



Center for Judicial Education and Research Advisory Committee

JULY 29, 2020



JUDICIAL COUNCIL
OF CALIFORNIA

CENTER FOR JUDICIAL EDUCATION AND
RESEARCH ADVISORY COMMITTEE

**Center for Judicial Education and
Research Advisory Committee
Business Meeting**



JUDICIAL COUNCIL
OF CALIFORNIA
CENTER FOR JUDICIAL EDUCATION AND
RESEARCH ADVISORY COMMITTEE

**July 29, 2020
Teleconference**

Agenda

- 12:00-12:05 **Welcome and Roll Call**
Hon. Kimberly A. Gaab
- 12:05–12:15 p.m. **Proposed Amendment to Rule of Court Rule 10.469 (Action Item)**
Hon. Kimberly A. Gaab
Open Meeting Item per Rule 10.75
- 12:15–12:35 p.m. **Draft New Rule of Court 10.492 (Action Item)**
Hon. Kimberly A. Gaab
Open Meeting Item per Rule 10.75

2020 Meetings

Thursday September 3, 2020

10:00 a.m. – 3:00 p.m.
Microsoft Teams

Tuesday, December 1, 2020

12:00 p.m. – 1:45 p.m.
Microsoft Teams



JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

Item No.:

For business meeting September 24–25, 2020

Title

Judicial Branch Education: Mandatory
Education on Unconscious Bias and
Prevention of Discrimination and
Harassment

Agenda Item Type

Action Required

Effective Date

January 1, 2021

Rules, Forms, Standards, or Statutes Affected

Amend Cal. Rules of Court, rule 10.469

Date of Report

July 20, 2020

Recommended by

Center for Judicial Education and Research
Advisory Committee
Hon. Kimberly A. Gaab, Chair
Judicial Council staff
Mary Ann Koory, Senior Education
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Executive Summary

Pursuant to the recommendations of the Work Group on the Prevention of Discrimination and Harassment, the Center for Judicial Education and Research Advisory Committee recommends amending a rule of court to make education on unconscious bias, as well as on the prevention of discrimination and harassment, mandatory for judicial officers. Research shows that unconscious bias affects all human beings, but can escape the awareness of even the most diligent decision-makers; therefore, making this training mandatory will help raise awareness and reduce the impact of bias in judicial decision-making. Mandatory training on the prevention of discrimination and harassment demonstrates the judicial branch's commitment to a workplace free of sexual harassment and discrimination.

Recommendation

The Center for Judicial Education and Research Advisory Committee recommends that, effective January 1, 2021, the Judicial Council amend rule 10.469 of the California Rules of Court to make education on unconscious bias, as well as on the prevention of discrimination and harassment, mandatory for judicial officers.

The text of the amended rule is attached at page 6.

Relevant Previous Council Action

Rule 10.469 (Judicial education recommendations for justices, judges, and subordinate judicial officers) was adopted effective January 2008. The Judicial Council has not taken any previous action relevant to subdivision (e) (Fairness and access education), which is proposed to be amended.

Analysis/Rationale

Based on the recommendations of the Work Group on the Prevention of Discrimination and Harassment, and with input from other Judicial Council advisory bodies, the Center for Judicial Education and Research (CJER) Advisory Committee proposes to amend rule 10.469 of the California Rules of Court to make education on unconscious bias, as well as for the prevention of discrimination and harassment, mandatory for judicial officers.

Mandatory training on the prevention of sexual harassment has existed in California since 2005 when Assembly Bill 1825 (Stats. 2004, ch. 933) mandated that all organizations with 50 or more employees provide two hours of sexual harassment training and education to supervisory employees every two years. In January 2019, in response to the nationwide #MeToo movement, legislators passed AB 1343 (Stats. 2018, ch. 956), which mandated sexual harassment training for non-supervisory employees every two years for employers with five employees or more, in addition to the training for supervisors already mandated by AB 1825.

