workers' compensation judges.

CONSIDERATION OF ALTERNATIVES

In accordance with Government Code section 11346.5(a)(13), the Administrative Director must determine that no reasonable alternative considered or that has otherwise been identified and brought to the Administrative Director's attention would be more effective in carrying out the purpose for which the actions are proposed, or would be as effective and less burdensome to affected private persons than the proposed actions.

The Administrative Director invites interested persons to present reasonable alternatives to the proposed regulation at the scheduled hearing or during the written comment period.

PUBLIC DISCUSSIONS OF PROPOSED REGULATION

Proposed regulatory language was posted on the forum website of DWC, for prepare-regulatory public comment. The proposed regulatory text has been submitted to the affected state employee collective bargaining units for their consideration and comment.

AVAILABILITY OF INITIAL STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATION / INTERNET ACCESS

An Initial Statement of Reasons and the text of the proposed regulation have been prepared and are available from the contact person named in this notice. The entire rulemaking file will be made available for inspection and copying at the address indicated below or a copy will be provided upon written request.

In addition, this Notice, the Initial Statement of Reasons, and the text of regulations may be accessed and downloaded from the Department of Industrial Relations' Internet site at www.dir.ca.gov under the heading "Rulemaking-proposed regulations." Any subsequent changes in regulation text and the Final Statement of Reasons will be available at that Internet site when made.

PRESENTATION OF ORAL AND/OR WRITTEN COMMENTS AND DEADLINE FOR SUBMISSION OF WRITTEN COMMENTS

Members of the public are invited to present oral and/or written statements, arguments or evidence at the public hearing. If you provide a written comment, it will not be necessary to present your comment as oral testimony at the public hearing. To provide everyone a chance to speak, public testimony will be limited to 10 minutes per speaker and should be specific to the proposed regulations. Testimony which would exceed 10 minutes may be submitted in writing. In order to ensure unimpeded access for disabled individuals wishing to present comments and to facilitate the accurate transcription of public comments, camera usage will be allowed in only one area of the hearing room.

Any person may submit written comments on the proposed regulation to the DWC contact person:

Ms. Maureen Gray
Regulations Coordinator
Division of Workers' Compensation
Post Office Box 420603
San Francisco, CA 94142

Written comments may also be submitted by facsimile transmission (FAX), addressed to the contact person at (510) 286-0687. Written comments may also be sent electronically (via e-mail), using the following e-mail address: dwcrules@hq.dir.ca.gov

Unless submitted prior to or at the public hearing, all written comments must be received by the agency contact person, no later than 5:00 p.m. on Monday, January 7, 2008. Equal weight will be accorded to oral and written materials.

COMMENTS TRANSMITTED BY E-MAIL OR FACSIMILE

Due to the inherent risks of non-delivery by facsimile transmission and email transmission, the Administrative Director suggests, but does not require, that a copy of any comments transmitted by facsimile transmission or email transmission also be submitted by regular mail.

Comments sent to other e-mail addresses or other facsimile numbers will not be accepted. Comments sent by e-mail or facsimile are subject to the deadline set forth above for written comments.

AVAILABILITY OF RULEMAKING FILE AND LOCATION WHERE RULEMAKING FILE MAY BE INSPECTED

Any interested person may inspect a copy or direct questions about the proposed regulation, the Initial Statement of Reasons, and any supplemental information contained in the rulemaking file.

The rulemaking file, including the Initial Statement of Reasons, the complete text of the proposed regulation and any documents relied upon in this rulemaking may be inspected during normal business hours (8:00 a.m. to 5:00 p.m., Monday through Friday, excluding public holidays) at the following location:

Division of Workers' Compensation
1515 Clay Street, 17th Floor
Oakland, California 94612

AVAILABILITY OF RULEMAKING DOCUMENTS ON THE INTERNET

Documents concerning this proceeding are available on the Division's website: www.dir.ca.gov. To access them, click on the "Rulemaking - proposed regulations" link, then click on the "Division of Workers' Compensation regulations" link and scroll down the list of rulemaking proceedings to find the rulemaking link, "Ethical Standards For Workers' Compensation Administrative Law Judges."

CONTACT PERSON:

Nonsubstantive inquiries concerning this action, such as requests to be added to the mailing list for rulemaking notices, requests for copies of the text of the proposed regulation, the Initial Statement of Reasons, and any supplemental information contained in the rulemaking file may

be directed to the contact person. The contact person is:

Ms. Maureen Gray
Regulations Coordinator
Division of Workers' Compensation
Post Office Box 420603
San Francisco, CA 94142

The telephone number of the contact person is (510) 286-7100.

**BACK-UP CONTACT PERSON / CONTACT PERSON FOR
SUBSTANTIVE QUESTIONS**

To obtain responses to questions regarding the substance of the proposed regulation, or in the event the contact person is unavailable, inquiries should be directed to: Richard Starkeson, Counsel, at the same address and telephone number as noted above for the contact person.

AVAILABILITY OF CHANGES FOLLOWING PUBLIC HEARING

If the Administrative Director makes changes to the proposed regulation as a result of the public hearing and public comment received, the modified text with changes clearly indicated will be made available for public comment for at least 15 days prior to the date on which the regulation is adopted. The modified text will be made available on the Division's website: www.dir.ca.gov and may be located by following the direction provided above.

AVAILABILITY OF THE FINAL STATEMENT OF REASONS

Upon its completion, the Final Statement of Reasons will be available and copies may be requested from the contact person named in this notice or may be accessed on the Division's website: www.dir.ca.gov by following the directions provided above.

AUTOMATIC MAILING

A copy of this Notice, including the Informative Digest, will automatically be sent to those interested persons on the Administrative Director's mailing list.

If adopted, the regulations will appear in Title 8, California Code of Regulations, commencing with section 9720.1.