Work group recommendation 2(A)(1)

In October 2018, the Chief Justice appointed the Work Group for the Prevention of Discrimination and Harassment to support the judicial branch's commitment to a workplace free of harassment and discrimination. The work group examined research and discussed potential areas for improvement relating to harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification. The work group ultimately proposed recommendations to the Judicial Council, including recommendation 2(A)(1):

Consistent with the requirements of California Government Code sections 68088 and 11135, and the California Rules of Court, rules 10.461 et seq., the Work Group recommends that the Center for Judicial Education and Research Advisory Committee, in consultation with the administrative presiding justices, appellate court clerk/executive officers, trial court presiding judges, and trial court executive officers, under the oversight of the Rules and Projects Committee,

engage in the rulemaking process regarding education for judicial officers on the prevention of harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification.¹

The Judicial Council adopted the recommendations of the work group at its meeting on July 19, 2019.

Rule 10.469

The rules regarding the education requirements for judicial officers are specific to court level. Supreme Court and appellate court justices are covered by rule 10.461. Superior court judges and subordinate judicial officers are covered by rule 10.462. Both rules discuss content-based and hours-based education recommendations for justices and judges.

Rule 10.469, however, applies to all categories of judicial officers. Subdivision (e) of the rule states that “each justice, judge, and subordinate judicial officer should regularly participate in education on access and fairness.” The CJER Advisory Committee recommends amending the subdivision to make education on access and fairness mandatory, based on the recommendations of the work group. Specifically, the committee proposes adding subdivision (e)(1) and (2). Subdivision (e)(1) would include the text of former subdivision (e) but would omit the term “sexual harassment.” Subdivision (e)(2) would read as follows:

Each justice, judge, and subordinate judicial officer must participate in education on unconscious bias, as well as the prevention of harassment, discrimination, retaliation, and inappropriate workplace conduct. This education must be taken at least once every three-year continuing education period as determined by rules 10.461(c)(1) and 10.462(d)(1).

Policy implications

Mandatory education on unconscious bias, as well as on the prevention of harassment, discrimination, retaliation, and inappropriate workplace conduct, is consistent with the policy and priorities of the Chief Justice and the Judicial Council. In her 2019 State of the Judiciary address, the Chief Justice noted with approval that Administrative Director Martin Hoshino had made unconscious bias training mandatory for Judicial Council staff, stating that he “recognizes the science, as do I, that the formation of unconscious stereotypes can affect attitudes, actions, and beliefs in all encounters where we meet someone different from ourselves.”

When the Chief Justice convened the Work Group on the Prevention of Discrimination and Harassment, she noted, “Institutions and industries across our country, including our judicial branch, have rightfully been focusing on issues of harassment and discrimination in the

¹ Judicial Council of Cal., Work Group for the Prevention of Discrimination and Harassment, *Judicial Branch Administration: Prevention of Discrimination, Harassment, Retaliation, and Inappropriate Workplace Conduct Based on a Protected Classification* (June 12, 2019), pp. 2–3 and 7–8, <https://jcc.legistar.com/View.ashx?M=F&ID=7336325&GUID=6B7E4EDA-1AEF-457E-8045-CA0439798302>.

workplace.” She appointed the work group “to ensure that we are on the right track in our efforts to ensure our own workplaces are safe for all employees and free of inappropriate behavior.”

Comments

After the Judicial Council directed the CJER Advisory Committee to implement the work group’s recommendations, the committee consulted with the Advisory Committee on Providing Access and Fairness, the Appellate Advisory Committee, the Administrative Presiding Justices Advisory Committee, the Trial Court Presiding Judges Advisory Committee, the Court Executives Advisory Committee, appellate clerk/executive officers, and the California Judges Association about the language of the proposed amendment to the rule. The amendment as proposed herein reflects input by those bodies. The CJER Advisory Committee also adopted a suggestion from the Administrative Presiding Justices Advisory Committee to specify unconscious bias education as well as education on the prevention of harassment and discrimination.

The amendment went through the spring invitation-to-comment process from April through June 2020 and received five comments. As indicated in the attached comments chart at pages 7–11, four of the five comments approved the proposed change. One commenter apparently misunderstood the change as adding hours to the existing mandatory requirement and limiting the opportunities for judicial officers to fulfill the requirement. No other disapproving comment, internal or external, was made to the CJER Advisory Committee during the previous 12 months of seeking feedback on the proposed rule amendment.

Alternatives considered

The Work Group on the Prevention of Discrimination and Harassment considered alternatives before recommending that the rules of court be amended to make training on the prevention of discrimination and harassment a mandatory requirement. Since rule 10.469 currently recommends that judicial officers have education on “race and ethnicity, gender, sexual orientation, persons with disabilities, and sexual harassment,” the CJER Advisory Committee did not think that keeping the rule as written or simply adding the categories of “retaliation, and inappropriate workplace conduct based on a protected classification” would adequately meet the work group’s recommendation. Nor would keeping the education recommended signal a commitment of the judicial branch commensurate to other employers in a state in which supervisory and non-supervisory employees are mandated to take such training. Adding educational categories to the rule and making the training mandatory would fully support the branch’s ability, in the words of the Chief Justice, to “ensure our own workplaces are safe for all employees and free of inappropriate behavior.” Moreover, when considering the unconscious nature of unconscious bias, the CJER Advisory Committee deemed it possible that some judicial officers may not be aware of the effects of their unconscious biases and, therefore, would not make such training a priority on a purely voluntary basis.

Fiscal and Operational Impacts

The education offered by the Center for Judicial Education and Research already includes training in unconscious bias and the prevention of harassment; the new requirements will lead to some expansion in those areas, as well as in the areas of prevention of discrimination, retaliation, and inappropriate workplace conduct. Education that fulfills this new requirement can also be provided by approved providers in addition to CJER. The primary costs to the judicial branch to implement the amended rule are associated with the development of expanded education content in these areas.

No direct fiscal or operational impacts are anticipated for any other entity. Although implementation of this rule would add additional content requirements, the overall required number of education hours would not change; there would be no increase in education hours for judicial officers and no increase in education costs for judicial officers or their courts. No negative impacts are anticipated on justice partners, attorneys, self-represented litigants, or the courts; in fact, these entities may perceive benefits from working with judicial officers with more training in these areas.

The relatively minor implementation costs would be outweighed by the enormous benefit of educating judicial officers about these important issues.

Attachments and Links

1. Cal. Rules of Court, rule 10.469, at page 6
2. Chart of comments, at pages 7–11

Rule 10.469 of the California Rules of Court would be amended, effective January 1, 2021, to read:

1 ***Rule 10.469. Judicial education recommendations for justices, judges, and***
2 ***subordinate judicial officers, and additional requirements***

3
4 (a)–(d) * * *

5
6 (e) **Education on fairness and access education, unconscious bias, and prevention**
7 **of harassment, discrimination, retaliation, and inappropriate workplace**
8 **conduct**

9
10 (1) In order to achieve the objective of assisting judicial officers in
11 preserving the integrity and impartiality of the judicial system through the
12 prevention of bias, each justice, judge, and subordinate judicial officer should
13 regularly participate in education on fairness and access. The education
14 should include the following subjects: race and ethnicity, gender, sexual
15 orientation, and persons with disabilities,~~and sexual harassment.~~

16
17 (2) Each justice, judge, and subordinate judicial officer must participate in
18 education on unconscious bias, as well as the prevention of harassment,
19 discrimination, retaliation, and inappropriate workplace conduct. This
20 education must be taken at least once every three-year continuing education
21 period as determined by rules 10.461(c)(1) and 10.462(d)(1).
22

SPR 20-06

Judicial Branch Education: Mandatory Judicial Training Requirement for Prevention of Discrimination, Sexual Harassment and Inappropriate Workplace Behavior, and Unconscious Bias (Cal. Rules of Court, rule 10.469)

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
1.	Legal Aid Association of California by Selena Copeland Executive Director, LAAC Kate Marr Executive Director, Community Legal Aid SoCal Martina Cucullu Lim Executive Director, Eviction Defense Collaborative Amy Poyer Senior Staff Attorney, California Women’s Law Center Leigh Ferrin Director of Litigation and Pro Bono, Public Law Center	A	We support the Center for Judicial Education and Research (CJER) Advisory Committee’s proposal to add the subsection to Rule 10.469 (e) . . . Empirical evidence demonstrates that we all have unconscious and implicit bias. This bias contributes to staggering disparities in our justice system. Research shows that trial court judges often rely on intuition, rather than deliberative judging in deciding matters before the bench. Studies show prosecutors are more likely to charge Black suspects than White suspects in similar circumstances. Public defenders may work harder for a defendant they perceive as more educated or likely to be successful than for other defendants.	No response required.
2.	California Commission on Access to Justice by Hon. Mark Juhas Chair	A	* The Access Commission supports the change to rule 10.469 and all of the recommendations made by the Prevention of Discrimination and Harassment Work Group. The Access Commission believes that the proposed amendment to Rule 10.469 is a good step towards addressing one of the stated purposes of the Work Group—to improve efforts by the judicial branch to prevent harassment, discrimination, retaliation, and inappropriate workplace conduct based on a	No response required.

	Commenter	Position	Comment	Committee Response
			<p>protected classification. Mandatory judicial training on these topics is an important improvement in prevention efforts . . . As noted by the Work Group, mandatory trainings are only part of the solution. The Access Commission encourages the Judicial Council to implement other of the Work Group’s recommendations. . . The Access Commission also supports the proposed amendment to rule 10.469 and the other recommendations of the Work Group to the extent they set standard baselines for prevention training and other issues through Rules of Court paired with the ability for courts to develop their own solutions and approaches, with the Judicial Council’s support, based on their needs and circumstances.</p>	
3.	<p>The Family Violence Appellate Project Cory Hernandez Staff Attorney</p>	A	<p>*In addition to agreeing with the proposed revisions to make rule 10.469(e)2 mandatory, the FVAP also urges that a) rule 10.469(e)1 become mandatory, b) domestic violence be included as a mandatory education topic along with the topics listed in 10.469(e)2, and c) education on unconscious bias, prevention of harassment, discrimination, retaliation, and inappropriate workplace conduct and domestic violence become mandatory for court personnel.</p> <p>We are writing to express support for SPR20-06, and to urge the Council to extend these amendments to cover additional judicial officers and court personnel, as well as another area of concern, domestic violence . . . we would urge that rule 10.469(e)(1) also become mandatory,</p>	<p>Because these would be important substantive changes to the proposal, the committee believes public comment should be sought before they are considered for adoption. The committee will consider these suggestions during the next rules cycle.</p>

	Commenter	Position	Comment	Committee Response
			<p>instead of recommendatory as it is now. . . .</p> <p>Rule 10.649(e)(1) recommends training on fairness and access, with a focus on race, ethnicity, gender, sexual orientation, and people with disabilities. Rule 10.649(e)(1) states its intent is to “assist[] judicial officers in preserving the integrity and impartiality of the judicial system through the prevention of bias.”</p> <p>. . . Expanding the required education will only further help “judicial officers in preserving the integrity and impartiality of the judicial system.” The issues in both rules 10.469(e)(1) and 10.469(e)(2) are related and there is overlap, which means the mandatory education requirements could be fulfilled at once or at least without substantially more time needed, alleviating potential concerns of cost. . . .</p> <p>Furthermore, we would urge the Council to expand proposed rule 10.469(e)(2) to include “domestic violence” in the list of “prevention of harassment, discrimination, retaliation, and inappropriate workplace conduct.” Domestic violence is a grievous problem in our state that cuts across all genders, sexual orientations, races, ethnicities, ability levels, socioeconomic levels, and professions. Judicial officers not only encounter domestic violence in their courtrooms, regardless of the type of cases they hear, but also in their workplace. . . . Although domestic violence may be more likely to arise in criminal, family, juvenile, and probate cases, it could certainly arise in any other context. For instance, domestic violence is expressly listed as a tort in Civil Code section 1708.6, and being a</p>	

	Commenter	Position	Comment	Committee Response
			<p>victim of domestic violence can trigger special protections in housing and employment law. Domestic violence can touch any part of someone’s life, so it can show up in any given court case. Plus, many judicial officers switch assignments at least once in their career, meaning they may move into a position where domestic violence is more frequently litigated than they had previously experienced. By expanding rule 10.464, there would be no gap in education for such judicial officers; they would already be trained on domestic violence. . . . In addition, all of these education requirements should be extended to all court personnel, not just judicial officers. Currently, rule 10.479(c) only recommends training on fairness and access for court personnel. While rules 10.471-10.478 provide some education requirements for various court personnel, no requirement includes those mandated or recommended in rule 10.469. . . . court personnel also make important decisions that can impact a case. In many cases, litigants may interact more with court personnel than with judicial officers. . . . For the same reasons judicial officers must be trained on these important issues, so too must court personnel.</p>	
4.	Superior Court of Los Angeles County by Bryan Borys, Senior Advisor	D	<p>We support the goals of this proposal, which are to provide appropriate training to the judiciary that may help them avoid unconscious bias and prevent discrimination in the courtroom. However, this training should be included as part of the mandatory curriculum for Judicial College, New Judges Orientation, and the</p>	<p>The B.E. Witkin Judicial College and New Judges Orientation already contain content on unconscious bias. Qualifying Ethics curriculum already contains content on unconscious bias, and prevention of harassment, discrimination, retaliation, and inappropriate workplace conduct.</p>

	Commenter	Position	Comment	Committee Response
			<p>Qualifying Ethics curriculum. This approach will insure that all bench officers receive this important training twice -- once in their first few months on the bench, and again within their first 2 years, then every few years thereafter as part of the Ethics insurance requirements. This would allow judges to continue with the broad array of bias related courses already offered to them through the courts, CJA, the Bar and other organizations as part of the expected education framework.</p>	<p>All of the existing content would count toward the proposed mandatory requirement.</p> <p>Judges would not be barred from the “broad array of bias related courses already offered to them through the courts, the CJA, the Bar and other organizations.” As long as they are approved providers (which all of the named organizations are), their classes would count toward the proposed mandatory requirement.</p>
5.	<p>Bay Area Legal Aid by Kemi Mustapha, Supervising Attorney and Fawn Jade Korr, Senior Staff Attorney</p>	A	<p>This proposed rule comes at a time when thousands of Americans are protesting the killing of George Floyd and the widespread racialized violence against Black people. There is no American institution exempt from systemic racism. . . While overt discrimination is largely condemned, most of the behavior that produces racial discrimination is influenced by unconscious racial motivation. An intention to end racial bias is not enough, and the judicial system will continue to sanction institutional discrimination unless measures are taken to disrupt the status quo. Those measures must begin with mandatory implicit bias training for judges. . . Judicial officers, who hold positions of privilege and power, are not immune from the same implicit biases that impact the general population, leading to adverse consequences for people from marginalized communities navigating the legal system. . . . Bay Area Legal Aid stands in strong support of SPR20-06. We thank the Judicial Council and its committees for taking this issue seriously and addressing the devastating impact of racism in this country.</p>	No response required.

1 **Rule 10.492. Extension of time for judicial branch education requirements**

2
3 **(a) Application**

4
5 This rule applies to the requirements and expectations in the California Rules of
6 Court relating to judicial branch education, except rule 10.491 on minimum
7 education requirements for Judicial Council employees.

8
9 **(b) Definitions**

10 As used in this rule:

11
12
13 (1) “Content-based education requirement” means a requirement or expectation
14 of:

15
16 (A) Attendance at any specific program;

17
18 (B) A course of study on any specific topic or topics; or

19
20 (C) A course of study limited to a specific delivery method, such as
21 traditional (live, face-to-face) education.

22
23 (2) “Hours-based education requirement” means a requirement or expectation of
24 a specified number of hours of education to be completed within a specified
25 time period.

26
27 **(c) Content-based education requirement**

28
29 Notwithstanding any other rule, any deadline for completion of a content-based
30 education requirement or expectation is extended for 12 months from that
31 deadline, even if the deadline has passed.

32
33 **(d) Hours-based education requirement**

34
35 Notwithstanding any other rule, the months of April 2020 through March 2021 are
36 excluded from the education cycles in which those months fall, and the number of
37 hours of education to complete hours-based education requirements or
38 expectations is prorated accordingly.

39
40 **(e) Sunset**

41
42 This rule remains in effect until December 31, 2022, or until amended or repealed.

Attachment C –
Draft – Rule 10.492

Advisory Committee Comment

Various rules in Title 10, Chapter 7 of the California Rules of Court, authorize, for good cause, the granting of an extension of time to complete content-based and hours-based education requirements and expectations. Nothing in this rule modifies that authority.

Subdivision (c). This subsection applies to all rules of court containing content-based education requirements. Below are examples of this subsection in practice.

Rule 10.462(c)(1) contains education requirements for new trial court judges and subordinate judicial officers. Based on the date an individual took his or her oath of office, a judge has 6 months to attend the New Judge Orientation (NJO) Program, 1 year to attend an orientation course in his or her primary assignment, and 2 years to attend the B. E. Witkin Judicial College of California.

Under 10.462(c)(1), a judge who took her oath of office on January 1, 2020, would need to complete these programs by June 30, 2020 (NJO), December 31, 2020 (primary assignment), and December 31, 2021 (Judicial College), respectively. With the 12-month extension under rule 10.492(c), this same judge would now need to complete these programs by June 30, 2021 (NJO), December 31, 2021 (primary assignment), and December 31, 2022 (Judicial College).

As another example of the 12-month extension under rule 10.492(c), a judge who took his oath of office on December 1, 2018, would need to complete NJO by April 30, 2020 (within 18 months), a primary assignment by November 30, 2020 (within 2 years), and the Judicial College by November 30, 2021 (within 3 years).

Using a different rule as an additional example, rule 10.478(b)(1) requires court investigators to complete 18 hours of education within 1 year of their start date on specified topics.

Rule 10.492(c) would allow a court investigator up to 2 years to complete this education.

Subdivision (d). This subsection applies to all rules of court containing hours-based education requirements. Below are examples of this subsection in practice.

Rule 10.461(c)(1) contains education requirements for Supreme Court and appellate justices. Each justice must complete 30 hours of education every three years.

Under rule 10.492(d), a justice's hours requirements are prorated for the education cycle that runs from January 1, 2019, through December 31, 2021. For justices who were confirmed for appointment before January 1, 2019, they must complete 20 hours of education by December 31, 2021.

Attachment C –
Draft – Rule 10.492

1 Education requirements for justices who were confirmed for appointment on or after January 1,
2 2019, would also be prorated by rule 10.492(d) and prorated additionally based on the number of
3 years remaining in the three-year educational cycle. For example, a justice confirmed for
4 appointment on October 1, 2020, would ordinarily have 10 hours of hours-based education
5 requirements to complete for the last year of the three-year cycle. Under 10.492(d), the months of
6 January 2021 through March 2021 would be excluded, and the justice must complete 7.5 hours
7 rather than 10 hours of hours-based education.

8
9 As an additional example, rule 10.464(c)(2) requires 8 hours of continuing education every 2
10 years for non-management court staff. For a court employee hired on or before January 1, 2019,
11 rule 10.492(d) prorates the number of hours for the cycles that run from January 1, 2019, through
12 December 31, 2020, and the cycle that runs from January 1, 2021, through December 31, 2022.
13 For the cycle that runs from January 1, 2019, through December 31, 2020, the number of hours
14 required would be prorated for 3 quarters, April 1, 2020, through December 31, 2020. This results
15 in a reduced hours-based requirement of 5 hours. For the following cycle, the hours-based
16 requirement is reduced by 1 quarter, January 1, 2021, through March 30, 2022. For this cycle, the
17 hours-based requirement is reduced to 7 hours.